Navigating between principle and pragmatism : the roles and functions of atrocity-related United Nations Commissions of Inquiry in the international legal order

Harwood, C.E.M.

Universiteit Leiden

NAVIGATING BETWEEN PRINCIPLE AND PRAGMATISM: THE ROLES AND FUNCTIONS OF ATROCITY-RELATED UNITED NATIONS COMMISSIONS OF INQUIRY IN THE INTERNATIONAL LEGAL ORDER

Catherine Elizabeth Mary Harwood

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Catherine Elizabeth Mary Harwood

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Prof. dr. C. Stahn

Promotiecommissie: Prof. dr. N.M. Blokker

Prof. dr. A. Clapham (The Graduate Institute, Geneva, Switzerland)

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS

African Commission on Human and Peoples' Rights	ACHPR
African Union	AU
Central African Republic	CAR
Committee on Economic, Social and Cultural Rights	CESCR
Common Article 3 to the Geneva Conventions of 1949	CA 3
Democratic People's Republic of Korea	DPRK
Direct participation in hostilities	DPH
Economic and Social Council	ECOSOC
Economic, social, and cultural rights	ESCR
European Court of Human Rights	ECHR
European Union	EU
Human Rights Advisory Panel	HRAP
Inter-American Commission on Human Rights	IACHR
Inter-American Court of Human Rights	IACtHR
International armed conflict	IAC
International Covenant on Civil and Political Rights 1966	ICCPR
International Covenant on Economic, Social and Cultural Rights 1966	ICESCR
International Criminal Court	ICC
International Criminal Law	ICL
International Criminal Tribunal for Rwanda	ICTR
International Criminal Tribunal for the former Yugoslavia	ICTY
International Human Rights Law	IHRL
International Humanitarian Fact-Finding Commission	IHFFC
International Humanitarian Law	IHL
International Labour Organization	ILO

International, Impartial and Independent Mechanism to assist in the Investigation and Prosecution of those Responsible for the Most Serious Crimes under International Law committed in the Syrian Arab Republic since March 2011	IIIM
Islamic State of Iraq and the Levant	ISIS
Liberation Tigers of Tamil Eelam	LTTE
Multidimensional Integrated Stabilization Mission in the Central African Republic	MINUSCA
National Transitional Council	NTC
Non-governmental organisation	NGO
Non-international armed conflict	NIAC
Office of the United Nations High Commissioner for Human Rights	OHCHR
Optional Protocol to the Convention on the Rights of the Child Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict 2000	CRC-OP
Organization for Security and Co-operation in Europe	OSCE
Organization of African Unity	OAU
Organization of American States	OAS
Responsibility to Protect	R2P
Rwandan Patriotic Front	RPF
Sexual and gender-based violence	SGBV
United Nations Commission on Human Rights	UNCHR
United Nations	UN
United Nations Human Rights Council	HRC
United Nations Mission in Kosovo	UNMIK
United Nations War Crimes Commission	UNWCC
Universal Declaration of Human Rights	UDHR
World War One	WWI
World War Two	WWII

INTRODUCTION

Introduction to the Research

The plight of the Rohingya people in Myanmar has been documented in manifold reports alleging escalating atrocities.[1] Accompanying these allegations were mounting calls for an international investigation under the auspices of the United Nations. After several years of diplomatic wrangling, in 2017 the UN Human Rights Council (HRC) decided to establish "an independent international fact-finding mission… to establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State… with a view to ensuring full accountability for perpetrators and justice for victims".[2] Myanmar opposed this decision and barred commissioners' entry to its territory. In March 2018, the Independent International Fact-finding Mission on Myanmar (the Myanmar Commission) informed the HRC that the information it had collected from outside Myanmar "points at human rights violations of the most serious kind, in all likelihood amounting to crimes under international law" and "should spur action".[3] The HRC renewed its mandate, stressing the need to ensure that those responsible for crimes were held to account and acknowledging the authority of UN Security Council "to refer the situation in Myanmar to the International Criminal Court."[4] In April 2018, the Prosecutor of the International Criminal Court (ICC) requested that the ICC rule on whether it "can exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh",[5] citing human rights reports and the statement of the Myanmar Commission.[6] Should this question be answered in the affirmative, the actions of Myanmar's security forces and other individuals may be in the spotlight at the ICC.

This narrative gives rise to many questions. Why did the HRC favour non-binding inquiry to respond to the humanitarian crisis in Rakhine State? How did the Myanmar Commission carry out its mandate, in view of Myanmar's refusal to cooperate? What is the significance of framing the mandate by reference to international law and accountability? What are the practical and normative implications of the Commission's findings of violations? How does the Commission relate to actors in the international justice space, such as the ICC? Where does it fit in broader contexts of international law and global politics?

The Myanmar Commission is not an isolated occurrence. The UN has established more than thirty such inquiries into situations of atrocities, termed in this thesis as 'UN atrocity

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1 See, e.g., the numerous reports cited in ICC Prosecutor, 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', ICC-RoC46(3)-01/18-1, 9 April 2018, para. 7, available at http://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-RoC46(3)-01/18-1 (accessed 1 May 2018) [*OTP Jurisdiction Request*].

2 HRC Res. 34/22, 24 March 2017 [*Myanmar Mandate*].

3 'Statement by Mr. Marzuki Darusman, Chairperson of the Independent International Fact-Finding Mission on Myanmar, at the 37th session of the Human Rights Council', 12 March 2018, available at http://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=22798&LangID=E (accessed 1 May 2018) [*Myanmar Statement*].

4 HRC Res. 37/32, 23 March 2018, para. 8.

5 *OTP Jurisdiction Request*, *supra* note 1, para. 1.

6 *Ibid*., footnotes 6 and 23, citing *Myanmar Statement*, *supra* note 3.

inquiries' and referred to as 'commissions'.[7] There are several legal dimensions to commissions' work. These bodies are often tasked with establishing the facts of atrocities, classifying them as legal violations and identifying legal responsibilities. Serving in their personal capacity, commissioners often have international legal expertise. Commissions' legal analysis has attracted a great deal of attention in international legal discourse. They have even been described in scholarship as a new form of adjudication. Yet commissions remain non-legal in key ways. Most mandating authorities are political bodies of the UN, so there are often political dimensions to commissions' establishment. Lacking coercive information-gathering powers, commissions depend on state cooperation. Their reports have no direct legal effect and are not intended to replicate or substitute judicial proceedings. Commissions' recommendations may address political as well as legal actors and processes. Straddling domains of international law and politics, the identity of UN atrocity inquiries in the international legal order remains blurred.

This research explores UN atrocity inquiries' turn to international law and their navigation of considerations of principle (the legal) and pragmatism (the political), to discern their identity in the international legal order. Section 1 of this introductory chapter sets out the research aim, research question and sub-questions guiding each chapter. Section 2 delineates UN atrocity inquiries as the subjects of research, distinct from other fact-finding activities and bodies. Section 3 presents the thesis structure and methodology, including the research approaches adopted to answer each sub-question and the sources drawn upon in conducting research. Section 4 summarises strands of existing research into international fact-finding and inquiry and articulates the original contribution of this thesis to academic knowledge.

1. Research Aim and Question

This Section presents the research aim, research question, and sub-questions guiding each chapter. While commissions turn to international law in their practice, their findings are non-legal in the sense of not being binding, and they are established by, and report to, actors operating in the international political space. In this setting, the research aim is:

> To determine the identity of UN atrocity inquiries in the international legal order.

The concept of 'identity' may encompass many dimensions. To focus and concretise the research aim, this thesis zooms in on two elements: functional identity (functions) and relational identity (roles). Functional identity refers to the broad ends to be attained by UN atrocity inquiries, such as informing policy, deescalating tensions, raising alert, giving a voice to victims, and promoting accountability. Relational identity refers to commissions' place vis-à-vis other institutions. It evokes the idea of their playing a role in a system alongside other actors, including international criminal tribunals, UN political organs, human rights bodies, and transitional justice actors. The interrelationship of roles and functions is multifaceted. Where certain roles are highlighted, this has a bearing on a commission's functions, and *vice versa*. Moreover, different permutations of roles and functions can be envisaged in different

[7] Bodies classified as UN atrocity inquiries are listed in the Appendix.

situations and institutional settings. Thus, this thesis does not take a schematic approach to commissions' roles and functions, as this would oversimplify at the cost of nuance. Instead, these concepts are utilised to illuminate the unique institutional space in which commissions are situated.

In determining the identity of UN atrocity inquiries in the international legal order, this thesis interrogates their turn to international law, termed 'juridification',[8] and their navigation of considerations of principle and pragmatism. The term 'principle' refers to norms and values and is associated with the realm of law, while 'pragmatism' invokes utility and practical realities, and is associated with politics. These terms are not strictly oppositional; instead they are employed to illustrate how commissions navigate between the legal and the political in different settings and from different perspectives. These concepts also illustrate certain tensions. A strongly principled approach might boost a commission's impartiality and lend an air of legal authority but render its work less effective in practice. Conversely, a pragmatic approach might encourage state cooperation and promote policy-based goals but take a toll on commissions' independence. These concepts inform the discussion of roles and functions.

The main research question is:

> How have the roles and functions of UN atrocity inquiries informed their turn to international law and their place in the international legal order more generally?

This research question entails conceptualisation of commissions' roles and functions, analysis of how those roles and functions informed inquiry practice, and an evaluation of commissions' place in the international legal order more generally, utilising the key concepts discussed above.

The main research question is divided into six sub-questions which are addressed in six Chapters. They trace the lifecycle of UN atrocity inquiries from establishment, interpretation and implementation of the mandate, legal analysis, and production of findings and recommendations. The sub-questions are:

1. How have inquiries into situations of atrocities become part of UN practice, from historical and institutional perspectives?
2. How do mandating authorities shape UN atrocity inquiries' roles and functions?
3. How do commissions' roles and functions inform their mandate interpretation and implementation?

[8] E.g., Gordon Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics* (Cambridge: CUP, 2009) at 5 and Anne-Mette Magnussen and Anna Banasiak, 'Juridification: Disrupting the Relationship between Law and Politics?', 19 *European Law Journal* (2013) 325-339, at 326. Terms such as 'judicialization', 'formalization' or 'legalization' might alternatively be used, but carry other connotations: e.g., Alec Stone Sweet, 'Judicialization and the Construction of Governance', (1999) 32 *Comparative Political Studies* 147-184; Benedict Kingsbury, 'International Courts: Uneven Judicialization in Global Order', in James Crawford and Martti Koskenniemi (eds), *Cambridge Companion to International Law* (Cambridge: CUP, 2012) 202-228 and Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, 'The Concept of Legalization', (2000) 54(3) *International Organization* 401-419 [Abbott *et al*].

4. How do commissions' roles and functions inform the identification of the international legal framework applicable to their mandates?
5. How are commissions' interpretations and applications of substantive international law shaped by their roles and functions?
6. How do commissions' approaches to questions of responsibility and accountability reflect their roles and functions?

By interrogating commissions' roles and functions at different moments and from different perspectives, these sub-questions permit a contextualised analysis of commissions' relational and functional identities in the international legal order. Before setting out the research structure and methodology, it is necessary to delineate UN atrocity inquiries as the subjects of research, distinct from other fact-finding actors and activities.

2. Delineation of UN Atrocity Inquiries

This Section delineates UN atrocity inquiries as the focus of research. Bodies classified as UN atrocity inquiries are international commissions of inquiry (2.1) established by the UN (2.2) in respect of situations of atrocities (2.3). Recourse to commissions' substantive characteristics is necessary because identification is not always possible solely on the basis of their official titles. This is partly due to their inconsistent nomenclature. While some commissions were titled 'commission of inquiry',[9] others were named 'panel of experts', 'fact-finding mission', or 'commission of experts'.[10] Moreover, the UN conducts other fact-finding activities distinct from inquiry. Identifying UN atrocity inquiries by their substantive characteristics and delineating them from other fact-finding activities and entities generates some institutional and normative consistency in a heterogeneous fact-finding universe.

2.1 International Commissions of Inquiry

While international commissions of inquiry may be established by different actors for different purposes, several characteristics are held in common. These institutions are established on the international legal plane (2.1.1), conduct *ad hoc* fact-finding (2.1.2), are impartial and independent (2.1.3) and issue non-binding reports (2.1.4).

2.1.1 International legal plane

International commissions of inquiry are established on the international legal plane. They may be established by *ad hoc* agreement between states, pursuant to treaty regimes, or by international organisations. The Convention for the Pacific Settlement of International Disputes 1899 provides that states may facilitate the peaceful resolution of international disputes by establishing an inquiry.[11] These 'Hague-type' inquiries are often mentioned alongside mediation and conciliation as 'diplomatic' methods of dispute settlement, in

[9] E.g., Independent International Commission of Inquiry on the Syrian Arab Republic [Syria Commission] and Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea [North Korea Commission].

[10] E.g., Commission of Experts established Pursuant to Security Council Resolution 780 (1992) [Yugoslavia Commission] and United Nations Fact-Finding Mission on the Gaza Conflict [Goldstone Commission].

[11] Hague Convention for the Pacific Settlement of International Disputes 1899, Art. 9 [*First Hague Convention*].

contrast with 'adjudicative' mechanisms.[12] The former are seen as diplomatic "because the parties (ostensibly) retain control of the dispute and may accept or reject a proposed settlement."[13] Their diplomatic nature is underscored by the centrality of state consent to their establishment, composition and procedures. International inquiries may also be established by international organisations,[14] including regional organisations. Such inquiries are linked to organisations' functions and powers. They often have other international characteristics, such as being geographically diverse in composition and having regard to the international legal framework.

By contrast, 'domestic' inquiries are established under the law of a particular state[15] and may have coercive powers, depending on the legal system.[16] Some domestic inquiries with certain international dimensions might be considered 'internationalised'. An historic example is an inquiry established by Liberia at the instigation of the United States, which examined whether slavery existed in Liberia as defined in the Anti-Slavery Convention.[17] Inquiries in Bahrain[18] and Kyrgyzstan[19] also examined violations of international law and were composed of international legal experts.[20] This thesis classifies such inquiries as domestic, as they remained embedded in domestic jurisdictions. International inquiry should also be distinguished from fact-finding by civil society[21] and private initiatives to investigate international crimes.[22]

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12 J. Merrills, *International Dispute Settlement* (6th ed, Cambridge: CUP, 2017) at ix and Lucy Reed, 'Observations on the Relationship between Diplomatic and Judicial Means of Dispute Settlement', in Laurence Boisson de Chazournes, Marcelo Kohen and Jorge Viñuales (eds), *Diplomatic and Judicial Means of Dispute Settlement* (Leiden: Brill, 2012) 291-305, at 291.

13 Reed, *supra*, at 291.

14 The following definition of 'international organisation' is adopted: "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality": International Law Commission (ILC), *Draft Articles on the Responsibility of International Organizations*, GA Res. 66/100, 9 December 2011, Annex [DARIO].

15 E.g., Commission of Inquiry to Investigate the Massacre of Prisoners 1988 (Peru); Commission of Inquiry to Locate the Persons Disappeared during the Panchayat Period 1990 (Nepal) and National Commission on Political Imprisonment and Torture 2003 (Chile).

16 E.g., Royal Commissions Act 1902 (Cth) s. 2 (Australia).

17 US Department of State, 'Liberia: Appointment of the International Commission of Inquiry into the Existence of Slavery and Forced Labor in the Republic of Liberia', in *Papers Relating to the Foreign Relations of the United States*, Vol. III, 274-329 and US Department of State, 'The 1930 Enquiry Commission to Liberia', (1931) 30 *Journal of the Royal African Society* 277-290. Commissioners were appointed by the League of Nations, the US and Liberia.

18 *Report of the Bahrain Independent Commission of Inquiry*, 10 December 2011, available at http://www.bici.org.bh/BICIreportEN.pdf (accessed 1 May 2018), established by Royal Order No. 28 of 2011 (Bahrain), Art. 9.

19 *Report of the Independent International Commission of Inquiry into the Events in southern Kyrgyzstan in June 2010*, 2011, available at http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_490.pdf (accessed 1 May 2018).

20 Cecilie Hellestveit, 'International Fact-Finding Mechanisms: Lighting Candles or Cursing Darkness?', in Cecilia Bailliet and Kjetil Larsen (eds), *Promoting Peace Through International Law* (Oxford: OUP, 2015) 368-394, at 370.

21 E.g., *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford: OUP, 2000); Carnegie Endowment for International Peace, *Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars*, 1914, available at http://archive.org/details/reportofinternat00inteuoft (accessed 1 May 2018) and David Weissbrodt and James McCarthy, 'Fact-Finding by International Nongovernmental Human Rights Organisations', (1982) 22 Va J Int'l L 1-89.

22 E.g., War Crimes Committee of the International Bar Association and Hogan Lovells, *Inquiry on Crimes Against Humanity in North Korean Political Prisons* (2017), available at http://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=8ae0f29d-4283-4151-a573-a66b2c1ab480

2.1.2 Ad hoc fact-finding body

International commissions of inquiry are essentially concerned with finding facts.[23] While the concept of 'objective truth' may be epistemologically queried, commissions' narratives can elucidate facts and challenge other versions of events. Such narratives are not isolated from broader political contexts and struggles.[24] There is no uniform definition of 'fact-finding'; definitions tend to be crafted in light of the activities intended to be captured.[25] For instance, Rob Grace and Claude Bruderlein differentiate 'fact-finding' from 'monitoring' and 'reporting' and distinguish different strategies towards situations of concern.[26] They define fact-finding as "a corrective strategy" involving "in-depth examination of specific incidents in order to establish evidence of responsibility" with the primary goal to "determine the most effective route for ensuring accountability".[27] As this definition excludes bodies not oriented towards accountability, it seems to depart from the everyday meaning of the term. This thesis adopts the broader definition proposed by Théo Boutruche: "a 'method of ascertaining facts' through the evaluation and compilation of various information sources".[28]

A few UN atrocity inquiries wrote that they did not carry out 'fact-finding', adopting a narrow view of this concept. For instance, the Secretary-General's Panel of Experts on Sri Lanka (Sri Lanka Panel) wrote that it had not conducted fact-finding "as it does not reach factual conclusions regarding disputed facts, nor did it carry out a formal investigation that draws conclusions regarding legal liability".[29] The Human Rights Commission on South Sudan (South Sudan Commission) initially decided that it "did not have the mandate or resources to carry out investigations or fact-finding,"[30] but later accepted that it was a fact-finding body.[31]

(accessed 1 May 2018); Syria Justice and Accountability Centre, 'Collect and Preserve Documentation', available at http://syriaaccountability.org/what-we-do (accessed 1 May 2018) and 'Statement by William Wiley Executive Director, Commission for International Justice and Accountability at the Subcommittee on International Human Rights', 22 November 2016, available at http://openparliament.ca/committees/international-human-rights/42-1/33/william-wiley-1/only (accessed 1 May 2018).

[23] *First Hague Convention*, *supra* note 11, Art. 9.

[24] E.g., Hellestveit, *supra* note 20, at 391 and Laurie Blank, 'Investigations into Military Operations: What Impact on Transitional Justice?' 47(1) (2014) Isr L Rev 85-104.

[25] E.g., *Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security*, GA Res. 46/59, 9 December 1991, Art. 2 [*1991 Declaration*] and Stephen Wilkinson, '"Finding the Facts" Standards of Proof and Information Handling in Monitoring, Reporting and Fact-Finding Missions', *HPCR Policy Paper*, February 2014, at 11, available at http://ssrn.com/abstract=2400927 (accessed 1 May 2018) [Wilkinson 2014].

[26] Rob Grace and Claude Bruderlein, 'Building Effective Monitoring, Reporting and Fact-Finding Mechanisms', *HPCR Draft Working Paper*, April 2012, available at http://ssrn.com/abstract=2038854 (accessed 1 May 2018).

[27] *Ibid.*, at 12-13.

[28] Théo Boutruche, 'Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice', (2011) 16(1) J Conflict & Sec L 105-140, at 106 (footnote omitted), citing Karl Josef Partsch, 'Fact-Finding and Inquiry', in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam: North-Holland, 1992) 343.

[29] *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, para. 7, available at http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf (accessed 1 May 2018) [*Sri Lanka Report*].

[30] *Report of the Commission on Human Rights in South Sudan*, UN Doc. A/HRC/34/63, 6 March 2017, para. 9 [*South Sudan First Report*].

[31] *Report of the Commission on Human Rights in South Sudan*, UN Doc. A/HRC/37/CRP.2, 23 February 2018, para. 11 explained that a standard of proof was adopted "[c]onsistent with the practice of other United Nations fact-finding bodies" [*South Sudan Second Report*].

This Study classifies both as UN atrocity inquiries because their mandates and activities were substantively similar to commissions self-identifying as fact-finding bodies.[32]

Commissions' establishment, mandates and working methods are largely *ad hoc*. A commission is established upon a decision of its mandating authority and dissolves after presenting its report.[33] Fact-finding guidelines provide that the mandate must identify the investigative focus but permit adaptation when circumstances change.[34] As written mandates are usually brief, commissions must interpret them. This practice has given rise to questions as to the bounds of mandate interpretation.[35] There are few fixed rules of procedure; commissions' working methods are generally set by the mandating authority or by commissions themselves.[36] This characteristic enables the tailoring of mandates to different situations. A lack of standardised working methods has been criticized as damaging the veracity of findings and reduced methodological rigour.[37] Some common standards are emerging in the UN context.[38]

International commissions of inquiry should be distinguished from other *ad hoc* fact-finding in respect of situations of atrocities. While commissions may have a truth-seeking function,[39] they are distinguishable from 'truth commissions', defined by Pricilla Hayner as:[40]

> (1) focused on past, rather than ongoing, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experiences; (4) is a temporary body, with the aim of concluding with a final report; and (5) is officially authorized or empowered by the state under review.

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[32] *Sri Lanka Report*, *supra* note 29, paras. 5, 9 and 51; *South Sudan First Report*, *supra* note 30, paras. 10-12, compared with *Report of the International Commission of Inquiry on Darfur*, UN Doc. S/2005/60, 1 February 2005, para. 3 [*Darfur Report*]; *Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea*, UN Doc. A/HRC/25/CRP.1, 7 February 2014, paras. 67-68 [*North Korea Report*]; *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/S-17/2/Add.1, 23 November 2011, para. 5 [*Syria First Report*] and *Report of the International Commission of Inquiry on the Central African Republic*, UN Doc. S/2014/928, 22 December 2014, para. 16 [*CAR Report*].

[33] Most initiatives to create permanent international inquiry commissions were unsuccessful: Arthur Lenk, 'Fact-Finding as a Peace Negotiation Tool – The Mitchell Report and Israeli-Palestinian Peace Process', (2002) 24 Loy LA Int'l & Comp L Rev 289-325, at 292. An exception is the International Fact-Finding Commission, established by Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3, Art. 90 [*Additional Protocol I*].

[34] M. Cherif Bassiouni and Christina Abraham (eds), *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies* (Cambridge: Intersentia, 2013), Guideline 3 [*Siracusa Guidelines*].

[35] See Chapter Three, Section 1.

[36] E.g., *First Hague Convention*, *supra* note 11, Arts. 10 and 17.

[37] Juan Mendez, 'Commissions of Inquiry: Lessons Learned and Good Practices', (2012) 54(2) *Politorbis* 47-53.

[38] See Chapter Three, Section 4.

[39] *Report of the International Commission of Inquiry Mandated to Establish the Facts and Circumstances of the Events of 28 September 2009 in Guinea*, UN Doc. S/2009/693, 18 December 2009, para. 275 [*Guinea Report*]; *Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)*, UN Doc. S/1994/674, 27 May 1994, para. 320 [*Yugoslavia Final Report*].

[40] Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd ed, New York: Routledge, 2011) at 11-12.

Truth commissions are also usually based in domestic legal systems[41] and may exercise coercive powers.[42] By contrast, international commissions of inquiry are non-binding and not designed to comprehensively address grievances. Some commissions recommended the establishment of a truth commission as a follow-up measure.[43]

Commissions are also distinct from special procedures mandates administered by the HRC, which are "independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective."[44] As these mandate holders are independent experts who examine human rights situations of concern, they bear similarities with commissions. Indeed, they may be sequenced with UN atrocity inquiries, being established beforehand[45] or after an inquiry.[46] Whereas an inquiry examines a specific situation and dissolves after presenting its report,[47] special procedures mandates may continue for several years.[48] In addition, special rapporteurs are individual appointments, whereas commissions are always a collective. Establishing a commission may signal an escalation in response.

2.1.3 Impartiality and independence

The necessity of impartiality is articulated in different inquiry contexts.[49] 'Impartiality' may be defined as "equal treatment of all rivals or disputants" and "not prejudiced towards or against any particular side".[50] Impartiality may also be understood as the ability "to abstract him/herself from his prior opinions, to reduce oneself to one's function, to identify in oneself what are sources of bias".[51] Independence refers to a lack of ties or dependence upon interested actors, and its emphasis differs across contexts. The Hague tradition emphasises the inclusion of a neutral element rather than full independence from states, which participated in appointing commissioners.[52] By contrast, commissioners serving on almost all modern UN

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41 An exception is the Commission on the Truth for El Salvador, which was administered by the UN.

42 E.g., Truth and Reconciliation Commission of South Africa.

43 E.g., *Report of the Commission of Inquiry on the Events Connected with the March Planned for 25 March 2004 in Abidjan*, UN Doc. S/2004/384, 13 May 2004, para. 90(d) [*Abidjan Report*].

44 OHCHR, 'Special Procedures of the Human Rights Council', available at http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx (accessed 1 May 2018).

45 E.g., Special Rapporteur on the Democratic People's Republic of Korea, established by UNCHR Res. 2004/13, 15 April 2004. See *Report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, Marzuki Darusman*, UN Doc. A/HRC/22/57, 1 February 2013, para. 7.

46 E.g., Paulo Sérgio Pinheiro, Chair of the Syria Commission, was appointed as Special Rapporteur of that situation, to commence after the Commission's mandate had terminated: HRC Res. S-18/1, 2 December 2011.

47 An exception is the Syria Commission, established by HRC Res. S-17/1, 22 August 2011 [*Syria Mandate*], whose mandate has since been extended several times.

48 E.g., Special Rapporteur on Cambodia, established by UNCHR Res. 1993/6, 19 February 1993 and Working Group on Arbitrary Detention, established by UNCHR Res. 1991/42, 5 March 1991.

49 *First Hague Convention*, *supra* note 11, Art. 9; *1991 Declaration*, *supra* note 25, Art. 3 and *OHCHR Guidance and Practice*, *supra* note 63, at 33.

50 Collins English Dictionary, 'Impartial', available at http://www.collinsdictionary.com/dictionary/english/impartial (accessed 1 May 2018).

51 Frédéric Mégret, 'International Judges and Experts' Impartiality and the Problem of Past Declarations', (2011) 10 *The Law and Practice of International Courts and Tribunals* 31-66, at 44 [Mégret 2011].

52 *First Hague Convention*, *supra* note 11, Arts. 11 and 32; *Second Hague Convention*, *supra* note 62, Arts. 12 and 45.

atrocity inquiries must have "a proven record of independence and impartiality",[53] act in their personal capacity and not be instructed by governments or other actors.[54]

The element of independence distinguishes UN atrocity inquiries from fact-finding led by the UN Secretariat such as fact-finding missions by the Office of the UN High Commissioner for Human Rights (OHCHR),[55] 'mapping exercises',[56] and a joint OPCW-UN investigation into chemical weapons in Syria.[57] This is a key distinction, as their tasks bear similarities: commissions may "map"[58] violations, while OHCHR 'mapping exercises' also examine issues of accountability.[59] While OHCHR provides support staff to some commissions, commissioners are external experts and remain independent of "all extraneous influences".[60]

2.1.4 Non-binding report

Inquiry reports are in principle non-binding. Their findings and recommendations lack direct legal effect.[61] While the recommendatory function is not found in all inquiry contexts,[62] it is a standard feature of UN atrocity inquiries.[63] This feature distinguishes inquiry from arbitration, judicial settlement, and compensation commissions authorized to enter binding awards.[64]

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53 *OHCHR Guidance and Practice*, *supra* note 63, at 19.

54 *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principle 7 [*Principles Against Impunity*]. An exception is the Palmer Commission, discussed in Chapter Two, Section 5.

55 E.g., OHCHR Mission to the Syrian Arab Republic to Investigate Alleged Violations of International Human Rights Law, HRC Res. S-16/1, 29 April 2011. Some OHCHR missions recommended that investigations be continued by an independent inquiry, e.g., *Report of the United Nations Independent Investigation on Burundi*, UN Doc. A/HRC/33/37, 20 September 2016, para. 156.

56 OHCHR, 'Rule-of-Law Tools for Post-conflict States: Prosecution Initiatives', UN Doc. HR/PUB/06/4, 2006, at 6, available at http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf (accessed 1 May 2018). E.g., 'Terms of Reference', para. 2, in OHCHR, *Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003*, August 2010, Annex III, at 542 [*DRC Mapping Report*]; OHCHR, *Nepal Conflict Report*, October 2012, at 28, available at http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf (accessed 1 May 2018).

57 SC Res. 2235 (2015); *Seventh report of the Organisation for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism*, UN Doc. S/2017/904, 26 October 2017, para. 3.

58 HRC Res. 21/26, 28 September 2012, para. 18 (Syria Commission).

59 E.g., *DRC Mapping Report*, *supra* note 56, Executive Summary, paras. 7-8. See Rob Grace, 'From Design to Implementation: The Interpretation of Fact-finding Mandates', (2015) 20(1) J Conflict & Sec L 27-60, at 38-39 [Grace 2015].

60 Michael Kirby and Sandeep Gopalan, 'Recalcitrant States and International Law: The Role of the UN Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of Korea', (2015) 37(1) U Pa J Int'l L 229-294, at 239.

61 *First Hague Convention*, *supra* note 11, Art. 35. Exceptions are the Steamship Tiger Inquiry (Germany/Spain), 1918: P. Hamilton *et al* (eds), *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution* (The Hague: Kluwer Law, 1999) at 307 [Hamilton *et al*] and inquiry under the Bryan/Knox treaties.

62 *First Hague Convention*, *supra* note 11, Art. 14; Hague Convention for the Pacific Settlement of International Disputes 1907, Art. 35 [*Second Hague Convention*] and *1991 Declaration*, *supra* note 25, Art. 17.

63 Office of the United Nations High Commissioner for Human Rights (OHCHR), *Commissions of Inquiry and Fact-Finding Missions on International Human Right and Humanitarian Law: Guidance and Practice*, UN Doc. HR/PUB/14/7 (2015) at 11 [*OHCHR Guidance and Practice*], available at http://www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf (accessed 1 May 2018).

64 E.g., Ethiopia-Eritrea Claims Commission, Agreement between the State of Eritrea and the Federal Democratic Republic of Ethiopia 2000, Art. 5 and UN Compensation Commission, SC Res. 687 (1991).

While an inquiry report is not binding, it may be important that it be published.[65] Some mandating resolutions require reports to be public.[66] In UN practice, only one inquiry report remains confidential.[67] This requirement is less emphatic in the interstate dispute resolution context, which allows for confidential reports.[68]

Commissions generally do not have coercive powers and rely on states' cooperation to gather information. They cannot compel document production or the appearance of witnesses, nor enter territories without states' consent. Exceptional are inquiries established by the Security Council under Chapter VII, triggering the obligation of UN member states to carry out its decisions.[69] Where an inquiry is established under the Hague Conventions, there is an obligation to cooperate;[70] however, their existence is contingent upon state consent.

2.2 Established by the United Nations

This research focuses upon inquiries established by the UN in pursuit of its unique principles and purposes. Relevant mandating authorities are the Security Council, General Assembly, Secretary-General, and HRC.[71] This focus permits an analysis of the UN context, including the institutional features of UN mandating authorities; dynamics among these authorities and UN member states; and wider political factors at play, in light of the UN's central role in international affairs.

The focus on the UN indicates that other atrocity inquiry contexts are beyond the scope of research, such as inquiries established jointly by states and by other international and regional organisations. While there is more limited practice in this regard, UN practice may yet be viewed as part of a broader tradition of atrocity inquiries. This historical and institutional context is elaborated upon in Chapter One. Another context excluded from the ambit of research is inquiry to resolve international disputes pursuant to the Hague Conventions and certain other treaties.[72] Five such inquiries were established in practice, all centring on international maritime incidents.[73] Larissa van den Herik observes that each departed from the

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65 *OHCHR Guidance and Practice*, *supra* note 63, at 92; *Siracusa Guidelines*, *supra* note 34, Guideline 13.9; *Principles Against Impunity*, *supra* note 54, Principle 13 and Catherine Harwood and Carsten Stahn, 'Principle 13. Publicizing the Commission's Reports', in Frank Haldemann and Thomas Unger (eds), *The United Nations Principles to Combat Impunity: A Commentary* (Oxford: OUP, 2018) 152-159.

66 E.g., *Syria Mandate*, *supra* note 47, para. 14.

67 *Rapport de la Commission d'enquête internationale sur les allégations de violations des droits de l'homme en Côte d'Ivoire*, 25 May 2004, available at http://fr.wikisource.org/wiki/Rapport_de_la_Commission_d%E2%80%99enqu%C3%AAte_internationale_sur_les_all%C3%A9gations_de_violations_des_droits_de_l%E2%80%99homme_en_C%C3%B4te_d%E2%80%99Ivoire (accessed 1 May 2018) [*SC Côte d'Ivoire Report*].

68 *Second Hague Convention*, *supra* note 62, Arts. 17 and 34; Permanent Court of Arbitration, Optional Rules for Fact-finding Commissions of Inquiry 1997, Art. 10 [*PCA Optional Rules*].

69 Charter of the United Nations 1945, 1 UNTS 16, Arts. 25 and 48 [*UN Charter*].

70 E.g., *First Hague Convention*, *supra* note 11, Art. 12 and *Second Hague Convention*, *supra* note 62, Art. 23.

71 Powers and functions of UN mandating authorities are discussed in Chapter Two, Section 1.1.

72 John Noyes, 'William Howard Taft and the Taft Arbitration Treaties', (2011) 56 Vill L Rev 535-558; *Treaties for the Advancement of Peace between the United States and Other Powers Negotiated by the Honorable William J Bryan, Secretary of State of the United States*, (New York: OUP, 1920).

73 Dogger Bank Inquiry (UK/Russia) 1904, established by St. Petersburg Declaration 1904 [*Dogger Bank Mandate*]; Tavignano Inquiry (France/Italy) 1912, established by Convention of Inquiry in the *Tavignano, Camouna* and *Gaulois* cases between France and Italy 1912; Steamship Tiger Inquiry (Germany/Spain) 1918, in Hamilton *et al*, *supra* note 61, at 307; Tubantia Inquiry (Germany/Netherlands) 1921, established by Convention of Inquiry between Germany and the Netherlands 1921 and Red Crusader Inquiry (UK/Denmark)

Hague model in some way; some inquiry reports were treated as binding or involved vital state interests.[74] The so-called Bryan treaties were implemented just once in the *Letelier* inquiry.[75] Inquiry remains at states' disposal as a means of dispute resolution,[76] with some scholars proposing that inquiry be utilised to examine contemporary matters likely to cause a rupture, such as the cause of the crash of civilian aircraft MH17 and the South China Sea dispute.[77]

Inquiries established pursuant to specialised international regimes are also excluded from the scope of research. Such regimes include investigations of transboundary harms,[78] uses of chemical weapons,[79] and serious cross-border aircraft accidents;[80] and disputes regarding non-navigational uses of international watercourses.[81] These inquiries tend to be composed of technical or scientific experts. The International Labour Organization (ILO) also has a unique procedure whereby alleged violations of ILO-administered treaties may be investigated, and non-implementation of a commission's recommendations may be met with sanctions.[82]

2.3 Focus on Situations of Atrocities

Having narrowed the scope of research to the UN context, there is also a limitation in respect of the investigative focus of inquiry, namely to situations of atrocities. Such situations are governed by three key fields of international law: international human rights law (IHRL), international humanitarian law (IHL) in armed conflict, and international criminal law (ICL). It does not require that commissions expressly qualify atrocities as violations, but rather leaves this open to permit a broad examination of whether and how commissions engage with international law. This common legal framework enables comparisons to be drawn among the mandates, operations and reports of UN atrocity inquiries.

This limitation excludes UN inquiries into violations of sovereign rights, such as Security Council inquiries into violations of Greece's borders,[83] the "mercenary aggression" of the

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1961, established by Exchange of Notes between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Denmark 1961.

74 Larissa van den Herik, 'An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of International Law', (2014) 13 Chinese J Int'l L 1-30, at 8, referring to the Steamship Tiger Commission and the Dogger Bank Inquiry, respectively.

75 Treaty for the Settlement of Disputes That May Occur between the United States of America and Chile 1914 (Bryan-Suarez Mujica Treaty) and Compromis to the Agreement between the United States and Chile 1990.

76 UN Charter, Art. 33. See GA Res. 2329 (XXII), 18 December 1967.

77 Jan Lemnitzer, 'International Commissions of Inquiry and the North Sea Incident: A Model for a MH17 Tribunal?', (2016) 27(4) EJIL 923-944 and Ryan Mitchell, 'An International Commission of Inquiry for the South China Sea?: Defining the Law of Sovereignty to Determine the Chance for Peace', (2016) 49 Vand J Transnat'l L 749-818.

78 Convention on Environmental Impact Assessment in a Transboundary Context 1991, 1989 UNTS 309, Art. 3(7); Transboundary Effects of Industrial Accidents 1992, 2105 UNTS 457, Art. 4(2).

79 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1992, 1974 UNTS 45, Arts. IX and X.

80 Convention on International Civil Aviation 1944, 15 UNTS 295, Art. 26.

81 Convention on the Law of Non-navigational Uses of International Watercourses 1997, GA Res. 51/229, 21 May 1997, Art. 33.

82 Constitution of the International Labour Organisation 1919, TS 874, Arts. 26, 32 and 33. E.g., *Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention*, 1930 (No. 29).

83 Commission of Investigation on Greek Frontier Incidents, SC Res. 15 (1946) [*Greek Frontier Incidents Mandate*].

Seychelles[84] and damage to Angola from South Africa's invasion.[85] The research also excludes inquiries into discrete incidents such as attacks against peacekeepers[86] and assassinations.[87] The two UN inquiries concerning the Israeli interception of a flotilla bound for Gaza[88] are included in this Study, as both inquiries examined events in the broader humanitarian context of the Israeli-Palestinian conflict.

3. Thesis Structure and Methodology

Having delineated UN atrocity inquiries as the research subjects, this Section presents the structure of the thesis and the methodology. Section 3.1 outlines the structure of each chapter and the research approaches adopted when answering the sub-questions guiding each chapter. Section 3.2 discusses the primary and secondary sources utilized in conducting the research.

3.1 Structure and Research Approaches

While this research centrally concerns the international legal order, it extends beyond the classic doctrinal question: 'what is the law?' In determining commissions' roles and functions, the research has descriptive, comparative, conceptual, legal, and critical elements. It describes and compares commissions' institutional settings, operations, and practices. It conceptualises their roles and functions. The analysis of how commissions interpreted legal norms calls for doctrinal legal research into those norms. When querying whether elements of inquiry practice maintain the *status quo* of power relations and structures, the research has a critical character.

Chapter One asks: how have inquiries into situations of atrocities become part of UN practice, from a historical and institutional perspective? It contextualises UN atrocity inquiry practice by providing a historical and institutional taxonomy of inquiries into atrocities established on the international legal plane. This overview locates UN atrocity inquiries within a broader inquiry tradition and allows comparisons and linkages to be drawn across contexts. It describes different commissions established into situations of atrocities and conducts a comparative analysis of commissions' mandates and institutional settings.

Chapter Two asks: how do mandating authorities shape UN atrocity inquiries' roles and functions? This Chapter explores how UN mandating authorities act as 'architects' by sketching out commissions' aesthetics and conceptual plans through their mandates. It describes and compares mandating authorities' institutional contexts, functions, and powers. The scope of these powers is identified through doctrinal research into principles of international institutional law. The Chapter examines the investigative focus and operational aspects of written mandates and issues of selectivity arising therefrom. The Chapter concludes

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[84] Commission of Inquiry in connection with the Republic of the Seychelles, SC Res. 496 (1981) [*Seychelles Mandate*].

[85] Security Council Commission on Angola, SC Res. 571 (1985) [*Angola Mandate*].

[86] Commission of Inquiry concerning Somalia, SC Res. 885 (1993) [*Somalia Mandate*].

[87] UN Commission of Inquiry on the Circumstances of the Death of Mr. Lumumba, GA Res. 1601 (XV), 15 April 1961; Commission of Investigation into the Conditions and Circumstances Resulting in the Tragic Death of Mr. Dag Hammarskjold and Members of the Party Accompanying Him, GA Res. 1628 (XVI), 26 October 1961; UN Commission of Inquiry into the Benazir Bhutto Assassination, UN Doc. S/2009/67, 3 February 2009 [*Bhutto Mandate*] and UN International Independent Investigation Commission, SC Res. 1595 (2005) [*UNIIIC Mandate*].

[88] *Statement by the President of the Security Council*, UN Doc. S/PRST/2010/9, 1 June 2010.

by discussing key issues arising out of mandating authorities' choices which informed commissions' roles and functions, and which reveal tensions between principled and pragmatic considerations. In appraising the political significance of mandating bodies' decisions, this Chapter draws on perspectives from international relations and critical legal scholarship.

If mandating authorities are the architects of UN atrocity inquiries, commissions are the 'engineers'. Chapter Three asks: how do commissions' roles and functions inform the interpretation and implementation of their mandates? This Chapter describes and compares how commissions interpreted different dimensions of their mandates, including the geographic and temporal scope and the actors under scrutiny, to ensure that mandates were impartial and of appropriate scope. It then discusses key principles and practical challenges which informed commissions' information-gathering and assessment, and initiatives taken by commissions to foster credible and reliable findings. This Chapter concludes by discussing how these different elements of inquiry practice were informed by commissions' roles and functions.

Chapter Four turns from fact-finding aspects of inquiry towards commissions' embrace of international law. It asks: how do commissions' roles and functions inform their identification of the international legal framework considered applicable to their mandates? This Chapter describes different approaches taken by commissions when identifying the applicable law. It then examines commissions' reasoning for extending the applicable law beyond the legal fields in their written mandates. Next, the Chapter discusses commissions' views of the applicability of IHRL, IHL and ICL to situations and actors under scrutiny. Commissions' rationales are compared to ascertain similarities and differences in approach. It is argued that commissions have justified the inclusion of different legal fields by reference to their roles and functions.

Chapter Five asks: how are commissions' interpretations and applications of substantive international law shaped by their roles and functions? To focus the discussion, a thematic comparative analysis is conducted of commissions' analysis of substantive legal issues, namely economic, social and cultural rights, IHL principles and their interaction with the right to life, sexual and gender-based violence, genocide, and crimes against humanity. These topics display the range of approaches taken by commissions and key challenges faced by them when legally appraising facts. It is queried whether commissions are well-placed to apply such norms considering their institutional architecture. The Chapter then discusses how several cross-cutting issues, namely commissions' focus on incident-based violations, the level of certainty of findings of legal violations, and the rigour of their legal analysis, are informed by commissions' roles and functions.

In light of the recurrent emphasis on 'accountability' in inquiry mandates and reports, commissions' practice with respect to accountability norms and institutions warrant a detailed examination. Chapter Six asks: how do commissions' approaches to questions of responsibility and accountability reflect their roles and functions? It describes the extent to which commissions engaged with responsibility regimes for different actors, and the range of recommendations proposed for corrective action. Commissions' recommendations are

critically assessed in view of their roles and functions, against the broader political and institutional backdrop. The Chapter concludes with a discussion of how commissions' practice responds to different dimensions of accountability and interacts with the politics of accountability.

The Conclusion draws these threads together to offer final reflections as to how commissions continuously navigate between realms of law and politics, with the equilibrium shifting in different moments and contexts. As such, commissions' identity in the international legal order remains liminal, and encompasses choices and trade-offs between considerations of principle and pragmatism. Some final thoughts are then offered as to the future place of UN atrocity inquiries in the international legal order.

3.2 Sources

This research primarily utilised text-based documentary sources. Different primary and secondary sources shed light on institutional, legal and normative aspects of the research. When examining institutional features and settings of UN atrocity inquiries, primary sources of central importance were those produced by mandating authorities and commissions. Documents relevant to mandating authorities include the resolution or decision formally establishing the commission and its mandate; records of debates and voting results; statements by UN member states in explanation of their votes; and resolutions reacting to commissions' reports and implementing recommendations. Relevant documents of UN atrocity inquiries include the final report, any interim reports, and other documents produced by them, such as terms of reference, press releases, information sheets and oral or periodic updates.[89]

The research also examined other documents which illuminated the workings of the UN system and contextualised the practice of UN atrocity inquiries, such as reports of the Secretary-General, publications of OHCHR, and resolutions of the Security Council, General Assembly, HRC and the former Commission on Human Rights. A range of secondary sources also informed institutional components of the research. Scholarly works by former commissioners provided information in respect of the commissions on which they served, including mandate interpretation and implementation, operational challenges and perceptions of commissions' roles and functions. Other scholarly accounts critiqued commissions' institutional features and practices in a more general way. 'Outsider perspectives' in critical scholarship also informed the appraisal of UN atrocity inquiries' roles and functions in the international legal order.

Legal components of the research, which analysed how commissions identified, interpreted, and applied international law, required a close reading of inquiry reports as well as primary and secondary legal sources. Sources of international law, including treaties, international judicial decisions and expert restatements as evidence of custom were examined to identify the applicability and content of international legal norms. Secondary sources of relevance included general comments of treaty bodies and scholarly works. Scholarship that critically

[89] E.g., 'Questions and Answers on the commission of inquiry on human rights in Eritrea, Prepared for the oral update to the Human Rights Council, 16 March 2015', available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoIEritrea/CoIE_QuestionsAndAnswers.doc (accessed 1 May 2018) [*Eritrea Q&A*].

analysed UN atrocity inquiries' legal analysis was utilised in assessing commissions' legal approaches.

Finally, the research was informed by the author's attendance at expert meetings where former commissioners and fact-finding practitioners shared experiences from practice,[90] and from the author's conversations with several individuals who worked within UN atrocity inquiries as commissioners or support staff. These sources indirectly informed the research, as they could not be cited directly. Most expert meetings were conducted under Chatham House Rules, and UN confidentiality obligations often also applied. Nonetheless, these meetings and conversations provided valuable insights from those with 'on the ground' knowledge and expertise and informed the author's research and analysis.

4. Contribution to Knowledge

This Section explains how this thesis makes an original contribution to knowledge by mapping previous scholarly efforts and explaining how it builds on those endeavours to ascertain the identity of UN atrocity inquiries in the international legal order.

Until recently, non-judicial fact-finding had not garnered much attention from international legal scholars. Only a few scholarly works on such topics were published in earlier decades.[91] In 2011, Philip Alston suggested that the proliferation and diversification of international fact-finding rivalled that of international criminal courts and tribunals in terms of significance for human rights, but that "while the criminal courts and tribunals have generated a veritable industry and a vast literature, fact-finding has been largely neglected as an area for sustained exploration, critique, and refinement."[92] Leading academic institutions have since carried out research projects on fact-finding.[93] Several edited volumes[94] and other scholarly works have

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[90] 'From Fact-finding to Evidence: Harmonizing Multiple Investigations of International Crimes', The Hague Institute for Global Justice [THIGJ], The Hague, 26-27 October 2012; 'Meeting of Experts on the Establishment of Principles and Best Practices for International and National Commissions of Inquiry', International Institute of Higher Studies in Criminal Sciences, Siracusa, 14-17 March 2013; 'Special Session: Harvard Group of Professionals on Monitoring, Reporting, and Fact‐finding: Coordination Between Monitoring, Reporting, and Fact-finding Missions and International Courts and Tribunals', THIGJ, The Hague, 9 June 2013; 'Experts Meeting on Attributing Individual Responsibility for Violations of International Human Rights and Humanitarian Law in UN-Mandated Commissions of Inquiry, Fact-Finding Missions and Other Investigations', OHCHR, Geneva, 18 October 2016.

[91] Bertrand Ramcharan (ed.), *International Law and Fact-finding in the Field of Human Rights* (The Hague: Martinus Nijhoff, 1982); Thomas Franck and Laurence Cherkis, 'The Problem of Fact-Finding in International Disputes', (1967) 18 W Res L Rev 1483-1524; Stephen Kaufman, 'The Necessity for Rules of Procedure in Ad Hoc United Nations Investigations', (1969) 18 Am U L Rev 739-768; Edwin Firmage, 'Fact-Finding in the Resolution of International Disputes - From the Hague Peace Conference to the United Nations', (1971) Utah L Rev 421-473 and Thomas Franck and H. Scott Fairley, 'Procedural Due Process in Human Rights Fact-Finding by International Agencies', (1980) 74 AJIL 308-345.

[92] Philip Alston, 'Introduction: Commissions of Inquiry as Human Rights Fact-Finding Tools', (2011) 105 Am Soc'y Int'l L Proc 81-85, at 84-85.

[93] Leiden University, 'Inquiry and International Law', http://www.universiteitleiden.nl/en/research/research-projects/law/inquiry-and-international-law (accessed 1 May 2018); The Hague Institute for Global Justice (THIGJ), 'From Fact-Finding to Evidence: Harmonizing Multiple Investigations of International Crimes', available at http://www.thehagueinstituteforglobaljustice.org/projects/from-fact-finding-to-evidence-harmonizing-multiple-investigations-of-international-crimes (accessed 1 May 2018); Forum for International Criminal and Humanitarian Law, 'Quality Control in Fact-Finding Outside Criminal Justice for Core International Crimes', available at http://www.fichl.org/activities/quality-control-in-international-fact-finding-outside-criminal-justice-for-core-international-crimes (accessed 1 May 2018); NYU Center for Human Rights and Global Justice, 'Initiative on Human Rights Fact-Finding, Methods, and Evidence',

been produced. Fact-finding guidelines and principles have also been prepared by scholars and practitioners, including OHCHR.[95]

Scholarly engagement with the work of UN atrocity inquiries and fact-finding more generally can be grouped into different clusters. Several scholarly works focus on specific inquiries[96] with some contributions by former commissioners.[97] Practice-oriented scholarship identifies challenges and proposes reforms to fact-finding practices and working methods.[98] Another cluster of scholarship examines the use of inquiry reports in international criminal proceedings, and the manifestation of international criminal law in the inquiry context.[99] A schematic strand of scholarship distinguishes different fact-finding activities and locates UN atrocity inquiries within broader fact-finding traditions.[100] Some commentators examine

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available at http://chrgj.org/researchfocuses/past-programs (accessed 1 May 2018) and Harvard University Program on Humanitarian Policy and Conflict Research (HPCR), 'Monitoring, Reporting, and Fact-Finding', available at http://hhi.harvard.edu/research/mrf#research-on-monitoring (accessed 1 May 2018).

94 Morten Bergsmo (ed.), *Quality Control in Fact-Finding* (Florence: Torkel Opsahl Academic EPublisher, 2013); Derek Jinks, Jackson Maogoto and Solon Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies International and Domestic Aspects* (The Hague: TMC Asser Press, 2014); Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (Oxford: OUP, 2016) and Christian Henderson (ed.), *Commissions of Inquiry: Problems and Prospects* (Oxford and Portland: Hart Publishing, 2017).

95 *OHCHR Guidance and Practice*, *supra* note 63; Harvard Program on Humanitarian Policy and Conflict Research, *Advanced Practitioner's Handbook on Commissions of Inquiry*, March 2015, available at http://hhi.harvard.edu/sites/default/files/publications/handbook-hpcrweb.pdf (accessed 1 May 2018) [*HPCR Handbook*] and *Siracusa Guidelines*, *supra* note 34.

96 E.g., Philip Alston, 'The Darfur Commission as a Model for Future Responses to Crisis Situations', (2005) 3 JICJ 600-607 [Alston 2005]; James Stewart, 'The UN Commission of Inquiry for Lebanon', (2007) 5 JICJ 1039-1059; Dinah PoKempner, 'Valuing the Goldstone Report', (2010) 16 *Global Governance* 144-159; Zeray Yihdego, 'The Gaza Mission: Implications for International Humanitarian Law and UN Fact-Finding', (2012) 13 MJIL 1-59; Russell Buchan, 'The Palmer Report and the Legality of Israel's Naval Blockade of Gaza', (2012) 61(1) ICLQ 264-273; Thilo Marauhn, 'Sailing Close to the Wind: Human Rights Council Fact-Finding in Situations of Armed Conflict – the Case of Syria', (2013) 43 Cal W Int'l LJ 401-459; Kevin Heller, 'The International Commission of Inquiry on Libya: A Critical Analysis', in Jens Meierhenrich (ed.), *The Law and Practice of International Commissions of Inquiry* (OUP, forthcoming), unpublished version available at http://ssrn.com/abstract=2123782 (accessed 1 May 2018).

97 E.g., M. Cherif Bassiouni, 'The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)', 88(4) (1994) AJIL 784-805; Christine Chinkin, 'U.N. Human Rights Council Fact-Finding Missions: Lessons from Gaza', in Mahnoush Arsanjani, Jacob Katz Cogan, Robert Sloane and Siegfried Wiessner (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, (Leiden: Martinus Nijhoff, 2011) 475-498; Philippe Kirsch, 'The Work of the International Commission of Inquiry for Libya', in M. Cherif Bassiouni and William Schabas (eds), *New Challenges for the UN Human Rights Machinery* (Cambridge: Intersentia, 2011) 293-318 and Michael Kirby, 'UN Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of Korea: Ten Lessons', (2014) 15 MJIL 1-27.

98 E.g., M. Cherif Bassiouni, 'Appraising UN Justice-Related Fact-Finding Missions', (2001) 5 Wash U JL & Pol'y 35-49 [Bassiouni 2001]; Boutruche, *supra* note 28 and Stephen Wilkinson, 'Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions', *Geneva Academy of Working Paper* (2012) available at http://www.geneva-academy.ch/joomlatools-files/docman-files/Standards%20of%20Proof%20in%20Fact-Finding.pdf (accessed 1 May 2018).

99 E.g., Carsten Stahn and Dov Jacobs, 'Human Rights Fact-Finding and International Criminal Proceedings: Towards a Polycentric Model of Interaction', in Alston and Knuckey, *supra* note 94, 255-280; Dov Jacobs and Catherine Harwood, 'International Criminal Law Outside The Courtroom: The Impact of Focusing on International Crimes for the Quality of Fact-Finding by International Commissions of Inquiry', in Bergsmo, *supra* note 94, 325-357; Catherine Harwood, 'Human Rights in Fancy Dress? The Use of International Criminal Law by Human Rights Council Commissions of Inquiry in Pursuit of Accountability', (2015) 58 JYIL 71-100.

100 E.g., Christian Henderson, 'Commissions of Inquiry: Flexible Temporariness or Permanent Predictability?', (2014) 45 NYIL 287-310 [Henderson 2014]; Federica D'Alessandra, 'The Accountability Turn in Third

whether commissions' reports have developed international law.[101] Other scholarship is normative, discussing how commissions could be better utilised in pursuit of the goals of prevention or accountability.[102] Recent critical scholarship challenges these perspectives by viewing commissions as products and producers of hegemonies.[103]

This Study complements this burgeoning scholarship by comprehensively analysing the practice of UN atrocity inquiries and their mandating authorities. It builds on scholarly discussions of different roles of inquiry[104] to comprehensively study their practice and render explicit operational choices which shape their roles and functions, and thus their identity in the international legal order. In so doing, the research hopes to inform future UN atrocity inquiry practice. Having laid these foundations, Chapter One situates UN atrocity inquiries in historical and institutional context.

Wave Human Rights Fact-Finding', (2017) 33(84) Utrecht J Int'l & Eur L 59-76 and Grace and Bruderlein, *supra* note 26.

[101] E.g., Russell Buchan, 'Quo Vadis? Commissions of Inquiry and their Implications for the Coherence of International Law', in Henderson, *supra* note 94, 257-283 [Buchan 2017] and Shane Darcy, 'Laying the Foundations: Commissions of Inquiry and the Development of International Law', in Henderson, *supra* note 94, 231-256.

[102] E.g., Lara Talsma, 'UN Human Rights Fact-Finding Establishing Individual Criminal Responsibility?', (2012) 24 Fla J Int'l L 384-427; Micaela Frulli, 'Fact-Finding or Paving the Road to Criminal Justice?', (2012) 10 JICJ 1323-1338; Lyal Sunga, 'Can International Criminal Investigators and Prosecutors Afford to Ignore Information from United Nations Human Rights Sources', in Bergsmo, *supra* note 94, 359-400 and Steven Ratner, 'The Political Dimension of Human Rights Fact-Finding', (2013) 107 Am Soc'y Int'l L Proc 70-77.

[103] E.g., Michelle Farrell and Ben Murphy, 'Hegemony and Counter-Hegemony: The Politics of Establishing United Nations Commissions of Inquiry', in Henderson, *supra* note 94, 35-64; Christine Schwöbel-Patel, 'Commissions of Inquiry: Courting International Criminal Courts and Tribunals', in Henderson, *supra* note 94, 145-169; Dustin Sharp, 'Human Rights Fact-Finding and the Reproduction of Hierarchies', in Alston and Knuckey, *supra* note 94, 69-87 and Shreya Atrey, '"The Danger of a Single Story": Introducing Intersectionality in Fact-Finding', in Alston and Knuckey, *supra* note 94, 156-173.

[104] E.g., Larissa van den Herik and Catherine Harwood, 'Commissions of Inquiry and the Charm of International Criminal Law Between Transactional and Authoritative Approaches', in Alston and Knuckey, *supra* note 94, 233-254; Van den Herik, *supra* note 74; Patrick Butchard and Christian Henderson, 'A Functional Typology of Commissions of Inquiry', in Henderson, *supra* note 94, 11-34 and Hellestveit, *supra* note 20.

CHAPTER ONE

CHARTING THE RISE OF UN ATROCITY INQUIRY

Introduction

This Chapter traces the development of international atrocity inquiries through time and institutional contexts, culminating in their manifestation at the United Nations (UN). International atrocity inquiries may be established through *ad hoc* interstate agreement, treaty regimes, or international organisations. In light of this diversity, the development of international atrocity inquiry is presented contextually as well as temporally. By locating UN practice in a broader tradition of international atrocity inquiries, certain synergies and linkages may also be identified across contexts. This presentation also invites reflections on the prevalence of certain institutional settings across time, as well as obstacles to the establishment of atrocity inquiries in different contexts.

This Chapter presents a historical and institutional taxonomy of international atrocity inquiries. It discusses the practice of establishing inquiries via *ad hoc* agreement among states (Section 1); 'Geneva' inquiry from IHL treaties (Section 2); atrocity inquiries by international organisations beyond the UN (Section 3) before zooming in on UN inquiry practice (Section 4). Some reflections on the varied settings and aims of international atrocity inquiries are offered in Section 5.

1. Interstate Atrocity Inquiries

International atrocity inquiries jointly established by states clustered around two ruptures of international peace: World War One (WWI) and World War Two (WWII). At the Paris Peace Conference in 1919, Allied Powers established an inquiry to examine the responsibility of the 'authors' of WWI and breaches of the laws and customs of war (1.1). Separate inquiries were conducted into atrocities by Bulgaria in occupied Serbia and Greek forces in Smyrna (1.2). In 1942, in the midst of World War Two, Allied nations established the United Nations War Crimes Commission (UNWCC) to collect evidence and advise on alleged war crimes by nationals of Axis Powers (1.3). Functional and structural aspects of the UNWCC were different to the 1919 Commission and to later international atrocity inquiries. As it is a significant part of the history of international responses to atrocities and has been depicted as an early atrocity inquiry,[105] it is discussed here.

1.1 1919 Commission

A key product of the Paris Peace Conference was an international inquiry into violations of international law by Germany and its allies during WWI. The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (the '1919 Commission') was established on 25 January 1919 at a plenary session of the Paris Peace

[105] E.g., Bassiouni, *supra* note 97, at 784 and Darcy, *supra* note 101.

Conference, and consisted of representatives of Allied powers.[106] The Commission was to inquire into the "responsibility of the authors" of the war; "facts as to breaches of the laws and customs of war" committed by Germany and its allies; the degree of responsibility attaching to individuals; and the characteristics of a tribunal appropriate to try those offences.[107] By 1919, the idea of establishing an inquiry into a situation of atrocities was somewhat novel but perhaps not extraordinary. By that date, some states had conducted domestic inquiries into atrocities, such as Ottoman inquiries into Armenian massacres[108] – one involving British, French and Russian delegates[109] – and the UK's Casement inquiry into Belgian atrocities in the Congo Free State.[110] Moreover, in 1914, the UK established an inquiry into German violations of IHL[111] and 1918, set up the Committee of Inquiry into the Breaches of the Laws of War. This Committee, chaired by Sir John MacDonnell, recommended that an international tribunal be established "for the trial and punishment of the ex-Kaiser as well as other offenders against the laws and customs of war and the laws of humanity".[112] By 1919, Allied Powers were familiar with utilising domestic inquiries to investigate atrocities and the UK had already settled on German responsibility for IHL violations in WWI.

The idea of an *international* inquiry to determine responsibility for violations of international law was innovative and might have been unwittingly encouraged by Germany. As at 1919, international inquiries had been established under the auspices of the Hague Conventions to ascertain the facts of international maritime incidents.[113] Diplomatic exchanges reveal that Germany proposed a neutral inquiry to investigate responsibilities arising from WWI. After signing the armistice, Germany requested to negotiate peace[114] and wrote to the US, via Switzerland:[115]

> [I]t seems imperatively necessary to throw light on the events which brought on the war, in all the belligerent States and in all their particulars. A complete truthful account of the world conditions and of the negotiations among the powers in July 1914 and of the steps taken at that time by the several Governments could and would go far toward

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[106] Preliminary Peace Conference, 25 January 1919 (Minute No. 2) provided that the Commission would be composed of 15 members, two nominated by each 'Great Power', namely the US, UK, France, Italy and Japan, and five from 'Powers with special interests', namely Belgium, Greece, Poland, Romania and Serbia.

[107] Minute No. 2, *supra*.

[108] E.g., Mazhar Inquiry Commission (1918). See Vahakn Dadrian, 'Military Defeat and the Victor's Drive for Punitive Justice', in Vahakn Dadrian and Taner Akçam (eds), *Judgment At Istanbul: The Armenian Genocide Trials* (New York: Berghahn Books, 2011) 19-77, at 60.

[109] Inquiry into Massacre at Sassoun (1894): Adolphus Ward and George Gooch (eds), *The Cambridge History of British Foreign Policy, 1783-1919* (Cambridge: CUP, 1923) at 234.

[110] *Correspondence and Report from His Majesty's Consul at Boma respecting the Administration of the Independent State of the Congo*, Africa. No. 1 (1904), available at http://archive.org/details/CasementReport.

[111] *Report of the Committee on Alleged German Outrages* (1915), available at http://archive.org/details/reportofcommitte01grea (accessed 1 May 2018).

[112] *First Interim Report from the Committee of Inquiry into the Breaches of the Laws of War*, cited in Harry Rhea, 'The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties and its Contribution to International Criminal Justice After World War II', (2014) 25 *Criminal Law Forum* 147-169, at 150. See *History of the United Nations War Crimes Commission and the Development of the Law of War* (London: UNWCC, 1948) at 435 [*History of the UNWCC*].

[113] See Introduction, Section 2.2.

[114] US Office of the Historian, 'Swiss Minister (Sulzer) to the Secretary of State', 26 November 1918, in *Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919*, Vol. II, at 71, available at http://history.state.gov/historicaldocuments/frus1919Parisv02/pg_71 (accessed 1 May 2018).

[115] *Ibid.*, 'Swiss Minister (Sulzer) to the Secretary of State', 2 December 1918, 71-72.

> demolishing the walls of hatred and misconstruction erected by the long war to separate the peoples… The German Government therefore proposes that a neutral Commission be organized to probe the responsibilities for the war, which should be composed of men whose character and political experience will guarantee a true verdict…

Similar proposals were sent to France and the UK.[116] Allied states rejected the proposal, sharing the view that German responsibility was "incontestably proved".[117] When Germany was notified of that position on 1 February,[118] the 1919 Commission was already established. As the British inquiry had recommended an international tribunal, it may be that the Allies adapted Germany's proposal for an inquiry to investigate responsibilities in light of their view that Germany was to blame.

The 1919 Commission was composed of three sub-commissions. Sub-Commission I found and collected evidence relating to culpable conduct on the part of the so-called 'Enemy Powers' while Sub-Commissions II and III considered whether on the facts established by Sub-Commission I, prosecutions could be instituted in respect of conduct which brought about WWI and which took place in hostilities, respectively; and the individuals who should be prosecuted.[119] The report does not explain the Commission's working methods in detail. It appears to have relied upon documentary sources, including memoranda and reports prepared by national delegations and an 'Inter-Allied' commission of inquiry.[120] Individuals appointed as commissioners were legal experts, many of whom held political positions, "showing the nexus between legal interpretations and political power."[121]

Having examined documentary evidence of violations of the laws and customs of war, the 1919 Commission found thirty-two violations liable for prosecution.[122] Regarding its mandate to consider responsibilities, the Commission found that it was "not necessary to wait for proof attaching guilt to particular individuals",[123] as there was sufficient information to warrant criminal investigations. The Commission concluded that all individuals who had committed "offences against the laws and customs of war or the laws of humanity"[124] could be prosecuted. It rejected the idea of sovereign immunity from judicial process, as this would mean that those most responsible for the gravest crimes would escape punishment.[125] These conclusions did not enjoy full consensus, with American and Japanese representatives dissenting on the basis that prosecutions for violations of 'laws of humanity' would not comply with the principle of legality and that sovereign immunity should be recognised.[126]

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116 *Ibid.*, 'Acting Secretary of State to the Commission to Negotiate Peace', 6 January 1919, at 73.
117 *Ibid.*, 'Commission to Negotiate Peace to the Acting Secretary of State', 10 January 1919, at 74.
118 *Ibid.*, 'Acting Secretary of State to the Swiss Minister (Sulzer), 1 February 1919, at 74.
119 *Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* (1920) 14(1) AJIL 95-154, at 97-98 [*1919 Report*].
120 *Ibid.*, at 98 and 112, including *Report of the Inter-Allied Commission on the violations of the Hague Conventions and of international law in general, committed between 1915 and 1918 by the Bulgars in occupied Serbia* (Paris, 1919) at 3 [*Occupied Serbia Report*].
121 Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950* (Oxford: OUP, 2014) at 42.
122 *1919 Report*, *supra* note 119, at 112-115.
123 *Ibid.*, at 116.
124 *Ibid.*, at 117.
125 *Ibid.*, at 116.
126 *Ibid.*, Annex II, at 135-136 and 146; Annex III, at 151-152.

The Commission made several recommendations pertaining to responsibility. Concluding that acts of aggression should not be prosecuted as they were not prohibited by positive law,[127] the Commission recommended that penal sanctions should be provided in the future.[128] The Commission proposed that serious violations affecting several Allied nations be prosecuted before a High Tribunal that was international in nature, with members selected from courts of Allied powers and the law to be applied as "principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience."[129] This language borrowed from the Martens Clause.[130] This proposal was innovative; as at 1919, most commentators located the basis for war crimes trials in domestic legal systems.[131]

Allied Powers departed from these recommendations in several respects. The proposal for an international tribunal to prosecute war crimes was not adopted; instead the Treaty of Versailles provided for a tribunal of Allied judges to prosecute the former German Emperor for "a supreme offence against international morality and the sanctity of treaties".[132] Article 228 provided that Germany recognised the Allies' right to prosecute individuals accused of violating the laws and customs of war in domestic military tribunals, and would extradite suspects for this purpose. Mixed military tribunals would prosecute crimes committed against nationals of several Allied states.[133] Even this pared-back system proved ineffective. The former Emperor sought refuge in the Netherlands, which refused to extradite him. Germany also persuaded Allied Powers that rather than extraditing suspected war criminals, they should be prosecuted in its own courts.[134] Of the 896 suspects identified, only twelve individuals were prosecuted, with six acquittals. The Leipzig trials are impugned as inadequate,[135] but "nonetheless serve as an important historical precedent for war crimes trials".[136]

Despite its limited impact, the 1919 Commission's investigation of violations of international law, consideration of responsibilities and proposal for an international criminal tribunal mark it as the first international inquiry to promote criminal responsibility for violations of international law. However, the Commission was not without flaws. Its identification of violations attracting criminal sanction and affirmation of international criminal responsibility was criticised by some Commission representatives as beyond settled law. Moreover, the

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[127] *Ibid.*, at 98, 118, and 120.
[128] *Ibid.*, at 120.
[129] *Ibid.*, at 122.
[130] Convention (IV) respecting the Laws and Customs of War on Land 1907, with Annex of Regulations, TS 539, Preamble [*Hague Regulations*].
[131] René Provost, *International Human Rights and Humanitarian Law* (Cambridge: CUP, 2004) at 78.
[132] Treaty of Versailles 1919, 225 Consol. TS 188, Art 227.
[133] *Ibid.*, Arts. 228-229.
[134] Theodor Meron, 'Reflections on the Prosecution of War Crimes by International Tribunals', (2006) 100 AJIL 551-579, at 557.
[135] Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000) at 81.
[136] Bassiouni, *supra* note 97, at 786.

circumstances of its establishment and composition reflect a certain tolerance for 'victor's justice'.[137] These issues were to be reignited twenty years later, at the UNWCC.

1.2 Inter-Allied Commissions of Inquiry

Two lesser-known international inquiries were established during the Paris Peace Conference into atrocities by Greek forces at Smyrna (modern İzmir, Turkey) and by Bulgaria in occupied Serbia. Much less has been written about these inquiries; they are briefly discussed here.

An Inter-Allied inquiry was established by the Supreme Council of the Conference to investigate "violations of the Hague Convention and International Law in general"[138] by Bulgaria in occupied Serbia during WWI ('Commission on occupied Serbia'). The Commission on occupied Serbia was composed of a mix of state representatives and legal experts.[139] In its October 1919 report, the Commission explained that it undertook a preliminary investigation to "establish the necessity of judicial repressive measures" and reparations. Moreover, the Commission was unable to investigate the high number of complaints due to time pressure and practical difficulties in carrying out investigations, so its inquiry was limited to "a cursory view of the collected documents, and a general statement that grave violations of the international law have been committed."[140] While not providing a detailed account of its working methods, the Commission stated that it only considered facts "which have seemed to it certain and irrefutable", including orders by Bulgarian authorities, material evidence such as destroyed villages and mass graves, and eye-witness testimony.[141] The report found violations under several headings, including unlawful treatment of belligerents, massacres of the civilian population, torture, rape, internment, pillage and denationalisation. The Commission also examined state responsibility, distinguishing crimes by Bulgarian government officials and groups operating alongside, and tolerated by, official authorities, from crimes by individuals not connected to Bulgaria. According to the Commission, Bulgaria was responsible for violations in the former case as "these organs have acted in the spirit of the general instructions given by the Government."[142]

The Commission's report was mentioned in passing by the 1919 Commission, together with several others which supplied "abundant evidence of outrages of every description committed on land, at sea, and in the air, against the laws and customs of war and of the laws of humanity"[143] by Germany and its allies. While the 1919 Commission discussed the possibility of an international tribunal for Balkan war crimes, this proposal did not find support after the signing of the Treaty of Versailles, which did not provide for such a mechanism in respect of

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[137] M. Cherif Bassiouni, 'International Criminal Justice in Historical Perspective: The Tension Between States' Interests and the Pursuit of International Justice', in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: OUP, 2009) 131-142, at 134.

[138] *Occupied Serbia Report*, *supra* note 120, at 3. See Jeremy Salt, *The Unmaking of the Middle East: A History of Western Disorder in Arab Lands* (Berkley: University of California Press, 2008) at 76.

[139] L. Stoyanovitch (Chair; former Serbian Prime Minister); A. Bonnassiuex (French representative); P. Gavrilovitch (Minister Plenipotentiary for Russia); H. Mayne (British representative) and S. Yovanotich (Serbian law professor and diplomat). The latter also sat on the 1919 Commission.

[140] *Occupied Serbia Report*, *supra* note 120, at 3.

[141] *Ibid.*, at 3.

[142] *Ibid.*, at 4.

[143] *1919 Report*, *supra* note 119, at 113.

German war crimes.[144] In a similar fashion, Balkan war crimes were to be prosecuted before domestic military tribunals.[145] The report has not been much discussed in scholarship; perhaps it was overshadowed by the 1919 Commission. Yet it bears similarities with inquiries established several decades later in terms of its working methods, evaluation of IHL violations and consideration of responsibilities.

A second Inter-Allied inquiry was established in July 1919 by the Supreme Council of the Conference to investigate reported atrocities by Greek forces at Smyrna, whose presence had been authorised by the Council.[146] This Commission was mandated to investigate facts and responsibilities, and asked to propose solutions. It was composed of four state representatives, all military officials. The Commission travelled to several locations, including Smyrna, to hear witnesses.[147] Its report found Greece largely responsible for the violence, but did not overtly qualify incidents as legal violations.[148] The Commission found the presence of Greek forces as unnecessary and based on false information, and that its occupation had the appearance of annexation.[149] Council members accepted the findings but also criticised the Commission for exceeding its mandate.[150] Victoria Solomonidis observes that the Council was irritated at the Commission's revival of a controversial issue that they would have preferred to shield from public view.[151] The report was eventually published[152] after being suppressed.[153]

1.3 United Nations War Crimes Commission

In 1943, in the midst of World War Two, seventeen Allied powers established the UNWCC to collect evidence of war crimes committed against Allied nationals and identify responsible individuals.[154] The Commission had three committees with different functions. Committee I (Facts and Evidence) examined charges submitted by national offices; Committee II (Enforcement) was concerned with measures to ensure the apprehension, trial and punishment of war criminals while Committee III (Legal) advised on issues of international law. Although the UNWCC was originally envisaged to conduct independent investigations,[155] this function was assigned to national offices within Allied states. The UNWCC reviewed information submitted by national offices and advised whether there was sufficient evidence to bring

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144 Lewis, *supra* note 121, at 52.

145 Treaty of Neuilly-sur-Seine 1919, 226 Consol. TS 332, Art. 118.

146 Victoria Solomonidis, 'Greece in Asia Minor: the Greek administration of the Vilayet of Aidin, 1919-1922', Ph.D. Thesis, King's College, University of London (1984) at 68-86, available at http://kclpure.kcl.ac.uk/portal/files/2934862/245618.pdf (accessed 1 May 2018).

147 Inter-Allied Commission of Inquiry into the Greek Occupation of Smyrna and adjoining Territories [Smyrna Commission], *Document 2, Background to the Inter-Allied Commission of Inquiry into the Greek Occupation of Smyrna and adjoining Territories*.

148 Smyrna Commission, *Establishment of Responsibilities*, 11 October 1919, available at http://www.ataa.org/reference/iacom.pdf (accessed 1 May 2018).

149 Smyrna Commission, *Document 8: Conclusions put forward by the Commission*, 13 October 1919.

150 Solomonidis, *supra* note 146, at 83, citing statements of the British representative, Sir Eyre Crowe.

151 *Ibid.*, at 85.

152 E. Woodward and Rohan Butler (eds), *Documents on British Foreign Policy 1919-1939*, First Series, Vols. I-II (London: His Majesty's Stationery Office, 1947).

153 Solomonidis, *supra* note 146, at 86; Hansard, HC Debate, 26 February 1920, Vol. 125 cc1882-1883, available at http://api.parliament.uk/historic-hansard/commons/1920/feb/26/smyrna (accessed 1 May 2018).

154 Established at a diplomatic conference at the Foreign Office, London, 20 October 1943: *History of the UNWCC*, *supra* note 112, at 112.

155 *Ibid.*, at 120.

cases; reported its findings to governments and circulated lists of war criminals. Carsten Stahn observes that the UNWCC was more of an "examining body than a fact-finder".[156] In its five years of operations, the Commission received files involving more than 36,000 individuals and units,[157] and listed over 24,000 accused persons.[158] In assessing cases for prosecution and coordinating with domestic bodies, the UNWCC played a pivotal support role. Stahn likens it to "a sort of international pretrial examination".[159]

The UNWCC also advised governments on legal questions relevant to war crimes trials.[160] Committee III examined many legal questions of relevance to ICL, including the availability of the defence of superior orders and whether aggression was recognised as an international crime.[161] In respect of the latter issue, the majority took a similar view as the 1919 Commission, finding that aggression was not legally recognised as a crime but should be prohibited.[162] Committee III proposed a definition of crimes against humanity which was incorporated in Article 6 of the Nuremberg Charter.[163] Dan Plesch and Shanti Sattler write that the UNWCC "offers a rare body of legal material developed by states working together… to address and develop elements of international law".[164]

Assessments of the UNWCC's contributions to prosecutions are mixed. Around 2,000 war crimes trials of 'minor' war crimes suspects took place in military tribunals between 1945 and 1948, many involving multiple defendants.[165] Certain theatres of combat were excluded from prosecution. M. Cherif Bassiouni observes that although the UNWCC had extensive evidence of Italian and Libyan war crimes, no prosecutions occurred for "essentially political" reasons.[166] Stahn points out that Committee III considered the Ethiopian charges as beyond its jurisdiction but took a "pragmatic" approach in practice, examining those cases at its final meeting.[167] Bassiouni also points out that the UNWCC had limited impact on the trials of 'major' suspects, as the IMT prosecution was led by the US which conducted its own investigation.[168]

Certain parallels and distinctions can be drawn between the UNWCC and the 1919 Commission. Both bodies were established to consider responsibilities arising out of world wars, representing attempts to re-establish rule of law. While the 1919 Commission examined responsibilities of states and individuals, the UNWCC focused entirely on suspected international crimes. The UNWCC's limited focus "gave it a more neutral and targeted

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156 Carsten Stahn, 'Complementarity and Cooperative Justice Ahead of Their Time? The United Nations War Crimes Commission, Fact-Finding and Evidence', (2014) 25(1) *Criminal Law Forum* 223-260, at 229.
157 *History of the UNWCC, supra* note 112, at 508.
158 *Ibid.*, at 484-485.
159 Stahn, *supra* note 156, at 231.
160 *History of the UNWCC, supra* note 112, at 3.
161 *Ibid.*, at 98, 181, and 279.
162 *Ibid.*, at 182.
163 *Ibid.*, at 176.
164 Dan Plesch and Shanti Sattler, 'Changing the Paradigm of International Criminal Law: Considering the Work of the United Nations War Crimes Commission of 1943–1948', (2013) 15 Int'l Comm L Rev 203-223, at 211.
165 *History of the UNWCC, supra* note 112, at 518.
166 M. Cherif Bassiouni, 'Current Developments: The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)', 88(4) (1994) AJIL 784-805, at 779 [Bassiouni 1994].
167 Stahn, *supra* note 156, at 231, at 240, referring to *History of the UNWCC, supra* note 112, at 149.
168 Bassiouni 1994, *supra* note 166, at 778.

mandate"[169] and closely connected it to binding justice mechanisms. However, its one-sided mandate to focus on crimes by nationals of Axis Powers rendered it vulnerable to criticisms of victor's justice, as had afflicted the 1919 Commission. Yet it also represents a multilateral commitment to accountability for international crimes.[170] A significant accountability function for international inquiry would not be seen again until the Yugoslavia Commission in 1992.

2. 'Geneva' International Humanitarian Law Inquiry

This Section explains developments in the 'Geneva' strand of inquiry arising from IHL treaties. Inquiry mechanisms were set down in successive treaties, culminating in the establishment of a standing permanent commission in Additional Protocol I 1977. The International Humanitarian Fact-Finding Commission (IHFFC) represents both an achievement and still unrealised potential; its competence was triggered for the first time in 2017.

Article 30 of the Geneva Convention 1929 provided that upon "the request of a belligerent, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the Convention".[171] This provision was initially seen as "a significant step forward".[172] However, at the 1929 Diplomatic Conference, delegates expressed fears that findings of IHL violations by an inquiry might lead to sanctions.[173] The requirement for parties to agree on inquiry procedures would prove to be problematic.[174] An opportunity to put Article 30 into practice arose in 1936 during the Italio-Ethiopian conflict. Both parties agreed in principle to an inquiry into alleged misuse of the protected emblem, and the ICRC entered into discussions concerning its procedures. Allegations of use of poison gas by Italy also surfaced, but Italy considered methods of warfare as beyond the scope of the inquiry.[175] After the use of poison gas came to the attention of the League of Nations, the prospective inquiry was subject political manoeuvring, also posing challenges to the role of the ICRC. The inquiry procedure under the 1929 Geneva Convention was not put into practice.

In an effort to render IHL inquiry more effective, the ICRC submitted a proposal to the 1949 Diplomatic Conference for an 'investigation procedure' that would allow parties to "demand the institution of an inquiry" into alleged violations.[176] States did not support that proposal, finding some aspects too complicated.[177] The essence of the 1929 provision was retained in the Geneva Conventions of 1949, with the amendment that if parties were unable to agree on

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169 Stahn, *supra* note 156, at 225.
170 *Ibid.*, at 226.
171 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field 1929, 118 LNTS 303, Art. 30.
172 *Updated Commentary on the First Geneva Convention 1949* (Cambridge: CUP, 2016), 'Commentary to Article 52', para. 8 [*2016 Commentary to Geneva Convention I*].
173 Jean Pictet, *Commentary on the Geneva Conventions of August 12 1949. Vol. I* (Geneva: ICRC, 1952) at 375.
174 *2016 Commentary to Geneva Convention I*, *supra* note 172, para. 8.
175 Rainer Baudendistel, *Between Bombs and Good Intentions: The International Committee of the Red Cross and the Italio-Ethioloan War 1935-1936* (New York and Oxford: Berghahn Books, 2006) at 280.
176 *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. I, 55-56 and 70; *2016 Commentary to Geneva Convention I*, *supra* note 172, Article 52, para. 3035.
177 *2016 Commentary to Geneva Convention I*, *supra* note 172, para. 3036.

procedure, they should jointly appoint an umpire to decide.[178] The requirement of *ad hoc* state consent remained. This mechanism also remains unused.[179] The *2016 Commentary to Geneva Convention I* (*2016 Commentary*) suggests that states' lack of use of this inquiry procedure is mainly due to the requirement for parties to reach agreement.[180]

Further efforts were made at the 1977 Diplomatic Conference[181] to breathe life into IHL inquiry. There was a division at the Conference between states in favour of a more robust mechanism and those opposed.[182] The product was the International Fact-Finding Commission (also known as the International Humanitarian Fact-Finding Commission, or IHFFC), provided for in Article 90 of Additional Protocol I. Pursuant to Article 90, the IHFFC may investigate facts alleged to be a grave breach or "other serious violation" of the Geneva Conventions or Additional Protocol I.[183] While the IHFFC's mandate indicates the relevance of legal questions,[184] the IHFFC states that its procedure "stops short of stating the law, which opens more possibilities for States to find mutually acceptable compromise solutions."[185] Former IHFFC President Ghalib Djilali explains, "[c]larity about relevant facts might serve as a basis of mutual confidence and therefore better respect for [IHL]."[186] The IHFFC does not aim to 'name and shame'; its reports are confidential unless parties agree to their publication.[187]

The IHFFC's trigger mechanisms reflect a compromise between states' positions at the Diplomatic Conference in favour of state consent. Article 90 provides that states may recognise the IHFFC's compulsory competence in advance and that an inquiry must be requested by a state which accepts its competence regarding alleged violations by another state which also accepts its competence.[188] The IHFFC may investigate "other situations"[189] at the request of a party with the consent of other parties concerned, which may include non-

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[178] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31, Art. 52 [Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949, 75 UNTS 85, Art. 53; [Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War 1949, 75 UNTS 135, Art. 132 [Geneva Convention III] and Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287, Art. 149 [Gevena Convention IV].

[179] ICRC, *Annual Report 1973* (Geneva, 1974) at 11, available at http://library.icrc.org/library/docs/RA_CICR/RA_1973_ENG.pdf (accessed 1 May 2018) and ICRC, *Annual Report 1974* (Geneva, 1975) at 18-19, available at http://library.icrc.org/library/docs/RA_CICR/RA_1974_ENG.pdf (accessed 1 May 2018). See Théo Boutruche, 'Good Offices, Conciliation and Enquiry', in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford: OUP, 2015) 561-574, para. 24 [Boutruche 2015].

[180] *2016 Commentary to Geneva Convention I*, *supra* note 172, para. 3059.

[181] Plenary Meeting of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.

[182] Grace and Bruderlein, *supra* note 26, at 4.

[183] *Additional Protocol I*, *supra* note 33, Art. 90(5)(a).

[184] Boutruche 2015, *supra* note 179, para. 23.

[185] IHFFC, *Report on the Work of the IHFFC* (Berne, 2006) at 18, available at http://www.ihffc.org/Files/en/pdf/ihffc_work_report_engl.pdf (accessed 1 May 2018).

[186] 'Statement by Professor Ghalib Djilali President of the International Humanitarian Fact-Finding Commission', Fifth Assembly of the States parties to the International Criminal Court, November 2006, available at http://www.ihffc.org/Files/en/pdf/ihffc_icc_declarationofficial.pdf (accessed 1 May 2018).

[187] *Additional Protocol I*, *supra* note 33, Art. 90(5)(c).

[188] *Ibid.*, Art. 90(2)(a).

[189] *Ibid.*, Art. 90(2)(d).

international armed conflict (NIAC).[190] The IHFFC remains the principal IHL inquiry mechanism in existence, with recent proposals not finding sufficient state support.[191]

The IHFFC remained dormant from its entry into force in 1991 until 2017. Likening the IHFFC to a "sleeping beauty",[192] Frits Kalshoven surmised that the reasons for its dormancy lay in its independence and "the reluctance of parties to an armed conflict to have the truth about certain alleged facts exposed".[193] The practice of UN bodies in establishing inquiries into IHL violations may also have diverted situations from the IHFFC. Grace and Bruderlein note that the Security Council appointed two IHFFC members to the Yugoslavia Commission "[a]s if to accentuate the IHFFC's irrelevance".[194] However, the Sleeping Beauty recently awoke. On 18 May 2017 the IHFFC received its first mandate, upon the request of the Organization for Security and Co-operation in Europe (OSCE). The IHFFC was asked to investigate an incident in Ukraine in which a vehicle exploded, causing the death of a paramedic and injuries to OSCE monitors. Its mandate was to "establish the facts… against the background of [IHL]",[195] but not to consider criminal responsibility. The report is confidential, but an executive summary states that the explosion was caused by an anti-vehicle mine in violation of IHL due to its "predictable indiscriminate effect."[196] The IHFFC's acceptance of jurisdiction by an organisation of states[197] indicates its willingness to act beyond the strict confines of Additional Protocol I, and perhaps inviting future requests from other actors.

3. Atrocity Inquiries by International Organisations other than the UN

International organisations have international legal personality[198] but do not have the same breadth of competence as states, which hold "the totality of international rights and duties recognized by international law".[199] According to the ICJ, the rights and duties of an international organisation "depend upon its purposes and functions as specified or implied in

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[190] Luigi Condorelli, 'The International Humanitarian Fact-Finding Commission: an obsolete tool or a useful measure to implement international humanitarian law?', (2001) 83(842) IRRC 393, at 402; IHFFC, 'The IHFFC in a few words', available at http://www.ihffc.org/index.asp?Language=en&page=aboutus_general (accessed 1 May 2018).

[191] International Conference of the Red Cross and Red Crescent, *Strengthening compliance with international humanitarian law: Concluding Report*, Doc. No. 32IC/15/19.2, October 2015; International Conference of the Red Cross and Red Crescent, Resolution 2, 'Strengthening compliance with international humanitarian law', Doc. No. 32IC/15/R2, available at http://rcrcconference.org/international-conference/documents (accessed 1 May 2018) and Jelena Pejic, 'Strengthening compliance with IHL: The ICRC-Swiss initiative', (2016) 98(901) IRRC 315-330.

[192] Frits Kalshoven, 'The International Humanitarian Fact-Finding Commission: A Sleeping Beauty?', (2002) 4 *Humanitäres Völkerrecht* 213-216.

[193] *Ibid.*, at 215. See *2016 Commentary to Geneva Convention I*, *supra* note 172, para. 3059.

[194] Grace and Bruderlein, *supra* note 26, at 5, referring to Fritz Kalshoven and Torkel Opsahl.

[195] IHFFC, 'International Humanitarian Fact-Finding Commission to lead an independent forensic investigation in Eastern Ukraine (Luhansk province)', 19 May 2017, available at http://www.ihffc.org/index.asp?page=news (accessed 1 May 2018).

[196] *Executive Summary of the Report of the Independent Forensic Investigation in relation to the Incident affecting an OSCE Special Monitoring Mission to Ukraine (SMM) Patrol on 23 April 2017*, 7 September 2017, available at http://www.osce.org/home/338361 (accessed 1 May 2018).

[197] Ingo Peters, 'Legitimacy and International Organizations—the Case of the OSCE', in Dominik Zaum (ed.), *Legitimating International Organizations* (Oxford: OUP, 2013) 196-220, at 203.

[198] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Reports 174, at 178 [*Reparation for Injuries Opinion*].

[199] *Ibid.*, at 180.

its constituent documents and developed in practice." [200] Inquiries by international organisations link to their functions and purposes. This Section considers the practice of international organisations in establishing atrocity inquiries, specifically the League of Nations (3.1) and regional organisations (3.2). The more extensive practice of the UN is discussed in Section 4.

3.1 League of Nations

The League of Nations was established in 1919 to encourage international cooperation and peace.[201] The Covenant of the League of Nations provided that members had to submit "disputes likely to lead to a rupture" to arbitration, judicial settlement or "enquiry by the Council".[202] The League established seven inquiries, all of which concerned territorial disputes and invasions.[203] Some commissions were asked to offer settlement recommendations as well as to ascertain facts.[204]

League practice is interesting for its lack of inquiries into atrocities. Commissions generally focussed on restoring peaceful international relations. For instance, the 1931 Lytton Inquiry was asked to report on circumstances threatening to disturb peace following Japan's invasion of Manchuria and to consider solutions to reconcile states' interests.[205] The Commission appealed to states' interests,[206] finding that Japan's actions could not be regarded as self-defence[207] but avoiding characterising the invasion as aggression.[208] The 1925 Inquiry into Greek Frontier Incidents acknowledged human suffering, but its central purpose was to establish facts enabling the fixing of responsibility and reparations arising from Bulgaria's invasion and occupation of Greece.[209] In calculating reparations, the Commission identified harm to civilians as a type of damage but did not qualify such harms as legal violations, and its emphasis remained on reducing the threat of war.[210] Mark Lewis observes that the League's priority was not to establish punishments for aggression and war crimes, but rather to build "a new permanent system of adjudication for disputes between states".[211]

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[200] *Ibid.*, at 180.
[201] Covenant of the League of Nations 1919, 34 LNTS, Preamble [*League Covenant*].
[202] *Ibid.*, Art. 12. See Arts. 11 and 15.
[203] Aaland Islands Dispute (1920), Albania Commission (1921), Upper Silesia Commission (1921), Memel Inquiry (1923), and Mosul Inquiry (1924), Commission of Enquiry into the Incidents on the Frontier between Bulgaria and Greece (1926) and Commission of Enquiry into the Sino-Japanese Dispute (1931).
[204] E.g., *General Report of the Commission of Enquiry presented to the Council on May 12th, 1922*, (1922) League of Nations Official Journal, C. 202 (a). M. 148. 1922. VII, Annex 336, at 572.
[205] Declaration by the President of the Council on Resolution of 10 December 1931, in *Report of the Commission of Enquiry into the Sino-Japanese Dispute*, 4 September 1932, at 7.
[206] *Ibid.*, at 135.
[207] *Ibid.*, at 71.
[208] US Department of State, 'The Ambassador in Japan (Grew) to the Secretary of State', 16 July 1932, *US Department of State/Papers relating to the foreign relations of the United States, Japan* (1931-1941), available at http://digicoll.library.wisc.edu/cgi-bin/FRUS/FRUS-idx?type=turn&entity=FRUS.FRUS193141v01.p0189&id=FRUS.FRUS193141v01&isize=M (accessed 1 May 2018).
[209] *Report of the Commission of Enquiry into the Incidents on the Frontier between Bulgaria and Greece*, (February 1926) League of Nations Official Journal 196.
[210] *Ibid.*, at 203 and 207.
[211] Lewis, *supra* note 121, at 63.

At one point the League appeared to consider an inquiry into the use of poison gas by Italy during the Italio-Ethiopian conflict, upon the request of the Emperor of Ethiopia.[212] The Committee of Thirteen of the League did not consider it as within the League's mandate, as its goal was "to stop a war and not to observe a war".[213] The Committee requested information from the ICRC, which declined to do so to avoid compromising its neutrality.[214] When a League inquiry became a possibility, Italy proposed that the ICRC should widen the terms of a separate inquiry into violations of the Geneva Convention 1929 to include those allegations.[215] The League's attention turned away from the matter. Ultimately, the ICRC inquiry did not materialise, so the situation was not subject to an inquiry. In short, League inquiries generally focussed on resolving territorial disputes and tensions in order to promote peace.

3.2 Regional Organisations

Regional organisations conduct an array of fact-finding activities. This Section highlights key inquiries into situations of atrocities established by prominent regional organisations in Europe, Africa and the Americas, and in respect of Arab states. This Section also identifies some other fact-finding activities by these actors to situate regional inquiries within their broader contexts.

In the European context, the Council of the European Union (EU) established an inquiry into violations of international law in the 2008 conflict between Russia and Georgia.[216] The European Council has occasionally instructed fact-finding missions in respect of human rights situations.[217] The EU is active at the UN, sponsoring mandating resolutions of HRC-led atrocity inquiries.[218] The European Parliament has requested that EU member states pursue atrocity inquiries at the UN.[219] Human rights fact-finding has also been conducted by the Council of Europe.[220] From 1953 until its abolition in 1998,[221] the European Commission on Human Rights examined alleged violations of the European Convention on Human Rights.[222]

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[212] *History of the UNWCC*, *supra* note 112, at 189-190.

[213] US Department of State, 'Telegram from Consul at Geneva (Gilbert) to Secretary of State', 21 January 1936, *Foreign Relations of the United States Diplomatic Papers, 1936, the Near East and Africa, Vol. III*, available at http://history.state.gov/historicaldocuments/frus1936v03/d103 (accessed 1 May 2018).

[214] Rainer Baudendistel, 'Force Versus Law: The International Committee of the Red Cross and Chemical Warfare in the Italio-Ethiopian War 1935-1936', (1998) 322 IRRC 81-104.

[215] *Ibid*.

[216] EU Council Decision 2008/901/CFSP, Art 1.

[217] E.g., *EC Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia: Report to EC Foreign Ministers* (Copenhagen: Ministry of Foreign Affairs, 1993), available at http://www.womenaid.org/press/info/humanrights/warburtonfull.htm (accessed 1 May 2018).

[218] E.g., the EU co-sponsored UN Doc. A/HRC/22/L.19 (North Korea) and UN Doc. A/HRC/33/L.31 (Burundi): EU, 'Outcomes of the 33rd session of the Human Rights Council from the European Union's perspective', 30 September 2016, available at http://eeas.europa.eu/delegations/un-geneva/10865/outcomes-33rd-session-human-rights-council-european-unions-perspective_en (accessed 1 May 2018).

[219] E.g., European Parliament Resolution P8_TA-PROV(2017)0219, 18 May 2017, para. 1.

[220] Statute of the Council of Europe 1949, ETS No. 001.

[221] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms Restructuring the Control Machinery Established Thereby, ETS 155, Strasbourg, 11.V.1994.

[222] E.g., European Commission on Human Rights, *The Greek Case, Report of the Commission* (Strasbourg, 1970).

Turning to the African region, the Organization of African Unity (OAU) and its successor, the African Union (AU) have established a few inquiries. The OAU created an International Panel of Eminent Personalities to investigate causes and responsibilities of the Rwandan genocide.[223] The International Panel examined the failure of the international community to take action and the need for accountability in respect of violations.[224] In 2013, the AU established an inquiry into human rights violations in the South Sudan conflict. That Commission was asked to make recommendations on "accountability, reconciliation and healing".[225] The report, which found extensive violations,[226] was published more than a year after completion, with deferral due to concerns that it would obstruct peace efforts.[227] The African Commission on Human and Peoples' Rights (ACHPR) has carried out fact-finding missions on its own initiative and at the request of the AU Peace and Security Council. These missions were composed of ACHPR commissioners rather than independent experts.[228] The AU has also supported UN-led inquiries, such as the Security Council's inquiry on the Central African Republic (the CAR).[229]

The League of Arab States has established inquiries concerning violations arising in the context of Israeli military operations in Gaza in 2009[230] and human rights violations in Darfur in 2004. The former inquiry was mandated to report on alleged violations of IHL and human rights, and to collect information on the responsibility of states and individuals for violations.[231] Its report was oriented towards ascertaining responsibility and promoting accountability, including by recommending that the situation in Gaza be referred to the ICC.[232] In respect of the latter inquiry on Darfur, its public statement about human rights violations was suppressed and its report was not published after Sudan apparently protested its findings.[233]

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[223] *Report of the Secretary-General on the Establishment of an International Panel of Eminent Personalities to Investigate the Genocide in Rwanda and the Surrounding Events*, OAU Doc. CM/2048 (LXVIII), as endorsed by the OAU Council of Ministers in OAU Doc. CM/Dec.379 (LXVII).

[224] *Rwanda: The Preventable Genocide*: *Report of International panel of eminent personalities*, July 2000, available at http://www.refworld.org/docid/4d1da8752.html (accessed 1 May 2018).

[225] Commission of Inquiry on South Sudan, established by AU Peace and Security Council, Communiqué PSC/AHG/COMM.1(DXXVII), 26 September 2015, para. 25.

[226] *Final Report of the African Union Commission of Inquiry on South Sudan*, 15 October 2014, available at http://www.peaceau.org/uploads/auciss.final.report.pdf (accessed 1 May 2018).

[227] AU Peace and Security Council, Communiqué PSC/AHG/COMM.1(DXXVII), 26 September 2015, para. 25 and Communiqué PSC/AHG/COMM.1(CDLXXXIV), 29 January 2015, para. 9.

[228] E.g., Fact-finding Mission to Burundi, established pursuant to AU Peace and Security Council, Communiqué PSC/PR/COMM.(DLI), 17 October 2015, para. 12(iv); *Report of the Delegation of the African Commission on Human and Peoples' Rights on its Fact-finding Mission to Burundi 7-13 December 2015*, available at http://www.achpr.org/files/news/2016/05/d218/achpr_report_fact_finding_eng.pdf (accessed 1 May 2018). See Fact-Finding Mission to the Republic of Mali, established pursuant to AU Peace and Security Council, Communiqué PSC/AHG/COMM.1(CCCXXVII), 14 July 2012 and Fact-finding Mission to Darfur, established pursuant to ACHPR Resolution on the Situation of Human Rights in Darfur, Sudan, 35th Ordinary Session, 4 June 2004, available at http://www.achpr.org/files/activity-reports/17/achpr34and35_actrep17_20032004_eng.pdf (accessed 1 May 2018).

[229] AU Peace and Security Council, Communiqué PSC/AHG/COMM.2(CDXVI), 29 January 2014.

[230] *Report of the Independent Fact Finding Committee on Gaza: No Safe Place*, 30 April 2009, in UN Doc. S/2009/537, 14 October 2009 [*Arab League Gaza Report*].

[231] *Ibid*., 'Terms of Reference', Annex I, at 217, paras. 2-3.

[232] *Ibid*., para. 40(2).

[233] Nadim Hasbani, 'About the Arab Stance Vis-à-vis Darfur', *Al-Hayat*, 21 March 2007, available at http://www.crisisgroup.org/africa/horn-africa/sudan/about-arab-stance-vis-vis-darfur (accessed 1 May 2018)

In the Americas, the Organization of American States (OAS) has investigated several situations. Like the fact-finding missions of the ACHPR, most inquiries were composed of OAS Council representatives rather than independent commissioners,[234] with an inquiry into violence in Haiti as an exception.[235] The OAS also established an inquiry jointly with the UN into allegations of extra-judicial executions in Togo.[236] The Inter-American Commission on Human Rights, an OAS organ, has also established inquiries.[237]

Regional organisations have shown interest in conducting fact-finding with respect to atrocities and some mandates emphasised accountability for violations. Several such organisations have a richer practice of establishing fact-finding missions composed of organisational officials, rather than independent inquiries. It is difficult to draw conclusions in respect of regional inquiries as a general type or category, not only due to their rather limited number, but also because they are located within distinct institutional and geographic contexts. They report to mandating authorities with divergent functions and powers, which in turn operate in organisational contexts guided by different principles and purposes. Regional inquiries may thus be distinguished from one another as well as from universal organisations.

4. UN Atrocity Inquiries

By contrast with the League of Nations and regional organisations, the UN provided fertile institutional soil for atrocity inquiries, generating a rich repository of practice. The UN was established in 1945 for several purposes, including the maintenance of international peace and security and the promotion of human rights and fundamental freedoms.[238] The Security Council, General Assembly and Secretary-General may all consider matters of international peace and security, with the Council primarily responsible for its maintenance.[239] These organs may undertake fact-finding to exercise their responsibilities in this field.[240] The HRC[241] and its predecessor, the UN Commission on Human Rights (UNCHR),[242] have also established UN atrocity inquiries. Mandating authorities' functions and powers are addressed in Chapter Two. This Section discusses two broad periods of UN practice: 1945 to 1991 (4.1) and 1992 onwards (4.2). 1992 is selected as the dividing line as wider global events around

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and Human Rights Watch, 'Arab League: Condemn Atrocities in Darfur', 6 August 2004, available at http://www.hrw.org/news/2004/08/06/arab-league-condemn-atrocities-darfur (accessed 1 May 2018).

234 Joan Kreuger Wadlow, 'Commissions of Inquiry in International Disputes', Ph.D. thesis, University of Nebraska, 1963, at 204.

235 *Report of the Commission of Inquiry into the Events of December 17, 2001 in Haiti*, OAS Doc Ref. OEA/Ser.G, CP/INF. 4702/02, 1 July 2002, available at http://www.oas.org/OASpage/Haiti_situation/cpinf4702_02_eng.htm (accessed 1 May 2018).

236 International Commission of Inquiry for Togo, established pursuant to request by Togo under the auspices of the UN and OAS: *Note by the High Commissioner for Human Rights transmitting the report of the International Commission of Inquiry for Togo*, UN Doc. E/CN.4/2001/134, 22 February 2001, para. 1.

237 E.g., Agreement for the Incorporation of International Technical Assistance from a Human Rights Perspective in the Investigation of the Forced Disappearance of 43 Students of the Rural Normal School 'Raúl Isidro Burgos', 12 November 2014, available at http://www.oas.org/es/cidh/mandato/docs/Acuerdo-Addendum-Mexico-CIDH.pdf (accessed 1 May 2018).

238 UN Charter, Arts. 1(1) and 1(3).

239 *Ibid*., Arts. 10-11, 25, 34, and 99.

240 *1991 Declaration*, *supra* note 25, Preamble.

241 Established by GA Res. 60/251, 15 March 2006.

242 ECOSOC Res. 5(I), 16 February 1946.

this time, notably the fall of the Iron Curtain, marked a new era of global multilateralism and improved cooperation in the Security Council.

4.1 Sparse atrocity inquiry practice 1945 – 1991

UN atrocity inquiry practice in the period 1945 to 1991 should be viewed against wider human rights developments. The 1960s saw a burst of human rights activity. Several binding international human rights instruments were created[243] and the 1968 Tehran Human Rights Conference explored proposals for reforms to the UN human rights system.[244] Non-governmental organisations (NGOs) also emerged as important voices in reporting on human rights abuses, especially in respect of authoritarian regimes and struggles of decolonisation.[245] The establishment of truth commissions in several states to investigate human rights violations also signalled a recognition of accountability responses to mass atrocities.

Against this backdrop of human rights activity, the UN's practice of establishing inquiries was rather sparse, and entirely emanated from New York. Security Council inquiries centred on territorial disputes and invasions.[246] Only two UN inquiries into situations of atrocities occurred between 1945 and 1992, both of which were established by the General Assembly. Neither commission's written mandate mentioned human rights, nor did their reports have much impact at the General Assembly, for different reasons. Each inquiry is briefly discussed.

The Vietnam Commission was established in 1963 at the invitation of the President of South Vietnam to "ascertain the facts of the situation in that country as regards relations between the Government… and the Vietnamese Buddhist community".[247] The Vietnam Commission interpreted its mandate as to investigate alleged violations of human rights,[248] consistent with the listing of the situation in the General Assembly's agenda as '[t]he violation of human rights in South Vietnam'.[249] The Commission acknowledged allegations of human rights violations but did not reach findings;[250] its mandate was terminated after a coup d'état and the General Assembly did not discuss its findings.[251]

In 1973 the Assembly established an inquiry into "reported atrocities" in Mozambique, which was in the process of gaining independence from Portugal.[252] The Mozambique Commission characterised atrocities as violations of IHRL and IHL[253] and considered whether genocide

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[243] International Covenant on Civil and Political Rights 1966, 999 UNTS 171 [ICCPR] and International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3 [ICESCR].

[244] Andrew Thompson, 'Tehran 1968 and Reform of the UN Human Rights System', (2015) 14(1) *Journal of Human Rights* 184-100.

[245] Franck and Cherkis, *supra* note 91, at 1511. See Weissbrodt and McCarthy, *supra* note 21 and D'Alessandra, *supra* note 100, at 61.

[246] E.g., *Greek Frontier Incidents Mandate*, *supra* note 83; *Seychelles Mandate*, *supra* note 84 and *Angola Mandate*, *supra* note 85.

[247] *Statement by the President of the General Assembly*, 1239th Meeting, 11 October 1963 [*Vietnam Mandate*] reproduced in *Report of the UN Fact-Finding Mission to South Vietnam*, UN Doc. A/5630, 7 December 1963, para. 5 [*Vietnam Report*].

[248] *Vietnam Report*, *supra*, para. 7.

[249] General Assembly Agenda, 18th Session, 153rd meeting, 18 September 1963.

[250] *Vietnam Report*, *supra* note 247, para. 64.

[251] Franck and Cherkis, *supra* note 91, at 1505.

[252] GA Res. 3114 (XXVIII), 12 December 1973 [*Mozambique Mandate*].

[253] *Report of the Commission of Inquiry on the Reported Massacres in Mozambique*, UN Doc. A/9621, 22 November 1974, paras. 140, 146, 151 and 155 [*Mozambique Report*].

had occurred.[254] The Commission recommended that the General Assembly request Portugal and Mozambique to "bring to court all those persons responsible for the reported massacres and other atrocities, in order that they may be called to reckoning".[255] It also recommended that Portugal provide compensation.[256] The General Assembly did not endorse the report, but simply took note of it "with appreciation" and decided to "commend for appropriate action the recommendations".[257] Theo van Boven writes that the summary disposal of the report resulted from political change, demonstrating that at the UN, "political context determines the pertinence of human rights violations".[258]

While few formal inquiries into atrocities were established in this period, the UN did carry out some other fact-finding activities. In 1947, the General Assembly created a subsidiary body to report on international peace and security.[259] Among other duties, the Interim Committee was asked to "appoint commissions of enquiry".[260] This body, established to counteract paralysis in the Security Council, did not establish any inquiries and was sidelined after the Uniting for Peace resolution.[261] In 1952, the General Assembly established a working group into racial discrimination in South Africa,[262] and in 1968 established a working group into the situation in Israeli-occupied territories.[263] In 1967, UNCHR was authorised to investigate patterns of human rights violations[264] and established working groups into situations of concern.[265] The Security Council did not establish atrocity inquiries in this period, but did create a working group on racial discrimination in South Africa.[266] In general, the Council had limited engagement with human rights prior to 1991, with only a few mentions of human rights in its resolutions.[267] Welscher writes that most Council members considered human rights issues as matters internal to states.[268] This perspective was to be radically altered following political upheavals in the period 1989 to 1991.

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[254] *Ibid*., paras. 142-144.
[255] *Ibid*., para. 177(2).
[256] *Ibid*., para. 177(3).
[257] Decision of the General Assembly, UN Doc. A/9631, 13 December 1974, at 117.
[258] Theo van Boven, 'United Nations and Human Rights: A Critical Appraisal', in Antonio Cassese (ed.), *UN Law, Fundamental Rights: Two Topics in International* Law (Alphen aan den Rijn: Sijthoff and Noordhoff, 1979) 119-136, at 129.
[259] GA Res. 111 (II), 13 November 1947.
[260] *Ibid*., para. 2(e).
[261] GA Res. 377 (V) 3 November 1950. See Bertrand Ramcharan, *The International Law and Practice of Early-Warning and Preventive Diplomacy: The Emerging Global Watch* (Dordrecht: Martinus Nijhoff, 1991) at 73.
[262] Commission on the Racial Situation in the Union of South Africa, GA Res. 616A (VII), 5 December 1952.
[263] Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, GA Res. 2443 (XXIII), 19 December 1968.
[264] ECOSOC Res. 1235 (XLII), para. 3.
[265] Working Group of Experts on Southern Africa, UNCHR Res. 2 (XXIII), 6 March 1967; Special Working Group of Experts to investigate alleged Israeli violations of IHL in occupied territories, UNCHR Res. 6 (XXV), 4 March 1969; Working Group on Chile, UNCHR Res. 8 (XXXI), 27 February 1975; Working Group on Involuntary Disappearances, UNCHR Res. 20 (XXXVI), 29 February 1980.
[266] Group of Experts on South Africa, SC Res. 182 (1963).
[267] E.g., SC Res. 120 (1956); SC Res. 161 (1961); SC Res. 294 (1971); SC Res. 181 and 182 (1963).
[268] Joanna Welscher, 'Human Rights', in David Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (Boulder and London, Lynne Rienner, 2004) 55-68, at 55.

4.2 Proliferation of UN atrocity inquiries – 1992 and beyond

In the past twenty-five years, there has been a proliferation in UN atrocity inquiries and a renewed interest by UN bodies in responding to violations of international law with inquiry. This Section discusses broader developments relevant to the changes in UN dynamics (4.2.1); and identifies atrocity inquiries established by mandating authorities, namely the Security Council (4.2.2), Secretary-General (4.2.3), General Assembly (4.2.4), and HRC (4.2.5).

4.2.1 Changing UN dynamics

The physical fall of the Berlin Wall in 1989 and the symbolic fall of the Iron Curtain in 1991 marked the beginning of a new multilateralism, notably in the Security Council, and strengthening of the UN human rights system. The UN's human rights programme had originated as a small division at New York and later moved to Geneva, becoming the 'Centre for Human Rights' in the 1980s.[269] In 1989, "in the euphoria that followed the ending of the Cold War",[270] the General Assembly held a global conference to assess human rights progress. At the World Conference on Human Rights at Vienna in 1993, 171 states reaffirmed human rights and recommended strengthening the UN human rights system, including by creating the post of the UN High Commissioner for Human Rights. The General Assembly established this post in December 1993, to be exercised under the authority of the Secretary-General.[271] In 1998, the Secretary-General merged the Centre for Human Rights, which had been governed by an Assistant Secretary-General, with OHCHR.[272] OHCHR carries out human rights activities and provides support to human rights bodies established under the Charter and pursuant to treaties. These developments reinforced Geneva's role as the UN's centre for human rights and would lead some commentators to observe rivalries between Geneva and New York.[273]

Accompanying the end to the deadlock in the Security Council was a shift in the Council's view of the links between violations of IHRL and IHL, and international peace and security. Although the Security Council had used fact-finding mechanisms since its inception, "commissions of inquiry related to gross violations of human rights became an integral part of Council practice only following the Cold War."[274] In 1991 it condemned the "repression of the Iraqi civilian population… the consequences of which threaten international peace and

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[269] OHCHR, 'Brief history', available at http://www.ohchr.org/EN/AboutUs/Pages/BriefHistory.aspx (accessed 1 May 2018).

[270] Patricia Feeney, 'The UN World Conference on Human Rights, Vienna, June 1993', (1993) 3(3) *Development in Practice* 218-221, at 221.

[271] GA Res. 48/141, 20 December 1993, para. 4.

[272] Manfred Novak, 'It's Time for a World Court of Human Rights', in Bassiouni and Schabas, *supra* note 97, 97-106.

[273] E.g., Universal Rights Group, 'Sibling rivalry? Measuring and understanding the uneasy relationship between the Human Rights Council and the Third Committee of the GA', 1 March 2017, available at http://www.universal-rights.org/blog/relationship-human-rights-council-third-committee-ga-measuring-coherence (accessed 1 May 2018).

[274] Security Council Report, 'The Rule of Law: The Security Council and Accountability' No. 1 (2013) at 11, available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/cross_cutting_report_1_rule_of_law_2013.pdf (accessed 1 May 2018).

security".[275] Some commentators point to this resolution as the Council's first recognition that human rights violations could threaten international peace and security.[276]

There was also "progressive interaction"[277] between the Security Council and human rights bodies. In 1992, UNCHR requested that reports of the Special Rapporteur for the former Yugoslavia be sent to the Security Council for its consideration of "appropriate steps towards bringing those accused to justice."[278] When referring the situation in Libya to the ICC, the Security Council welcomed the HRC's decision to establish the Libya Commission.[279] Cecilie Hellestveit observes that this was "the first explicit recognition of the HRC fact-finding mechanisms as part of the Security Council's investigative functions."[280] The Council has discussed the situation of human rights in the Democratic People's Republic of Korea (DPRK or North Korea) several times[281] since the report of the International Commission of Inquiry on North Korea (North Korea Commission) was submitted to it by the General Assembly.[282] Security Council members have called on Burundi to cooperate with the HRC's Burundi Commission.[283] In 2017, the Security Council held its first thematic debate on human rights.[284] The Council thus engages with human rights norms and bodies more regularly.[285]

These developments reflect increasing recognition of links between security and human rights at the UN more generally.[286] In 2005, the General Assembly recognised that "development, peace and security and human rights are interlinked and mutually reinforcing."[287] Similar

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[275] SC Res. 688 (1991), para. 1.

[276] E.g., Kelly Pease and David Forsythe, 'Human Rights, Humanitarian Intervention, and World Politics', (1993) 15 HRQ 290-314, at 303 and Richard Lillich, 'The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post-Cold War World', (1994) 3 Tul J Int'l & Comp L 1-17, at 7.

[277] Elvira Domínguez-Redondo, 'Making the Connection: Security and Human Rights', in Bassiouni and Schabas, *supra* note 97, 267-290, at 279.

[278] UNCHR Res. S-2/1, 1 December 1992, para. 10.

[279] SC Res. 1970 (2011), Preamble.

[280] Hellestveit, *supra* note 20, at 383.

[281] United Nations, 'Security Council, in Divided Vote, Puts Democratic People's Republic of Korea's Situation on Agenda following Findings of Unspeakable Human Rights Abuses', UN Doc. SC/11720, 22 December 2014, available at http://www.un.org/press/en/2014/sc11720.doc.htm (accessed 1 May 2018) [*SC Press Release*]; 'Security Council briefing on the situation in the Democratic People's Republic of Korea, Under-Secretary-General Jeffrey Feltman', 10 December 2015, available at http://www.un.org/undpa/en/speeches-statements/10122015/DPRK (accessed 1 May 2018) [*SC Briefing*] and 'Security Council Narrowly Adopts Procedural Vote to Authorize Discussion on Human Rights Situation in Democratic People's Republic of Korea', UN Doc. SC/12615, 9 December 2016, available at http://www.un.org/press/en/2016/sc12615.doc.htm (accessed 1 May 2018) [*SC procedural vote*].

[282] GA Res. 69/188, 18 December 2014, para. 8.

[283] United Nations, 'Security Council Press Statement on Situation in Burundi', UN Doc. C/12750, 13 March 2017, available at http://www.un.org/press/en/2017/sc12750.doc.htm (accessed 1 May 2018).

[284] United Nations, 'Security Council Must Take Human Rights into Account in All Deliberations, Secretary-General Stresses during Thematic Debate', UN Doc. SC/12797, 18 April 2017, available at http://www.un.org/press/en/2017/sc12797.doc.htm (accessed 1 May 2018).

[285] Security Council Report, 'Human Rights and the Security Council—An Evolving Role', (2016) at 5, available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_human_rights_january_2016.pdf (accessed 1 May 2018).

[286] E.g., *Report of the Panel on United Nations Peace Operations*, UN Docs. A/55/305-S/2000/809, 21 August 2000, para. 6(e).

[287] *World Summit Outcome Document*, GA Res. 60/1, 24 October 2005, para. 9.

statements were issued by the Security Council and Secretary-General.[288] The concept of the 'Responsibility to Protect' also links security and human rights, recognising that where states manifestly fail to protect their civilian populations from atrocity crimes, UN member states are prepared to take collective action through the Security Council to protect those populations.[289] The thawing of dynamics in the Security Council in the 1990s was thus accompanied by significant developments in the UN human rights system and increased linkages between paradigms of human rights and collective security.

4.2.2 Security Council atrocity inquiries

Against this background, the Security Council established its first atrocity inquiry in 1992, in respect of the conflict in the former Yugoslavia. The Commission of Experts on the former Yugoslavia (Yugoslavia Commission) was asked to examine information and provide its conclusions on the evidence of IHL violations.[290] Michael Scharf recalls that in negotiations, the US insisted that the mandating resolution state 'Commission' rather than 'Committee', as was the preference of the UK, France, and Russia, because:[291]

> [T]he title 'Commission' was of historic importance since the investigative body that preceded the Nuremberg Tribunal was known as the United Nations War Crimes Commission. Further, we felt the title would be of practical significance since it would suggest a greater degree of independence and authority for the new body.

The Yugoslavia Commission was thus linked with the UNWCC and intended to have a high degree of autonomy.

The Yugoslavia Commission characterised incidents as violations of IHL and international crimes. Apparently encouraged to consider the value of an international criminal tribunal by members of the Security Council,[292] the Commission wrote that creating such a tribunal would be consistent with its work.[293] The Council subsequently established the International Criminal Tribunal for the former Yugoslavia (ICTY),[294] linking international security with criminal justice.[295] After the Yugoslavia Commission issued its final report, the Council established an inquiry into the Rwandan genocide. The Rwanda Commission held a similar mandate, with added instruction to examine the evidence of acts of genocide.[296] That

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[288] *Report of the Secretary-General: In Larger Freedom: Toward Development, Security and Human Rights for All*, UN Doc. A/59/2005, 21 March 2005 [*In Larger Freedom*] and *Statement by the President of the Security Council*, UN Doc. S/PRST/2007/1, 8 January 2007.

[289] World Summit Outcome Document, *supra* note 287, paras. 139-140.

[290] SC Res. 780 (1992), para. 2 [*Yugoslavia Mandate*].

[291] Michael Scharf, 'Cherif Bassiouni and the 780 Commission: the Gateway to the Era of Accountability', in Leila Sadat and Michael Scharf (eds), *The Theory and Practice of International Criminal Law* (Leiden: Brill, 2008) 269-284, at 272-273.

[292] Bassiouni 1994, *supra* note 166, at 790. See *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UN Doc. S/25274, 10 February 1993, para. 74 [*Yugoslavia Interim Report*].

[293] *Yugoslavia Interim Report*, *supra* note 292, para. 74.

[294] SC Res. 808 (1993).

[295] Statement by Mr. O'Brien (New Zealand), *Provisional Verbatim Record of the 3217th Meeting of the Security Council*, UN Doc. S/PV.3217, 25 May 1993, at 22: "the establishment of the [ICTY] and the prosecution of persons suspected of crimes against [IHL] is closely related to the wider efforts to restore peace and security to the former Yugoslavia."

[296] SC Res. 935 (1994), para. 1 [*Rwanda Mandate*].

Commission found violations of IHL and international crimes, including genocide.[297] It recommended international prosecutions,[298] and the Council established the International Criminal Tribunal for Rwanda (ICTR) following its interim report.[299] Some scholars write that this inquiry served as a vehicle for the Council's ultimate intention to set up another *ad hoc* tribunal.[300]

The Security Council established several other inquiries into situations of atrocities, namely in Burundi in 1995,[301] Côte d'Ivoire[302] and Darfur[303] in 2004, and the CAR in 2013.[304] The Darfur Commission represents another significant development in atrocity inquiry practice; after receiving its report, the Council referred the situation in Sudan to the ICC.[305] Then Secretary-General Kofi Annan described its report as "one of the most important documents in the recent history of the [UN]".[306] However, not all Security Council-led inquiries engendered international prosecutions.[307] The Security Council also establishes other fact-finding initiatives. In 2015, it established jointly with the OPCW a team composed of UN and OPCW staff members to investigate responsibilities for uses of chemical weapons in Syria.[308] Recently, it established an investigative team to assist Iraq in prosecuting international crimes by ISIS members.[309] These bodies represent further avenues to promote accountability.

4.2.3 Secretary-General atrocity inquiries

The Secretary-General has established a few inquiries into situations of atrocities. Inquiries into situations of violence in Côte d'Ivoire,[310] Guinea[311] and Mali[312] were established with the

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[297] *Final Report of the Commission of Experts established pursuant to Security Council resolution 935 (1994)*, UN Doc. S/1994/1405, 9 December 1994 [*Rwanda Final Report*].

[298] *Preliminary Report of the Independent Commission of Experts established in accordance with Security Council resolution 935 (1994)*, UN Doc. S/1994/1125, 4 October 1994, para. 150 [*Rwanda Interim Report*].

[299] SC Res. 955 (1994).

[300] Bassiouni 2001, *supra* note 98, at 43 and Zachary Kaufman, 'The United States' Role in the Establishment of the United Nations International Tribunal for Rwanda', in Phil Clark and Zachary Kaufman (eds), *After Genocide: Transitional Justice, Post-Conflict Reconstruction, and Reconciliation in Rwanda and Beyond* (New York: Columbia University Press, 2009), 229-260, at 231 [Kaufman 2009].

[301] International Commission of Inquiry concerning Burundi, SC Res. 1012 (1995) [*SC Burundi Mandate*].

[302] International Commission of Inquiry on Violations of Human Rights in Côte d'Ivoire, UN Doc. S/PRST/2004/17, 25 May 2004.

[303] International Commission of Inquiry on Darfur, SC Res. 1564 (2004) [*Darfur Mandate*].

[304] International Commission of Inquiry on the Central African Republic, SC Res. 2127 (2013) [*CAR Mandate*].

[305] SC Res. 1757 (2007).

[306] United Nations, 'Secretary-General, High Commissioner for Human Rights call for urgent action by Security Council to halt violence in Sudan', UN Doc. SC/8313, 16 February 2005.

[307] E.g., *Report of the International Commission of Inquiry on Burundi*, UN Doc. S/1996/682, 22 August 1996, para. 498 [*SC Burundi Report*].

[308] SC Res. 2235 (2015).

[309] SC Res. 2379 (2017). Concerns were raised regarding the human rights implications of this mandate, e.g., Human Rights Watch, 'Iraq: Missed Opportunity for Comprehensive Justice UN Security Council's ISIS Probe Omits Other Forces' Abuse', 21 September 2017, available at http://www.hrw.org/news/2017/09/21/iraq-missed-opportunity-comprehensive-justice (accessed 1 May 2018).

[310] *Abidjan Report*, *supra* note 43, paras. 1-2.

[311] 'Terms of Reference for the Commission of Inquiry for Guinea', annexed to *Letter Dated 28 October 2009 from the Secretary-General addressed to the President of the Security Council*, UN Doc. S/2009/556, 28 October 2009 [*Guinea TOR*].

[312] 'Terms of Reference of the International Commission of Inquiry established by the Secretary-General to investigate allegations of abuses and serious violations of international human rights and international

consent of those states. The Secretary-General established inquires to evaluate accountability measures in states which had experienced mass atrocities, namely Timor-Leste in 2005[313] and Sri Lanka in 2009.[314] The Secretary-General also created a Panel of Inquiry on the Flotilla Incident, known as the Palmer Commission after its chair Geoffrey Palmer, to examine Israel's interception of a flotilla bound for Gaza.[315] Established with the consent of Turkey and Israel, the Palmer Commission was asked to review national reports, identify the facts and recommend ways of avoiding such incidents.[316] The HRC also established an inquiry into this situation with a rather different investigative focus.[317]

The Secretary-General conducts a myriad of other fact-finding activities, including a special mandate to investigate uses of biological and chemical weapons. A fact-finding mission into the use of chemical weapons in the Iran-Iraq war was established upon the request of Iran,[318] and was subsequently granted a general mandate to conduct such investigations.[319] In 2013, the Secretary-General established a fact-finding mission to "ascertain the facts related to the allegations of use of chemical weapons" [320] in Syria, which excluded questions of responsibility. It was headed by chemical weapons expert Åke Sellström, rather than a panel. The Secretary-General also establishes confidential internal 'headquarters boards of inquiry' into incidents involving UN property and personnel[321] and has created special investigations into situations concerning peacekeeping operations, headed by a single investigator.[322] These

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humanitarian law, including allegations of conflict-related sexual violence, committed throughout the territory of Mali between 1 January 2012 and the date of the establishment of the Commission', annexed to *Letter dated 19 January 2018 from the Secretary-General addressed to the President of the Security Council*, UN Doc. S/2018/57, 19 January 2018 [*Mali TOR*].

313 *Letter Dated 11 January 2005 from the Secretary-General addressed to the President of the Security Council*, UN Doc. S/2005/96, 18 February 2005.

314 *Joint Statement by the Secretary-General and the President of Sri Lanka*, UN Doc. SG/2151, 26 May 2009 [*Sri Lanka Mandate*].

315 *Statement by the President of the Security Council*, UN Doc. S/PRST/2010/9, 1 June 2010 and *Letter Dated 2 August 2010 from the Secretary-General addressed to the President of the Security Council*, UN Doc. S/2010/414, 3 August 2010 [*Palmer Mandate*].

316 'Terms of Reference of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident' [*Palmer TOR*], in *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*, September 2011, at 7, available at http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf (accessed 1 May 2018) [*Palmer Report*].

317 International Fact-finding Mission to Investigate Violations of International Law, including International Humanitarian and Human Rights Law, resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance, HRC Res. 14/1, 2 June 2010 [*Gaza Flotilla Mandate*].

318 *Report of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict Between the Islamic Republic of Iran and Iraq*, UN Doc. S/17911, 12 March 1986.

319 GA Res. 42/37, 30 November 1987 and GA Res. 43/74, 7 December 1988. See SC Res. 620 (1988).

320 *United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic Final Report*, 12 December 2013, para. 1, available at http://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/12/report.pdf (accessed 1 May 2018) [*Chemical Weapons Report*].

321 E.g., *Directives for Military Matters Involving Military Personnel of National Contingents*, UN Doc. DPKO/MD/03/00993, July 2003, para. 23 and *Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers*, UN Doc. DPKO/MD/03/00994 (undated), para. 22. Some report summaries have been released, e.g., *Summary by the Secretary-General of the report of the United Nations Headquarters Board of Inquiry into certain incidents in the Gaza Strip between 27 December 2008 and 19 January 2009*, UN Doc. A/63/855, 15 May 2009 and *Summary by the Secretary-General of the report of the United Nations Headquarters Board of Inquiry into certain incidents that occurred in the Gaza Strip between 8 July 2014 and 26 August 2014*, UN Doc. S/2015/286, 27 April 2015.

322 E.g., 'Secretary-General Appoints Major General Cammaert of Netherlands to Lead Investigation into July 2016 Violence in South Sudan, Response of United Nations Mission', UN Docs. G/A/1677-AFR/3433-

mechanisms are not examined further due to their technical nature and institutional differences from UN commissions of inquiry.

4.2.4 General Assembly atrocity inquiries

The General Assembly has rarely established atrocity inquiries since 1991. In 1997, the General Assembly requested the Secretary-General to examine Cambodia's request for assistance to respond to past serious violations, including the possibility of appointing a group of experts to evaluate the evidence and propose measures to achieve reconciliation, strengthen democracy and address individual accountability.[323] The Group of Experts on Cambodia (Cambodia Commission) determined the nature of the crimes by Khmer Rouge leaders from 1975 to 1979; and assessed the feasibility and modalities of bringing them to justice.[324] Following the Cambodia Commission's recommendation of an *ad hoc* international tribunal,[325] a special chamber was established within Cambodia's domestic jurisdiction with UN assistance.[326] In an emergency session in 2006, the Assembly established an inquiry into Beit Hanoun.[327] This mission was not dispatched, as Israel did not confirm its cooperation.[328] The HRC also established an inquiry into this situation, despite Israel's opposition.[329]

A noteworthy development is the General Assembly's establishment in 2016 of the International, Impartial and Independent Mechanism to assist in the Investigation and Prosecution of those Responsible for the Most Serious Crimes under International Law committed in the Syrian Arab Republic since March 2011 (IIIM).[330] This body is headed by a single judge who is a UN staff member.[331] The IIIM has "a quasi-prosecutorial function"[332] beyond the scope of the HRC's International Commission of Inquiry on Syria (Syria Commission).[333] These bodies have distinct yet complementary roles: the Syria Commission collects information, reports on violations and makes recommendations, while the IIIM "builds on the information collected by others… by collecting, consolidating, preserving and

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PKO/601, 23 August 2016, available at http://www.un.org/press/en/2016/sga1677.doc.htm (accessed 1 May 2018).

323 GA Res. 52/135, 12 December 1997, para. 16 [*Cambodia Mandate*].

324 *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135*, UN Docs. A/53/850-S/1999/231, 16 March 1999, para. 6 [*Cambodia Report*].

325 *Cambodia Report*, *supra* note 324, para. 219(1).

326 Agreement between the UN and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea 2003.

327 GA Res. ES-10/16, 17 November 2006, para. 3.

328 *Letter dated 21 December 2006 from the Secretary-General addressed to the President of the General Assembly*, UN Doc. A/ES-10/374, 22 December 2006.

329 High-Level Fact-Finding Mission in Beit Hanoun, HRC Res. S-3/1, 15 November 2006 [*Beit Hanoun Mandate*].

330 International, Impartial and Independent Mechanism to assist in the Investigation and Prosecution of those Responsible for the Most Serious Crimes under International Law committed in the Syrian Arab Republic since March 2011, GA Res. 71/248, 21 December 2016, para. 4 [*IIIM Mandate*].

331 United Nations, 'UN chief appoints head of panel laying groundwork for possible war crimes probe in Syria', 3 July 2017, available at http://www.un.org/apps/news/story.asp?NewsID=57112#.WVz7PoN9670 (accessed 1 May 2018); Secretary-General, *Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, UN Doc. A/71/755, 19 January 2017, para. 40 [*IIIM First Implementation Report*].

332 *IIIM First Implementation Report*, *supra* note 331, para. 32.

333 *Syria Mandate*, *supra* note 47, para. 13.

analysing evidence and prepares files"[334] to assist prosecutions. The IIIM states that access to the Syria Commission's "extensive documentary holdings… is a central requirement" [335] in its mandate and the modalities of cooperation were being agreed. It also bears similarities with a Security Council-led inquiry to facilitate criminal investigations into the assassination of Rafik Hariri, which was headed by a criminal investigator.[336] There are also similarities with the 1919 Commission and the UNWCC, which analysed evidence of crimes provided by other actors. That this mechanism represents a further step in the direction of legal accountability is also reflected in the UN High Commissioner for Human Rights' request that the HRC consider recommending that the General Assembly "establish a new impartial and independent mechanism, complementary to the work of the [Myanmar Commission], to assist individual criminal investigations of those responsible".[337]

4.2.5 Human Rights Council atrocity inquiries

The General Assembly's decision in 2006 to replace UNCHR with the HRC led to a significant increase in UN atrocity inquiries. The former only established two such inquiries, namely Timor-Leste in 1999[338] and Gaza in 2000.[339] The HRC is the most prolific mandating authority, having created sixteen inquiries at the time of writing. It established several inquiries into violations arising in different phases of the Israel-Palestine conflict,[340] as well as Lebanon,[341] Darfur,[342] Libya,[343] Côte d'Ivoire,[344] Syria,[345] the DPRK,[346] Eritrea,[347] South Sudan,[348] Burundi[349] and Myanmar.[350] All HRC commissions examined human rights

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334 *IIIM First Implementation Report*, *supra* note 331, para. 30.

335 *Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, UN Doc. A/72/764, 28 February 2018, para. 56 [*IIIM Report*].

336 *UNIIIC Mandate*, *supra* note 87.

337 OHCHR, 'Statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein', 5 December 2017, available at http://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=22487&LangID=E (accessed 1 May 2018). The HRC acknowledged the request but did not make a recommendation: HRC Res. 37/32, Preamble.

338 International Commission of Inquiry on East Timor, UNCHR Res. S-4/1, UN Doc. E/CN.4/1999/167/Add.1, 27 September 1999 [*East Timor Mandate*]. See *Report of the International Commission of Inquiry on East Timor*, UN Doc. S/2000/59, 31 January 2000, para. 17 [*East Timor Report*].

339 Human Rights Inquiry Commission, UN Doc. E/CN.4/RES/S-5/1, 19 October 2000 [*CHR Gaza Mandate*].

340 *Beit Hanoun Mandate*, *supra* note 317; Goldstone Commission, HRC Res. S-9/1, 12 January 2009 [*Goldstone Mandate*]; *Gaza Flotilla Mandate*, *supra* note 317; International Fact-Finding Mission on Israeli Settlements in the Occupied Palestinian Territory, HRC Res. 19/17, 10 April 2012 [*Israeli Settlements Mandate*]; International Commission of Inquiry for the Occupied Palestinian Territory, HRC Res. S-21/1, 23 July 2014 [*Gaza Mandate*] and UN Commission of Inquiry on the 2018 protests in the Occupied Palestinian Territory, HRC Res. S-28/1, 18 May 2018 [*Gaza Protests Mandate*].

341 International Commission of Inquiry on Lebanon, HRC Res. S-2/1, 11 August 2006 [*Lebanon Mandate*].

342 High-Level Mission on the Situation of Human Rights in Darfur, HRC Decision S-4/101, 13 December 2006 [*Darfur High-Level Mandate*].

343 International Commission of Inquiry on Libya, HRC Res. S-15/1, 25 February 2011 [*Libya Mandate*].

344 International Commission of Inquiry on Allegations of Violations of Human Rights in Côte d'Ivoire, HRC Res. 16/25, 25 March 2011 [*HRC Côte d'Ivoire Mandate*].

345 *Syria Mandate*, *supra* note 47.

346 North Korea Commission, HRC Res. 22/13, 21 March 2013 [*North Korea Mandate*].

347 International Commission of Inquiry on Eritrea, HRC Res. 26/24, 23 June 2014 [*Eritrea Mandate*].

348 Commission on Human Rights in South Sudan, HRC Res. 31/20, 23 March 2016 [*South Sudan Mandate*].

349 Commission of Inquiry on Burundi, HRC Res. 33/24, 30 September 2016 [*HRC Burundi Mandate*].

350 *Myanmar Mandate*, *supra* note 2.

violations. Some were also asked to examine violations of IHL and international crimes, and many were instructed to identify those responsible and to carry out their mandates with a view to ensuring that those responsible were held accountable.[351]

In addition to establishing full-fledged inquiries, the HRC has occasionally instructed the High Commissioner for Human Rights to establish teams of experts to investigate situations of atrocities, which are to directly report to the High Commissioner rather than the HRC.[352] Perceived by some states as a softer measure than full inquiry, such arrangements have been seen as a compromise.[353] The HRC also continues to administer the special procedures system that were previously under the auspices of UNCHR.

Conclusions

International atrocity inquiries have been established in a range of institutional settings, reflecting changing dynamics in international affairs. The earliest inquiries were established pursuant to *ad hoc* interstate agreements. States' efforts to establish IHL inquiry procedures reflect general support for such mechanisms, coupled with an enduring unwillingness to relinquish control over them. International organisation practice is more mixed. The absence of such inquiries at the League of Nations is perhaps not surprising, given the limited development of human rights and the League's focus on preventing war. Regional organisations created a few inquiries into situations of atrocities. By contrast, the UN has a rich practice of establishing atrocity inquiries. The varied functions and powers of UN mandating authorities add further complexity and are explored in Chapter Two.

While institutional contexts differ, certain synergies are visible in the roles and functions of international atrocity inquiries. In some traditions, impartial fact-finding is the primary means to prevent further atrocities and encourage compliance with legal obligations. The 'Geneva' fact-finding tradition seeks to encourage the parties to a conflict to respect IHL. State consent is vital; if states object to the establishment of an inquiry, they will be unlikely to accept its findings, especially if they are not favourable to the state's position.

Classic human rights fact-finding sheds light on atrocities and characterise incidents as violations to raise alert and provoke an international response. By 'naming and shaming', such inquiries ramp up political pressure to induce actors to change their behaviour. States may face reputational costs and a damage to their diplomatic relations, in addition to enforcement measures such as sanctions. This approach is particularly prevalent in UN atrocity inquiries during the 1960s, which coincided with an increasingly active civil society.[354] This purpose is also reflected in the mandates and reports of many contemporary commissions established by UN organs, particularly the HRC.

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[351] E.g., *Syria Mandate*, *supra* note 47, para. 13.

[352] E.g., International Team of Experts on the Kasai region of the Democratic Republic of the Congo, HRC Res. 35/33, 23 June 2017; para. 10; Group of Eminent Experts on Yemen, HRC Res. 36/31, 29 September 2017, paras. 12 and 14 [*Yemen Mandate*].

[353] E.g., John Irish and Stephanie Nebehay, 'Compromise sought on U.N. Yemen inquiry as Saudi pressure mounts', *New York Times*, 29 September 2017, available at http://www.reuters.com/article/us-yemen-security-un-france/compromise-sought-on-u-n-yemen-inquiry-as-saudi-pressure-mounts-idUSKCN1C32SO (accessed 1 May 2018).

[354] Franck and Cherkis, *supra* note 91, at 1511.

Some atrocity inquiries sought to enforce responsibilities for legal violations. A justice-oriented approach can be traced back to the 1919 Commission and associated inquiries. Bassiouni, who chaired the Yugoslavia Commission, characterizes the 1919 Commission and UNWCC as "historical precedents" to the Yugoslavia Commission,[355] with all three bodies aiming "to investigate war crimes and prepare for the eventual prosecutions before international and national judicial bodies".[356] The Yugoslavia Commission has been deemed a 'watershed moment' for UN atrocity inquiry and international criminal justice.[357] Michaela Frulli writes that the inquiries on Yugoslavia and Rwanda were "precursors to prosecution-oriented investigations led by UN fact-finding missions".[358] Several scholars observe an 'accountability turn' in UN inquiry practice.[359]

International atrocity inquiries have therefore been established in pursuit of diverse aims, including improving diplomatic relations, encouraging compliance with legal obligations, preventing future atrocities, and, increasingly, ensuring accountability for violations. The features of such inquiries, including the circumstances of establishment, mandate and composition are inexorably shaped by wider institutional and political dynamics, particularly those of their mandating authorities. Chapter Two turns to examine how these wider forces have shaped the roles and functions of UN atrocity inquiries.

[355] E.g., M. Cherif Bassiouni, 'Yugoslavia: Investigating Violations of International Humanitarian law and Establishing an International Criminal Tribunal', (1994) 18 Fordham Int'l LJ 1191-1211, at 1193 and Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: Norton, 2011) at 112.

[356] Bassiouni 1994, *supra* note 166, at 784.

[357] D'Alessandra, *supra* note 100, at 63; Triestino Mariniello, 'The Impact of International Commissions of Inquiry on the Proceedings before the International Criminal Court', in Henderson, *supra* note 94, 171-196, at 173.

[358] Frulli, *supra* note 102, at 336.

[359] See D'Alessandra, *supra* note 100 and Herik and Harwood, *supra* note 104.

CHAPTER TWO

ESTABLISHING THE MANDATE: MANDATING AUTHORITIES AS ARCHITECTS OF ATROCITY INQUIRIES

Introduction

Chapter One provided a historical and institutional taxonomy of international atrocity inquiries and explained how the UN has created most of these inquiries in the past twenty-five years. UN mandating authorities define commissions' written mandates in concise terms: typically, one paragraph in the mandating resolution. Like an architect's plan, the written mandate represents a broad vision of what an inquiry is supposed to achieve as informed by the architect's own goals, institutional context, and the needs of the situation.

This Chapter illuminates how the institutional characteristics and key choices of UN mandating authorities have shaped the roles and functions of UN atrocity inquiries. Section 1 discusses institutional and political dynamics at play in establishing inquiries in the UN context. Section 2 examines legal dimensions of written mandates and analyses the HRC's competence to establish mandates beyond IHRL. Section 3 examines the impartiality of mandates, including temporal and geographic parameters, actors under scrutiny and prejudgment of findings. Section 4 discusses commissioner appointment processes and selections. Section 5 examines mandating authorities' decisions on operational aspects of inquiry, notably the extent of discretion accorded to commissions, provision of resources and time limits. Section 6 steps back to examine broader trends and consequences, namely the juridification of mandates, use of inquiry to condemn violations, and the proposition that establishing an inquiry may both build and release pressure. In examining these facets, the Chapter depicts how mandating authorities' institutional dynamics and choices have shaped commissions' roles and functions.

1. Dynamics of Establishment

This Section examines how institutional and political dynamics surrounding UN mandating authorities' decisions to establish atrocity inquiries shape commissions' roles and functions. Section 1.1 sets out the institutional framework governing the establishment of UN atrocity inquiries. Section 1.2 discusses the relevance of state consent and cooperation for commissions' establishment. Commissions' *ad hoc* establishment necessarily means that some situations are selected while others are not. Ramifications of this selectivity are discussed in Section 1.3. Broader dynamics in UN strongholds of New York and Geneva may also shape decisions to establish inquiries. These dynamics are discussed in Section 1.4.

1.1 Institutional framework relevant to UN atrocity inquiries

UN organs may conduct fact-finding on the basis of their powers as set down in the UN Charter and impliedly necessary to carry out their functions and purposes.[360] UN atrocity inquiries are established in pursuit of the spheres of responsibility of their mandating

[360] UN Charter, Arts. 13, 34, 62 and 99. See Statute of the International Court of Justice, Art. 50.

authorities. Inquiries are also established pursuant to mandating authorities' decision-making processes. This Section recounts and distinguishes these aspects of UN mandating authorities, namely the Security Council, General Assembly, Secretary-General, and HRC.

Article 34 of the UN Charter provides that the Security Council, which has primary responsibility for maintaining international peace and security,[361] may investigate situations which might lead to international friction to determine whether they may threaten international peace and security.[362] The Council has only invoked that provision twice;[363] commentators suggest that its atrocity inquiries are established pursuant to its implied powers.[364] In some cases it determined that there was a threat to international peace and security when establishing an inquiry.[365] Inquiries are established upon a majority vote of its fifteen members, provided that one or more of the five permanent members does not exercise its power of veto.[366]

The General Assembly as the UN's plenary body may discuss and make recommendations on any matters within the scope of the Charter, and has a complementary responsibility in the field of international peace and security.[367] General Assembly resolutions to establish UN atrocity inquiries may either be adopted by consensus (without a vote) or otherwise by a majority vote of UN member states present and voting.[368] The General Assembly may also "initiate studies and make recommendations to assist in the realization of human rights".[369] The General Assembly has only occasionally established atrocity inquiries.[370]

Pursuant to Article 99, the Secretary-General can bring the Security Council's attention to "any matter which in his opinion may threaten the maintenance of international peace and security". The Secretary-General also performs "such functions as are entrusted to him"[371] by other UN organs. Although some authors query the Secretary-General's ability to establish an inquiry in the absence of state consent,[372] other authors locate an implied power to do so.[373] Dag Hammarskjold writes that Article 99 "carries with it, by necessary implication, a broad discretion to conduct inquiries"[374] regarding threats to international peace and security. The

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[361] *Ibid.*, Art. 24(1).
[362] *Ibid.*, Art. 34.
[363] *Greek Frontier Incidents Mandate*, *supra* note 83; UN Commission for India and Pakistan, SC Res. 39 (1948).
[364] E.g., *CAR Mandate*, *supra* note 304. See Hellestveit, *supra* note 20, at 272.
[365] E.g., SC Res. 1556 (2004), para. 21 and *Darfur Mandate*, *supra* note 303.
[366] UN Charter, Art. 27.
[367] *Ibid.*, Arts. 10-12.
[368] *Ibid.*, Art. 18(3).
[369] *Ibid.*, Art. 13.
[370] See Chapter One, Section 4.2.4.
[371] UN Charter, Art. 98.
[372] Russell Buchan, 'The Mavi Marmara Incident and the Application of International Humanitarian Law by Quasi-Judicial Bodies', in Jinks *et al*, *supra* note 94, 479-503 [Buchan 2014].
[373] Nabil Elaraby, 'The Office of the Secretary General and the Maintenance of International Peace and Security', in *The United Nations and Maintenance of International Peace and Security* (Leiden: Martinus Nijhoff, 1987), 177-212 at 190-196 and Hellestveit, *supra* note 20, at 374.
[374] Dag Hammarskjold, Lecture, Oxford University, in *Servant of Peace: A Selection of the Speeches and Statements of Dag Hammarskjold* (1962) 335, cited in Edward Plunkett, 'UN Fact-Finding as a Means of Settling Disputes', (1969) 9(1) Va J Int'l L 154-183, at 172.

Secretary-General may establish an inquiry unilaterally[375] but in practice usually does so upon the request of the General Assembly, Security Council, or member states.[376]

The HRC, a subsidiary body of the General Assembly, is also a mandating authority of UN atrocity inquiries. It was created in 2006 to replace UNCHR, which had been established in 1946 by the Economic and Social Council (ECOSOC) to encourage compliance with human rights.[377] UNCHR could not "take action on individual human rights complaints"[378] until its mandate was expanded in 1967 to include investigations.[379] It then established thematic and country-specific mandates.[380] From 1990, UNCHR was permitted to meet "exceptionally" to respond to human rights emergencies,[381] and established two atrocity inquiries on this basis.[382] The HRC was mandated to assume, review and improve UNCHR's mechanisms, functions and responsibilities.[383] It provides a forum for debates on human rights issues and administers monitoring and compliance mechanisms, including special procedures.[384]

Although the HRC has amassed significant practice of establishing inquiries, its power to do so is not expressly provided. The 'institutional-building package' resolution which sets out the mechanisms to be administered by the HRC does not mention inquiry. Christine Chinkin observes that as the HRC is a subsidiary body of the General Assembly, it shares its parent's "authority to establish fact-finding missions."[385] The General Assembly has welcomed several HRC commissions' reports, signaling its acceptance of this practice.[386] Such competence to may also be implied from the HRC's mandate to address situations of human rights violations and respond to human rights emergencies.[387] While all UN member states may participate in the HRC's activities, only 47 states have voting rights. Some HRC commissions were established by consensus[388] but most mandating resolutions, including all inquiries into Israel/Palestine, were established pursuant to a vote.

1.2 State consent and cooperation

The consent of a concerned state is not required to establish an inquiry, unless that state is a permanent member of the Security Council which exercises its veto power. However, if a

[375] Independent Inquiry into the Actions of the UN during the 1994 Genocide in Rwanda, *Letter Dated 18 March 1999 from the Secretary-General addressed to the President of the Security Council*, UN Doc. S/1999/339, 26 March 1999 [*UN Rwanda Mandate*].

[376] E.g., *Palmer Mandate*, *supra* note 315; Abdijan Commission, requested by Côte d'Ivoire, *Abidjan Report*, *supra* note 43, para. 1; UN Independent Special Commission of Inquiry for Timor-Leste, requested by Timor-Leste, *Report of the UN Independent Special Commission of Inquiry for Timor-Leste*, UN Doc. S/2006/822, 18 October 2006, para. 1 [*Timor-Leste Report*]; *Guinea TOR*, *supra* note 311, para. 1.

[377] ECOSOC Res. 5 (I), pursuant to UN Charter, Art. 68.

[378] ECOSOC Res. 728F (XXVIII), 30 July 1959, para. 1.

[379] ECOSOC Res. 1235 (XLII), 6 June 1967, para. 3. See ECOSOC Res. 1503 (XLVIII), 27 May 1970, para. 6.

[380] E.g., Working Group of Experts on Southern Africa, UNCHR Res. 2 (XXIII), 6 March 1967; Special Working Group of Experts to investigate alleged Israeli violations of IHL in occupied territories, UNCHR Res. 6 (XXV), 4 March 1969; Working Group on Chile, UNCHR Res. 8 (XXXI), 27 February 1975 and Working Group on Disappearances, UNCHR Res. 20 (XXXVI), 29 February 1980.

[381] ECOSOC Res. 1990/48, 25 May 1990, para. 3.

[382] *East Timor Mandate*, *supra* note 338 and *CHR Gaza Mandate*, *supra* note 339.

[383] GA Res. 60/251, para. 6.

[384] 'Institution-Building Package', HRC Res. 5/1, 18 June 2007.

[385] Chinkin, *supra* note 97, at 481.

[386] Harwood, *supra* note 99.

[387] GA Res. 60/251, para. 3.

[388] E.g., inquiries into Libya; North Korea; Eritrea; South Sudan and Myanmar.

concerned state objects to the establishment of an inquiry, it is unlikely to cooperate, which may have significant flow-on effects for commissions' information-gathering practices. The emphasis placed by the mandating authority on securing state cooperation may be reflected in the scope and focus of the mandate, and thus in commissions' roles and functions.

UN member states' obligations to cooperate with UN atrocity inquiries are governed by the UN's institutional framework. The Charter contains a general obligation on member states to give the UN "every assistance in any action it takes in accordance with the present Charter".[389] The *Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security 1991* (*1991 Declaration*) provides that states should give fact-finding missions the assistance necessary to fulfil the mandate[390] but also that sending a UN mission "to the territory of any State requires the prior consent of that State, subject to the relevant provisions of the Charter".[391] As UN member states agree to accept and carry out the decisions of the Security Council, states are arguably obliged to cooperate with Security Council-led inquiries.[392] The Council may also order states to cooperate by invoking Chapter VII, which it has done on occasion.[393] Its inquiries have faced little overt opposition from concerned states, but they have occasionally expressed disagreement. For instance, when the Security Council established the Darfur Commission and indicated the possibility of sanctions in the event of non-cooperation, the Sudanese Representative stated that the resolution was an "unfair text, only aimed at achieving political aims",[394] but that "[d]espite the injustice of the resolution, his Government would continue to honour its commitments".[395] The Darfur Commission reported that the Government cooperated with its investigation, and carried out field visits.[396] By contrast, since the Security Council referred the situation of Sudan to the ICC in 2005,[397] the ICC Prosecutor has faced a "policy of complete non-cooperation"[398] from the Government, and cannot conduct *in situ* investigations. In 2014, the Prosecutor decided to "put investigative activities in Darfur on hold" due to this non-cooperation.[399]

The Secretary-General has tended to establish inquiries at the request of states or with their consent,[400] and is sensitive to states' views when formulating mandates. Steven Ratner, who sat on the Sri Lanka Panel, writes that the Secretary-General "deliberately devised a mandate that never used the word investigation, but instead was focused on giving advice to the Sri

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389 UN Charter, Art. 2(5).
390 *1991 Declaration*, *supra* note 25, para. 22.
391 *Ibid.*, para. 6 (emphasis added).
392 UN Charter, Arts. 25 and 48.
393 *Darfur Mandate*, *supra* note 303 and *CAR Mandate*, *supra* note 304.
394 United Nations, 'Security Council Declares Intention to Consider Sanctions to Obtain Sudan's Full Compliance with Security, Disarmament Obligations on Darfur', UN Doc. SC/8191, 18 September 2004, available at http://www.un.org/press/en/2004/sc8191.doc.htm (accessed 1 May 2018).
395 *Ibid.*
396 *Darfur Report*, *supra* note 32, paras. 26-39.
397 SC Res. 1593 (2005).
398 ICC Prosecutor, 'Statement before the United Nations Security Council on the Situation in Darfur', pursuant to UNSCR 1593 (2005), 8 June 2017, para. 12, available at http://www.icc-cpi.int/legalAidConsultations?name=170608-otp-stat-UNSC (accessed 1 May 2018).
399 ICC Prosecutor, 'Statement by Fatou Bensouda to the Security Council', Records of the 7337th meeting of the Security Council, UN Doc. S/PV.7337, 12 December 2014, at 2.
400 See Chapter One, Section 4.2.3.

Lankan government on international standards and best practices regarding accountability."[401] The Palmer Commission was established with the concurrence of Turkey and Israel after "intensive consultations" with those states.[402] This consensual approach circumvented criticisms of politicisation in commissions' establishment, but did not always ensure that they enjoyed full cooperation in practice. For instance, the Sri Lanka Panel was denied territorial access[403] and several requests for information by the Guinea Commission were ignored by the Guinean authorities.[404]

Neither the General Assembly nor the HRC requires the consent of concerned states to establish inquiries, but such commissions do not have coercive powers and rely on state cooperation. Some states refused to cooperate with commissions on the basis that they did not consent to their establishment. For instance, in 2016, Burundi blamed the way in which an HRC-inquiry into Burundi was created – against its wishes – as making it impossible to cooperate with the Burundi Commission.[405] State cooperation is essential to carry out *in situ* investigations, and a lack of consent can pose serious practical impediments. Several HRC commissions denied territorial access to concerned states were unable to carry out *in situ* visits or meet victims and witnesses in those states.[406] Lack of cooperation is particularly evident when one compares Syria's refusal to cooperate with the Syria Commission with its granting of territorial access to a fact-finding mission by the Secretary-General into chemical weapons.[407] A similar difference may be observed between the Palmer Commission and an inquiry into the same situation by the HRC; the former received information from Israel which was not shared with the HRC-led inquiry.[408] Anne-Marie Devereux queries whether the Security Council could be more involved in calling on states to cooperate with inquiries established by other bodies.[409] Commissions endeavoured to overcome these challenges in different ways; these efforts are discussed in Chapter Three.

In short, atrocity inquiries by UN political bodies are not generally established with the consent of concerned states, which generates different obligations and consequences for cooperation. As is discussed below, HRC inquiries are often established in the face of their fierce opposition, which has led to a lack of cooperation. By contrast, inquiries by the Secretary-General are established with the consent of concerned states, which facilitates cooperation.

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401 Steven Ratner, 'After Atrocity: Optimizing UN Action Toward Accountability for Human Rights Abuses', (2015) 36(3) Mich J Int'l L 541-556, at 551 [Ratner 2015].

402 *Palmer Mandate*, *supra* note 315.

403 *Sri Lanka Report*, *supra* note 30, paras. 21-22.

404 *Guinea Report*, *supra* note 40, para. 20.

405 *Rapport final détaillé de la Commission d'enquête sur le Burundi*, UN Doc. A/HRC/36/CRP.1, 18 September 2017, para. 16 [*HRC Burundi Detailed Report*].

406 E.g., access was not granted to inquiries on Burundi (2017), Syria, Eritrea and North Korea.

407 *Chemical Weapons Report*, *supra* note 320, paras. 33-39.

408 *Palmer Report*, *supra* note 316, para. 81.

409 Anne-Marie Devereux, 'Investigating Violations of International Human Rights Law and International Humanitarian Law through an International Commission of Inquiry: Libya and Beyond', in David Lovell (ed.), *Investigating Operational Incidents in a Military Context: Law, Justice, Politics* (Leiden: Brill/Nijhoff, 2015) 99-122, at 114.

1.3 Selection of situations

Commissions' *ad hoc* establishment dictates that some situations are selected while others are not. As described above, the Secretary-General usually secures the consent of concerned states in establishing inquiries, and so the question of selectivity has not been of major concern. However, UN political bodies often establish inquiries without the consent of concerned states. As these decisions are made by member states, they are particularly vulnerable to accusations of bias or politicisation, which might form the basis of a challenge to the impartiality of the commission. Such criticisms have been frequently levelled at the HRC and its predecessor. UNCHR was plagued by accusations of bias, particularly in respect of its country-specific mandates. In 2005 the Secretary-General observed that states sought to become its members "not to strengthen human rights but to protect themselves against criticism or criticize others", and that a "credibility deficit has developed, which casts a shadow on the reputation of the [UN] system as a whole".[410] In an effort to overcome these issues, the HRC was established in 2006 to replace UNCHR.[411]

Complaints of politicisation continued at the HRC, with some authors identifying similar patterns of conduct.[412] The HRC's 47 member states with voting rights are elected for three-year terms and seats are divided into geographic groups.[413] While this assists equitable geographic representation, it also contributes to the formation of voting blocs. That said, an empirical analysis of HRC voting records between 2006 and 2010 reveals that voting patterns are not explained solely by geographic or ideological groupings; rather, HRC members' human rights records and levels of democracy are important factors in explaining their voting preferences.[414] The authors observe that countries with poor human rights records tend to vote systematically differently from those which observe human rights; and that most controversial resolutions are proposed by a small group of countries with blemished human rights records.[415]

The HRC's decisions to establish inquiries have been critiqued on two levels: accusations of bias against particular states and a general objection to country-specific mandates. Israel has complained of being persistently singled out, positing that inquiries into its conduct are pretexts for political attacks.[416] The HRC's focus on Israel has arguably been disproportionate. Chinkin observes that by 2009, half of its special sessions focussed on

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[410] *In Larger Freedom*, *supra* note 288, para. 18. See Rosa Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment* (New York: Routledge, 2013) 17-54.

[411] GA Res. 60/251.

[412] Yaniv Roznai and Ido Tzang, 'The United Nations Human Rights Council and Israel: Sour Old Wine in a New Bottle', (2013) 5 *Human Rights and Globalization Law Review* 25-55.

[413] Number of seats: Africa Group (13); Asia Group (13); Latin America and the Caribbean Group (8); Western Europe and Others Group (7); Eastern Europe Group (6).

[414] Simon Hug and Richard Lukács, 'Preferences or blocs? Voting in the United Nations Human Rights Council', (2014) 9(1) *The Review of International Organizations* 83–106, at 103.

[415] *Ibid*.

[416] Israel Ministry of Foreign Affairs, 'Israel rejects one-sided resolution of UN Human Rights Council in Geneva', 12 January 2009, available at http://mfa.gov.il/MFA/PressRoom/2009/Pages/Israel_rejects_resolution_UN_Human_Rights_Council_12-Jan-2009.aspx (accessed 1 May 2018) [*Israel MFA Press Release*] and Israel Ministry of Foreign Affairs, 'Israel will not cooperate with UNHRC investigative committee', 13 November 2014, available at http://mfa.gov.il/MFA/PressRoom/2014/Pages/Israel-will-not-cooperate-with-UNHRC-investigative-committee-13-Nov-2014.aspx (accessed 1 May 2018).

Israel.[417] This has since lessened: by June 2018, eight of the HRC's 28 special sessions concerned Israel. However, resolutions concerning Israel are also concluded at its regular sessions.[418] Some HRC mandating resolutions were utilised to make wider political statements against Israel. An example is the mandating resolution of the 2014 Gaza Commission, whose Preamble states that Israeli assaults are "the latest in a series of military aggressions by Israel".[419] The US was alone in voting against the resolution, explaining that it was a "biased and political instrument".[420] Others, including the EU bloc, abstained out of concern of bias.[421] A similar issue arose in respect of the mandate of the Lebanon Commission.[422] Eleven states opposed that resolution, including Canada and the US, because it did not recognise the actions of all parties to the conflict.[423] Other concerned states have opposed inquiries into their territories on a similar basis. The DPRK rejected the North Korea Commission's mandate as "an extreme manifestation of politicisation, selectivity and double standards which denied dialogue and cooperation."[424] Eritrea opposed an inquiry into its territory, stating that it was "strongly opposed to country-specific mandates and resolutions which lacked the consent of the concerned country", and that such mandates were "abused for other ulterior motives."[425] In opposing the creation of the Syria Commission, Russia stated that the resolution was "one-sided and politicised" and "aimed at removing a legitimate government while fully ignoring the [principles] of democracy."[426]

Several states explained their negative or abstaining votes as a principled objection to country-specific mandates. For example, Venezuela opposed the establishment of the HRC's Burundi Commission, stating that it "would continue to call for reflection in the [HRC] on the

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[417] Chinkin, *supra* note 97, at 483-484.

[418] E.g., HRC Res. 28/26, 27 March 2015 and HRC Res. 28/27, 27 March 2015.

[419] *Gaza Mandate*, *supra* note 340.

[420] OHCHR, 'Human Rights Council establishes Independent, International Commission of Inquiry for the Occupied Palestinian Territory', 23 July 2014, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14897&LangID=E (accessed 1 May 2018) [*Gaza Press Release*].

[421] 'EU – Explanation of vote', reproduced at Ireland Department of Foreign Affairs and Trade, 'Ireland's position at UN Human Rights Council on situation in Gaza and Israel', 23 July 2014, available at http://www.dfa.ie/news-and-media/press-releases/press-release-archive/2014/july/ireland%27s-position-at-the-un-human-rights-council (accessed 1 May 2018) [*EU Press Release*].

[422] *Lebanon Mandate*, *supra* note 341.

[423] OHCHR, 'Second special session of Human Rights Council decides to establish high level inquiry commission for Lebanon', 11 August 2006, available at http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=3087&LangID=E (accessed 1 May 2018) [*Lebanon Press Release*].

[424] OHCHR, 'Council Establishes Commission of Inquiry to Investigate Human Rights Violations in the Democratic People's Republic of Korea', 21 March 2013, available at http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13178&LangID=E (accessed 1 May 2018) [*North Korea Press Release*].

[425] OHCHR, 'Human Rights Council holds interactive dialogue with the Special Rapporteur on the situation of human rights in Eritrea', 24 June 2015, available at http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16136&LangID=E (accessed 1 May 2018).

[426] OHCHR, 'Human Rights Council decides to dispatch a commission of inquiry to investigate human rights violations in the Syrian Arab Republic', 23 August 2011, available at http://reliefweb.int/report/syrian-arab-republic/human-rights-council-decides-dispatch-commission-inquiry-investigate (accessed 1 May 2018) [*Syria Press Release*].

ineffectiveness of the mandates against specific sovereign countries."[427] When abstaining in the vote to establish the Syria Commission, India stated that its position "concerning country specific resolutions was well known. India believed that engaging the country concerned was a more positive approach than pointing and naming."[428] Several states regularly advocate that human rights matters should be pursued through dialogue.[429] This issue is not limited to the HRC; states also sought to curtail country-specific texts at the General Assembly.[430] The High Commissioner for Human Rights has criticised this position as "self-serving" and "usually voiced by leaders of States that feature few independent institutions, and which sharply curtail fundamental freedoms".[431]

Critiques of HRC commissions as products of politics have synergies with accusations that this body overlooks situations of atrocities for the same reason. A pertinent example is the conflict in Yemen, in respect of which HRC member states have sought to establish an inquiry at successive sessions. In September 2015, exiled President Hadi created a national inquiry into human rights violations.[432] A draft resolution sponsored by the Netherlands requested that OHCHR support that inquiry and establish its own investigation.[433] After apparent pressure from Saudi Arabia, this draft was withdrawn[434] and replaced with a Saudi-led text focussing on technical assistance and omitting reference to an OHCHR-led investigation.[435] In September 2016, another draft resolution requesting OHCHR to send a fact-finding mission was withdrawn.[436] Instead, the HRC passed a Sudan-sponsored resolution limiting OHCHR's role to technical assistance and requesting that the High Commissioner send human rights experts to assist the national inquiry.[437] In 2017, another effort to create an inquiry led to the establishment of an 'eminent team of experts' which reports to the High Commissioner rather

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[427] OHCHR, 'Human Rights Council adopts four resolutions, creates commission of inquiry on Burundi', 30 September 2016, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20619&LangID=E (accessed 1 May 2018).

[428] *Syria Press Release*, *supra* note 426.

[429] E.g., OHCHR, 'Human Rights Council establishes Commission on Human Rights in South Sudan', 23 March 2016, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18528#sthash.TjP9PJUp.dpuf (accessed 1 May 2018).

[430] E.g., United Nations, 'Third Committee Approves 5 Draft Resolutions on Situations in Syria, Iran, Crimea, Introduces 5 Others Concerning Self-Determination, Enhanced Cooperation', UN Doc. GA/SHC/4188, 15 November 2016, available at http://www.un.org/press/en/2016/gashc4188.doc.htm (accessed 1 May 2018).

[431] United Nations, 'Addressing Human Rights Council, UN rights chief decries some States' lack of cooperation', 6 June 2017, available at http://www.un.org/apps/news/story.asp?NewsID=56915#.WTkE0miGM2w (accessed 1 May 2018).

[432] Presidential Decree No. 13 of 7 September 2015 (Yemen).

[433] UN Doc. A/HRC/30/L.4/Rev.1, 30 September 2015, para. 13.

[434] E.g., Nick Cumming-Bruce, 'Saudi Objections Halt U.N. Inquiry of Yemen War', *New York Times*, 30 September 2015, available at http://www.nytimes.com/2015/10/01/world/middleeast/western-nations-drop-push-for-un-inquiry-into-yemen-conflict.html?_r=0 (accessed 1 May 2018) and Julia Brooks, 'Why No International Inquiry in Yemen?', *ATHA Blog*, 4 November 2015, available at http://atha.se/blog/why-no-international-inquiry-yemen (accessed 1 May 2018).

[435] HRC Res. 30/18, 2 October 2015.

[436] UN Doc. A/HRC/33/L.32, 27 September 2016.

[437] HRC Res. 33/16, 29 September 2016, paras. 10-11.

than the HRC.[438] This resolution reflects a compromise between Saudi Arabia and states supportive of a fully-fledged inquiry.[439]

The above examples illustrate a critique that the HRC prioritises political interests and strategies above human rights. An expert paper on the HRC stated:[440]

> Hopes for a new era of international collaboration in promoting and protecting human rights through the [HRC] have proved to be unfounded. Apart from the UPR the Council has been at least as partial, political, selective and confrontational as its predecessor. Perhaps this is inevitable. The [HRC] is a political body. It is made up of States whose representatives act on the instructions and in the interests of their Governments. It is not made up of human rights experts who act on the basis of [IHRL] and knowledge and experience of human rights violations.

However, some HRC inquiries do not follow this pattern. For instance, the situations in the DPRK, Eritrea, Burundi and Myanmar have been of concern for several years, and the HRC's decision to establish inquiries in respect of these states followed years of reports of grave violations. For instance, the HRC established the North Korea Commission after the tenth report of the Special Rapporteur reviewed more than sixty documents pertaining to human rights violations in the DPRK and recommended that an inquiry body "produce a more complete picture, quantify and qualify the violations in terms of international law, attribute responsibility … and suggest effective courses of international action."[441] The North Korea Commission's mandating resolution passed with consensus, notably with no statement by China. The Burundi Commission was likewise established following the recommendation of independent experts that an inquiry body should continue investigations.[442] The HRC's decisions to establish inquiries in these situations cannot be dismissed as resulting from bias. Nevertheless, as a political body, the HRC's decisions are inherently political, even when its resolutions promote principles of human rights and accountability. HRC-led commissions must create distance from these political dynamics and establish their own authority as independent and impartial entities.

Political interests also shape the Security Council's decisions to establish inquiries, but it has not been subject to the same criticism as the HRC. Michelle Farrell and Ben Murphy argue that "the charge of a legitimacy-deficit levelled at the [HRC] but not at the Security Council is itself evidence of a form of politicisation, which can be best understood as an acceptance and perpetuation of the hegemonic order"[443] within the UN. Decisions of all UN political organs are inevitably influenced by political factors. When selection processes are influenced by political factors beyond the gravity of the situation and the objective utility of an inquiry, decisions may be criticised as biased. Commissions established on the basis of such decisions

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[438] *Yemen Mandate*, *supra* note 352, paras. 12 and 14.

[439] Zachary Kaufman, 'The Prospects, Problems and Proliferation of Recent UN Investigations of International Law Violations', (2018) 16(1) JICJ 93-112, at 104 [Kaufman 2018] and Irish and Nebehay, *supra* note 353.

[440] Kamelia Kemileva, Benjamin Lee, Claire Mahon and Chris Sidoti, 'Expertise in the Human Rights Council', *Geneva Academy Policy Paper*, June 2010, at 6, available at http://www.geneva-academy.ch/joomlatools-files/docman-files/Expertise%20in%20the%20Human%20Rights%20Council.pdf (accessed 1 May 2018).

[441] *Report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, Marzuki Darusman*, UN Doc. A/HRC/22/57, 1 February 2013, para. 6.

[442] *Report of the OHCHR Investigation on Burundi*, *supra* note 55, para. 156.

[443] Farrell and Murphy, *supra* note 103, at 37-38.

may be insulated from such critiques if their mandates create conditions for an impartial inquiry. Whether that has occurred in practice is discussed in Section 3 below.

1.4 New York/Geneva dynamics

Wider dynamics among UN bodies oriented towards security at New York and human rights at Geneva may also shape their decisions to establish inquiries. Hellestveit observes that when the HRC was created, "a certain division of labour was envisaged" with the Security Council.[444] In practice, both bodies establish inquiries into violations of international law to ensure accountability. The division of labour appears to lie elsewhere.

States have taken different views as to whether the HRC should involve itself in ongoing conflicts. For instance, some states opposed the HRC's creation of the Lebanon Commission, mandated to investigate violations in the Israel-Hezbollah conflict, on the basis that action should be channeled through the Security Council.[445] By contrast, the Libyan delegation supported an inquiry, noting that the Security Council was unable to pass a resolution "calling for the immediate cessation of the Israeli aggression".[446]

Some authors suggest that the HRC's establishment of inquiries is particularly important in situations likely to be greeted with paralysis in the Security Council. Stephen Rapp observes that the HRC was established inquiries in situations where a Council veto would have likely been cast, including in respect of the DPRK, Eritrea, Sri Lanka and Gaza.[447] Zeray Yihdego writes that HRC fact-finding in such situations is "a persuasive, engaging and influential (rather than confrontational) undertaking to protect the values at stake."[448] Van den Herik observes:[449]

> It may in fact also be that, occasionally, these Geneva-based commissions rather function as a correction mechanism to New York dynamics and in particular to a paralysed Security Council. In such a case, 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 [ICC]. This different emphasis in their role, function and audience may obviously impact the manner in which they fulfil their mandate, and more specifically it may influence their invocation of international law.

Van den Herik compares the two UN inquiries into the Gaza flotilla situation as an illustration of these approaches. The HRC-led inquiry was instructed to investigate violations of international law, while the Palmer Commission was asked to make findings of fact and recommend how such incidents could be avoided in the future.[450]

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444 Hellestveit, *supra* note 20, at 383.
445 *Lebanon Press Release*, *supra* note 423.
446 *Ibid*.
447 Steven Rapp, 'Bridging The Hague-Geneva Divide: Harmonizing Multiple Investigations of International Crimes', (2016) 7 *Intersections* 11, at 11.
448 Yihdego, *supra* note 96, at 56.
449 Van den Herik, *supra* note 74, at 22 (citations omitted).
450 *Ibid.*, at 22.

At the same time, the Security Council has positively engaged with some HRC inquiries. For instance, when referring Libya to the ICC, the Security Council welcomed the HRC's decision to establish the Libya Commission.[451] In 2014, the General Assembly submitted the North Korea Commission's report to the Security Council and encouraged it to "take appropriate action to ensure accountability".[452] Some Security Council members met with commissioners in an Arria-Formula meeting[453] and the Council discussed the situation of human rights in the DPRK despite opposition by several members.[454] Yet enforcement action remains directed at its weapons activities.[455] Also in 2014, a draft resolution which would have taken note of the Syria Commission's reports and referred Syria to the ICC failed due to vetoes from China and Russia.[456] The Security Council has not always taken enforcement action recommended by the HRC, but has at least engaged with some of its atrocity inquiries.

Some authors argue that the Security Council is the more appropriate body to establish inquiries to examine IHL violations and foster prosecutions due to its enhanced capacity to ensure state cooperation and take binding enforcement action.[457] By contrast, Hellestveit observes that the Council's reliance on fact-finding by other UN bodies gives it "more flexibility to refrain from acting where intervention may in fact cause a situation to escalate rather than be contained."[458] The Council's selective engagement with HRC inquiries may create distance between commissions' reports and expectations for follow-up. States may prefer to establish inquiries through the HRC precisely because it has no power to take binding action. States can condemn violations and place pressure on concerned states in the knowledge that collective security measures still require Council consent, while it can engage with atrocity inquiries and yet have room to manoeuvre. From this perspective, the New York/Geneva divide may not be so much a 'gap' in need of being filled, but rather strategic 'wiggle room'.

2. Legal Dimensions of Written Mandates

According to a UN declaration on fact-finding, a "decision by the competent [UN] organ to undertake fact-finding should always contain a clear mandate for the fact-finding mission and precise requirements to be met by its report".[459] Commissions' turn towards international law

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[451] SC Res. 1970 (2011), Preamble.

[452] GA Res. 69/188, para. 8.

[453] United Nations, 'Background Note on the 'Arria-Formula' Meetings of the Security Council Members', available at http://www.un.org/en/sc/about/methods/bgarriaformula.shtml (accessed 1 May 2018). Security Council Report, 'Arria-Formula Meeting with the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (DPRK)', *What's in Blue*, 16 April 2014, available at http://www.whatsinblue.org/2014/04/arria-formula-meeting-with-the-commission-of-inquiry-on-human-rights-in-the-democratic-peoples-repub.php (accessed 1 May 2018) [*North Korea Arria-Formula Meeting*].

[454] *SC Press Release*, *supra* note 281; *SC Briefing*, *supra* note 281 and *SC procedural vote*, *supra* note 281.

[455] E.g., SC Res. 2321 (2016), para. 45.

[456] UN Doc. S/2014/348, 22 May 2014; United Nations, 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution', UN Doc. SC/11407, 22 May 2014, available at http://www.un.org/press/en/2014/sc11407.doc.htm (accessed 1 May 2018).

[457] E.g., Frulli, *supra* note 102, at 1338 and Micaela Frulli, 'UN Fact-Finding Commissions and the Prosecution of War Crimes: An Evolution Towards Justice-Oriented Missions?', in Fausto Pocar, Marco Pedrazzi and Micaela Frulli (eds), *War Crimes And The Conduct Of Hostilities* (Cheltenham: Edward Elgar Publishing, 2013), 331-348 at 347.

[458] Hellestveit, *supra* note 20, at 383.

[459] *1991 Declaration*, *supra* note 25, Art. 17.

may be stimulated at the outset via the terms of their mandates. While the differentiation of facts and law is not entirely neat,[460] an emphasis on international law can shape commissions' roles and functions. This Section discusses juridified elements in the investigative focus and instructions to provide recommendations (2.1). Next, the particular legal lenses invoked by mandating authorities are identified (2.2). This Section finally examines challenges to the HRC's jurisdiction to examine fields of international law beyond IHRL and evaluates potential rationales for such competence (2.3).

2.1 Investigative focus and recommendations

An inquiry into a situation of atrocities might be mandated to find facts and additionally to determine whether violations of international law have occurred. As "[i]t is the norms that tell us what facts one is looking for",[461] a juridified investigative focus hones in on facts capable of being characterised as legal violations. In practice, most mandates framed commissions' fact-finding tasks by reference to fields of international law, discussed in Section 2.2 below.

A juridified investigative focus is underscored by an instruction to collect evidence of crimes.[462] For instance, the Syria Commission was asked to "preserve the evidence of crimes for possible future criminal prosecutions or a future justice process".[463] After the General Assembly established the IIIM,[464] the HRC stressed "the complementary nature of its mandate"[465] and took note of information collected by the Syria Commission "in support of future accountability efforts, in particular the information on those who have allegedly violated international law".[466]

A turn to international law is also evident in instructions to make recommendations in pursuit of accountability.[467] The concept of accountability is broader than the enforcement of legal responsibility and is discussed in detail in Chapter 6. At this stage, it suffices to observe that the concept of accountability has legal dimensions when invoked in connection with legal violations. For instance, the Cambodia Commission was instructed to evaluate Khmer Rouge leaders' crimes and propose individual accountability measures.[468] The Secretary-General instructed the Sri Lanka Panel to advise on modalities of accountability "having regard to the nature and scope of violations."[469] Each commission had to assess the nature and extent of violations to identify appropriate accountability measures. The accountability concept also invokes the rule of law, defined by the Secretary-General as:[470]

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460 Frédéric Mégret, 'Do Facts Exist, Can they be Found, and Does it Matter?" in Alston and Knuckey, *supra* note 94, 28-48, at 34 [Mégret 2016].
461 Mégret 2016, *supra* note 460, at 35.
462 E.g., *South Sudan Mandate Extension*, *supra* note 506, para. 16(b).
463 *Al-Houla Mandate*, *supra* note 596, para. 8.
464 *IIIM Mandate*, *supra* note 330.
465 HRC Res. 34/26, 24 March 2017, para. 40.
466 *Ibid.*, para. 2.
467 E.g., *Darfur Mandate*, *supra* note 303; *CAR Mandate*, *supra* note 304; *Guinea Mandate*, *supra* note 311; *North Korea Mandate*, *supra* note 346; *Eritrea Mandate*, *supra* note 347; *Libya Mandate*, *supra* note 343; *Syria Mandate*, *supra* note 47; *Gaza Mandate*, *supra* note 340; *South Sudan Mandate*, *supra* note 348.
468 *Cambodia Mandate*, *supra* note 323, para. 15.
469 *Sri Lanka Report*, *supra* note 29, Executive Summary, at i.
470 *Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies*, UN Doc. S/2004/616, 23 August 2004, para. 6 (emphases added).

> [A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are *accountable* to laws…, measures to ensure adherence to the principles of supremacy of law, equality before the law, *accountability to the law*, fairness in the application of the law, separation of powers, participation in decisionmaking, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

Some commissions with a juridified investigative focus were asked to make recommendations in pursuit of goals beyond legal accountability, such as reconciliation.[471] Such mandates are more rare: 'justice-oriented' inquiries became increasingly common in the 2000s and continue to be the dominant model.[472] As observed by William Schabas, "[p]robably the star of 'transitional justice' is now waning in the discourse of the [UN] in favour of the cognate concept of 'rule of law".[473]

That juridified investigative focuses and recommendations are choices on the part of mandating authorities is demonstrated by the few occurrences to the contrary.[474] For instance, the Mozambique Commission was instructed to carry out an investigation of 'reported atrocities' and 'massacres'.[475] Although the Commission made findings of violations, the language of IHRL was absent from its mandate. A modern example is Palmer Commission, which was asked to identify the "facts, circumstances and context" [476] of the Israel's interception of the Gaza flotilla and "recommend ways of avoiding similar incidents in the future."[477] The Palmer Commission was intended to de-escalate tensions between Turkey and Israel, whose diplomatic relations had deteriorated.[478] When establishing the Commission, the Secretary-General stated that he hoped "this will have a positive impact on the overall Turkey-Israel relationship and the situation in the Middle East."[479] Geoffrey Palmer remarks that for "inquiries established for preventive diplomacy objectives, the absence of consent may bring into question the utility of having an inquiry at all."[480] Laurie Blank writes that the Palmer Commission "was specifically designed to seek a middle ground of sorts between the divergent views of Turkey and Israel".[481]

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[471] *SC Burundi Mandate*, *supra* note 301; *South Sudan Mandate*, *supra* note 348, para. 18(c).

[472] Catherine Harwood, 'Contributions of Commissions of Inquiry to Transitional Justice', in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Cheltenham: Edward Elgar, 2017) 401-423, at 410-411.

[473] William Schabas, 'Transitional Justice and the Norms of International Law: Presentation to Annual Meeting of the Japanese Society of International Law', Kwansei Gakuin University, 8 October 2011, at 3, available at http://www.jsil.jp/annual_documents/2011/fall/schabas_trans_just911.pdf (accessed 1 May 2018).

[474] *Vietnam Mandate*, *supra* note 247.

[475] *Mozambique Mandate*, *supra* note 252.

[476] *Palmer TOR*, *supra* note 316, para. 3.

[477] *Ibid.*, para. 3.

[478] 'Israel, Turkey strike deal to normalize ties', *CNN*, 27 June 2016, available at http://edition.cnn.com/2016/06/26/middleeast/israel-turkey-relations (accessed 1 May 2018).

[479] *Palmer Mandate*, *supra* note 315.

[480] Geoffrey Palmer, 'Reform of UN Inquiries', in Suzannah Linton, Gerry Simpson and William Schabas (eds), *For the Sake of Present and Future Generations: Essays on International Law, Crime and Justice in Honour of Roger S. Clark* (Leiden: Brill, 2015) 597-616, at 610.

[481] Blank, *supra* note 24, at 100.

2.2 Legal lenses of analysis

This Section identifies the 'legal lenses'[482] in commissions' written mandates. Legal lenses were articulated with varying specificity. Only two mandates instructed commissions to investigate situations with respect to 'international law' generally.[483] Most mandates identified fields of international law, namely IHRL (2.2.1), IHL (2.2.2) and ICL (2.2.3).

2.2.1 International human rights law

Almost all inquiries by the HRC and UNCHR were explicitly mandated to examine alleged violations of human rights or the "human rights situation"[484] in a concerned state.[485] The Security Council and the Secretary-General have also established inquiries with human rights dimensions.[486] The mandates of some recent HRC commissions identified particular violations of concern. The North Korea Commission was instructed to investigate nine types of human rights violations, including the right to food and the prohibitions of torture, arbitrary detention, and enforced disappearances.[487] The Myanmar Commission was requested to establish the facts with respect to arbitrary detention, torture, sexual violence, arbitrary killings and enforced disappearances.[488]

An instruction to establish the facts with respect to human rights violations might be perceived as one-sided where a situation involves armed groups, if states are seen as the sole duty-bearers of human rights obligations.[489] Such challenges have been experienced by treaty bodies, whose work "may appear rather one-sided, given that they cannot hear applications against or demand reports from the non-State entity which may, in fact, be committing more or worse atrocities than the State party."[490] Andrew Clapham writes:[491]

> Given that many of the concerns could not be presented as violations of the law of armed conflict, the human rights framework has been extended by NGOs to the activity of certain armed non-state actors. At the same time UN Commissions of Inquiry and Special Rapporteurs found themselves confronted with the need for balanced reporting and starting addressing human rights concerns to armed non-state actors in the situations under consideration.

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[482] Théo Boutruche, 'Selecting and Applying Legal Lenses in Monitoring, Reporting, and Fact-Finding Missions', *HPCR Working Paper*, October 2013, available at http://ssrn.com/abstract=2337437 (accessed 1 May 2018) [Boutruche 2013].

[483] *Lebanon Mandate*, *supra* note 341; *Gaza Flotilla Mandate*, *supra* note 317.

[484] E.g., *Darfur High-Level Mandate*, *supra* note 342, para. 4.

[485] The HRC's first two inquiry mandates did not refer to human rights: *Lebanon Mandate*, *supra* note 341 and *Beit Hanoun Mandate*, *supra* note 317.

[486] E.g., *Darfur Mandate*, *supra* note 303; *CAR Mandate*, *supra* note 304; *Abidjan Report*, *supra* note 43, para. 1; *Guinea Mandate*, *supra* note 311.

[487] *North Korea Mandate*, *supra* note 346, para. 5.

[488] *Myanmar Mandate*, *supra* note 2, para. 11.

[489] See Chapter Four, Section 2.4.

[490] Christine Byron, 'A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies', (2007) 47 Va J Int'l L 839-896, at 883.

[491] Andrew Clapham, 'Human Rights Obligations for Non-State-Actors: Where Are We Now?', in Fannie Lafontaine and François Larocque (eds), *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (Intersentia, forthcoming), unpublished version at 3, available at http://ssrn.com/abstract=2641390 (accessed 1 May 2018) [Clapham forthcoming].

In some situations involving armed groups, mandating authorities instructed commissions to examine both 'violations' and 'abuses' of human rights. For instance, the Security Council established an inquiry into "reports of violations of [IHL], [IHRL], and abuses of human rights in CAR by all parties."[492] The HRC created an inquiry on "the alleged recent human rights violations by military and security forces, and abuses, in Myanmar".[493] This phrasing suggests that state organs commit 'violations', while 'abuses' may be carried out by other actors,[494] and this interpretation was adopted by recent commissions.[495] This broad phrasing may permit an even-handed approach in terms of scrutinizing the actions of organized armed groups. However, it is also important to recognise when the applicability or scope of obligations vary, to avoid giving a false sense of equivalence. The extent to which human rights obligations are applicable to these actors have been discussed at length by scholars and was addressed by UN atrocity inquiries. Commissions' interpretations of this issue are discussed in Chapter Four.

2.2.2 International humanitarian law

Many UN atrocity inquiries were mandated to examine IHL violations, reflecting the fact that atrocities occurred in the context of armed conflict. All Security Council commissions established since 1992 concerned situations of armed conflict, and were all mandated to examine IHL violations.[496] Its more recent commissions were instructed to investigate both IHL and human rights violations.[497] Several commissions established by the HRC and UNCHR held mandates to examine IHL violations.[498] This has engendered controversy in light of the HRC's human rights-oriented mandate; this issue is discussed in Section 2.3 below.

2.2.3 International criminal law

Several written mandates referred to ICL or to 'crimes' more generally. The Security Council has established several inquiries with ICL dimensions. The Yugoslavia Commission and Rwanda Commission were instructed to examine grave breaches of the Geneva Conventions, which are criminalized as war crimes.[499] The Yugoslavia Commission was also asked to analyse "information submitted pursuant to resolution 771 (1992)",[500] which affirmed that individuals who perpetrated grave breaches of the Geneva Conventions were "individually

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[492] *CAR Mandate*, *supra* note 304.

[493] *Myanmar Mandate*, *supra* note 2, para. 11.

[494] Cordula Droege, 'Human Rights Obligations of Non-State Armed Groups: Realistic or Overly Ambitious? Book Discussion', *EJIL: Talk*, 3 November 2016, available at http://www.ejiltalk.org/book-discussion-daragh-murrays-human-rights-obligations-of-non-state-armed-groups-2 (accessed 1 May 2018).

[495] 'Terms of Reference of the Commission of Inquiry on Burundi', at II(i), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoIBurundi/TermsofreferenceCOIBurundiENGL.pdf (accessed 1 May 2018) [*HRC Burundi TOR*].

[496] *Yugoslavia Mandate*, *supra* note 290 and *Rwanda Mandate*, *supra* note 296.

[497] *Darfur Mandate*, *supra* note 303; *HRC Côte d'Ivoire Mandate*, *supra* note 344 and *CAR Mandate*, *supra* note 304.

[498] E.g., *Gaza Mandate*, *supra* note 340; *East Timor Mandate*, *supra* note 338 and *UNCHR Gaza Mandate*, *supra* note 339.

[499] Marco Sassòli, 'Humanitarian law and International Criminal Law', in Cassese, *supra* note 137, 111-120, at 112.

[500] *Yugoslavia Mandate*, *supra* note 290, para. 2.

responsible"[501] and called upon states to collect information on IHL violations.[502] When the Yugoslavia Commission's mandating resolution is read together with Resolution 771, a focus on individual criminal responsibility is discernible. HRC-led commissions have been instructed to investigate violations which might amount to crimes against humanity,[503] or war crimes,[504] or international crimes generally.[505] Other HRC-led commissions were instructed to investigate violations and "related crimes"[506] or "crimes perpetrated".[507] The Secretary-General has crafted such mandates only occasionally, such as when mandating the Guinea Commission to "qualify the crimes perpetrated".[508]

An ICL lens may also be inferred from instructions to point to "possible criminal responsibility"[509] and to identify "alleged perpetrators"[510] or "those responsible"[511] for violations of human rights and IHL. This inference is drawn from the fact that individuals are responsible under international law for committing violations recognised as international crimes. Many of these mandates were formulated by the HRC. It may be similarly queried whether the HRC trespasses its mandate when establishing inquiries into international crimes. This issue is discussed in Section 2.3 below.

2.3 Challenges to legal lenses of HRC-led inquiries

Some scholars have questioned the institutional competence of the HRC to establish inquiries and other mechanisms to investigate violations beyond IHRL.[512] Daphne Richemond-Barak writes, "no matter how laudable the goal of enforcing IHL, the automatic application of IHL by the [HRC] finds legal support neither in theory or in practice."[513] Such a jurisdictional overstep would likely create an internal irregularity rather than being *ultra vires* the UN as a whole.[514] However, concerned states and other stakeholders might use this ground to refuse to cooperate with an inquiry or challenge its findings. As the HRC is the most prolific mandating authority, this challenge is highly relevant to current and future UN atrocity inquiries. This Section analyses whether the HRC is competent to instruct commissions to examine IHL and ICL, by reference to principles of international institutional law. It examines three possible bases: conferral of competence by the General Assembly (2.3.1); competence implied from

[501] SC Res. 771 (1992), para. 1.
[502] *Ibid*., para. 5.
[503] *North Korea Mandate*, *supra* note 346, para. 5; *Syria Mandate*, *supra* note 47, para. 13; Eritrea Commission, HRC Res. 29/18, 2 July 2015, para. 10 [*Eritrea Mandate Extension*].
[504] *Gaza Protests Mandate*, *supra* note 340, para. 4.
[505] *HRC Burundi Mandate*, *supra* note 349, para. 23(a).
[506] South Sudan Commission, HRC Res. 34/25, 24 March 2017, para. 16 [*South Sudan Mandate Extension*].
[507] *Libya Mandate*, *supra* note 343, para. 11; *Syria Mandate*, *supra* note 47, para. 13; *Gaza Mandate*, *supra* note 340.
[508] *Guinea Mandate*, *supra* note 311, para. 2(d).
[509] *CAR Mandate*, *supra* note 304.
[510] E.g., *Darfur Mandate*, *supra* note 303; *CAR Mandate*, *supra* note 304; *Libya Mandate*, *supra* note 343; *HRC Burundi Mandate*, *supra* note 349.
[511] *Guinea Mandate*, *supra* note 311; *HRC Côte d'Ivoire Mandate*, *supra* note 344; *Syria Mandate*, *supra* note 47; *Gaza Mandate*, *supra* note 340.
[512] Mandates by the Security Council and Secretary-General have avoided such critiques, perhaps due to their scope of powers: UN Charter, Arts. 24(1) and 99.
[513] Daphne Richemond-Barak, 'The Human Rights Council and the Convergence of Humanitarian Law and Human Rights Law', in William Banks (ed.), *Counterinsurgency Law: New Directions in Asymmetric Warfare* (Oxford: OUP, 2013) 3-23, at 21.
[514] *Certain Expenses of the United Nations*, Advisory Opinion [1962] ICJ Reports 151, at 168.

the responsibility to promote and protect human rights (2.3.2); or developed in practice (2.3.3).

2.3.1 Conferral of competence by the General Assembly

As an international organisation, the UN's rights and duties "depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."[515] Implied powers are conferred "by necessary implication as being essential to the performance of its duties."[516] Like other international organisations, the UN acts through its organs, which may establish subsidiary bodies to assist in fulfilling their functions.[517] UN commissions of inquiry are considered as subsidiary bodies of their mandating authorities.[518] HRC-led inquiries have an extra degree of subsidiarity due to the HRC's position as a subsidiary of the General Assembly.

One possibility is that the HRC acquired competence to examine IHL and ICL by the General Assembly, which may consider any matters within the scope of the Charter.[519] Chinkin argues that the HRC shares its parent's "residual responsibility for international peace and security".[520] As a subsidiary body, the HRC's functions and powers are primarily located in its mandating resolution, GA Resolution 60/251. The Preamble recognizes that "development, peace and security and human rights are interlinked and mutually reinforcing". It provides that the HRC is responsible for "promoting universal respect for the protection of all human rights and fundamental freedoms",[521] addressing situations of violations of human rights, and making recommendations. This resolution further provides that the HRC should promote "full implementation of human rights obligations undertaken *by States*"[522] and does not mention individual responsibility for violations. There is no mention of IHL or ICL in its mandating resolution, nor were those legal fields discussed in General Assembly debates.[523]

There is a glimmer of reference to IHL in subsequent resolutions relevant to the HRC's institutional framework. In 2007, the HRC adopted its 'Institution-building package' which set out its monitoring and reporting mechanisms. That resolution stated that in respect of Universal Periodic Review, "given the complementary and mutually interrelated nature of [IHRL] and [IHL], the review shall take into account applicable [IHL]."[524] The HRC also has a confidential complaints procedure to address "consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms".[525] OHCHR advises that

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[515] *Reparation for Injuries Opinion*, *supra* note 198, at 180. See Henry Schermers and Niels Blokker, *International Institutional Law* (Leiden: Martinus Nijhoff, 2011), para. 225.
[516] *Ibid.*, at 182.
[517] Schermers and Blokker, *supra* note 515, para. 224, citing ECJ, *Meroni*, Case 9156, [1958] ECR 133.
[518] OHCHR, 'Human Rights Council Subsidiary Bodies', available at http://www.ohchr.org/EN/HRBodies/HRC/Pages/OtherSubBodies.aspx (accessed 1 May 2018) and United Nations, 'Subsidiary Organs: Overview', available at http://www.un.org/en/sc/repertoire/subsidiary_organs/overview.shtml (accessed 1 May 2018).
[519] UN Charter, Art. 10.
[520] Chinkin, *supra* note 97, at 481. See Van den Herik and Harwood, *supra* note 104, at 326.
[521] GA Res. 60/251, paras 2-3.
[522] *Ibid.*, para. 5(d) (emphasis added).
[523] Richemond-Barak, *supra* note 513, at 16.
[524] HRC Res. 5/1, Annex, para. 2.
[525] *Ibid.*, para. 85.

the term 'gross violations' in this context includes "breaches of [IHL] or threat to peace".[526] However, the limited information that is publicly available about this process indicates that the HRC has focused on human rights concerns.[527] The General Assembly endorsed the HRC's institution-building package,[528] and when conducting a general review of the HRC in 2011, affirmed its human rights mandate but did not recognise its competence in IHL or ICL.[529]

GA Resolution 60/251 provides that the HRC assumed all "mandates, mechanisms, functions and responsibilities" of UNCHR,[530] so another possibility is that the HRC might have inherited IHL and ICL competence from its predecessor. ECOSOC resolutions pertaining to UNCHR's powers did not mention IHL but in practice, UNCHR instructed two inquiries to investigate IHL violations.[531] Elvira Domínguez-Redondo observes that by the end of the 1990s, "humanitarian standards were becoming a normal component within the work of [UNCHR] and its subsidiary organs".[532] Alston and others posit that ECOSOC's support of UNCHR's IHL activities impliedly brought this field within its mandate, which was then inherited by the HRC.[533] Richemond-Barack disagrees, arguing that the HRC was a clean break, so that even if UNCHR had an IHL mandate, it did not transfer to the HRC.[534]

Similar arguments might be made in respect of UNCHR's mandate with respect to ICL, but its record of practice is patchier. UNCHR resolved that commissions of inquiry "can be complementary to the essential role of judicial mechanisms in protecting human rights and combating impunity" [535] but its two commissions were not instructed to investigate international crimes, nor referred to ICL.[536] A few special rapporteurs analysed whether violations amounted to international crimes, but their written mandates did not mention ICL.[537]

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[526] OHCHR, 'Human Rights Council Complaints Procedure Frequently Asked Questions', available at http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/FAQ.aspx#ftn2 (accessed 1 May 2018).

[527] OHCHR, 'List of Situations Referred to the Human Rights Council under the Complaint Procedure Since 2006', available at http://www.ohchr.org/Documents/HRBodies/ComplaintProcedure/SituationsConsideredUnderComplaintProcedures.pdf (accessed 1 May 2018).

[528] GA Res. 62/219, 22 December 2007, para. 2.

[529] GA Res. 65/281, 17 June 2011.

[530] GA Res. 60/251, para. 6.

[531] *East Timor Mandate*, *supra* note 338 and *UNCHR Gaza Mandate*, *supra* note 339.

[532] Domínguez-Redondo, *supra* note 277, at 273.

[533] Philip Alston, Jason Morgan-Foster and William Abresch, 'The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflicts: Extrajudicial Executions in the 'War on Terror'', (2008) 19 EJIL 183-209, at 199 [Alston *et al*].

[534] Richemond-Barak, *supra* note 513, at 15.

[535] UNCHR Res. 2005/81, UN Doc. E/CN.4/RES/2005/81, 21 April 2005.

[536] The only ICL reference is the UNCHR Gaza Commission's observation that violations would attract international criminal responsibility: *Report of the human rights inquiry commission established pursuant to Commission resolution S-5/1 of 19 October 2000*, UN Doc. E/CN.4/2001/121, 16 March 2001, para. 119 [*UNCHR Gaza Report*].

[537] E.g., *Preliminary report of the Special Rapporteur on the situation of systematic rape, sexual slavery and slavery-like practices during periods of armed conflict, Ms. Linda Chavez*, UN Doc. E/CN.4/Sub.2/1996/26, 16 July 1996, paras. 20-25, established by UNCHR Decision 1996/107, 19 April 1996, UN Doc. E/CN.4/1996/177, at 290; *Report of the joint mission charged with investigating allegations of massacres and other human rights violations occurring in eastern Zaire since September 1996*, UN Doc. A/51/942, 2 July

2.3.2 Competence implied from human rights function

The HRC's competence to consider IHL and ICL might spring from the rights to the truth and a remedy, as part of its human rights mandate.[538] The General Assembly and HRC recognise the right to truth in respect of serious violations of human rights and IHL.[539] Truth-seeking remedies are also affirmed in the General Assembly's *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (*Principles on the Right to a Remedy*).[540] The HRC has invited its mechanisms to take into account "the issue of the right to the truth"[541] in their work. Flowing from this recognition, the HRC might be empowered to establish mechanisms to examine IHL and ICL to promote the rights to truth and a remedy.

This argument has not usually been accepted as a basis for including IHL and ICL within the jurisdiction of bodies competent to assess individual complaints of human rights violations.[542] The Human Rights Committee has not made findings of IHL violations when assessing individual communications. Most regional human rights courts had regard to IHL only in order to interpret the scope of human rights in armed conflicts.[543] An exception is a line of jurisprudence from the Inter-American Commission of Human Rights in which findings of IHL violations were made.[544] However, the Inter-American Court of Human Rights (IACtHR) deemed that approach as exceeding the Commission's jurisdiction.[545] Silja Vöneky sees the competence of human rights bodies for violations of IHL as "indirect" as each body "works under a particular mandate that is distinct from the responsibility of states to respect and ensure respect for [IHL]."[546] Escorihuela reaches a similar view, stating "no human rights

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1997, paras. 86-88 [*DRC Joint Mission Report*], established by UNCHR Res. 1997/58, 15 April 1997; *Report of the Special Rapporteur, Ms. Mona Rishmawi, submitted in accordance with Commission on Human Rights resolution 1999/75*, UN Doc. E/CN.4/2000/110, 26 January 2000, paras. 32-39 and 165 [*Somalia SR Report*], established by UNCHR Res. 1999/75, 28 April 1999.

538 GA Res. 60/251, para. 2.

539 GA Res. 68/165, 18 December 2013, para. 1; HRC Res. 21/7, 27 September 2012, para. 1.

540 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res. 60/147, 21 March 2006 [*Principles on the Right to a Remedy*], paras. 22(b), (d) and (e). See UNCHR Res. 2005/35, 19 April 2005 and ECOSOC Res. 2005/30, 25 July 2005.

541 HRC Res. 9/11, 18 September 2008, para. 10.

542 David Weissbrodt, 'The Role of the Human Rights Committee in Interpreting and Developing Humanitarian Law', (2010) 31(4) U Pa J Int'l L 1185-1237, at 1204.

543 E.g., ECtHR, *Hassan v. United Kingdom*, No. 29750/09, Judgment, Grand Chamber, 16 September 2014 and IACHR, *Coard and others v. United States*, Case 10.951, Report No. 109/99, 29 September 1999, para. 42. See Larissa van den Herik and Helen Duffy, 'Human Rights Bodies and International Humanitarian Law: Common but Differentiated Approaches', in Carla Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Leiden: Brill, 2016) 366-406, at 384.

544 IACHR, *Abella v. Argentina*, Case No. 11.137, Report No. 55/97, 18 November 1997, para. 1. E.g., IACHR, *Arturo Ribón Avilán and others v. Colombia*, Case No. 11.142, Report No. 26/97, 30 September 1997, para. 132.

545 IACtHR, *Las Palmeras v. Colombia*, Case 11.237, Judgment (Preliminary Objections), 4 February 2000, para. 33: The American Convention on Human Rights "has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions."

546 Silja Vöneky, 'Implementation and Enforcement of International Humanitarian Law', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (3rd ed, Oxford: OUP, 2013) 1401-1436, at 1426(2).

body has jurisdiction over the *lex specialis* just because they have jurisdiction over the supposed *lex generalis*".[547] Richemond-Barak writes that human rights courts' practice of interpreting human rights in light of IHL, without pronouncing on IHL violations, "reveals the weakness of the claim that the [HRC] has no choice but to apply IHL under the *lex specialis* doctrine."[548]

Bodies competent to adjudicate allegations of human rights violations have occasionally had regard to ICL, but through the lens of human rights law. The Human Rights Committee frames its findings as violations of the International Covenant on Civil and Political Rights 1966 (ICCPR), even when applicants characterised them as crimes against humanity.[549] The European Court of Human Rights (ECHR) has occasionally considered the criminal nature of conduct when assessing alleged violations of the right to a fair trial. In *Korbely v. Hungary*, the ECHR examined whether the applicant's conduct amounted to crimes against humanity,[550] and in *Kononov v. Latvia*, it examined if conduct amounted to war crimes.[551] In both cases, the Court did not independently determine criminal responsibility, but considered whether the acts, when committed, were recognised as crimes.[552] In *Almonacid-Arellano and others v. Chile*, the IACtHR characterised murder as a crime against humanity when determining that an amnesty law was incompatible with the duty to investigate and prosecute serious violations and give effect to the right to truth.[553] However, the IACtHR has also held that it is not necessary to qualify incidents as international crimes in order to find that the state must investigate and prosecute.[554] In *La Cantuta v. Perú*, the IACtHR observed that it "is not a criminal court with power to ascertain liability of individual persons for criminal acts", and that in order to establish a violation of rights, "it is not necessary to determine the responsibility of its author or their intention, nor is it necessary to identify individually the agents who are attributed with the violation".[555]

In general, human rights bodies have engaged with IHL and ICL only to the extent necessary to assess violations of human rights recognised in specific instruments. These bodies are generally reluctant to make findings of IHL violations and international crimes, even when doing so might promote the right to truth. However, the HRC has a broader mandate to promote human rights and address situations of concern, rather than to adjudicate individual complaints of violations. The goals of giving effect to the rights to truth and a remedy might be a possible basis for the HRC's competence to apply IHL and ICL, but it also marks a point of departure from human rights bodies with authority to determine individual complaints.

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[547] Alejandro Escorihuela, 'Humanitarian Law and Human Rights Law: The Politics of Distinction', (2011) 19 Mich St J Int'l L 299-407, at 381.

[548] Richemond-Barak, *supra* note 513, at 12.

[549] E.g., in *Bouzaout v. Algeria*, the author described the death of his wife as a 'crime against humanity'. The ICCPR Committee (CCPR) framed its finding as a violation of the right to life under ICCPR, Art. 6(1): CCPR, *Bouzaout v. Algeria*, UN Doc. CCPR/C/111/D/1974/2010, 23 July 2014, paras. 3.2 and 7.4.

[550] ECtHR, *Korbely v. Hungary*. No. 9174/02, Judgment, Grand Chamber, 19 September 2008.

[551] ECtHR, *Kononov v. Latvia*, No. 36376/04, Judgment, Grand Chamber, 17 May 2010.

[552] *Korbely*, *supra* note 550, para. 73.

[553] IACtHR, *Almonacid-Arellano and others v. Chile*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 26 September 2006, paras. 129 and 150.

[554] E.g., IACtHR, *Gomes Lund v. Brazil*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 24 November 2010.

[555] IACtHR, *La Cantuta v. Perú*, Judgment (Merits, Reparations and Costs), 29 November 2006, para. 156.

From the perspective of international institutional law, the HRC's own practice may be relevant to the scope of its competence. This potential basis for the HRC's competence to consider matters beyond IHRL is discussed next.

2.3.3 Competence developed through organisational practice

The practice of an international organisation is depicted as both a source and interpretive aid of its rules.[556] Relevant for interpretation is an international organisation's practice, including that of its organs[557] and member states.[558] The upshot of the functionalist theory of implied powers is that "many instances of application can be regarded as implicit acts of interpretation";[559] this can lead to organisational mission creep.[560] Whether a subsidiary body's practice can shape its own powers remains unclear. Commentary has analysed the practice of judicial bodies established by non-judicial organs, where the former's implied powers may be explained as an inherent part of the judicial function.[561] Considering the HRC's subsidiarity and the lack of clarity regarding the nature of subsidiaries' practice, it is apposite to examine responses of the General Assembly as the HRC's parent organ, as well as the practice of the HRC and its member states. These bodies provide a forum for member states to articulate their views and build up a repository of practice which can indicate the scope of the HRC's powers.

Inclusion of IHL and ICL in some commissions' mandates indicates that the HRC considers these fields as within its competence. Alston, in his capacity as Special Rapporteur, observes that the HRC has acquiesced to IHL developments in special procedures' mandates "through its response to the reports, traditionally in the form of resolutions"[562] endorsing or approving the mandate-holder's activities. The HRC generally acknowledged commissions' findings of IHL violations, even where written mandates did not mention IHL.[563] For instance, when welcoming a report of the Syria Commission which found IHL violations,[564] the HRC

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[556] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986, (1986) 25 ILM 543, Art. 2(1)(j) defines "rules of the organization" as including its "established practice". See DARIO, *supra* note 14, Art. 2(b).

[557] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request by WHO)*, Advisory Opinion [1996] ICJ Reports 66, at 74-75 [*Nuclear Weapons Opinion*]; Catherine Brölmann, 'Specialized Rules of Treaty Interpretation: International Organizations', in Duncan Hollis (ed.), *The Oxford Guide to Treaties* (Oxford: OUP, 2012) 507-524.

[558] VCLT, Art. 31(3)(b); Niels Blokker, 'Is the authorization authorized? Powers and practice of the UN Security Council to authorize the use of force by 'coalitions of the able and willing'', (2000) 3 EJIL 541-568, at 555; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Advisory Opinion [1971] ICJ Reports 16, para. 22.

[559] Brölmann, *supra* note 557, at 11.

[560] Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca: Cornell University Press, 2004) at 2; Nigel White, *The Law of International Organisations* (2nd ed, New York: Juris Publishing, 2005) at 84; Derek Bowett, 'The Impact of the U.N. Structure, Including That of the Specialized Agencies, on the Law of International Organization', (1970) 64 Am Soc'y Int'l L Proc 48-51, at 49; Jan Klabbers, 'International Institutions', in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge: CUP, 2012) 228-244, at 231.

[561] Danesh Sarooshi, 'The Legal Framework Governing United Nations Subsidiary Organs', (1997) 67(1) *British Yearbook of International Law* 413-478, at 454.

[562] *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc. A/62/265, 16 August 2007, para. 53 [*Extrajudicial Executions SR Report*].

[563] E.g., HRC Res. 22/29, 15 April 2013, Preamble and HRC Res. 9/18, 24 September 2008, para. 5.

[564] *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/21/50, 16 August 2012 [*Syria Third Report*].

resolved that it was imperative to investigate violations including war crimes.[565] HRC practice of acknowledging commissions' findings of international crimes seems to be guided by whether the written mandate had an ICL component. The HRC acknowledged findings of crimes against humanity by the Syria Commission and North Korea Commission;[566] both were instructed to examine such crimes. After the Eritrea Commission presented a report that was limited to human rights violations, citing the scope of its written mandate,[567] the HRC extended its mandate to include crimes against humanity[568] and subsequently acknowledged its ICL findings.[569] By contrast, ICL findings by commissions whose written mandates lacked ICL components were not affirmed as strongly.[570] For instance, when welcoming the Israeli Settlements Commission's report, the HRC referred to IHL but not ICL,[571] even though the Commission characterised the transfer of Israeli citizens as an international crime.[572]

Turning to the practice of HRC member states, a majority of voting members approved of IHL and ICL components to commissions' written mandates, while a minority voiced opposition. For instance, Canada opposed the Lebanon Commission's mandate to examine IHL:[573]

> As the [UN's] principal body responsible for human rights, this was an opportunity for the [HRC] to focus specifically on the human rights concerns emanating from the conflict, reflecting its mandate and its competence. The armed conflict that was occurring in Israel and Lebanon had resulted in actions that were contrary to [IHL] and these should be pursued in other appropriate contexts by the international community.

In the past, the US challenged HRC mandate-holders' competence to apply IHL, in line with its view that human rights and IHL were mutually exclusive.[574] The US now accepts that IHRL applies in armed conflict with IHL as the "controlling body of law".[575] It has also sponsored HRC resolutions condemning IHL violations.[576] However, in 2014, voting against the establishment of the Gaza Commission, the US objected to the recommendation that

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[565] HRC Res. 21/26, para. 10 (emphasis added).
[566] HRC Res. S-18/1, para. 1; HRC Res. 25/25, 9 April 2014, Preamble.
[567] *Report of the detailed findings of the Commission of Inquiry on Human Rights in Eritrea*, UN Doc. A/HRC/29/CRP.1, 5 June 2015, para. 11 [*Eritrea First Report*].
[568] *Eritrea Mandate Extension*, *supra* note 503, para. 10.
[569] *Detailed findings of the commission of inquiry on human rights in Eritrea*, UN Doc. A/HRC/32/CRP.1, 8 June 2016 [*Eritrea Second Report*]; HRC Res. 32/24, 1 July 2016, Preamble.
[570] E.g., HRC Res. 17/21, 19 July 2011, para. 5(c) (welcoming *Côte d'Ivoire Report*) and HRC Res. 19/39, 23 March 2012, para. 6 (welcoming *Libya Second Report*).
[571] HRC Res. 22/26, 12 April 2013.
[572] *Report of the independent international factfinding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, UN Doc. A/HRC/22/63, 7 February 2013, para. 38 [*Israeli Settlements Report*].
[573] *Lebanon Press Release*, *supra* note 423.
[574] See, e.g., *Response dated 8 April 2004 of the United States to the Special Rapporteur on extrajudicial, summary, or arbitrary executions*, UN Doc. E/CN.4/2005/7/Add.1 (2005), para. 765, cited in Alston *et al*, *supra* note 533, at 188 and *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston*, UN Doc. A/HRC/11/2/Add.5, 28 May 2009, para. 71.
[575] US Department of Defense, *Law of War Manual*, June 2015, at 22, available at http://www.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-June-2015.pdf (accessed 1 May 2018) [*US Law of War Manual*].
[576] E.g., UN Doc. A/HRC/30/L.5/Rev.1, 30 September 2015.

Switzerland reconvene the conference of High Contracting Parties to Geneva Convention IV[577] as outside the HRC's mandate.[578]

A minority of states have objected to the HRC's engagement with themes of accountability and ICL. For instance, when debating a resolution on Syria,[579] India stated that the text "unduly focused on accountability" and that the HRC "should not confuse its mandate with the humanitarian one."[580] Pakistan stated that mandate-holders' statements that crimes against humanity were likely to have been committed in Syria should be recalled.[581] Although Russia voted for a resolution endorsing the Goldstone Commission's recommendations, it stated that some provisions "went beyond the scope of the Mission, in particular recommendations to the [ICC] and the Security Council, as well as calls on States to prosecute war crimes".[582] Most HRC member states have not voiced opposition; a majority supported the inclusion of 'crimes against humanity' in some mandates,[583] and the Syria Commission's draft mandate was amended to include this term.[584]

General Assembly practice is sparser; it has not responded to all HRC commissions' reports.[585] Nonetheless, its practice indicates general support for the HRC's engagement with IHL and ICL. For instance, responding to the Goldstone Commission's report, the Assembly called upon Israel to investigate "serious violations of [IHL] and [IHRL] reported by the Fact-Finding Mission".[586] The Assembly recognised the North Korea Commission's finding of "reasonable grounds to believe that crimes against humanity have been committed"[587] when recommending that the Security Council refer that situation to the ICC. Perhaps the most demonstrative acceptance of the HRC's competence was in respect of the Syria Commission. In 2013, the General Assembly welcomed the Syria Commission's report and stressed the need to conduct an international investigation into violations, "including those that may amount to crimes against humanity and war crimes".[588] In 2016, the Assembly created the IIIM and instructed it to "closely cooperate" with the Syria Commission to collect and analyse evidence of IHL and human rights violations.[589] These statements indicate that the Assembly approved of the Commission's engagement with IHL and ICL. In general, the above practice indicates that most HRC member states and the General Assembly have accepted or at least acquiesced to the

[577] *Gaza Mandate*, *supra* note 340, para. 11.
[578] *Gaza Press Release*, *supra* note 420.
[579] UN Doc. A/HRC/23/L.29, 11 June 2013 and HRC Res. 23/26, 25 June 2013.
[580] OHCHR, 'Council Condemns All Violations of Human Rights in Syria, Urges the Government to Cooperate with the Commission of Inquiry', 14 June 2013, available at http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13458&LangID=E (accessed 1 May 2018).
[581] *Ibid*.
[582] OHCHR, 'Human Rights Council Endorses Recommendations in Report of Fact-Finding Mission led by Justice Goldstone and Calls for their Implementation', 16 October 2009, available at http://unispal.un.org/DPA/DPR/unispal.nsf/0/B5EFBF358A066D2E8525765100553F95 (accessed 1 May 2018).
[583] *Syria Press Release*, *supra* note 426; *North Korea Press Release*, *supra* note 424.
[584] UN Doc. A/HRC/S-17/L.1, 18 August 2011.
[585] *E.g.*, HRC inquiries on Côte d'Ivoire, Libya, Israeli settlements, Eritrea and Gaza.
[586] GA Res. 64/10, 5 November 2009, para. 3. See GA Res. 65/105, 10 December 2010, at 3.
[587] GA Res. 69/188, para. 7.
[588] GA Res. 67/183, 20 December 2012, para. 10, responding to *Third Syria Report*.
[589] *IIIM Mandate*, *supra* note 330, para. 4.

HRC's practice of establishing commissions to investigate IHL violations and international crimes.

3. Impartiality of Written Mandates

In order for inquiries to be impartial and insulated from political forces surrounding their establishment, written mandates must allow for the examination of relevant events, actors and contexts. The quality of impartiality, recognised in various fact-finding instruments,[590] has been variously defined as "equal treatment of all rivals or disputants; fairness"[591] and "not prejudiced towards or against any particular side or party; fair; unbiased."[592] These definitions invoke different understandings of the concept. While even-handedness implies equal treatment, this may not be required if impartiality is understood as 'absence of prejudice'. In any case, where the mandate indicates elements of bias or prejudgment, the commission may be perceived as politicised and lacking in objectivity. Impartiality is therefore essential for commissions' narratives to be accepted as authoritative, their truth-finding efforts to be recognised as sincere, and their calls for accountability to be taken seriously.

This Section identifies key aspects of written mandates that generated impartiality challenges, namely geographic parameters (3.1), temporal scope (3.2), actors under scrutiny (3.3) and prejudgment of findings (3.4). Commissions' efforts to protect and restore impartiality in their mandates are detailed in Chapter Three.

3.1 Geographic parameters

Written mandates consistently identified the geographic scope of the situation under scrutiny. Usually commissions were instructed to examine the situation in a concerned state.[593] Sometimes particular regions were specified. For example, commissions were asked to examine alleged violations in the Darfur region of Sudan[594] and in Rakhine State, Myanmar.[595] The Syria Commission was mandated to examine specific localities alongside its general mandate with respect to Syria.[596]

The geographic scope of the mandate was problematic in respect of several HRC inquiries established into situations of armed conflict involving Israel. In 2006, the HRC established an inquiry into "systematic targeting and killing of civilians by Israel in Lebanon."[597] In 2009, the Goldstone Commission was mandated to investigate violations "by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip".[598] In 2014, an inquiry was launched into violations "in the Occupied Palestinian Territory, including East Jerusalem, particularly in the occupied

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[590] *First Hague Convention*, *supra* note 11, Art. 9; *Second Hague Convention*, *supra* note 62, Art. 9; *1991 Declaration*, *supra* note 25, para. 3.

[591] Oxford English Dictionary, 'Impartial', available at http://www.oxforddictionaries.com/definition/english/impartial (accessed 1 May 2018).

[592] Collins English Dictionary, *supra* note 50.

[593] E.g., *North Korea Mandate*, *supra* note 346, para. 5; *Yugoslavia Mandate*, *supra* note 290, para. 2.

[594] *Darfur Mandate*, *supra* note 303.

[595] *Myanmar Mandate*, *supra* note 2.

[596] HRC Res. S-19/1, 4 June 2012 [*Al-Houla Mandate*]; HRC Res. 23/1, 29 May 2013 (Al Qusayr); HRC Res. S-25/1, 21 October 2016 (Aleppo); HRC Res. 37/1, 5 March 2018 (Eastern Ghouta).

[597] *Lebanon Mandate*, *supra* note 341.

[598] *Goldstone Mandate*, *supra* note 340.

Gaza Strip".[599] These written mandates did not include violations occurring on the territory of Israel. There was significant pushback from some HRC members who considered these resolutions as biased against Israel.[600] Perhaps unsurprisingly, Israel refused to cooperate with all these commissions. Commissions took different approaches towards remedying one-sided mandates; these are discussed in Chapter Three.

3.2 Temporal scope

Mandating authorities have taken different approaches towards identifying the temporal scope of an inquiry. Where an inquiry is established in respect of a long-standing situation of concern, mandating authorities tended not to identify a particular time period. For instance, the Eritrea Commission was simply instructed to investigate "all alleged violations of human rights in Eritrea".[601] A similarly broad mandate was held by the North Korea Commission.[602] Open-ended mandates were also held by commissions investigating ongoing conflicts. For instance, the Syria Commission was instructed to investigate violations in Syria "since March 2011".[603]

A closed time period was generally utilised when an inquiry concerned a time-bound event. For instance, the Cambodia Commission was instructed to examine the period 1975 to 1979,[604] tracking the regime of Democratic Kampuchea. The Guinea Commission was asked to investigate "events of 28 September 2009 in Guinea and the related events in their immediate aftermath".[605] Although these mandates specified particular dates, some flexibility is visible in directions to consider 'related events'. The mandates of HRC inquiries into Operation Cast Lead and Operation Protective Edge struck a compromise in specifying investigations to be conducted into violations in the context of the military operations, "whether before, during or after".[606] This broad framing enabled commissions to investigate incidents of relevance to the general situation, while focussing on specific operations.

The temporal scope of some mandates was criticised as producing incomplete narratives. A case in point is the situation of Burundi, in respect of which the UN established several inquiries to examine violence in the 1990s and in 2015.[607] However, none were mandated to examine earlier uprisings, including what one inquiry termed a "genocidal repression"[608] in

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599 *Gaza Mandate*, *supra* note 340, para. 13.

600 OHCHR, 'Council Strongly Condemns Grave Israeli Violations of Human Rights in Lebanon', 11 August 2006, available at http://news.un.org/en/story/2006/08/188712-un-rights-council-condemns-israeli-violations-lebanon-sends-team-investigate (accessed 1 May 2018) and *Gaza Press Release*, *supra* note 420.

601 *Eritrea Mandate*, *supra* note 347, para. 8.

602 *North Korea Mandate*, *supra* note 346, para. 5.

603 *Syria Mandate*, *supra* note 47, para. 13.

604 *Cambodia Report*, *supra* note 324, para. 6.

605 *Guinea TOR*, *supra* note 311, para. 2. See *Guinea Report*, *supra* note 39, para. 4.

606 *Goldstone Mandate*, *supra* note 340 and *Gaza Mandate*, *supra* note 340.

607 Preparatory Fact-Finding Commission to Burundi, *Note by the President of the Security Council*, UN Doc. S/26757, 16 November 1993; *Report of the Security Council Mission to Burundi on 13 and 14 August 1994*, UN Doc. S/1994/1039, 9 September 1994; *Report of the Special Envoy Appointed to Examine the Feasibility of Establishing Either a Commission on the Truth or a Judicial Fact-Finding Commission in Burundi*, UN Doc. S/1995/631, 28 July 1995; *Report of the Security Council mission to Burundi on 10 and 11 February 1995*, UN Doc. S/1995/163, 28 February 1995; *SC Burundi Mandate*, *supra* note 301, para. 1(a); *HRC Burundi Mandate*, *supra* note 349, para. 23(a).

608 *Report of the Preparatory Fact-Finding Mission to Burundi*, UN Doc. S/1995/157, 24 February 1995, para. 36.

1972. A mission established in 2005 to consider the utility of a 'judicial' inquiry reproached:[609]

> In a society deeply divided along ethnic lines, where the inter-ethnic killings in 1965, 1972, 1988, 1991 and 1993 form part of the same whole, limiting the mandate of any inquiry to a single cycle of massacres and, worse still, characterizing them, and them alone, as genocide, was considered by many in Burundi as a partial and biased account of the events, and one oblivious to the suffering of an entire ethnic group, by far the largest. In a society where "genocide" is not only a legal characterization of a crime but a political statement and global attribution of guilt to an entire ethnic group, the 1996 report had a divisive effect on Burundian society and contributed to the perception of a biased international community. The call for the establishment of a commission of inquiry whose temporal jurisdiction extends over four decades of Burundi recent history is thus an appeal for fairness in recounting the historical truth and putting the 1993 massacres in historical perspective. It was also a plea for recognition that members of all ethnic groups were at different times both victims and perpetrators of the same crimes.

Writing in 2006, Romana Schweiger observes that these limited mandates "neither satisfied the need for justice through criminal prosecution, nor the need for producing an objective historical record."[610] The modalities of a comprehensive truth-seeking mechanism were subject to peace negotiations[611] and the resulting national truth commission is at last operational.[612] Its temporal scope is from 1 July 1962 until 4 December 2008. The UN has continued to establish inquiries into Burundi with temporal limits; the HRC's most recent inquiry was mandated to investigate violations "since April 2015".[613] Burundi objected to the series of limited mandates and lack of follow-up when refusing to cooperate with the latest inquiry, stating: "[t]he people of Burundi had memories of the violence that had occurred until 1994, however, the [UN] had remained silent on these crimes. Why was the [UN] only focusing on crimes committed from 2015?"[614]

By limiting the temporal scope in each case, mandating authorities did not appear to intend for commissions to produce an authoritative overarching historical narrative or conduct comprehensive truth-seeking. In contexts such as Burundi, a short-term focus may not permit a full appreciation of the cyclical nature of violence and its drivers, so root causes remain unaddressed. While these commissions were designed to inquire into specific periods of heightened unrest to focus attention and raise alert, they did not appear to have been intended to hold a strong preventative function.

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609 *Report of the Assessment Mission on the Establishment of an International Judicial Commission of Inquiry for Burundi*, UN Doc. S/2005/158, 11 March 2005, para. 20 [*Burundi Assessment Report*].

610 Romana Schweiger, 'Late Justice for Burundi', (2006) 55 ICLQ 653-670, at 655.

611 Arusha Peace and Reconciliation Agreement for Burundi 2000.

612 Republic of Burundi Truth and Reconciliation Commission, 'Reminder on the current deposition collection phase', 14 June 2017, available at http://cvrburundi.bi/en/2017/07/19/reminder-current-deposition-collection-phase (accessed 1 May 2018).

613 *HRC Burundi Mandate*, *supra* note 349, para. 23(a).

614 OHCHR, 'Human Rights Council holds interactive dialogue with the Commission of Inquiry on Burundi', 19 September 2017, available at http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22103&LangID=E (accessed 1 May 2018).

3.3 Actors under scrutiny

An impartial mandate must permit examination of all relevant actors suspected of committing atrocities. In situations where atrocities were suspected on the part of the government, mandates focussed on human rights violations in concerned territories. For instance, the commissions on Eritrea and North Korea were asked to investigate alleged human rights violations.[615] In situations of sporadic violence involving clashes between governmental forces and militants, mandating authorities referred to human rights 'violations' and 'abuses', which might also encompass actions of non-state actors. For instance, the Myanmar Commission was asked to establish facts regarding alleged human rights violations "by military and security forces" as well as "abuses".[616]

In situations of violence amounting to armed conflict, an impartial mandate must involve an examination of all parties. This issue not only affects impartiality, but the fact-finding process itself, as to "under IHL, rules on the conduct of hostilities necessitate establishing facts with regard to the behaviour of the other party."[617] Some written mandates did not mention actors, but rather instructed commissions to examine violations in the relevant territory.[618] The Security Council instructed its inquiries on Darfur and the CAR to investigate violations "by all parties" to armed conflicts.[619]

In some cases, identification of particular parties to a conflict but not others generated criticisms of bias. All such mandates were in respect of HRC-led inquiries involving Israel. The HRC's first inquiry concerned the conflict between Israel and Hezbollah in Lebanon. The Lebanon Commission was asked to investigate civilian deaths "by Israel in Lebanon" and the "deadly impact of Israeli attacks",[620] omitting the other party to the conflict. Voting against that resolution, Canada stated that as it did not consider the responsibilities of all parties, it was not constructive in promoting human rights, the rule of law, or regional stability.[621] In abstaining, Switzerland considered the mandate "somewhat unbalanced and selective".[622] Also in 2006, the Beit Hanoun Commission was asked to recommend ways "to protect Palestinian civilians against any further Israeli assaults".[623] The Goldstone Commission's original mandate was to investigate violations "by the occupying Power, Israel, against the Palestinian people".[624] Israel rejected these resolutions as biased.[625] Although the written mandate of the 2014 Gaza Commission did not single out Israel, the HRC had not fully heeded earlier criticisms, as its geographic scope was limited to violations "in the Occupied Palestinian Territory."[626]

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615 *Eritrea Mandate*, *supra* note 347, para. 8 and *North Korea Mandate*, *supra* note 346, para. 5.
616 *Myanmar Mandate*, *supra* note 2.
617 Boutruche, *supra* note 28, at 125.
618 *Yugoslavia Mandate*, *supra* note 290; *Rwanda Mandate*, *supra* note 296; *Libya Mandate*, *supra* note 343.
619 *Darfur Mandate*, *supra* note 303, para. 12; *CAR Mandate*, *supra* note 304, para. 24.
620 *Report of the high-level fact-finding mission to Beit Hanoun established under Council resolution S-3/1*, UN Doc. A/HRC/9/26, 1 September 2008, para. 7 [*Beit Hanoun Report*].
621 *Lebanon Press Release*, *supra* note 423.
622 *Ibid*.
623 *Beit Hanoun Mandate*, *supra* note 317, para. 7.
624 *Goldstone Mandate*, *supra* note 340, para. 14.
625 *Israel MFA Press Release*, *supra* note 416.
626 *Gaza Mandate*, *supra* note 340.

The HRC's repeated practice of establishing mandates which refer to alleged violations by one party is unhelpful. Chinkin writes that the HRC's practice suggests that it lacks "political sensibility",[627] as such mandates predictably lead to non-cooperation by concerned states. Such mandates do not create ideal conditions for a principled inquiry and make it very difficult for commissions to alleviate suspicions that they are simply another type of politics.

3.4 Prejudgment of findings

As a general principle, mandates should not presume the existence of facts that are ostensibly yet to be found. Such prejudgment may suggest that a fact-finding exercise is not genuine and is merely a conduit for political objectives. Fact-finding guidelines caution against prejudging findings in the mandate. The Belgrade Rules provide that the mandate should not prejudge the issues to be investigated, the mission's work or its findings.[628] OHCHR writes that mandates should "be drafted in such a way as to enable the [commission] to conduct its work in line with best practice methodology, without prejudging any aspects of its work."[629]

Some UN inquiries into incidents whose facts were unclear were formulated so as not to prejudge findings.[630] However, the mandates of some atrocity inquiries suggested predisposed outcomes. The HRC has condemned violations of human rights and IHL when establishing inquiries ostensibly to investigate them. Sometimes, these conclusions were expressed in the written mandates, such as the Lebanon Commission's instruction to investigate "systematic targeting and killings of civilians by Israel".[631] The original written mandate of the Goldstone Commission instructed that body to "investigate all violations of [IHRL] and [IHL] by the occupying Power, Israel, against the Palestinian people…"[632] Israel rejected the mandate on the basis that it "prejudges the issue at hand, determining at the outset that Israel has perpetrated grave violations of human rights and implying that Israel has deliberately targeted civilians and medical facilities…"[633] In 2014, many states did not support the establishment of an inquiry into Operation Protective Shield for similar reasons. EU members abstained on the basis that the text "prejudges the outcome of the investigation by making legal statements".[634] In 2018, Australia voted against establishing an inquiry into violations in the context of civilian protests in Palestine as it was "concerned that the language of the draft resolution prejudged the outcome of the inquiry."[635] In that case, the HRC condemned "disproportionate

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627 Chinkin, *supra* note 97, at 488.

628 *Belgrade Minimal Rules of Procedure for International Human Rights Fact-Finding Missions* (1981) 75 AJIL 163-165, para. 1. See International Bar Association, *International Human Rights Fact-Finding Guidelines (Lund-London Guidelines) 2009*, para. 6, available at http://www.ibanet.org/Fact_Finding_Guidelines.aspx (accessed 1 May 2018) and *Siracusa Guidelines*, *supra* note 34, Guideline 3.3.

629 *OHCHR Guidance and Practice*, *supra* note 63, at 10.

630 E.g., *UNIIIC Mandate*, *supra* note 87 and *Bhutto Mandate*, *supra* note 87.

631 *Lebanon Mandate*, *supra* note 341, para. 7(a).

632 *Goldstone Mandate*, *supra* note 340, para. 14.

633 *Letter from the Permanent Representative of Israel at the UN Office at Geneva to Richard Goldstone*, 7 April 2009 [*Israel letter to Goldstone Commission*], in *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48, 25 September 2009, at 436 [*Goldstone Report*].

634 *EU Press Release*, *supra* note 421.

635 OHCHR, 'Human Rights Council concludes special session on the deteriorating human rights situation in the occupied Palestinian territory', 18 May 2018, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23107&LangID=E (accessed 18 May 2018).

and indiscriminate use of force by the Israeli occupying forces against Palestinian civilians, including in the context of peaceful protests"[636] in violation of IHL, IHRL and UN resolutions. In some cases, operative paragraphs of mandating resolutions instructed commissions to examine 'alleged' violations,[637] formally insulating mandates from prejudgment, while condemning violations elsewhere in the document. The HRC frequently adopts this practice,[638] but it is not alone. In 2013, the Security Council condemned violations of IHL and human rights when establishing the CAR Commission.[639] In other cases, the Security Council has been more reserved. When establishing the Yugoslavia Commission, the Council expressed alarm at "continuing reports"[640] of violations, and when creating the Darfur Commission, urged parties to respect IHL and human rights and instructed the Commission to investigate "reports of violations" and "determine also whether or not acts of genocide have occurred".[641]

Not every recognition of violations amounts to predetermination. The HRC is empowered to "respond promptly to human rights emergencies",[642] requiring situations of concern to have been recognised as such in order for an inquiry to be established. Moreover, in practice, the political momentum for HRC members to decide to establish in inquiry is often built through other credible reports of violations. For instance, when establishing the North Korea Commission, the HRC took note of reports over a period of ten years by the Special Rapporteur,[643] and condemned human rights violations in the DPRK on the basis of those reports.[644] The creation of inquiries in such circumstances is underscored by the ECOSOC resolution authorising UNCHR to investigate "situations which *reveal* a consistent pattern of violations of human rights".[645] Unlike investigations of genuinely unknown or disputed facts, UN atrocity inquiries are usually established to examine suspected violations in order to expose their gravity and inspire corrective action. Whether recognition of violations amounts to wrongful prejudgment should be considered in light of the wider context.

4. Appointment and Composition of Commissions

Mandating authorities appoint individuals to serve on UN atrocity inquiries. This Section examines how mandating authorities' appointment processes and selections informed commissions' roles and functions. Section 4.1 discusses mandating authorities' *ad hoc* appointment processes and efforts to render these more transparent and standardised. Section 4.2 discerns the emphasis placed on commissioner independence and impartiality in different inquiry settings and moments, and safeguard mechanisms to address concerns of bias. Finally, individuals are appointed in light of their education, skills and expertise, and carry those

[636] *Gaza Protests Mandate*, *supra* note 340, para. 1.
[637] E.g., *Eritrea Mandate*, *supra* note 347, para. 8.
[638] E.g., *East Timor Mandate*, *supra* note 338, para. 2; *UNCHR Gaza Mandate*, *supra* note 339 and *Libya Mandate*, *supra* note 343, para. 1.
[639] *CAR Mandate*, *supra* note 304, para. 17.
[640] *Yugoslavia Mandate*, *supra* note 290, Preamble.
[641] *Darfur Mandate*, *supra* note 303, para. 12.
[642] GA Res. 60/251, para. 5(f).
[643] *North Korea Mandate*, *supra* note 346, Preamble.
[644] *Ibid.*, para. 1.
[645] ECOSOC Res. 1235 (XLII), para. 3 (emphasis added).

qualities with them as commissioners. Section 4.3 examines mandating authorities' practice with respect to the expertise deemed relevant to commissions' mandates.

4.1 Appointment processes

The decision on the composition of a UN atrocity inquiry normally rests with the mandating authority, which may appoint commissioners directly or instruct another UN organ to do so on its behalf. The Security Council and General Assembly have requested the Secretary-General to appoint commissioners to inquiries established by them.[646] Commissions established by the Secretary-General have been appointed in different ways. The Secretary-General appointed some commissioners directly[647] and OHCHR was involved in other selection decisions.[648] The Secretary-General consulted with ECOWAS and the AU regarding the Guinea Commission,[649] and the Palmer Commission was established after "intensive consultations" with Turkey and Israel.[650] HRC-led inquiries are appointed by the President of the Council, who "generally seeks the views of States, [NGOs] and OHCHR regarding possible candidates".[651] Experts registered with OHCHR may be considered for appointment, and OHCHR reviews potential candidates, but the final decision is taken by the President.[652] While processes differ for various mandating authorities, all are *ad hoc* appointments.

There has been periodic interest in establishing lists of experts eligible for appointment to UN inquiries. A roster would make the appointment process more transparent and limit a mandating authority's ability to select individuals on the basis of political factors. The use of a roster is not unknown in the UN system. Some experts are appointed from a roster, such as panels of experts attached to Security Council sanctions committees,[653] experts on investigations into biological and chemical weapons[654] and special procedures mandate-holders.[655] While there have been initiatives to establish rosters of fact-finders, these have not been embraced in practice. Such initiatives include the General Assembly's UN Panel for Inquiry and Conciliation,[656] its instruction in 1967 for the Secretary-General to establish a roster of fact-finding experts[657] and provision in the *1991 Declaration* for the Secretary-

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[646] *Yugoslavia Mandate*, *supra* note 290; *Rwanda Mandate*, *supra* note 296; *Darfur Mandate*, *supra* note 303; *CAR Mandate*, *supra* note 304; *Cambodia Mandate*, *supra* note 323.

[647] *Sri Lanka Report*, *supra* note 29.

[648] *Abidjan Report*, *supra* note 43, para. 2; *Timor-Leste Report*, *supra* note 376, para. 6.

[649] *Guinea Report*, *supra* note 39, para. 6.

[650] *Palmer Mandate*, *supra* note 315.

[651] *OHCHR Guidance and Practice*, *supra* note 63, at 18

[652] *Ibid.*, at 18.

[653] United Nations, 'Security Council Affairs Division Roster of Experts', available at http://www.un.org/sc/suborg/en/sanctions/expert-roster (accessed 1 May 2018).

[654] UN Office for Disarmament Affairs, 'Secretary-General's Mechanism for Investigation of Alleged Use of Chemical and Biological Weapons', available at http://www.un.org/disarmament/wmd/secretary-general-mechanism (accessed 1 May 2018).

[655] *Letter from the Chairperson of the Coordination Committee of Special Procedures to the President of the Human Rights Council dated 4 September 2007*, available at http://www2.ohchr.org/english/bodies/chr/special/docs/cclettertechnical.pdf (accessed 1 May 2018).

[656] *Articles Relating to the Composition and Use of the Panel for Inquiry and Conciliation*, Art. 1, annexed to GA Res. 268D (III), 28 April 1949. See Douglas Coster, 'The Interim Committee of the General Assembly: An Appraisal', (1949) 3(3) *International Organization* 444-458, at 455.

[657] GA Res. 2329 (XXII), 18 December 1967. See Antonio Cassese, 'Fostering Increased Conformity with International Standards: Monitoring and Institutional Fact-Finding', in Antonio Cassese (ed.), *Realizing*

General to maintain lists of experts available for fact-finding missions.[658] There has been a recent resurgence in calls to establish a roster for commissions.[659] To date, appointment processes remain *ad hoc* and largely opaque.

4.2 Commissioner independence and impartiality

Fact-finding guidelines provide that commissioners must "have a proven record of independence and impartiality",[660] act in their personal capacity and not be instructed by governments or other actors.[661] Impartiality may be understood as a commissioner's ability "to abstract him/herself from his prior opinions, to reduce oneself to one's function, to identify in oneself what are sources of bias",[662] while independence refers to a lack of ties or dependence upon parties to a dispute or other relevant actors. Ratner argues that independence is crucial for UN human rights fact-finding bodies, as it "creates distance between the report and those who will use it, permitting the [Secretary-General] or others seeking to promote accountability to take a sort of political cover behind the reputation of the commissioners."[663] The importance of independence and impartiality wax and wane across temporal and institutional contexts. This Section outlines these different emphases (4.2.1), the contemporary problem of prior statements (4.2.2) and independence and impartiality safeguards in practice (4.2.3).

4.2.1 Emphasis on independence and impartiality

Commissioners serving on international atrocity inquiries have not always served in their personal capacity. Historic inquiries such as the 1919 Commission and the UNWCC were composed of representatives of Allied governments. Early UN atrocity inquiries were similarly composed of representatives of UN member states. The President of the General Assembly identified the member states which would serve on the Mozambique Commission,[664] and individual commissioners were appointed by their governments.[665] A similar procedure was adopted in respect of the Vietnam Commission.[666] Acceptance of this practice was illustrated by draft rules on fact-finding prepared in 1970 by the Secretary-General (*Draft Model Rules 1970*) which provided that fact-finding bodies could be composed of 'individuals' or 'states'.[667]

Critiques centring on lack of independence began to surface in the 1970s in relation to UN human rights bodies composed of representatives of states which did not have friendly

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Utopia: The Future of International Law (Oxford: OUP, 2012) 295-303 [Cassese 2012] and Kemileva *et al*, *supra* note 440, at 30.

658 *1991 Declaration*, *supra* note 25, Art. 14.

659 Cassese 2012, *supra* note 657, at 303.

660 *OHCHR Guidance and Practice*, *supra* note 63, at 19.

661 *1991 Declaration*, *supra* note 25, Art. 25; *Principles Against Impunity*, *supra* note 54, Principle 7.

662 Mégret 2011, *supra* note 51, at 44.

663 Ratner 2015, *supra* note 401, at 106.

664 GA Res. 3144 (XXVIII) 12 December 1973, para. 1 and *Mozambique Report*, *supra* note 253, para. 8.

665 *Mozambique Report*, *supra* note 253, para.10.

666 *Vietnam Report*, *supra* note 273, at 5.

667 *Draft Model Rules of procedure suggested by the Secretary-General of the UN for ad hoc bodies of the United Nations entrusted with studies of particular situations alleged to reveal a consistent pattern of violations of human rights*, UN Doc. E/CN.4/1021/Rev.1, 30 October 1970, rule 4 [*Draft Model Rules 1970*].

relations with states under scrutiny.[668] For instance, a General Assembly committee which investigated the human rights situation in Israeli-occupied territories was composed of individuals from Ceylon (Sri Lanka), Somalia and Yugoslavia,[669] where the two latter states had no diplomatic relations with Israel. Israel protested its composition, arguing that unless fact-finding was carried out under conditions ensuring objectivity, it was a "worthless exercise, that simply converts the [UN] itself into a vehicle for propaganda and political warfare."[670] The independence and impartiality of the Working Group on Southern Africa was similarly brought into question as three of its six members were state representatives and at least three members had previously made critical statements concerning the racial policies of South Africa, Portugal and Southern Rhodesia.[671]

Efforts have since been made to improve the independence and impartiality of UN fact-finding. In 1970, ECOSOC reported that the composition of a human rights body "must be such as to provide a reliable guarantee of its competence and impartiality."[672] The *Draft Model Rules 1970* proposed to solemnise commissioners' commitment to independence through a declaration, similar to a judicial oath.[673] When that document was revised by a UNCHR working group, this rule was removed, apparently because "it would not be appropriate to require this solemn declaration from representatives of States".[674] In 2015, OHCHR formulated model rules of procedure (*OHCHR Model Rules*) which provide that commissioners must promise to exercise their functions "independently, impartially, loyally and conscientiously... without seeking or accepting instructions from any Government or any other source."[675]

Against this background, independence and impartiality are generally required of individuals serving on modern UN atrocity inquiries. In almost all cases, commissioners were appointed in their personal capacity.[676] For instance, the Guinea Commission's terms of reference provided that it was to be composed of three members with "a reputation for probity and

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668 Franck and Fairley, *supra* note 91, at 313.

669 The Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories was to be "composed of three Member States": GA Res. 2443 (XXIII), 19 December 1968. Composed of H. Amerasinghe (UN Permanent Representative of Ceylon); Abdulrahim Abby Farah (UN Permanent Representative of Somalia) and Borut Bohte (Yugoslavian law professor and politician).

670 *Note Verbale from the Permanent Representative of Israel to the Secretary-General*, 6 January 1970, in *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories*, UN Doc. A/8089, 5 October 1970, para. 11. See Franck and Fairley, *supra* note 91, at 314.

671 Robert Miller, 'United Nations Fact-Finding Missions in the Field of Human Rights', (1970-1973) *Australian Yearbook of International Law* 40-50, at 45.

672 *Report of ECOSOC on its 25th Session*, UN Doc. A/8003 (1970) at 49, cited in Morris Greenspan, 'Human Rights in the Territories Occupied by Israel', (1972) 12(2) Santa Clara L Rev 377-402, at 379.

673 *Draft Model Rules 1970*, *supra* note 667, Rule 6.

674 *Model rules of procedure for United Nations bodies dealing with violations of human rights: Report of the Working Group established under Resolution 14 (XXVII) of the Commission on Human Rights*, UN Doc. E/CN.4/1086 (1972) at 4 [*UNCHR Model Rules*], cited in Franck and Fairley, *supra* note 91, at 315.

675 *Model Standard Rules of Procedure for Commissions of Inquiry/Fact-Finding Missions on Violations of International Human Rights Law and International Humanitarian Law*, Rule 3, in *OHCHR Guidance and Practice*, *supra* note 63, Annex II [*OHCHR Model Rules*]. See *Siracusa Guidelines*, *supra* note 34, Guideline 4.4.

676 E.g., *Report of the Secretary-General on the Establishment of the Commission of Experts Pursuant to Paragraph 1 of Security Council Resolution 935 (1994) of 1 July 1994*, UN Doc. S/1994/879, 26 July 1994, para. 12 [*SG Report on Rwanda*].

impartiality."[677] The Palmer Commission is an exception to this trend, as it was composed of representatives of Turkey and Israel alongside two independent commissioners.[678] As its central goal was to improve diplomatic relations,[679] the Palmer Commission finds synergies with inquiry under the Hague Conventions, where states participate in appointing commissioners and an inquiry requires the inclusion of a neutral element, rather than fully independent commissioners.[680]

4.2.2 The problem of prior statements

UN regulations and guidelines acknowledge that prior statements may affect the impartiality and independence of fact-finding. According to the *Regulations for Experts on Mission*, which apply to commissioners,[681] experts must avoid "any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status."[682] A 2015 guidance document for commissions of inquiry published by OHCHR (*OHCHR Guidance and Practice*) states that it is essential that "the background of candidates, prior public statements or political or other affiliations do not affect their independence or impartiality, or create perceptions of bias."[683] As observed by Geoffrey Robertson, professional expertise is insufficient to guard against bias, as "some undoubted experts will already have committed themselves to an opinion, and could therefore be criticised for pre-judgment."[684]

Although commissions are supposed to be impartial, a certain tension between impartiality and activism is seen in practice, particularly in relation to HRC-led inquiries. Several commissioners were accused of bias based on their prior statements.[685] For example, UN Watch, an NGO, petitioned for Christine Chinkin to recuse herself from the Goldstone Commission because of a public letter which she had signed onto characterising Israeli military actions in 2009 as aggression,[686] which it said gave rise to actual or apparent bias.[687]

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677 *Guinea TOR*, *supra* note 311, para. 5.

678 Composed of Geoffrey Palmer (former Prime Minister of New Zealand), Alvaro Uribe (former President of Colombia), Joseph Ciechanover Itzhar (Israel) and Süleyman Özdem Sanberk (Turkey).

679 *Palmer Mandate*, *supra* note 315. See Deane-Peter Baker, 'Ethics or Politics? The Palmer Commission Report on the 2010 Gaza Flotilla Incident', in David Lowell (ed.), *Investigating Operational Incidents in a Military Context: Law, Justice and Politics* (Leiden: Brill Nijhoff, 2015) 123-145, at 123.

680 *First Hague Convention*, *supra* note 11, Arts. 11 and 32; *Second Hague Convention*, *supra* note 62, Arts. 12 and 45. See *Dogger Bank Mandate*, *supra* note 73 and Wadlow, *supra* note 234, at 4.

681 *Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission*, UN Doc. ST/SGB/2002/9 (2002) [*Regulations for Experts on Mission*]. See *1991 Declaration*, *supra* note 25, Art. 24; 'Terms of Reference of the Syria Commission', para. 4, annexed to *Syria First Report*, *supra* note 32, and *Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance*, UN Doc. A/HRC/15/21, 27 September 2010, para. 7(b) [*Gaza Flotilla Report*].

682 *Ibid.*, Reg. 2(d).

683 *OHCHR Guidance and Practice*, *supra* note 63, at 18.

684 Geoffrey Robertson, 'Human Rights Fact-Finding: Some Legal and Ethical Dilemmas', (2010) 3 UCL Hum Rts Rev 15-43, at 22.

685 Anti-Defamation League, 'ADL Has 'Serious Doubts' About Impartiality of U.N. Fact Finding Mission on Israeli Settlements', 9 July 2012, available at http://www.adl.org/news/press-releases/adl-has-serious-doubts-about-impartiality-of-un-fact-finding-mission-on-0 (accessed 1 May 2018).

686 'Israel's bombardment of Gaza is not self-defence – it's a war crime', *Sunday Times*, 11 January 2009.

687 UN Watch, 'Request to disqualify Prof. Christine Chinkin from UN Fact Finding Mission on the Gaza Conflict', 20 August 2009, available at

In 2014, Israel, UN Watch and some academics criticized the appointment of William Schabas to the Gaza Commission, citing his prior statements concerning President Netanyahu which were said to show an anti-Israel bias.[688] In both cases, the HRC did not replace those commissioners on the basis of their prior statements. In 2015, Israel renewed its calls for Schabas' resignation because of a prior "contractual relationship with the Palestinian side".[689] Schabas subsequently resigned.[690]

The HRC's practice of appointing commissioners who have publicly weighed in on situations under scrutiny may be by design. Frédéric Mégret observes, "in some cases individuals will have been chosen for certain international mandates precisely because of their commitment to a cause understood either generally or specifically".[691] Challenges on the basis of prior statements also results in part from "revolving doors of international academia and international professional opportunities."[692] This observation is apt for the above examples, where statements were generally issued in commissioners' capacities as academics and human rights advocates.

It is arguable that there should be greater tolerance for prior statements in the context of UN atrocity inquiries, in light of the need for commissioners to hold relevant expertise. Individuals appointed to judicial institutions might be expected to anticipate topics to be avoided,[693] but this may be more difficult in respect of temporary inquiries. It is also questionable the extent to which potential commissioners should engage in self-censorship, especially when employed as academics. Mégret advises that impartiality should not be approached too rigorously and that apprehensions of bias should be assessed according to factors including the focus of the statement, whether it was proffered in a professional or

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http://secure.unwatch.org/site/apps/nlnet/content2.aspx?c=bdKKISNqEmG&b=1330819&ct=7311887 (accessed 1 May 2018) [*UN Watch Recusal Request*].

688 Israel Ministry of Foreign Affairs, 'Letter to UN Sec-Gen on appointment of William Schabas', 12 August 2014, available at http://mfa.gov.il/MFA/InternatlOrgs/Issues/Pages/Letter-to-UN-Sec-Gen-on-appointment-of-Schabas-12-Aug-2014.aspx (accessed 1 May 2018); UN Watch, 'Request for William Schabas to Recuse Himself for Bias or the Appearance Thereof', 4 September 2014, available at http://www.humanrightsvoices.org/assets/attachments/documents/UN_WATCH_REQUEST_TO_DISQUALIFY_WILLIAM_SCHABAS.pdf (accessed 1 May 2018) and Joseph Weiler, 'After Gaza 2014: Schabas', *EJIL:Talk*, 4 November 2014, available at http://www.ejiltalk.org/after-gaza-2014-schabas (accessed 1 May 2018).

689 *Letter from the Permanent Representative of Israel to the President of the Human Rights Council*, 30 January 2015.

690 *Letter of resignation from William Schabas to UN Human Rights Council President*, 2 February 2015, available at http://www.humanrightsvoices.org/assets/attachments/documents/Letter_of_resignation_from_William_Schabas_to_Joachim_Ruecker.pdf (accessed 1 May 2018). See *Letter from William Schabas to UN Human Rights Council President Joachim Ruecker*, 2 February 2015, available at http://www.humanrightsvoices.org/assets/attachments/documents/Letter_From_William_Schabas_to_Joachim_Ruecker.pdf (accessed 1 May 2018), responding to conflict of interest allegation.

691 Mégret 2011, *supra* note 51, at 37.

692 *Ibid.*, at 35.

693 See *Prosecutor v. Thomas Lubanga Dyilo*, 'Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*', ICC-01/04-01/06-3040-Anx, 11 June 2013, paras. 33-39.

personal capacity, and the passage of time.[694] He surmises that "[t]he problem is, at least formally, that the [HRC] is insistent that human rights mandates involve impartiality."[695]

Recent HRC practice in respect of the Myanmar Commission suggests that the HRC may be changing its position towards prior statements. That Commission was established in March 2017[696] and its composition was announced in May.[697] In July, the HRC President removed Indian lawyer Indira Jaising as the head of the inquiry and replaced her with Marzuki Darusman, an Indonesian lawyer who had served as Special Rapporteur on North Korea and sat on the North Korea Commission.[698] The HRC's press release does not give a reason for this change. Media reports quote an anonymous UN official as stating, "Jaising agreed to step down after the council president raised concerns about public comments she made that could be seen as indicating bias,", and that "[i]f there's any perceived bias... it undermines the credibility of the mission before it has started".[699] In May 2017, Jaising had been quoted by *Al Jazeera* as stating, "[t]he situation of the Rohingya community in Myanmar is especially deplorable because they face the risk of a genocide".[700] This recent practice suggests that the HRC may be becoming more responsive to apprehensions of bias from commissioners' prior statements.

4.2.3 Ensuring impartiality and independence in practice

There is little by way of formal recourse to mandating authorities for raising and responding to concerns regarding commissioners' independence or impartiality. Recusal is "the preferred route to avoiding partiality"[701] in practice, but there are no binding UN rules to this effect[702] and procedures governing challenges to independence are under-developed. Mégret observes that the mandates of international experts "stand in a relative grey zone when it comes to impartiality mechanisms, given the more explicitly political nature of their designation."[703]

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694 *Ibid.*, at 48-63.
695 *Ibid.*, at 46-47.
696 *Myanmar Mandate*, *supra* note 2.
697 OHCHR, 'President of Human Rights Council appoints Members of Fact-finding Mission on Myanmar', 30 May 2017, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21671&LangID=E (accessed 1 May 2018).
698 OHCHR, 'Human Rights Council President announces appointment of Marzuki Darusman as Chair of Myanmar Fact-finding Mission', 27 July 2017, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21914&LangID=E (accessed 1 May 2018).
699 'New Chairman Appointed to U.N. Mission Probing Myanmar Abuses', *Reuters*, 27 July 2017, available at http://www.reuters.com/article/us-myanmar-rohingya-un-idUSKBN1AC1O1 (accessed 1 May 2018).
700 'UN appoints team to probe crackdown against Rohingyas', *Al Jazeera*, 30 May 2017, available at http://www.aljazeera.com/news/2017/05/appoints-team-probe-crackdown-rohingyas-170530133709053.html (accessed 1 May 2018).
701 Mégret 2011, *supra* note 51, at 64.
702 Xiaodan Wu, 'Quality Control and the Selection of Members of International Fact-Finding Mandates', in Bergsmo, *supra* note 94, 193-210, at 205.
703 Mégret 2011, *supra* note 51, at 38.

As commissioners hold privileges and immunities of UN experts on mission,[704] concerns as to their ability to carry out their mandates might be guided by regulations applicable to those positions. The *Regulations for Experts on Mission* contain many duties, but its accountability section is brief, simply stating that experts "are accountable to the [UN] for the proper discharge of their functions."[705] The Commentary to the *Regulations* states:[706]

> The method of accountability may vary. For officials appointed by the General Assembly, that accountability would be a matter for the Assembly. For experts on mission, it would be the Secretary-General or the appointing authority who could terminate an assignment or otherwise admonish the expert.

The Commentary clarifies that it is for the UN to "characterize an [expert's] action or pronouncement as adversely reflecting on the status of an official or an expert on mission".[707] The non-binding Updated Principles to Combat Impunity 2005 (*Principles Against Impunity*) provide that sitting commissioners should not be removed "except on grounds of incapacity or behaviour rendering them unfit to discharge their duties and pursuant to procedures ensuring fair, impartial and independent determinations."[708] The *OHCHR Model Rules* do not discuss recusal, simply providing that if a commissioner "for any reason, is no longer able to fulfil his or her functions,"[709] a new commissioner should be promptly appointed. In the absence of clear rules, some NGOs advocate that regulations of international criminal tribunals should guide UN fact-finding.[710] While judicial procedures may be too rigorous, the general lack of guidance does not indicate a strong commitment on the part of mandating authorities to ensuring impartiality.

4.3 Commissioner expertise

Fact-finding guidelines provide that commissioners should possess the skills, knowledge and qualifications "required to carry out the mandate."[711] Commissioners' knowledge and expertise shape the inquiry report, as "facts deemed relevant and the recommendations made on the basis of the fact-finding are… determined by the expertise of the commissioners."[712] The expertise required should reflect the inquiry's investigative focus. For instance, naval officers served on inquiries into maritime incidents and early Security Council inquiries into threats to international security were composed of diplomats and military experts.[713] Early UN human rights inquiries were also composed of diplomatic personnel.[714] UNCHR expressed an

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[704] Convention on the Privileges and Immunities of the United Nations 1946, 1 UNTS 15, Art. 22 and *1991 Declaration*, *supra* note 25, Art. 24. See *SG Report on Rwanda*, *supra* note 676, para. 16; *Guinea TOR*, *supra* note 311, para. 3(f) and *HRC Burundi TOR*, *supra* note 495, para. V(i).

[705] *Regulations for Experts on Mission*, *supra* note 681, Reg. 3.

[706] *Ibid.*.

[707] *Ibid.*, Commentary to Reg. 2(d).

[708] *Principles Against Impunity*, *supra* note 54, Principle 7.

[709] *OHCHR Model Rules*, *supra* note 675, Rule 6.

[710] *UN Watch Recusal Request*, *supra* note 687, para. 25.

[711] *Siracusa Guidelines*, *supra* note 34, Guideline 4.

[712] Schwöbel-Patel, *supra* note 103, at 149.

[713] E.g., the Somalia Commission was composed of Matthew Ngulube (Chief Justice of Zambia) and military officers Lt. General Gustav Hagglund (Finland) and Lt. General Emmanuel Erskine (Ghana).

[714] E.g., the Mozambique Commission was composed of Shailendra Kumar Upadhyay (former Nepali Permanent Representative to the UN); Guenter Mauersberger (German Ambassador to Ethiopia); R. Martinez

interest in appointing legal experts, resolving that the Working Group of Experts on Southern Africa was to be composed of "eminent jurists and prison officials".[715] In reality, appointees included diplomatic personnel.[716] Scholars have called for further professionalisation of UN inquiries since the 1970s.[717] This is not to say that diplomats were entirely unqualified; Iain Guest notes that appointing the UK representative to UNCHR as chairperson of its Working Group on Enforced Disappearances was advantageous: "as a former government minister he would be able to understand, and talk to, governments."[718] However, such appointments emphasised the diplomatic tradition and an inclination to appoint institutional insiders. This practice tapered off in the 1990s, and it is now rare for government officials to be appointed as commissioners. An exception is the Palmer Commission, which was composed of former heads of state and state representatives, in line with its more diplomatic approach.

As commissions' mandates have juridified, so too has commissioners' expertise. The Yugoslavia Commission was initially headed by IHL expert Frits Kalshoven, and later by international law professor Cherif Bassiouni.[719] The Secretary-General informed the Security Council that in selecting the Rwanda Commission, he would "take into account their qualifications in the areas of human rights, humanitarian law, criminal law and prosecution, as well as their integrity and impartiality."[720] The Darfur Commission was headed by former ICTY Judge Antonio Cassese and inquiries into Libya,[721] Syria,[722] and the DPRK[723] counted international judges, special rapporteurs and prosecutors among commission members. Some mandating authorities expressly required that commissions include legal experts.[724] For instance, the Security Council specified that the CAR Commission should include experts in IHL and human rights,[725] and the Secretary-General specified that those appointed to the Mali Commission must have expertise in "[IHRL] and/or [IHL] and/or [ICL]".[726]

Ordonez (former Permanent Representative of Honduras to the UN); Blaise Rabetafika (Representative of Madagascar to the UN) and Severre Johansen (Norwegian politician).

715 UNCHR Res. 2 (XXIII), 6 March 1967.

716 Composed of Ibrahim Boye (Permanent Representative of Senegal to the UN), Felix Ermacora (Austrian law professor), N. Jha (Permanent Mission of India to the UN), Waldo Waldron-Ramsey (Tanzanian Mission to the UN), Branimir Jankovic, Yugoslavian law professor and diplomat) and Luis Marchand-Stens (law professor serving in Peruvian embassy in Washington).

717 Miller, *supra* note 671, at 48.

718 Iain Guest, *Behind the Disappearances: Argentina's Dirty War against Human Rights and the United Nations* (Philadelphia: University of Pennsylvania Press, 1990) at 205.

719 Also composed of William Fenrick (Canadian military lawyer); Keba M'baye (Senegalese judge) and Torkel Opsahl (Norwegian human rights expert).

720 *SG Report on Rwanda*, *supra* note 676, para. 11. The Rwanda Commission was composed of Atsu-Koffi Amega (Chief Justice of Togo), Haby Dieng (Advocate-General of the Supreme Court of Guinea) and Salifou Fomba (Legal Counsel to the Ministry of Human Rights of Mali).

721 Composed of M. Cherif Bassiouni, Phillipe Kirsch (former ICC President) and Asma Khader, a senior human rights advocate.

722 Composed of Paulo Sergio Pinheiro (Brazil); Karen Koning AbuZayd (US); Carla Del Ponte (Switzerland). Previously Vitit Muntarbhorn (Thailand) and Yakın Ertürk (Turkey).

723 Composed of Michael Kirby (former Judge of High Court of Australia), Marzuki Darusman (Indonesia; Special Rapporteur on North Korea) and Sonja Biserko (Serbian human rights campaigner).

724 E.g., *SC Burundi Mandate*, *supra* note 301, para. 2; *Lebanon Mandate*, *supra* note 341, para. 7.

725 Composed of Philip Alston (Australia), Fatimata M'Baye (Mauritania) and Bernard Acho Muna (Cameroon).

726 *Mali TOR*, *supra* note 312, para. 4(a).

It should not be overlooked that other types of expertise remain relevant.[727] On occasion, mandating authorities provided for other types of expertise. In respect of the Mali Commission, individuals were appointed in light of criteria including knowledge of principles and processes of fact-finding or investigations, violence against persons, and the Malian and regional contexts.[728] The HRC resolved that relevant fields of expertise for the Myanmar Commission included forensics and sexual and gender-based violence.[729] Such expertise may be supplied via UN support staff,[730] experts contributed by states,[731] or Justice Rapid Response.[732]

Some commissions faced criticism that commissioners lacked relevant expertise. Lyal Sunga critiques the Rwanda Commission on the basis that its members "claimed no specialist expertise" in ICL, IHL or human rights, and that a "more international spectrum of experience and expertise could have lent greater credibility to this important fact-finding effort."[733] In a similar vein, Xiaodan Wu criticises the Israeli Settlements Commission as lacking expertise in IHL.[734] Critiques are particularly loud from IHL experts who warn against the appointment of human rights lawyers to assess IHL violations, due to the risks of inaccurate interpretation and application of IHL norms.[735] As commissions may collect information in anticipation of prosecutions, expertise relating to evidence collection is highly relevant. Dan Saxon writes that commissioners should have expertise in "international law and accountability"[736] rather than career diplomats or academics. Such critiques promote commissions' further juridification through the expertise of those implementing the mandates.

Commissioners' credentials and professional standing may "lend legitimacy to the mission"[737] and raise the profile of an inquiry. The public relations practices of some mandating authorities seem to link commissioners' credentials to the authority of inquiries on which they serve. The HRC routinely publishes biographies of commissioners on webpages dedicated to its commissions.[738] Although Security Council-led commissions do not have the same online

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727 Chinkin, *supra* note 97, at 489.

728 *Mali TOR*, *supra* note 312, para. 4(b), (c) and (d).

729 *Myanmar Mandate*, *supra* note 2, para. 13. See *HRC Burundi Mandate*, *supra* note 349, para. 25.

730 E.g., *Updated report of OHCHR on human rights and forensic science*, UN Doc. A/HRC/4/103, 27 February 2007, para. 22.

731 *Second interim report of the Commission of Experts established pursuant to Security Council resolution 780 (1992)*, UN Doc. S/26545, 6 October 1993, paras. 96-100.

732 Justice Rapid Response, *Annual Report 2014*, at 8, available at http://www.justicerapidresponse.org/wp-content/uploads/2015/03/Annual_Report_Final_Email.pdf (accessed 1 May 2018).

733 Lyal Sunga, 'How Can UN Human Rights Special Procedures Sharpen ICC Fact- Finding?', (2011) 15(2) *The International Journal of Human Rights* 187-205, at 195 [Sunga 2011].

734 Wu, *supra* note 702, at 202.

735 E.g., Theodor Meron, 'The Humanization of Humanitarian Law', (2000) 94 AJIL 239-278, at 247; Richemond-Barak, *supra* note 513; Boutruche, *supra* note 28, at 107; Charles Garraway, 'Armed Conflict and Law Enforcement: Is There a Legal Divide?' in Marielle Matthee, Brigit Toebes and Marcel Brus (eds), *Armed Conflict and International Law: In Search of the Human Face* (The Hague: TMC Asser Press, 2013) 259-284.

736 Dan Saxon, 'Purpose and Legitimacy in International Fact-Finding Bodies', in Bergsmo, *supra* note 94, 211-224, at 223.

737 Grace and Bruderlein, *supra* note 26, at 38.

738 E.g., OHCHR, 'Biographies of the members of the Fact-Finding Mission on Myanmar', available at http://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/Members.aspx (accessed 1 May 2018) and 'Biographies of the members of the Commission of Inquiry on Burundi', available at http://www.ohchr.org/EN/HRBodies/HRC/CoIBurundi/Pages/Commissioners.aspx (accessed 1 May 2018).

presence as those of the HRC, the Secretary-General has highlighted individuals' expertise when announcing commissioner appointments.[739] The Darfur Commission included commissioners' biographies in its report.[740] *OHCHR Guidance and Practice* cautions that while "having eminent personalities as members could be beneficial for mandates that require a high-profile approach", it should not be the sole criterion for appointment.[741]

The emphasis on legal expertise is consistent with the juridified investigative focus of modern UN atrocity inquiries. As noted by Boutruche, it seems "virtually impossible to conduct fact-finding without knowledge of the law because it is only through legal expertise that one can select the relevant facts from the huge quantity of information around a given incident."[742] Commissioners' legal expertise may also juridify the process of mandate implementation. Christine Schwöbel-Patel observes that as the "perspective from which the facts are considered not only depends on the mandate but also on the members appointed to the commission".[743] This change marks a turn away from diplomatic settlement towards a more juridified model. More fundamentally, participation of international legal experts may impart the gravitas and authority of international law to commissions, even though they remain formally non-judicial bodies.

5. Decisions on Operational Aspects

The roles and functions of UN atrocity inquiries are affected by decisions regarding their working methods and operations. This Section first discusses the extent to which such matters were left to commissions' discretion, including initiatives to standardize fact-finding methods (5.1). It then discusses how mandating authorities' decisions in respect of the allocation of resources and time limits for reporting have important operational consequences (5.2).

5.1 Scope of discretion accorded to commissions

Mandating authorities identified general tasks to be carried out such as to establish facts,[744] conduct investigations,[745] determine responsibilities[746] and make recommendations.[747] Instructions were often generalized, with operational decisions made by commissions. The conferral of broad discretion upon commissions to decide their own fact-finding approaches and working methods creates distance between commissions and mandating authorities, which in turn promotes a principled approach grounded in autonomy and impartiality.

Conferring broad discretion to commissions might also be explained by pragmatic factors such as the difficulty of reaching consensus regarding technical elements, or that mandating authorities are simply uninterested in such details. However, the example of the Palmer

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[739] E.g., United Nations, 'Secretary-General Announces Members of Central African Republic Commission of Inquiry to Investigate Events since 1 January 2013', UN Doc. SG/A/1451-AFR/2799, 22 January 2014, available at http://www.un.org/press/en/2014/sga1451.doc.htm (accessed 1 May 2018).

[740] *Darfur Report*, *supra* note 32, at 165.

[741] *OHCHR Guidance and Practice*, *supra* note 63, at 19.

[742] Boutruche, *supra* note 28, at 111.

[743] Schwöbel-Patel, *supra* note 103, at 148.

[744] E.g., *SC Burundi Mandate*, *supra* note 301.

[745] E.g., *Darfur Mandate*, *supra* note 303; *Lebanon Mandate*, *supra* note 341 and *Libya Mandate*, *supra* note 343.

[746] *Guinea Mandate*, *supra* note 311.

[747] E.g., *Libya Mandate*, *supra* note 343.

Commission indicates that where a commission is intended to improve diplomatic relations, mandating authorities prefer to retain more control over the fact-finding process. The Secretary-General set out the Palmer Commission's working methods in comprehensive terms of reference[748] and a separate document.[749] The Commission received information through 'Points of Contact' designated by Israel and Turkey, exclusively obtaining information "through diplomatic channels".[750] The Secretary-General's involvement in setting down its working methods reflects the fact that these aspects were negotiated by Israel and Turkey. Involving states in this way encouraged their cooperation. The close association between the Palmer Commission and its mandating authority was advantageous in this setting. The Commission's curtailed autonomy seemed to generate trust on the part of concerned states and reflected its more pragmatic function.

Requiring commissions to determine their own working methods promotes independence from mandating authorities but is also impugned as producing unreliable reports. Martin and Villarreal Sosa argue that the lack of a standardized methodological framework "often results in the utilization of flawed methodology, which in turn leads to incorrect conclusions, and compromised relationships with Member States."[751] Such observations have led to calls for greater standardisation of commissions' working methods.[752] Debates on the merits of standardising inquiry have oscillated between concerns of flexibility/arbitrariness and certainty/rigidity.[753] In 1968, noting that problems associated with *ad hoc* fact-finding, the International Conference on Human Rights recognised the "importance of well-defined rules of procedure for the orderly and efficient discharge of their functions by [UN] bodies concerned with the field of human rights"[754] and recommended the preparation of model rules of procedure. The resulting *Draft Model Rules 1970* were subsequently substantially revised and not adopted by ECOSOC.[755] The revised rules did not provide guidance on many important aspects such as witness testimony.[756] Franck and Fairley write, "[f]or those concerned with credibility and due process in fact-finding, the model rules are not the answer".[757] The *1991 Declaration* did not much advance this state of affairs, including just two provisions concerning the right of concerned states to express their views and use of "appropriate rules of procedure" to ensure fair hearings.[758]

In 2001, Bassiouni lamented that after fifty years of UN practice, "there is no standard operating procedure for fact-finding missions", resulting in "little consistency and predictability as to the methods and outcomes."[759] *OHCHR Guidance and Practice* represents

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[748] *Palmer TOR*, *supra* note 316, para. 2.
[749] 'Method of Work of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident,' in *Palmer Report*, *supra* note 316, at 13.
[750] *Palmer Report*, *supra* note 316, para. 6.
[751] Michelle Martin and Leticia Villarreal Sosa, 'An Empirical Analysis of United Nations Commissions of Inquiry: Toward the Development of a Standardized Methodology, in *Siracusa Guidelines*, *supra* note 34, 53-100, at 84.
[752] Cassese 2012, *supra* note 657.
[753] Kaufman, *supra* note 91 and Firmage, *supra* note 91.
[754] Final Act of the International Conference on Human Rights, Res. X, UN Doc. A/CONF.32/41, 12 May 1968.
[755] ECOSOC Res. 1870 (LVI), 17 May 1974.
[756] *Draft Model Rules 1970*, *supra* note 667, Rules 18-24, *contra UNCHR Model Rules*, *supra* note 674, Rule 18.
[757] Franck and Fairley, *supra* note 91, at 320.
[758] *1991 Declaration*, *supra* note 25, Arts. 26 and 27.
[759] Bassiouni 2001, *supra* note 98, at 40.

significant progress in this regard. It comprehensively examines fact-finding missions and commissions of inquiry, identifies best practices, and includes new model rules based on the *Model Rules 1970* and "modified on the basis of experience."[760] These rules do not exhaustively prescribe working methods, instead providing that inquiries "shall be conducted in conformity with relevant international standards and best practices on human rights fact-finding and investigations as developed by the [UN]."[761] This approach promotes consistency and development of institutional knowledge while retaining commissions' discretion to adopt methods of work appropriate for their mandates.

5.2 Provision of resources and time limits

Mandating authorities must ensure that commissions have sufficient resources to carry out their mandates and set appropriate time limits for the delivery of the report. OHCHR advises that deadlines and resources must be "commensurate with the mandate and consider the circumstances under which the commission/mission is required to operate."[762] The HRC commonly requests that commissions are provided with all resources necessary to fulfil their mandates.[763] However, information regarding the financing of inquiries is not easy to locate[764] and many inquiry reports do not specify the extent of resources or their allocation.[765]

Commissions have signalled that they operated with scarce resources and under tight time limits.[766] For instance, the Rwanda Commission only operated for four months, during which it was expected to examine massacre sites, interview witnesses, collect information and prepare its reports. Sunga observes, "[p]ractically speaking, it would have been very difficult for the three commission members to sift through the mass of documentary material, taped testimonies and other records it received in order to identify items of possible probative value to prosecutions."[767] Six months into its year-long mandate, the CAR Commission had only five investigators and lacked a chief of investigations and a legal advisor, which was a "source of anxiety"[768] regarding its ability to fulfil its mandate within the specified time. Marina Aksenova and Morten Bergsmo suggest that commissions' "widely defined, open-ended objectives"[769] contribute to this situation, and that mandates with more specific functions

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760 *OHCHR Guidance and Practice*, *supra* note 63, at 69.
761 *OHCHR Model Rules*, *supra* note 675, Rule 13.
762 *OHCHR Guidance and Practice*, *supra* note 63, at 10.
763 E.g., *Myanmar Mandate*, *supra* note 2, para. 13; *North Korea Mandate*, *supra* note 346, para. 9.
764 E.g., OHCHR's 2016 financial statement provides that US$4,934,900 was spent by "mandated Commissions of Inquiry": *OHCHR Report 2016*, at 93, available at http://www2.ohchr.org/english/OHCHRreport2016/allegati/Downloads/1_The_whole_Report_2016.pdf (accessed 1 May 2018).
765 Martin and Villarreal Sosa, *supra* note 751, at 92.
766 E.g., *Goldstone Report*, *supra* note 633, para. 157; *Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1*, UN Doc. A/HRC/29/CRP.4, 22 June 2015, para. 13 [*Gaza Report*]. See Boutruche 2013, *supra* note 482, at 17.
767 Sunga 2011, *supra* note 733, at 195.
768 *Preliminary report of the International Commission of Inquiry on the Central African Republic*, UN Doc. S/2014/373, 26 June 2014, para. 23 [*CAR Preliminary Report*].
769 Marina Aksenova and Morten Bergsmo, 'Non-Criminal Justice Fact-Work in the Age of Accountability', in Bergsmo, *supra* note 94, 1-23, at 18. See *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff*, UN Doc. A/HRC/24/42, 28 August 2013, para. 102.

might be more capable of being met. This proposal was not taken up by mandating authorities, which continue to award multi-faceted mandates.

A lack of resources might also be the result of political factors. Federica D'Alessandra writes that some mandating authorities ensured that commissions were understaffed and under-resourced to give the appearance of pursuing human rights "while at the same time not generating politically unwanted results".[770] In at least one case, commentators suggest that resource restrictions aimed to limit an inquiry's functions. Scharf, who participated in drafting the Yugoslavia Commission's mandate, writes that the UK and France preferred a more passive body which would analyse information received by it, while the US preferred a more active investigative mandate; and that the UK's agreement on that point was undermined "by insisting that the Commission be funded from existing UN resources rather than include in the resolution a specific budget for the Commission".[771] The General Assembly did not allocate resources for the Yugoslavia Commission, which required the Commission to seek independent funding and assistance.[772] The Yugoslavia Commission's temporal mandate concluded before it could complete its plan of work, and it had to cancel exhumations. The Commission sent its information to the ICTY Prosecutor before its final report was presented to the Security Council. Bassiouni writes that this lack of resources was due to the desire of some governments and those in the UN system "who wanted to advance the political agendas of those governments."[773]

6. Principle and Pragmatism in Mandating Authorities' Choices

The above discussion highlighted how mandating authorities determine key aspects of UN atrocity inquiries, including the investigative focus, composition, resources and in some cases, operational activities. This Section describes how choices by mandating authorities across these dimensions of inquiry practice reflect principled and pragmatic considerations and discusses consequences for commissions' roles and functions. These choices and consequences concern commissions' turn to international law (6.1), use of inquiry to condemn atrocities (6.2) and inquiry as a lever to build and release pressure (6.3).

6.1 Turn to international law

Mandating authorities frequently instructed UN atrocity inquiries to assess violations of international law. In addition to specifying legal lenses of analysis, many mandates linked the generation of recommendations with aims associated with the realm of law, such as ensuring accountability for violations. The appointment of commissioners with legal expertise reinforces commissions' legal orientation. International legal academics, judges, and practitioners are part of a professional community which Oscar Schachter famously termed the "invisible college of international lawyers",[774] where ideas are carried from one role to

[770] D'Alessandra, *supra* note 100, at 68.
[771] Scharf, *supra* note 291, at 273.
[772] Bassiouni 1994, *supra* note 166, at 801.
[773] Bassiouni 2001, *supra* note 98, at 47. See M. Cherif Bassiouni, 'Challenges to International Criminal Justice and International Criminal Law', in William Schabas (ed.), *Cambridge Companion to International Criminal Law* (Cambridge: CUP, 2016) 353-392, at 376 [Bassiouni 2016].
[774] Oscar Schachter, 'The Invisible College of International Lawyers', (1977) 72 (2) Nw U L Rev 217-226.

another. Commentators typify these inquiries as 'quasi-judicial',[775] 'justice-oriented',[776] and as new mechanisms for adjudication.[777] The Palmer Commission's mandate may be cited as a counterweight to the trend of juridification and shows that an emphasis on international law is a choice on the part of mandating authorities.[778]

The juridification of UN atrocity inquiries gives rise to certain consequences. Framing mandates by legal concepts focuses the scope of the inquiry. When a commission is mandated to inquire into violations, the fact-finding exercise naturally focuses on incidents which may be characterised in this way. Boutruche observes that where a fact-finding body is instructed to assess facts on the basis of law, "the facts covered through the inquiry are framed by the elements of the very rule allegedly violated. Otherwise, a legal conclusion cannot be reached."[779] A focus on legal violations also channels expected follow-up as a corollary of duties to investigate and prosecute serious violations.[780] As observed by Jean-Pierre Cot, "human rights do not leave much room for compromise."[781]

Several mandates emphasized criminal responsibility through instructions to investigate international crimes or to ensure 'full accountability' for violations. As noted by Saxon, a focus on individual accountability may be inevitable when a human rights lens is selected:[782]

> [A]ttempts to de-couple criminal accountability from human rights fact-finding creates a false dichotomy. Part of the relevance of fact-finding processes – whether by national or international bodies – includes the identification of persons responsible for international crimes.

The use of ICL language in mandates may also play a strategic role to draw attention to reported atrocities and signal the possibility of specific corrective action. Van den Herik argues that the North Korea Commission was instructed to use ICL language in order to "legally characterise given facts and thereby express a certain indignation and to evoke an external response rather than solely as a lens to select relevant facts."[783]

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[775] Franck and Fairley, *supra* note 91, at 308; Bertrand Ramcharan, 'Substantive Law Applicable', in Ramcharan, *supra* note 91, 26-40, at 26; Makane Moïse Mbengue and Brian McGarry, 'The International Commission of Inquiry on Darfur and the Application of International Humanitarian Norms', in Jinks *et al*, *supra* note 94, 479-504, at 481.

[776] Frulli, *supra* note 102.

[777] Dapo Akande and Hannah Tonkin, 'International Commissions of Inquiry: A New Form of Adjudication?', *EJIL:Talk*, 6 April 2012, available at http://www.ejiltalk.org/international-commissions-of-inquiry-a-new-form-of-adjudication (accessed 1 May 2018).

[778] *Palmer Mandate*, *supra* note 315.

[779] Boutruche, *supra* note 28, at 111.

[780] E.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment 1984, 1465 UNTS 85, Art. 12 [CAT]; ECtHR, *McCann and others v. United Kingdom* [1995] ECHR 31 [*McCann Case*]; *Principles on the Right to a Remedy*, *supra* note 540, Principle 4; Geneva Convention I, *supra* note 178, Arts. 49-50; Geneva Convention II, *supra* note 178, Arts. 50-51; Geneva Convention III, *supra* note 178, Arts. 129-130; Geneva Convention IV, *supra* note 178, Arts. 146-147; *Additional Protocol I*, *supra* note 33, Art. 85; Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277, Art. 1 [Genocide Convention].

[781] Jean-Pierre Cot, *International Conciliation* (1972) at 263, cited in Van den Herik, *supra* note 74, at 30.

[782] Saxon, *supra* note 736, at 220.

[783] Van den Herik, *supra* note 74, at 29.

Commissions' written mandates emphasising individual responsibility for violations may be cited as examples of a wider turn to criminal law in human rights practice. Karen Engle writes that the human rights project has rather uncritically embraced criminal law "with little systematic deliberation about the aims of criminal law or about its pitfalls. In fact, forgotten are not only the debates about justice versus peace and truth but also broader critiques of penal systems that have long been voiced by human rights advocates."[784] She cautions:[785]

> … as criminal law has become the enforcement tool of choice, it has negatively affected the lens through which the human rights movement and the international law scholars who support it view human rights violations. In short, as advocates increasingly turn to [ICL] to respond to issues ranging from economic injustice to genocide, they reinforce an individualized and decontextualized understanding of the harms they aim to address, even while relying on the state and on forms of criminalization of which they have long been critical.

Other scholars also argue that an individualised focus may even mask responsibilities of collective actors such as states and organized armed groups, whose actions (and inaction) produce conditions for mass atrocities to occur.[786] André Nollkaemper writes that criminal law "provides a distorted and fragmentized picture of reality in which the blame rests on a few individuals who, understandably, resent their being sacrificed as scapegoats."[787] Claire Nielsen similarly writes that ICL "fails to account for the structural causes of violence" and that its focus on actions of individuals is "obscuring and avoiding discussion of the global inequality in which powerful states are profoundly implicated."[788]

A mandate to investigate legal violations of can also produce quite different dynamics between commissions and states. There is less room for negotiation; rather than seeking collaboration with concerned states, commissions may be perceived as antagonistic and accusatory. For instance, Michael Kirby writes that the North Korea Commission could not ignore its mandate to examine culpability for violations even if "addressing this question might alienate the leadership or authorities of DPRK or make peaceful dialogue with them more difficult."[789] It may also mean that any perceived deviations in the mandate from full impartiality are more strictly critiqued and utilised to attack a commission's credibility.

6.2 Inquiry to condemn atrocities

Many mandating resolutions at once condemn violations and call for their investigation. While condemning atrocities may justify states' collective involvement in a crisis situation, it appears to prejudge the result of a supposedly impartial inquiry. UN atrocity inquiries are not usually established in circumstances where the facts are truly unknown or disputed. Rather,

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[784] Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights', (2015) 100 Cornell L Rev 1069-1128, at 1071.
[785] *Ibid*.
[786] Claire Nielsen, 'From Nuremburg to The Hague: The Civilizing Mission of International Criminal Law', (2008) 14 Auckland U L Rev 81-114, at 99.
[787] André Nollkaemper, 'Systemic Effects of International Responsibility for International Crimes', (2010) 8(1) Santa Clara J Int'l L 313-352, at 352.
[788] Nielsen, *supra* note 786, at 99.
[789] Kirby, *supra* note 97, at 25.

credible reports of violations build momentum for their establishment. As observed by Van den Herik:[790]

> Whereas the traditional [Hague] commissions of inquiry were principally meant to pacify and defuse a conflict, contemporary human rights commissions rather aim to stir, to evoke action, to opine and to condemn. Their inquiry is to a certain extent predisposed. The mere fact that a commission is created by the [HRC] signals a perception that there are credible allegations that human rights have been violated.

The HRC's responsibility to respond to human rights emergencies may be triggered upon reports of serious violations, so it is not inconsistent for a mandating resolution to acknowledge reported violations. However, the notion of 'impartial' inquiry must take on a different hue, as commissions mandated to investigate human rights violations and ensure accountability are "inherently biased to contribute to the normative agenda that underlies human rights."[791]

The desire to condemn violations may also influence commissioner selection. Commissions established to examine alleged violations of international law should include recognised legal experts who are demonstrably independent. Credibility and impartiality issues that have arisen from commissioners' prior statements illustrates that potential appointees' previous activities should be carefully considered. However, as observed by Mégret, "the politicized nature of designation processes means that judges/experts are in fact sometimes chosen not despite their previous declarations, but on the very basis of having made them."[792] In addition, appointment processes remain opaque and a matter of discretion for the mandating authority, despite initiatives to formalise this process. If mandating authorities wished to further demonstrate their commitment to impartiality, they might consider appointing commissioners from a public list of vetted candidates.

Challenges to impartiality are compounded where the mandating resolution is unbalanced, such as by identifying violations by only one party to a conflict or containing geographic or temporal limitations which exclude relevant actors, events, or contexts. As such imbalance is often seized upon by states as reason to deny cooperation, they may endanger a commission's ability to discharge its mandate. There is room for improvement in the drafting of mandates to avoid limiting commissions' impact before they have commenced their work. Devereux suggests that it may be beneficial to develop model precedents for mandates to "outline the desirable categories of information as well as provide draft language".[793] She writes that while states are likely to want to retain control over the formulation of mandates, identifying best practices might encourage greater uniformity and consistency, and thus greater clarity in written mandates.[794] However, it is unclear whether model precedents would discourage the sorts of mandates which appear to have been fully intended. In addition, the text is subject to debate and may reflect significant compromise in light of wider goals and interests.

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[790] Van den Herik, *supra* note 74, at 30.
[791] *Ibid*., at 30.
[792] Mégret 2011, *supra* note 51, at 32.
[793] Devereux, *supra* note 409, at 109.
[794] Devereux, *supra* note 409, at 109.

6.3 Inquiry as building and releasing pressure

Establishing an inquiry signals that allegations of violations are being taken seriously and that international community's attention is turned to the situation. As inquiry is one of several measures available at the UN, it represents an escalation in response. For instance, Human Rights Watch called on the UN to establish an inquiry on North Korea, stating "North Korea's defiance of the [HRC's] mandates and mechanisms should not be allowed to stand. It's time for the UN to take the next step, and ratchet up the pressure by [setting up an inquiry]."[795] When voting to establish the Syria Commission, Thailand's representative stated that Thailand supported the resolution because of "the need to turn back the tide of violence in Syria… and to send a firm message to the government of Syria".[796] Where a mandating authority has power to take binding action, inquiry might pave the way for enforcement measures. Bassiouni claims that the Security Council had already decided to establish the ICTR prior to establishing the Rwanda Commission, so the latter's function "was essentially window dressing."[797]

The prospect of inquiry may be used to induce states to comply with their obligations. For instance, the High Commissioner for Human Rights warned that unless the DRC cooperated with a hybrid investigation into violations, he would "insist on the creation of an international investigative mechanism".[798] Recent HRC practice shows that the label 'commission of inquiry' also has power. The Myanmar Commission is described in its written mandate as an "independent international fact-finding mission".[799] This term was evidently the subject of negotiation; in explaining its position on the resolution, the Philippines stated, "[t]he balanced efforts of the [EU] were appreciated, steering away from a Commission of Inquiry".[800] However, the official title of the Myanmar Commission is nearly identical to that of the Goldstone Commission.[801] Although the Myanmar Commission is substantively a commission of inquiry, the 'inquiry' label appears to have the ability to communicate denunciation.

At the same time as establishing an inquiry can build pressure for actors to comply with obligations, it may relieve other sources of pressure. While the subject-matter and composition of UN atrocity inquiries have moved closer to the realm of international law, they have not been endowed with judicial powers. Enforcet still depends on the will of external actors. Mandating authorities might establish an inquiry to appease feverish political

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[795] Human Rights Watch, 'North Korea: UN Should Investigate Crimes Against Humanity', 23 January 2012, available at http://www.hrw.org/news/2012/01/23/north-korea-un-should-investigate-crimes-against-humanity (accessed 1 May 2018).

[796] *Syria Press Release*, *supra* note 426.

[797] Bassiouni 2001, *supra* note 98, at 43.

[798] OHCHR, 'Denial of access and lack of cooperation with UN bodies will not diminish scrutiny of a State's human rights record', 6 June 2017, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21687&LangID=E (accessed 1 May 2018).

[799] *Myanmar Mandate*, *supra* note 2, para. 11.

[800] OHCHR, 'Human Rights Council decides to dispatch a fact-finding mission to Myanmar to establish facts on violations, especially in Rakhine State', 24 March 2017, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21443&LangID=E (accessed 1 May 2018).

[801] *Goldstone Mandate*, *supra* note 340, para. 14.

situations and mollify calls for immediate action. Such a perspective was originally advanced in 1899 by Martens in relation to commissions established to resolve international disputes:[802]

> One can compare the commission of inquiry to a safety valve given to the governments. They are allowed to say to the very excited and ill-informed public opinion, 'Wait— we will organize a commission which will go to the spot, which shall furnish all the new information— in a word, it shall shed light.' In that way time is gained, and in international life a day gained may save the future of a nation. The object of commissions of inquiry is therefore clear. They are the instruments of pacification.

A similar function has been observed of atrocity inquiries. For instance, as well as bolstering the case for an *ad hoc* tribunal, Bassiouni suggests that the Rwanda Commission served as a delay tactic: "[i]t was necessary to gain time before the Security Council established the ICTR in order to work out the logistics of the prospective tribunal."[803] Saxon writes that commissions may be subservient to wider diplomatic objectives, including "attempts to create a 'safety-valve' through which the international community may criticize a particular regime; to facilitate the resolution of a conflict or temper its severity; or, more cynically, to act as a 'placeholder' for an international community that cannot achieve consensus on a strategy for addressing a crisis."[804] Such observations have synergies with wider critiques of the Security Council's inaction in the face of ongoing atrocities[805] and its practice of establishing accountability mechanisms rather than taking measures of prevention or intervention.[806] Criminalized mandates are also critiqued for having the opposite effect. Schwöbel-Patel sees these commissions as part of an 'intervention formula' carried out in the name of the international community but in reality, at the service of powerful Western states.[807]

Some commentators perceive mandating authorities' lack of guidance and support of commissions' operations as in service of wider political goals. According to Bassiouni, the general state of '*ad hoc*-ery' can be explained by the fact that "the human rights component of the UN system reflects the values of justice, while systemically it functions as a political process, thus conditioning the upholding of these values to political oversight".[808] In any case, UN atrocity inquiries are "caught in a certain tension rising from international law's ambition of peace on the one hand and justice on the other."[809] Thus, the establishment of an inquiry can represent a mandating authority's commitment to principles of justice and the rule of law, as well as pragmatic considerations such as retaining discretion to take action and advancing wider political goals and interests.

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[802] Third Commission, Sixth Meeting, 19 July 1899, in James Brown Scott (ed.), *The Proceedings of the Hague Peace Conferences: The Conference of 1899* (New York: OUP, 1920) at 641.

[803] Bassiouni 2001, *supra* note 98, at 43.

[804] Saxon, *supra* note 736, at 212 (footnotes omitted).

[805] E.g., the Syria Commission wrote that inaction by the permanent members of the Security Council "provided the space for the proliferation of actors in [Syria], each pursuing its own agenda and contributing to the radicalization and escalation of violence. The Security Council bears this responsibility": *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/25/65, 12 February 2014, para. 155 [*Syria Seventh Report*].

[806] Engle, *supra* note 784, at 1076.

[807] Schwöbel-Patel, *supra* note 103, at 167.

[808] Bassiouni 2001, *supra* note 98, at 38.

[809] Hellestveit, *supra* note 20, at 394.

Conclusions

This Chapter illustrated how the characteristics and decisions of UN mandating authorities shaped the manifestation of UN atrocity inquiries in practice. Their institutional characteristics and spheres of responsibility attracted differing levels of consent and cooperation on the part of concerned states. Several HRC-led inquiries faced strong opposition from concerned states because of the HRC's constellation of features, including its political decision-making, practice of condemning violations and recommendatory powers. Inquiries by the Security Council and the Secretary-General did not face such impediments for different reasons; states generally obeyed Security Council decisions, while the Secretary-General sought their consent. State cooperation was thus influenced by the circumstances of commissions' establishment.

Mandating authorities fundamentally shaped commissions' roles and functions through the formulation of their written mandates. These mandates were often juridified, with a focus on legal violations and responsibilities, and were associated with the aim of ensuring accountability. Regarding commission composition, mandating authorities have moved away from the traditional practice of appointing state representatives. Recently, most commissioners were respected international legal experts serving in their personal capacity. These actions signal a commitment to encourage actors to comply with obligations and promote the rule of law. At the same time, mandating authorities have resisted initiatives to sharpen the institution of inquiry, so it remains institutionally 'soft' and deployed at their discretion.

Like an architect's conceptual plan, written mandates identify broad tasks and objectives, but leave much detail to be worked out by those charged with their implementation. While mandating authorities' institutional characteristics and decisions crucially inform the roles of UN atrocity inquiries, commissions also make their own choices. The next Chapter explores how commissions' interpretations and implementations of their mandates further illuminate their roles and functions.

CHAPTER THREE

MANDATE INTERPRETATION AND IMPLEMENTATION: COMMISSIONS AS ENGINEERS OF THEIR ROLES AND FUNCTIONS

Introduction

If mandating authorities are the architects of UN atrocity inquiries, sketching out the broad aesthetics and conceptual plan, commissions are the engineers. Commissions must work within the limits of their mandates to execute the mandating authority's vision, determining what is feasible and resolving practical issues. In addition to interpreting the scope of their mandates, commissions must decide *how* to carry out their work. Chapter Two explained that most often, mandating authorities left operational decisions in the hands of commissions.

This Chapter analyses how commissions interpreted and implemented their mandates in light of their roles and functions. The analysis chiefly draws from commissions' *reported* mandate interpretations and working methods. This qualification is important for two reasons. First, to evaluate how commissions carried out their mandates in practice, it would have been necessary to observe operations first-hand, which was not possible within the scope of this research. Secondly, commissions did not report on all aspects of their work and the level of detail provided is uneven.[810] As such, this Chapter aims to identify patterns and trends in commissions' approaches, to determine how their roles and functions informed their mandate interpretation and implementation.

Chapter Three is organised as follows. Section 1 examines how commissions interpreted their mandates in order to uphold, and in some cases to restore, impartiality. It does not address commissions' interpretations of the legal framework or recommendations, as these are discussed in Chapters Four and Six, respectively. Section 2 examines key principles guiding mandate implementation. Section 3 discusses practical challenges faced by commissions when operationalising their mandates and their efforts to overcome them. Section 4 discusses commissions' initiatives with respect to working methods in order to promote credible and reliable findings. The Conclusions section discusses how commissions' roles and functions shaped their approaches to mandate interpretation and implementation.

1. Interpretation of the Mandate

Chapter Two identified how mandating authorities set down written mandates and how some elements of these documents posed challenges to commissions' impartiality. Commissions routinely interpret their mandates in order to flesh out the focus of the inquiry and ensure that it is of appropriate scope. The *Advanced Practitioner's Handbook on Commissions of Inquiry* by the Harvard Program on Humanitarian Policy and Conflict Research (*HPCR Handbook*) recommends that commissions' interpretations be guided by principles of professional

[810] E.g., *Report of the International Commission of Inquiry on Côte d'Ivoire*, UN Doc. A/HRC/17/48, 1 July 2011, paras. 5-8 [*HRC Côte d'Ivoire Report*], as compared with *North Korea Report*, *supra* note 32, paras. 28-62. See Martin and Villarreal Sosa, *supra* note 751, at 69-70.

practice,[811] which include impartiality. This Section discusses how commissions interpreted their mandates so as to preserve or reinstate impartiality and distance themselves from the politicised circumstances of their establishment. It examines commissions' interpretations of geographic parameters (1.1), temporal scope (1.2), actors under scrutiny (1.3) and issues of prejudgment (1.4).

1.1 Geographic parameters

Commissions' written mandates generally specified the territory of concern. Where alleged violations were confined to a particular territory, the literal wording tended to be adopted. For instance, the Darfur Commission interpreted its geographic mandate as "only the situation in the Darfur region of the Sudan",[812] on the basis of the text of its mandating resolution.

Some commissions interpreted geographic parameters broadly to include actions or actors beyond concerned states. For instance, the HRC requested the North Korea Commission to investigate violations in the DPRK, including "abductions of nationals of other States".[813] The Commission interpreted its mandate broadly to include violations "by the DPRK against its nationals both within and outside the DPRK as well as those violations that involve extraterritorial action originating from the DPRK".[814] It explained that such violations fell within its mandate as they "facilitate subsequent human rights violations in the DPRK, or are the immediate consequence of human rights violations that take place in the DPRK."[815] This approach led the Commission to make findings in respect of China's *refoulement* practice.[816] In a similar vein, the HRC mandated the Burundi Commission to investigate violations "in Burundi".[817] The Commission interpreted its mandate to include "abuses committed in Burundi by nonstate entities, or their members, *based abroad*."[818] The mandating resolution also recognised the situation of Burundian refugees in neighbouring countries and invited the Commission to engage with them.[819] Reading these provisions together, the Burundi Commission determined that its mandate included an "examination of the human rights situation relating to refugees".[820]

By contrast, the Eritrea Commission adopted the literal meaning of its mandate to investigate violations "in Eritrea".[821] It interpreted the geographic scope as "the territory of Eritrea, without any exclusion of a specific area of the country and including the border zones and Eritrean maritime territory."[822] This interpretation excluded potential violations against members of the Eritrean diaspora. Van den Herik and Mirjam van Reisen write that the

[811] *HPCR Handbook*, *supra* note 95, at 9.
[812] *Darfur Report*, *supra* note 32, para. 11.
[813] *North Korea Mandate*, *supra* note 346, para. 5.
[814] *North Korea Report*, *supra* note 32, para. 19.
[815] *Ibid*., para. 20.
[816] *Ibid*., paras. 452, 458, 1197 and 1221(a).
[817] *HRC Burundi Mandate*, *supra* note 349, paras. 23(a) and (b).
[818] *HRC Burundi TOR*, *supra* note 495, at II(iii) (emphasis added).
[819] *HRC Burundi Mandate*, *supra* note 349, paras. 23(d).
[820] *HRC Burundi TOR*, *supra* note 495, at II(iii).
[821] *Eritrea Mandate*, *supra* note 347, para. 8.
[822] *Eritrea First Report*, *supra* note 567, para. 10.

diaspora was not perceived "as an object of protection in its own right",[823] although it was engaged as an information source and dissemination channel. The HRC seems to have approved of the Eritrea Commission's interpretation, as the geographic scope was not widened when its mandate was extended include an investigation of crimes against humanity.[824] The Eritrea Commission's approach diverges from that of the North Korea Commission, even though both examined authoritarian regimes which are often perceived as alike.[825] However, neither inquiry closely examined more diffuse contributions emanating beyond concerned states that enabled situations of violations to continue, such as foreign revenue streams.[826]

As observed in Chapter Two, where an inquiry is established into a situation of armed conflict, the mandate must include relevant all geographic zones. This aspect proved to be problematic for several HRC-led inquiries into conflicts involving Israel, whose written mandates focussed on violations occurring on the territory of the other party to the conflict and often explicitly referred to violations by Israel. As the effect of these formulations was to focus on one party to the conflict, they are discussed together in Section 1.3 below.

1.2 Temporal scope

Just as mandating authorities qualified the temporal scope in various ways, so too have commissions taken different approaches to their interpretation. Some commissions interpreted the temporal scope narrowly but also had regard to earlier events as relevant context. For instance, the Sri Lanka Panel was instructed to advise on accountability measures in relation to Sri Lanka's commitment to address IHL and IHRL violations "with respect to the final stages of the war".[827] Taking guidance from that phrase, the Panel focussed on the most "intense and violent phase",[828] namely September 2008 until May 2009, when the Sri Lankan Army carried out its final offensive and the Liberation Tigers of Tamil Eelam (LTTE) were defeated. It examined events prior to this point "in order to provide context."[829] The CAR Commission reported that although its temporal focus was limited to events on or after 1 January 2013, it "takes note of earlier events where appropriate to an understanding of the situation during the period under review."[830] The Gaza Commission was asked to investigate violations "in the context of the military operations conducted since 13 June 2014, whether before, during or after".[831] Understanding that its mandate was bookended by the murder of three Israeli teenagers on 12 June 2014 and the conclusion of Operation Protective Edge, the

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[823] Larissa van den Herik and Mirjam van Reisen, 'A Diasporic Perspective on the Commission of Inquiry for Eritrea: A Missed Opportunity to Maximize Impact?', forthcoming, at 2.
[824] *Eritrea Mandate Extension*, *supra* note 503.
[825] E.g., Nathaniel Myersjune, 'Africa's North Korea', *Foreign Policy*, 15 June 2010, available at http://foreignpolicy.com/2010/06/15/africas-north-korea (accessed 1 May 2018).
[826] Allegations of DPRK nationals being sent abroad to perform forced labour emerged after the North Korea Commission's report was published, and were examined by the Special Rapporteur: *Report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, Marzuki Darusman*, UN Doc. A/HRC/28/71, 18 March 2015, para. 19.
[827] 'Terms of Reference', in *Sri Lanka Report*, *supra* note 29, para. 5.
[828] *Sri Lanka Report*, *supra* note 29, para. 12.
[829] *Ibid*., para. 13.
[830] E.g., *CAR Report*, *supra* note 32, para. 6.
[831] *Gaza Mandate*, *supra* note 340, para. 13.

Gaza Commission interpreted its temporal mandate as "between 13 June and 26 August 2014".[832]

Other mandates were silent as to the temporal scope. Where an inquiry concerned a situation of increased violence or conflict, some commissions identified the beginning of the crisis period as the starting point. For instance, the Libya Commission focussed on events from 2011, as commissioners "perceived these incidents to constitute the mandate's implicit focus." [833] The Darfur Commission examined violations from 2003, when "reports of violations" began to emerge.[834]

In situations of long-standing concern, commissions defined temporal scope differently. In light of practical limitations of time and resources, the North Korea Commission focused on violations "reflective of the human rights situation as it persists at present" and, where resources permitted, patterns of past violations of continued relevance.[835] Historical events were considered where crucial to understanding the situation in North Korea and underlying causes of violations.[836] The Eritrea Commission focussed on events from 1991, "when Eritrean entities took effective control of Eritrean territory."[837] The Eritrean Government objected to the breadth of the written mandate "which theoretically can span any time period in Eritrean history"[838] but also criticised the Commission's determination of temporal limits as exceeding its authority.[839] This type of criticism indicates how a very broad written mandate could be used as a basis to undermine the work of an inquiry.

1.3 Actors under scrutiny

Most mandates did not identify particular actors as the focus of inquiry. Rob Grace observes that in such cases commissions should be "guided by the professional norm of evenhandedness to probe allegations of violations committed by all relevant parties."[840] In situations not involving active hostilities, commissions chiefly focussed on concerned states. For instance, the Eritrea Commission interpreted its mandate as limited to "violations that are imputable on Eritrean authorities."[841] The North Korea Commission took a slightly broader view, examining alleged violations "by the DPRK against its nationals" and "the extent to which other states carry relevant responsibility"[842] for violations in North Korea. In support of its broad interpretation, the Commission cited other UN atrocity inquiries which examined actions of actors other than concerned states.[843]

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832 *Gaza Report*, *supra* note 766, paras. 6 and 58.
833 *HPCR Handbook*, *supra* note 95, at 11.
834 *Darfur Report*, *supra* note 32, para. 11.
835 *North Korea Report*, *supra* note 32, para. 18.
836 *Ibid*., para. 18.
837 *Eritrea First Report*, *supra* note 567, para. 10; *Eritrea Second Report*, *supra* note 569, para. 1.
838 Eritrea Ministry of Foreign Affairs, 'Commission of Inquiry Report: Devoid of Credibility and Substance', 19 June 2015, para. 4, available at http://www.shabait.com/news/local-news/20031-commission-of-inquiry-report-devoid-of-credibility-and-substance (accessed 1 May 2018).
839 *Ibid*.
840 Grace 2015, *supra* note 59, at 46.
841 *Eritrea First Report*, *supra* note 567, para. 10.
842 *North Korea Report*, *supra* note 32, para. 20.
843 *Ibid*., footnote 8.

Some commissions examined contributions to situations of human rights concern by actors other than states. The Burundi Commission interpreted its mandate to examine human rights 'violations' as referring to state agents or entities, and 'abuses' to refer to "actions committed by non-state entities or their members."[844] The Israeli Settlements Commission, instructed to investigate human rights implications of Israeli settlements in Palestine,[845] interpreted the term 'Israeli settlements' to mean "all physical and non-physical structures and processes that… support the establishment, expansion and maintenance of Israeli residential communities beyond the Green Line of 1949".[846] This interpretation permitted the Commission to examine actors beyond the Israeli Government which contributed to the situation of the settlements, notably private companies.[847] The Eritrea Commission also examined contributions to the human rights situation by foreign enterprises, and directed recommendations to these actors.[848]

A few commissions were instructed to focus on specific actors. The Cambodia Commission was asked to examine crimes by "Khmer Rouge leaders".[849] The Cambodia Commission observed that its mandate excluded potential violations by other actors, but "endorse[d] this limitation as focusing on the extraordinary nature of the Khmer Rouge's crimes."[850] It may be queried whether a formally even-handed inquiry would have created an inappropriate sense of equivalence. More recently, the Myanmar Commission was asked to investigate "alleged recent human rights violations by military and security forces, and abuses, in Myanmar".[851] The term 'abuses' might be interpreted broadly to refer to non-state actors in line with other commissions' interpretations.[852] However, its mandate focusses principally on state institutions.

Commissions which examined situations of conflict generally interpreted their mandates to include all parties. For instance, the Libya Commission examined the military actions of the Gadhafi regime, opposition forces and NATO.[853] As discussed in Chapter Two, the HRC instructed several inquiries involving Israel to investigate violations by that State and limited the geographic scope to the territory of the other party. In addition to raising concerns of bias, such mandates are problematic because "rules on the conduct of hostilities necessitate establishing facts with regard to the behaviour of the other party."[854] The Lebanon Commission wrote, "any independent, impartial and objective investigation into a particular conduct during the course of hostilities must of necessity be with reference to all the belligerents involved."[855]

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[844] *HRC Burundi TOR*, *supra* note 495, at II(i).
[845] *Israeli Settlements Mandate*, *supra* note 340.
[846] *Israeli Settlements Report*, *supra* note 572, para. 4.
[847] *Ibid*., para. 96.
[848] *Eritrea First Report*, *supra* note 567, paras. 211-212, 1408-1412, and 1537.
[849] *Cambodia Report*, *supra* note 324, para. 9.
[850] *Ibid*., para. 10.
[851] *Myanmar Mandate*, *supra* note 2, para. 11.
[852] *HRC Burundi TOR*, *supra* note 495, at II(i).
[853] *Report of the International Commission of Inquiry on Libya*, UN Doc. A/HRC/19/68, 2 March 2012, para. 11 [*Libya Second Report*].
[854] Boutruche, *supra* note 28, at 125.
[855] *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1*, UN Doc. A/HRC/3/2, 23 November 2006, para. 14 [*Lebanon Report*]. See Stewart, *supra* note 96, at 1041.

Commissions took different approaches when trying to resolve one-sidedness mandates. The most conservative approach was taken by the Lebanon Commission, the first inquiry to be established by the HRC. It was asked to investigate "systematic targeting and killings of civilians by Israel in Lebanon".[856] The Commission considered that it could not construe its mandate as "equally authorizing the investigation of the actions by Hezbollah in Israel", as this would exceed its "interpretative function and would be to usurp the [HRC's] powers."[857] Israel refused to cooperate with this inquiry.[858] Also in 2006, the HRC established the Beit Hanoun Commission to, *inter alia*, "make recommendations on ways and means to protect Palestinian civilians against any further Israeli assaults".[859] The mandate focussed on Israeli violations and did not include victims in Israel. The Commission interpreted its mandate broadly to review the situation "within a broader context of events in Gaza"[860] and examined obligations of other parties to the conflict.[861] Chinkin writes that the instruction to make recommendations for the protection of Palestinian civilians "opened the way for inclusion of consideration of the firing of rockets from Gaza."[862] Israel refused to cooperate, so the Commission had to enter Beit Hanoun via Egypt.[863] The Commission stated that Israel's view that the mandate was biased "is a matter for the Council", and that the Commission had "gone to great lengths to execute its mandate in as balanced a way as possible."[864]

A two-step approach to mandate reformulation was taken by the UN Fact Finding Mission on the Gaza Conflict (known as the Goldstone Commission after its chair, Richard Goldstone). Its original mandate was to investigate violations "by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip".[865] Israel rejected the resolution as biased[866] and several potential commissioners declined appointment due to the mandate. The mandate was reformulated by the HRC President as a condition of Goldstone's appointment[867] as the investigation of violations "in the context of the military operations that were conducted in Gaza".[868] The Commission interpreted its mandate to require consideration of the actions of all parties and to "review related actions in the entire Occupied Palestinian Territory and Israel".[869] Despite the amended mandate and Goldstone's assurance of even-handed investigations,[870] Israel

[856] *Lebanon Mandate*, *supra* note 341.
[857] *Lebanon Report*, *supra* note 855, para. 15.
[858] *Lebanon Report*, *supra* note 855, para. 19.
[859] *Beit Hanoun Mandate*, *supra* note 317, para. 7.
[860] *Beit Hanoun Report*, *supra* note 620, para. 6.
[861] *Ibid*., para. 14.
[862] Chinkin, *supra* note 97, at 491-492.
[863] *Beit Hanoun Report*, *supra* note 620, paras. 3 and 7.
[864] *Ibid*., para. 73.
[865] *Goldstone Mandate*, *supra* note 340.
[866] *Israel MFA Press Release*, *supra* note 416.
[867] Richard Goldstone, 'Quality Control in International Fact-Finding Outside Criminal Justice for Core International Crimes', in Bergsmo, *supra* note 94, 35-53, at 47.
[868] *Ibid*.
[869] *Goldstone Report*, *supra* note 633, para. 152.
[870] *Letter from Richard Goldstone to the Permanent Representative of Israel to the United Nations at Geneva*, 3 April 2009, in *Goldstone Report*, *supra* note 633, at 434.

considered that the mandate could only be changed by the HRC, so the original mandate persisted.[871]

The 2014 Gaza Commission's mandate also raised concerns of partiality; it was instructed to investigate violations "in the [OPT], including East Jerusalem, particularly in the occupied Gaza Strip, in the context of the military operations conducted since 13 June 2014, whether before, during or after".[872] While this phrase did not mention Israel, the surrounding context emphasised Israeli violations.[873] The resolution did not mention Hamas, instead generally condemning "all violence against civilians wherever it occurs, including the killing of two Israeli civilians as a result of rocket fire", and urging "all parties" to respect IHL.[874] There was pushback from several states who considered the resolution biased.[875] The Gaza Commission interpreted its mandate as requiring it to also examine alleged violations in Israel.[876]

Commissions' approaches reflected different understandings of their interpretive powers. The Lebanon Commission took a narrow view of its interpretive competence, in contrast with more recent inquiries which interpreted mandates liberally. Its narrow interpretation may have been intended to discourage the HRC from issuing similar mandates in the future; if so, it was not successful. Chinkin writes that the HRC's practice to the contrary suggests that it lacks "political sensibility",[877] as such mandates predictably lead to non-cooperation. Fact-finding guidelines endorse commissions' ability to interpret their mandates to give effect to the mandating authority's intent while ensuring impartiality. Commissions' interpretations of their mandates to remove one-sided elements has not always produced state cooperation, so that such one-sided mandates may pose intractable difficulties for commissions.

1.4 Prejudgment of findings

Concerns of bias arose from several HRC mandates which presumed the existence of violations. Commissions tried to ameliorate these aspects by reformulating mandates in more neutral terms. For instance, the Gaza Flotilla Commission was instructed to investigate violations "resulting from the Israeli attacks" on the flotilla.[878] The Commission acknowledged that this wording indicate prejudgment[879] and reformulated the mandate as "ascertaining the facts surrounding the Israeli interception of the Gaza-bound flotilla to determine whether any violations… took place."[880] It also cautioned, "[i]t is important in the drafting of matters of the sort that the impression is not given of the appearance of any prejudgment."[881] Perhaps as a testament to the Commission's efforts, Israel's initial objection

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[871] *Israel letter to Goldstone Commission*, *supra* note 633, at 436. See Israel Ministry of Foreign Affairs, 'Initial Response to Report of the Fact-Finding Mission on Gaza', 24 September 2009, para. 15, available at http://mfa.gov.il/mfa/foreignpolicy/terrorism/pages/initial-response-goldstone-report-24-sep-2009.aspx (accessed 1 May 2018) [*Israel Response to Goldstone Report*].
[872] *Gaza Mandate*, *supra* note 340, para. 13.
[873] *Gaza Mandate*, *supra* note 340, para. 2.
[874] *Ibid*., para. 3.
[875] E.g., *Gaza Press Release*, *supra* note 420 and *EU Press Release*, *supra* note 421.
[876] *Gaza Report*, *supra* note 766, para. 6.
[877] Chinkin *supra* note 97, at 488.
[878] *Gaza Flotilla Mandate*, *supra* note 317, para. 8.
[879] *Gaza Flotilla Report*, *supra* note 681, para. 5.
[880] 'Terms of Reference', in *Gaza Flotilla Report*, *supra* note 681, Annex I, para. 4 [*Gaza Flotilla TOR*].
[881] *Gaza Flotilla Report*, *supra* note 681, para. 272.

on grounds of bias[882] was not reiterated after the Commission's interpretation. Rather, Israel argued that the report should be postponed until inquiries by national authorities and the Secretary-General were completed.[883] Ultimately, Israel did not cooperate with the HRC-led inquiry.

Some written mandates gave the impression of prejudgment through instructions to investigate 'all violations' or to make recommendations to protect civilians from '*further* assaults'.[884] This language contrasts with mandates to investigate 'alleged'[885] or 'reported' violations.[886] Several commissions included the word 'alleged' when interpreting their mandates. For instance, the Gaza Commission wrote that its mandate was to investigate "all alleged violations" and to "examine whether" crimes were perpetrated.[887] Such language communicates that violations are yet to be proven and that the commission is committed to carrying out an impartial inquiry.

It should also be noted that such language does not *necessarily* give rise to prejudgment. Where inquiries are established after credible reports of violations have emerged, mandating authorities may recognise those findings as grounds to establish an inquiry. The example of the North Korea Commission is illuminating. When establishing that inquiry, the HRC condemned "ongoing grave, widespread and systematic human rights violations"[888] and instructed the Commission to investigate violations "as outlined in paragraph 31 of the report of the Special Rapporteur".[889] In its report, the Commission recalled the raft of preceding human rights reports and explained that it aimed to further investigate and document those violations.[890] In this case, there was already evidence of violations, and recognition of that fact should not amount to prejudgment. In more immediate situations, commissions interpreted their mandates more cautiously to remove any pre-existing indications of prejudgment.

2. Principles Guiding Mandate Implementation

Commissions identified broad principles which guided the conduct of their work. Several commissions stated that they were guided by principles of independence, impartiality, objectivity, transparency, confidentiality, integrity and the principle of 'do no harm' in relation to victims and witnesses.[891] This Section zooms in on three key principles that have frequently informed mandate implementation: impartiality (2.1), centrality of victims (2.2) and accountability (2.3).

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[882] *Letter dated 18 August 2010, from Mr. Aaron Leshno Yaar addressed to Ambassador Sihasak Phuangketkeow, President, Human Rights Council*, in *Gaza Flotilla Report*, *supra* note 681, at 60.

[883] *Letter dated 13 September 2010, from His Excellency Mr. Aaron Leshno Yaar to Mr. Karl T. Hudson-Phillips*, in *Gaza Flotilla Report*, *supra* note 681, at 63.

[884] E.g., *Gaza Mandate*, *supra* note 340, para. 13; *Beit Hanoun Mandate*, *supra* note 317, para. 7.

[885] E.g., *Syria Mandate*, *supra* note 47.

[886] E.g., *Darfur Mandate*, *supra* note 303.

[887] *Gaza Report*, *supra* note 766, para. 22.

[888] *North Korea Mandate*, *supra* note 346, para. 1.

[889] *Ibid*., para. 5.

[890] *North Korea Report*, *supra* note 32, para. 15(a).

[891] *Israeli Settlements Report*, *supra* note 572, para. 5; *North Korea Report*, *supra* note 32, para. 29; *Eritrea First Report*, *supra* note 567, para. 25.

2.1 Impartiality

In addition to interpreting their mandates so as to ensure impartiality, commissions sought to establish the facts in a demonstrably impartial way. For instance, the UNCHR's Gaza Inquiry was "deeply mindful of its responsibility to exercise every care to be objective and impartial in gathering information and evaluating the evidence upon which it would base its conclusions and recommendations…"[892] The Goldstone Commission "based its work on an independent and impartial analysis of compliance by the parties with their obligations."[893] Members of the Security Council's Burundi Inquiry formally declared that they would act impartially,[894] a practice endorsed by fact-finding guidelines.[895]

Some commissions sought to take a 'balanced' approach by treating all parties equally. For instance, the Yugoslavia Commission wrote that although it had to adopt a selective approach to investigations due to resource constraints, "[i]n its choice and method of conducting research projects or investigations, the Commission endeavoured, at all times, to be both impartial and balanced."[896] The Commission explained that "as a matter of balance",[897] it simultaneously negotiated access to excavate mass graves believed to contain Serb victims and those believed to contain victims of Serb forces. The Rwanda Commission wrote that it applied the same standards of impartiality and independence when considering allegations of atrocities by RPF authorities and allegations of atrocities by other actors.[898] Impartiality was also demonstrated through broad information-gathering and outreach activities. Commissions routinely issued public calls for submissions, welcomed information from all interested actors, and made efforts to hear from relevant stakeholders. These efforts were not always successful, as discussed in Sections 3.3 and 3.4 below.

2.2 Centrality of victims

Evident in many commissions' reports is a concern that their work be victim-centred. Commissions recognised harms as experienced by victims and provided a platform for their voices to be heard. For instance, the Gaza Commission wrote that "the victims and their human rights were at the core of its mandate. Its activities were thus informed by the wish to ensure that the voices of all victims are heard".[899] The Goldstone Commission wrote that the purpose of its public hearings, which were broadcast live, was "to enable victims, witnesses and experts from all sides to the conflict to speak directly to as many people as possible in the region as well as in the international community", and priority was given to "participation of victims and people from the affected communities."[900] Kirby writes that the North Korea

[892] *UNCHR Gaza Report*, *supra* note 536, para. 104.
[893] *Goldstone Report*, *supra* note 633, para. 17.
[894] *SC Burundi Report*, *supra* note 307, Annex I, Rules of Procedure, Rule 1.
[895] *1991 Declaration*, *supra* note 25, Art. 25; *Siracusa Guidelines*, *supra* note 34, Guideline 4.4 and *OHCHR Model Rules*, *supra* note 675, Rule 3.
[896] *Yugoslavia Final Report*, *supra* note 39, para. 30.
[897] *Ibid*., paras. 268-269.
[898] *Rwanda Final Report*, *supra* note 297, para. 97.
[899] *Gaza Report*, *supra* note 766, para. 6.
[900] *Goldstone Report*, *supra* note 633, para. 22.

Commission resolved that collecting testimony at public hearings would be its "centrepiece" as it would "play a function in raising public consciousness of the suffering of the victims".[901]

Many commissions emphasised the importance of visiting affected communities. For instance, the Beit Hanoun Commission emphasized the importance of travelling to Beit Hanoun "to witness first-hand the situation of victims and survivors of the shelling, in particular to comprehend the deep distress of the victims of the shelling and of the population generated by the ongoing blockade."[902] The Goldstone Commission similarly wrote that its field visits were "particularly important to form an understanding of the situation, the context, impact and consequences of the conflict on people, and to assess violations of international law."[903] Several commissions were unable to enter relevant territories owing to a lack of cooperation by concerned states. Their efforts to overcome such obstacles are detailed in Section 3 below.

A victim-centred approach manifests in information-gathering techniques responsive to challenges in reporting violations, particularly in relation to sexual and gender-based violence (SGBV). Commissions observed that victims of SGBV faced difficulties in reporting violations due to fears of being disbelieved and stigmatized.[904] Almost a century ago, the Greek Delegate to the Smyrna Commission objected to its findings of rape on the basis that complaints were made by women of "dubious morality".[905] In 2014, the North Korea Commission wrote, "[v]iolence against women, in particular sexual violence, proved to be difficult to document owing to the stigma and shame that still attaches to the victims."[906] The Eritrea Commission received reports that some victims of sexual violence committed suicide "as a result of the extreme shame, stigma and related consequences from which they traditionally suffer."[907]

Some commissions designed their working methods in light of the challenges experienced by victims of SGBV. Of note is the work of the Yugoslavia Commission, which gave specific attention to sexual violence[908] and conducted interviews with victims by teams of female lawyers with the support of mental health specialists.[909] The Commission observed that it was the first time that an women-led rape investigation was conducted in wartime.[910] It also conducted a 'pilot study' on rape to review information and "develop a methodology for interviewing witnesses and victims in order to determine how relevant evidence could be obtained for use before a tribunal."[911] However, methodological attention to SGBV has not been uniform. An analysis of UN inquiry reports between 2005 and 2012 by Emily Kenny

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[901] Kirby, *supra* note 97, at 5.
[902] *Beit Hanoun Report*, *supra* note 620, para. 8.
[903] *Goldstone Report*, *supra* note 633, para. 163.
[904] See *Occupied Serbia Report*, *supra* note 120, at 13, noting the difficulties victims in reporting rape.
[905] Smyrna Commission, *Document 5: Appendix II. Comments made by Colonel Alexander Mazarakis on the account of the Inter-Allied Commission of Inquiry*, point 5. See Smyrna Commission, *Document 5: Appendix II. Comments made by Colonel Alexander Mazarakis on the account of the Inter-Allied Commission of Inquiry*, point 5.
[906] *North Korea Report*, *supra* note 32, para. 17. See *Eritrea First Report*, *supra* note 567, para. 50.
[907] *Eritrea First Report*, *supra* note 567, para. 51.
[908] *Yugoslavia Final Report*, *supra* note 39, paras. 232-253.
[909] *Ibid*., at 82, footnote 65.
[910] *Ibid*.
[911] *Ibid*., para. 238.

found "astonishing disparities in their reporting of gender issues"[912] and recommended strengthening gender dimensions of methodologies. In 2013, the HRC resolved that commissions should "devote specific attention to violence against women and girls in their reports and recommendations".[913] OHCHR's *Guidance and Practice* advises the integration of a gender perspective into commissions' work.[914]

Recent UN atrocity inquiries examined gendered dimensions of their work in more detail.[915] The Eritrea Commission engaged a specialist to provide gender-sensitive training and guidance.[916] The Commission recognised that women faced particular difficulties in giving information and "developed innovative ways to overcome these challenges",[917] including by engaging with women's networks and female intermediaries, conducting interviews at various locations, including women's homes; and observing strict confidentiality.[918] It tried to find interpreters "with experience in interpreting for survivors of [SGBV] and/or victims of trauma".[919] Examining SGBV remains difficult sensitive work which continues to pose challenges for commissions.

2.3 Accountability

Many commissions identified the principle of accountability as central to their work. Commissions conceived of this concept differently;[920] these themes are explored further in Chapter 6. The principle of accountability was embraced by commissions whose written mandates mentioned this term as well as some whose mandates did not.[921] Some commissions linked their work to accountability in a rather generalized way. For instance, the Eritrea Commission considered that an objective of its report was "to provide a comprehensive account of violations which could serve as a historical record for future accountability".[922] Other commissions identified more concrete contributions to criminal investigations and prosecutions. The Yugoslavia Commission wrote that its purpose was not only to establish "the existence of certain patterns of criminality but also to obtain specific evidence such as an investigative body would need for prosecution purposes".[923] The Burundi Commission similarly decided to "amass evidence that could be of use for any later judicial action".[924]

Commissions' concern to facilitate criminal proceedings influenced their methods of gathering, assessing and storing information. The South Sudan Commission sought to

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912 Emily Kenny, 'Developing a Gender Methodology for U.N. Commissions of Inquiry', (2014) 46(2) NYU J Int'l L & Pol 589-634, at 595.
913 HRC Res. 23/25, 14 June 2013, para. 17. The HRC has since instructed other inquiries to examine SGBV, e.g., *Myanmar Mandate*, *supra* note 2, para. 11 and *South Sudan Mandate Extension*, *supra* note 506, para. 16(b).
914 *OHCHR Guidance and Practice*, *supra* note 63, at 63.
915 E.g., *North Korea Report*, *supra* note 32, para. 17.
916 *Eritrea First Report*, *supra* note 567, paras. 44.
917 *Ibid*., paras. 46- 47.
918 *Ibid*., paras. 47-52.
919 *Eritrea Second Report*, *supra* note 569, para. 23.
920 E.g., *Goldstone Report*, *supra* note 633, para. 286; *Gaza Report*, *supra* note 766, para. 665; *Sri Lanka Report*, *supra* note 29, at iv.
921 E.g., *Lebanon Report*, *supra* note 855, para. 29.
922 *Eritrea Q&A*, *supra* note 89, at 1.
923 *Yugoslavia Interim Report*, *supra* note 292, para. 31.
924 *SC Burundi Report*, *supra* note 307, para. 6.

preserve the chain of custody of evidence, ensure high-quality witness statements and organize information in a database which could be utilised in criminal investigations.[925] The Syria Commission informed the HRC that it was "recording and safeguarding all evidence it obtains… bearing in mind its possible use by a future justice mechanism."[926] After the General Assembly established the IIIM to collect and preserve evidence of crimes,[927] the Commission aligned its work with this body.[928] The Darfur Commission represents the high water mark of this 'ICL approach'. It oriented its work towards criminal proceedings and collected "all material necessary" to classify facts according to ICL.[929] It made accounts of witnesses' testimony, collected official records and verified crime scenes, which "allow[ed] it to take a first step in the direction of ensuring accountability for the crimes committed in Darfur".[930]

Some commissions also designed their working methods in an effort to avoid impairing future trials. For instance, the Guinea Commission wrote that in order to preserve evidence, it did not visit locations that had been identified as mass graves, for fear of their destruction.[931] The Darfur Commission did not take signed witness statements, instead making accounts of witnesses' testimony.[932] This avoided the issue of generating multiple, and possibly conflicting, witness statements should a witness be called to testify in future criminal proceedings.

The question of whether UN atrocity inquiries *ought* to design their working methods in the aim of facilitating criminal proceedings is a subject of continued debate.[933] Commentators have examined to what extent UN atrocity inquiries contribute to criminal proceedings in practice.[934] There are some positive indications; Bassiouni writes that the ICTY Prosecutor would not have been able to start work so quickly had it not been for the work of the Yugoslavia Commission[935] and the Darfur Commission is credited with facilitating the ICC's plan of investigation.[936] At the same time, myriad issues arise from non-judicial investigations of international crimes, including contamination of evidence and witnesses,[937] problems associated with multiple witness interviews[938] and difficulties in transferring information

[925] *South Sudan Second Report*, *supra* note 31, para. 12.
[926] *Ibid*.
[927] *IIIM Mandate*, *supra* note 330.
[928] *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/34/64, 2 February 2017, para. 109(b) [*Syria Thirteenth Report*].
[929] *Darfur Report*, *supra* note 32, para. 14.
[930] *Ibid*., para. 538.
[931] *Guinea Report*, *supra* note 39, para. 13.
[932] *Darfur Report*, *supra* note 32, para. 538.
[933] E.g., Ratner 2015, *supra* note 401, at 553, contrasted with Sunga, *ibid*.
[934] E.g., Stahn and Jacobs, *supra* note 99, 255-280.
[935] Bassiouni 2001, *supra* note 98, at 47.
[936] Luis Moreno Ocampo, 'The International Criminal Court in Motion', in Carsten Stahn and Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff, 2009) 13-20, at 15.
[937] Rob Grace and Jill Coster van Voorhout, 'From Isolation to Interoperability: The Interaction of Monitoring, Reporting, and Fact-finding Missions and International Criminal Courts and Tribunals', *THIGJ Working Paper 4*, December 2014, available at http://hhi.harvard.edu/publications/isolation-interoperability-interaction-monitoring-reporting-and-fact-finding-missions (accessed 1 May 2018).
[938] Stahn and Jacobs, *supra* note 99, at 260; Grace and Coster van Voorhout, *supra* note 937, at 20-21.

across institutions.[939] In practice, accountability remains an important guiding principle for most commissions when implementing their mandates.

3 Practical Challenges Informing Mandate Implementation

Commissions implemented their mandates in light of practical challenges and limitations. These challenges include limitations in resources and time (3.1), security concerns (3.2), lack of territorial access (3.3) and states' refusals to provide information (3.4). This Section discusses these challenges and commissions' efforts to overcome them.

3.1 Resource and time limitations

Commissions' information-gathering and assessment practices were profoundly shaped by limitations in resources and tight reporting deadlines. Many commissions were instructed to examine 'all' violations in concerned states.[940] Such broad mandates were not usually matched with plentiful resources or lengthy time periods for reporting.

Working within these constraints, commissions often decided to focus on certain types or patterns of atrocities. For instance, the Goldstone Commission wrote, "[i]n view of the time frame within which it had to complete its work, the Mission necessarily had to be selective in the choice of issues and incidents for investigation."[941] Some commissions used terms such as 'representative', 'illustrative', or the 'most serious' to explain their selections.[942] Some commissions linked their focus on violations amounting to international crimes,[943] seeking to facilitate accountability efforts. For instance, the CAR Commission chose to focus on "more serious violations, and especially those for which it is reasonable to expect that accountability might be exacted in the future".[944] Commissions also referred to practical considerations. For instance, the Darfur Commission selected incidents deemed "most representative" of patterns of violations with "greater possibilities of effective fact-finding".[945] It highlighted site access, witness protection and evidence-gathering potential as particularly relevant to the selection process.[946] Not all commissions explained how incidents were selected.[947] Rob Grace suggests that "articulating the rationales for the mission's decisions in detailed terms would enhance the transparency regarding the mission's methodological choices".[948] There is no legal definition of 'serious' violations, but the Geneva Academy of International Humanitarian Law and Human Rights identifies certain indicators, including the nature of obligations, the scale

[939] Lyal Sunga, 'What Should be the UN Human Rights Council's Role in Investigating Genocide, War Crimes and Crimes Against Humanity?' in Bassiouni and Schabas, *supra* note 97, 319-349, at 344.
[940] *Darfur Mandate*, *supra* note 303.
[941] *Goldstone Report*, *supra* note 633, para. 157.
[942] E.g., *Darfur Report*, *supra* note 32, para. 223; *Goldstone Report*, *supra* note 633, para. 157; *Syria Third Report*, *supra* note 564, para. 37; *Lebanon Report*, *supra* note 855, para. 20.
[943] *HRC Burundi TOR*, *supra* note 495, para. II(i).
[944] *CAR Report*, *supra* note 32, at 9.
[945] *Darfur Report*, *supra* note 32, para. 223.
[946] *Ibid*., para. 223.
[947] E.g., *Syria Third Report*, *supra* note 564, para. 37.
[948] Grace 2015, *supra* note 59, at 37.

and impact of violations, and the status of victims.[949] Such parameters were adopted by some OHCHR-led mapping exercises[950] and might be useful for UN atrocity inquiries.[951]

Limited resources and time also meant that commissions could not always carry out all desired information-gathering activities.[952] For instance, the Gaza Commission decided that it was not feasible to hold public hearings in light of the timeframe for its work.[953] As it could not gain territorial access, it made a public call for submissions and held individual interviews in other locations.

Resource limitations pose particular difficulties for information-gathering regarding SGBV, as demonstrated in the example of the CAR Commission. That Commission reported that it could not fully investigate SGBV in refugee camps due to practical constraints:[954]

> Although it visited six camps and met with one hundred and ninety-eight victims in four days, it was unable to investigate [SGBV] due to time constraints which impeded its ability to establish the necessary rapport with the victims and to create a conducive working environment in which to conduct interviews.

The CAR Commission advised that this task should be undertaken by investigators with sufficient time and resources.[955] In effect, the Commission could not investigate SGBV in relation to this group of victims due to lack of time.

3.2 Security concerns

Security concerns also shaped commissions' working methods. The Syria Commission reported that concerns around witness protection "lie at the heart of the methodology of human rights investigations."[956] Several commissions faced challenges where victims and witnesses feared reprisals.[957] The North Korea Commission explained at length its consideration of risks posed to victims and witnesses by interacting with the Commission, including reprisals against those individuals or their family members inside the DPRK.[958] It did not take up offers to have mobile telephone contact with witnesses inside the DPRK out of concerns that such contact could put them at risk[959] and only heard publicly from people who had no close family in the DPRK or were judged not to be at risk in China.[960] Other commissions similarly took practical steps to minimise risks such as not interviewing

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[949] Geneva Academy of International Humanitarian Law and Human Rights, 'What amounts to 'a serious violation of international human rights law'?', *Geneva Academy Briefing No. 6*, August 2014, at 5 and 11, available at http://www.sipri.org/node/2872 (accessed 1 May 2018).
[950] E.g., *Nepal Conflict Report*, *supra* note 56, Annex II, at 230; *DRC Mapping Report*, *supra* note 56, para. 6.
[951] Grace 2015, *supra* note 59, at 39.
[952] E.g., *Libya Second Report*, *supra* note 853, para. 7.
[953] *Gaza Report*, *supra* note 766, para. 10.
[954] *CAR Report*, *supra* note 32, para. 474.
[955] *Ibid*., para. 474.
[956] *Syria Third Report*, *supra* note 564, para. 8.
[957] *Eritrea First Report*, *supra* note 567, para. 27, *North Korea Report*, *supra* note 32, para. 24.
[958] *North Korea Report*, *supra* note 32, paras. 51-53.
[959] *Ibid*., para. 52.
[960] *Ibid*., para. 53.

witnesses at locations where they could be seen to be cooperating,[961] conducting interviews confidentially, and redacting identifying information.[962]

Recently, commissions have recognised that they could not guarantee comprehensive witness protection.[963] For instance, the Eritrea Commission wrote that its ability to "physically protect concerned persons is limited" and that it depended on states to "respect their primary responsibility to protect all individuals present on their territories, whatever their status may be".[964] Such practice is consistent with OHCHR's recommendation that participants be informed of commissions' limited capacity to ensure their safety and that primary responsibility for ensuring their protection lies with states.[965]

In some situations, commissioners and support staff also faced security risks, which limited their ability to gather information. For instance, the CAR Commission could not visit some areas due to general instability in the CAR.[966] In addition, some support staff of the CAR Commission were targeted and held hostage.[967] The Libya Commission similarly reported that it faced significant security considerations and was unable to visit sites where active hostilities continued.[968]

3.3 Lack of territorial access

Where concerned states refused to cooperate, commissions were barred from entering their territories. HRC-led commissions have largely borne the brunt of this lack of cooperation; inquiries into North Korea, Eritrea, Syria, Myanmar, and different phases of the Israel/Palestine conflict were all denied territorial access and information.[969] It may be recalled from Chapter Two that while states usually consented to inquiries by the Secretary-General and Security Council, this did not always translate to full cooperation in practice.[970] Saxon writes that lack of state cooperation is not a "fatal impediment" where fact-finders are persistent and creative.[971] In practice, UN atrocity inquiries frequently resorted to gathering information from outside uncooperative states.

Some commissions held hearings and conducted interviews with victims and witnesses in third states. For instance, the North Korea Commission conducted public hearings in Seoul, Tokyo, London and Washington DC.[972] The Goldstone Commission held public hearings in Gaza and in Geneva.[973] The Syria Commission collected first-hand accounts from people who

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961 E.g., *Guinea Report*, *supra* note 39, para. 13.
962 E.g., *Eritrea First Report*, *supra* note 567, para. 31.
963 *South Sudan First Report*, *supra* note 30, para. 12 and *Gaza Report*, *supra* note 766, para. 9.
964 *Eritrea Q&A*, *supra* note 89, at 1.
965 *OHCHR Guidance and Practice*, *supra* note 63, at 56 and 75.
966 *CAR Report*, *supra* note 32, para. 7.
967 *Ibid*., para. 21.
968 *Report of the International Commission of Inquiry on Libya*, UN Doc. A/HRC/17/44, 12 January 2012, para. 11 [*Libya First Report*].
969 'Myanmar refuses visas to UN team investigating abuse of Rohingya Muslims', *The Guardian*, 30 June 2017, available at http://www.theguardian.com/world/2017/jun/30/myanmar-refuses-visas-un-abuse-rohingya-muslims (accessed 1 May 2018).
970 See Chapter Two, Section 1.2 and Yihdego, *supra* note 96, at 46.
971 Saxon, *supra* note 736, at 221.
972 *North Korea Report*, *supra* note 32, paras. 15(b) and 31.
973 *Goldstone Report*, *supra* note 633, para. 166.

had left the country and interviewed people inside Syria by Skype and telephone.[974] The Eritrea Commission similarly collected accounts from people located outside Eritrea, including refugees, asylum-seekers and migrants.[975]

Commissions also utilised documentary sources of information. Several commissions utilised satellite imagery; this enabled the Eritrea Commission to locate many detention facilities[976] and the North Korea Commission to confirm the existence of prison camps.[977] Some commissions obtained satellite imagery from the UN Institute for Training and Research's Operational Satellite Applications Programme,[978] while the North Korea Commission had to rely on commercially available information.[979] That Commission chided, "[a]lmost certainly, higher resolution satellite imagery produced by more technologically advanced states would have provided further information",[980] but that its requests were not granted, apparently due to security restrictions.[981]

Commissions also examined information available in the public domain, including by those implicated in violations. The Syria Commission examined public communications by CENTCOM[982] and videos and photographs published by extremist groups.[983] Some commissions also obtained clandestinely-recorded videos and photographs.[984] For instance, the Syria Commission examined a cache of thousands of photographs allegedly taken inside in Government-run detention facilities.[985] As it can be difficult to verify the authenticity of documentary sources, such information was usually used to corroborate first-hand accounts.[986][987] In some cases, commissions were not able to use photographic and video materials as they could not be authenticated.[988]

Some states criticised commissions' information-gathering methods after refusing to cooperate. For instance, Eritrea complained that most claims of violations were from "550 anonymous individuals who are comprised of refugees", which was "not representative of the vast majority of Eritreans abroad and inside the country."[989] Yet, Eritrea had denied access to the Eritrea Commission, which, in combination with that state's control of information and

[974] *Syria Third Report*, *supra* note 564, para. 9.
[975] *Eritrea First Report*, *supra* note 567, para. 34.
[976] *Ibid*., para. 35.
[977] *North Korea Report*, *supra* note 32, para. 60.
[978] *Eritrea First Report*, *supra* note 567, para. 35; *Goldstone Report*, *supra* note 633, para. 53; *Gaza Report*, *supra* note 766, para. 260.
[979] *North Korea Report*, *supra* note 32, para. 60.
[980] *Ibid*., para. 60.
[981] *Ibid*., footnote 1063.
[982] E.g., *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/36/55, 8 August 2017, footnotes 10 and 11 [*Syria Fourteenth Report*].
[983] E.g., *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/27/60, 13 August 2014, paras. 37 and 40 [*Syria Eighth Report*].
[984] *North Korea Report*, *supra* note 32, para. 61.
[985] *Syria Eighth Report*, *supra* note 983, para. 26.
[986] Eg, *North Korea Report*, *supra* note 32, paras. 71-72 and 734; *Syria Fourteenth Report*, *supra* note 982, Annex II, para. 8 and *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/37/72, 1 February 2018, Annex V, para. 24 [*Syria Fifteenth Report*].
[987] Eg, *North Korea Report*, *supra* note 32, paras. 71-72 and 734; *Syria Fourteenth Report*, *supra* note 982, Annex II, para. 8 and *Syria Fifteenth Report*, *supra* note 986, Annex V, para. 24.
[988] E.g., *Syria Third Report*, *supra* note 564, Annex VI, para. 22.
[989] Eritrea Ministry of Foreign Affairs, *supra* note 838, para. 6.

fears of reprisals, precluded the Commission from contacting those within the country. In response to the Government's assertion that testimonies of prison camps were false, the North Korea Commission stated that the best way for the DPRK to respond would be to allow access to sites allegedly containing such camps.[990] Commissions also adopted other strategies to respond to states' non-cooperation, discussed next.

3.4 States' refusals to provide information

Fact-finding instruments affirm that concerned states must have an opportunity to be heard.[991] Palmer writes that if such an opportunity is not reasonably afforded, an inquiry risks "delegitimization".[992] In practice, uncooperative states did not exercise this opportunity and refused to engage with commissions. In such cases, commissions reported that they had repeatedly invited the views of concerned states, without success.[993] Commissions also sought to identify states' views from their public statements. For instance, several commissions examined statements published on government websites expressing Israel's versions of events concerning its military operations.[994] The Sri Lanka Panel similarly examined governmental military strategies from publicly available sources, including the Defence Ministry website.[995] The Eritrea Commission wrote that in the face of Eritrea's non-cooperation, "the Commission has relied wherever possible on statements by the Government of Eritrea as reported on its official website or in the public domain."[996] Some commissions also afforded an opportunity for states to reply to their findings before their reports were finalised. For instance, the North Korea Commission shared its draft findings with the DPRK and invited its "comments and factual corrections."[997] That invitation was not accepted.

States' refusals to cooperate gave rise to particular difficulties where they exclusively held material information. Where cooperation was sought to no avail, some commissions decided to draw adverse inferences from their silence. This practice is known in arbitration[998] and the ECHR has ruled that where events in issue lie within the exclusive knowledge of the state and the facts give rise to a strong presumption of violations, "the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation."[999] In a draft general comment on the right to life, the Human Rights Committee identifies an obligation to

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[990] OHCHR, 'UN-mandated human rights inquiry on DPR Korea 'not biased', chair stresses', 29 October 2013, available at http://www.un.org/apps/news/story.asp?NewsID=46369 (accessed 1 May 2018).

[991] *1991 Declaration*, *supra* note 25, Art. 26. See *Principles Against Impunity*, *supra* note 54, Principle 9, concerning suspected perpetrators.

[992] Palmer, *supra* note 480, at 610.

[993] *North Korea Report*, *supra* note 32, para. 24 and *Beit Hanoun Report*, *supra* note 620, para. 3.

[994] *Beit Hanoun Report*, *supra* note 620, para. 7; *Goldstone Report*, *supra* note 633, para. 173; *Gaza Report*, *supra* note 766, para. 14.

[995] *Sri Lanka Report*, *supra* note 29, para. 54.

[996] *Eritrea Second Report*, *supra* note 569, para. 16.

[997] *North Korea Report*, *supra* note 32, para. 27. The Libya Commission extended a similar opportunity to NATO, which was more cooperative: *Letter from Peter Olson, NATO Legal Adviser to Judge Kirsch*, OLA(2012)0014, 15 February 2012, in *Libya Second Report*, *supra* note 853, Annex II, at 212 [*NATO letter 15 February 2012*].

[998] Jeremy Sharpe, 'Drawing Adverse Inferences from the Non-production of Evidence', (2006) 22(4) *Arbitration International* 549-572.

[999] ECtHR, *Khashiev and Akayeva v. Russia*, No. 57942/00 and 57945/00, Judgment, 24 February 2005. See ECtHR, *Isayeva and others v. Russia* (2005) 41 EHRR 39, para. 175 and ECtHR, *Salman v. Turkey*, No. 21986/93, Merits and Just Satisfaction, Grand Chamber [2000] ECHR 357, para. 100.

disclose information where an attack results in loss of life, subject to 'compelling' security concerns:[1000]

> States parties should, subject to compelling security considerations, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether non-lethal alternatives for attaining the same military objective were considered. They must also investigate allegations of violations of article 6 in situations of armed conflict in accordance with the relevant international standards.

In the inquiry context, the North Korea Commission reported that it was comfortable in drawing inferences, as it had provided many opportunities for DPRK authorities to address the Commission and provide its views, of which it had not availed itself.[1001] The example of the Goldstone Commission demonstrates how adverse inferences may not always promote effective implementation of the mandate. That Commission responded to Israel's refusal to provide information about its military operations by making findings on the basis of "the information available"[1002] or "in the absence of any information refuting the allegations".[1003] Such findings included that Israel had a policy of intentionally attacking civilians.[1004] Israel criticised the findings as made "in the absence of the sensitive intelligence information which Israel did not feel able to provide".[1005] Goldstone defended the Commission's findings: "Our mission obviously could only consider and report on what it saw, heard and read. If the government of Israel failed to bring facts and analyses to our attention, we cannot fairly be blamed for the consequences."[1006] While its report was heralded in some quarters as adhering to the highest standards of legality given the lack of cooperation and challenges posed by the fog of war,[1007] it was also criticised in others for making findings on the basis of information supplied by one party to the conflict.[1008] Later, Goldstone personally renounced some findings, explaining that information later published by Israel indicated that civilians were not targeted as a matter of policy, but that the Commission "had no evidence on which to draw

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[1000] CCPR, *General Comment No. 36 on article 6 of the ICCPR, Revised draft prepared by the Rapporteur*, para. 67, available at http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf (accessed 1 May 2018) [*Draft GC 36*]. See *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson*, UN Doc. A/HRC/29/51, 16 June 2015, para. 58.

[1001] *North Korea Report*, *supra* note 32, para. 76.

[1002] *Goldstone Report*, *supra* note 633, paras. 32, 75, 389, 437, 494, 629, 652, 701, 1102, 1167.

[1003] *Ibid*., paras. 595, 838, 1167.

[1004] *Ibid*., para. 1191.

[1005] Israel Ministry of Foreign Affairs, 'Israel's Analysis and Comments on the Gaza Fact-Finding Mission Report', 15 September 2009, available at http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Pages/Israel_analysis_comments_Goldstone_Mission_15-Sep-2009.aspx (accessed 1 May 2018).

[1006] Richard Goldstone, 'Israel's Missed Opportunity', *The Guardian*, 21 October 2009, available at http://www.theguardian.com/commentisfree/cifamerica/2009/oct/21/goldstone-report-israel-gaza-war-crimes-un (accessed 1 May 2018).

[1007] Richard Falk, 'The Goldstone Report and the Goldstone Retreat: Truths Told by Law and Reviled by Geopolitics', in Chantal Meloni and Gianni Tognoni (eds), *Is there a Court for Gaza?* (The Hague: TMC Asser Press, 2012) 83-103, at 97.

[1008] E.g., Trevor Norwitz, 'Letter to Justice Goldstone', in Gerald Steinberg and Anne Herzberg (eds), *The Goldstone Report "Reconsidered": A Critical Analysis* (Israel: NGO Monitor, 2011) 153-180,at 153.

any other reasonable conclusion".[1009] This episode stands as a cautionary tale of the real difficulties that arise when concerned states refuse to provide information.

Commentators are divided as to the use of adverse inferences in the inquiry context. Liesbeth Zegveld points out that inquiry reports are not sufficient to convict, but rather provide grounds for opening investigations.[1010] By contrast, Mégret writes that as states may argue that fact-finding reports are biased whether they cooperate or not, it is important to create incentives for cooperation and to tread carefully in reaching findings when access to information is denied. Mégret cautions that "adverse factual findings cannot be a way of 'punishing' a non-cooperative state and must evidently result from the best possible interpretation of the evidence in the circumstances."[1011] Drawing adverse inferences walks a tightrope between preventing non-cooperation from obstructing an inquiry and rendering findings vulnerable to criticism that they are incorrect or even a *de facto* penalty for refusing to cooperate. In both scenarios, the credibility of findings may be damaged, and prospects for stimulating corrective action may be reduced.

4. Fostering Quality in Methods of Work

While commissions enjoy a large degree of freedom in determining their working methods, this flexibility has engendered criticisms of arbitrariness and unreliability. Some states pointed to commissions' non-judicial nature as grounds to reject their findings. For instance, Eritrea wrote that the Eritrea Commission "admits that it is not a judicial body. In other words, its accusations do not meet fundamental standards of accuracy, objectivity, neutrality and legality".[1012] Commissions have taken various initiatives to reduce misgivings of *ad hoc*-ery and strengthen the credibility of their findings, as well as ensuring that working methods are appropriate to the context of inquiry. This Section discusses initiatives taken by commissions in pursuit of these aims, namely adopting judicial procedures (4.1), rules of procedure and terms of reference (4.2), standards of proof (4.3) and best practices (4.4).

4.1 Judicial procedures

A few UN atrocity inquiries borrowed procedures from the judicial context. For instance, the Burundi Commission decided to "conform as far as possible to judicial standards" in order to "give its eventual conclusions a solid base".[1013] It permitted any person appearing before it to be assisted by a lawyer, and all witnesses had to swear to "speak the truth, the whole truth,

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[1009] Richard Goldstone, 'Reconsidering the Goldstone Report on Israel and war crimes', *Washington Post*, 1 April 2011, available at http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html (accessed 1 May 2018). This statement was opposed by the other commissioners: Hina Jilani, Christine Chinkin and Desmond Travers, 'Goldstone report: Statement issued by members of UN mission on Gaza war', *The Guardian*, 14 April 2011, available at http://www.theguardian.com/commentisfree/2011/apr/14/goldstone-report-statement-un-gaza (accessed 1 May 2018).

[1010] Liesbeth Zegveld, 'The Importance of Fact-Finding Missions Under International Humanitarian Law', in Chantal Meloni and Gianni Tognoni (eds), *Is there a Court for Gaza?* (The Hague: TMC Asser Press, 2012) 161-167, at 165 [Zegveld 2012].

[1011] Mégret 2016, *supra* note 460, at 40.

[1012] Eritrea Ministry of Information, 'Press Statement by H.E. Mr. Yemane Gebreab, Presidential Adviser', 8 June 2016, available at http://www.shabait.com/news/local-news/21964-press-statement-by-he-mr-yemane-gebreab (accessed 1 May 2018) [*Eritrea Press Release*].

[1013] *SC Burundi Report*, *supra* note 307, para. 6.

and nothing but the truth".[1014] The Mozambique Commission also required witnesses to swear an oath, adopting the ICJ's formulation.[1015] The Darfur Commission adopted "an approach proper to a judicial body"[1016] when examining international crimes. These references to judicial standards and approaches appear to convey analytical rigour. At the same time, most commissions did not identify specific judicial regimes, so their invocations were generalised.

Commissions invoked 'judicial' procedures infrequently and distinguished their work from that of courts and judicial procedures.[1017] For instance, the Libya Commission emphasised that "it is not a court of law and that its investigations were not undertaken with the time, resources, and judicial tools (such as subpoena powers) that normally characterize criminal investigations."[1018] The Eritrea Commission stated, "it has no law enforcement powers and is not a judicial body. It has nevertheless adopted a rigorous approach to the analysis of the information it has collected."[1019] Although the Darfur Commission adopted a 'judicial approach', it explained that it was not "vested with prosecutorial or investigative functions proper", so focussed on collecting reliable information about suspected perpetrators.[1020] This distinction clarifies that commissions are not seeking to replicate the judicial process, so their investigations should not be judged against such standards. At the same time, such approaches could imbue the fact-finding process with gravitas akin to judicial proceedings, while maintaining differentiation.

4.2 Rules of procedure and terms of reference

Some commissions adopted rules of procedure to govern the conduct of their work. Such rules tended to govern formal aspects such as decision-making, confidentiality policies and methods of information-gathering and assessment. Although many rules were similar in content, these documents also contained some differences, and the practice of adopting them was *ad hoc*. Rules of procedure were especially popular during the 1990s and were also adopted by historic UN atrocity inquiries.[1021] Several commissions in the 1990s adopted rules of procedure, including inquiries on the former Yugoslavia, Rwanda, Burundi, and Timor-Leste.[1022]

The practice of adopting rules of procedure fell away in the 2000s, but support for their use has recently re-emerged. *OHCHR Guidance and Practice* recommends that commissions adopt rules of procedure defining their methods of work and responsibilities, and drew up model standard rules.[1023] OHCHR also recommends that commissions adopt terms of reference at the outset of their operations specifying the scope of the investigative mandate,

[1014] *Ibid*., Annex, Rules of Procedure, Rule 12.
[1015] *Mozambique Report*, *supra* note 253, para. 18. See *Vietnam Report*, *supra* note 273, Annex II, Rules of Procedure and Plan of Work of the Mission, Rule 13 [*Vietnam Rules of Procedure*].
[1016] *Darfur Report*, *supra* note 32, para. 14.
[1017] E.g., *ibid*., para. 14; *Timor-Leste Report*, *supra* note 376, paras. 11-12; *Goldstone Report*, *supra* note 633, para. 25 and *Libya First Report*, *supra* note 968, para. 227.
[1018] *Libya Second Report*, *supra* note 853, para. 8.
[1019] *Eritrea Second Report*, *supra* note 569, para. 31.
[1020] *Darfur Report*, *supra* note 32, para. 538.
[1021] *Vietnam Rules of Procedure*, *supra* note 1015, Rule 13.
[1022] *Yugoslavia Interim Report*, *supra* note 292, Appendix; *Rwanda Final Report*, *supra* note 297, Annex II; *SC Burundi Report*, *supra* note 307, Annex I and *East Timor Report*, *supra* note 338, Annex I.
[1023] *OHCHR Guidance and Practice*, *supra* note 63, Annex II.

legal framework and methods of work.[1024] The *Siracusa Guidelines* recommend that commissions adopt an 'operational plan' setting out their budget, internal protocols, functions, activities and methods of work, and an 'investigation plan' outlining investigative priorities, methodology and internal protocols.[1025] In practice, only two recent commissions reported that they adopted rules of procedure, and did not include them in their reports.[1026] Commissions have been more receptive to drawing up terms of reference, but practice remains mixed. Some commissions appended terms of reference to their reports[1027] or published them as separate documents.[1028] Other commissions discussed their terms of reference in their main reports.[1029] The CAR Commission reportedly adopted an 'investigation plan'.[1030] Other recent commissions did not refer to rules of procedure or terms of reference.[1031]

4.3 Standards of proof

In comparison with commissions' rather practices of adhering to judicial procedures or adopting rules of procedure, there is rich practice of utilising standards of proof, also termed 'evidentiary standards' or 'evidentiary thresholds', to communicate the strength of findings. In the adjudicative context, evidence must meet or surpass a standard of proof for findings to be made out.[1032] For instance, the standard of 'beyond a reasonable doubt' is generally required for criminal convictions.[1033] Proponents of standards of proof in the inquiry context argue that they may encourage commissions to scrutinise the strength of findings, convey the strength of conclusions and demonstrate procedural integrity, while also accepting they are not a panacea for credibility.[1034] The use of common standards of proof by UN fact-finding bodies was advocated as long ago as 1982.[1035] However, it has taken some time for standards of proof to become a regular part of commissions' working methods.

In the 1990s, commissions did not utilise standards of proof, instead expressing findings with differing degrees of certitude. For instance, the Yugoslavia Commission concluded with "a reasonable degree of certainty" that the civilian population was deliberately targeted during

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[1024] *Ibid*., at 67. See *OHCHR Model Rules*, *supra* note 675, Rule 2.
[1025] *Siracusa Guidelines*, *supra* note 34, Guidelines 5 and 7.
[1026] *Eritrea First Report*, *supra* note 567, para. 24; *CAR Preliminary Report*, *supra* note 768, para. 8.
[1027] *Lebanon Report*, *supra* note 855, Annex II; *Report of the High-Level Mission on the situation of human rights in Darfur pursuant to Human Rights Council decision S-4/101*, UN Doc. A/HRC/4/80, 9 March 2007, Annex II [*Darfur High-Level Report*]; *Syria First Report*, *supra* note 32, Annex I; *Gaza Flotilla Report*, *supra* note 681, Annex I.
[1028] 'Terms of Reference of the Independent International Fact-finding Mission on the Israeli Settlements in the Occupied Palestinian Territory including East Jerusalem', para. 11, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/FFM/FFMSettlementTOR.pdf (accessed 1 May 2018) [*Israeli Settlements TOR*] and *HRC Burundi TOR*, *supra* note 495.
[1029] E.g., *Goldstone Report*, *supra* note 633, para. 15 and *Darfur Report*, *supra* note 32, para. 2.
[1030] *CAR Preliminary Report*, *supra* note 768, para. 8.
[1031] E.g., *Gaza Report*, *supra* note 766. The North Korea Commission applied 'best practices' but it is unclear whether it adopted specific rules of procedure: *North Korea Report*, *supra* note 32, para. 29.
[1032] Katherine Del Mar, 'The International Court of Justice and Standards of Proof', in Karine Bannelier, Theodore Christakis and Sarah Heathcote (eds), *The ICJ and the Development of International Law: the Lasting Impact of the Corfu Channel Case* (Oxon: Routledge, 2011) 98-123.
[1033] E.g., Rome Statute of the International Criminal Court 1998, UN Doc. A/CONF.183/9, 2187 UNTS 90, Art. 66 [Rome Statute]. See Dov Jacobs, 'The Burden and Standard of Proof", in Goran Sluiter *et al* (eds), *International Criminal Procedure, Principles and Rules* (Oxford: OUP, 2013) 1128-1150.
[1034] Wilkinson 2014, *supra* note 25, at 12 and Franck and Fairley, *supra* note 91, at 310.
[1035] Ramcharan, 'Evidence', in Ramcharan, *supra* note 91, 64-82, at 78.

the battle of Sarajevo;[1036] the Rwanda Commission found "abundant evidence" of genocide,[1037] and the East Timor Commission concluded that evidence "clearly demonstrates" a pattern of serious violations.[1038] In 2005, the Darfur Commission applied a standard of proof when identifying suspected perpetrators. The standard adopted was "a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime."[1039] Since then, most commissions have articulated standards of proof,[1040] which have been expressed differently. For instance, the Sri Lanka Panel considered an allegation of violations as credible "if there was a reasonable basis to believe that the underlying act or event occurred".[1041] The Libya Commission adopted a 'balance of probabilities' standard.[1042] Other formulations were similar to that of the Darfur Commission.[1043] A review of these standards by Wilkinson in 2012 concluded that expressions of certitude were "being applied, though not uniformly and only to some extent".[1044]

Recent practice suggests that commissions are commonly adopting a standard of 'reasonable grounds to believe', defined by the North Korea Commission as "a reliable body of information, consistent with other material, based on which a reasonable and ordinarily prudent person has reason to believe that such incident or pattern of conduct has occurred."[1045] Many commissions have applied this standard,[1046] with some indicating that their adoption of this standard was consistent with the practice of other commissions[1047] and UN fact-finding bodies.[1048] Such self-referential practice contributes to the development of best practices, discussed below.

Commissions contrasted their standards of proof with those used in criminal proceedings and generally agreed that the 'beyond reasonable doubt' standard was inappropriate for the inquiry context, as their findings were not binding and they lacked coercive information-gathering powers.[1049] The Darfur Commission observed that its standard of proof was lower than the *prima facie* standard used to confirm indictments before *ad hoc* tribunals.[1050] Commissions have explained that the 'reasonable grounds to believe' standard is sufficiently high to call for

[1036] *Yugoslavia Final Report*, *supra* note 39, para. 209.
[1037] *Rwanda Final Report*, *supra* note 297, para. 184.
[1038] *East Timor Report*, *supra* note 338, para. 142.
[1039] *Darfur Report supra* note 32, para. 15.
[1040] An exception is the Palmer Commission, which wrote that that findings were established to its 'satisfaction': *Palmer Report*, *supra* note 316, para. 125. Wilkinson criticises this formulation as lacking transparency: Wilkinson 2014, *supra* note 25, at 13.
[1041] *Sri Lanka Report*, *supra* note 29, at i.
[1042] *Libya Second Report*, *supra* note 853, para. 6.
[1043] *Timor-Leste Report*, *supra* note 376, para. 12; *Guinea Report*, *supra* note 39, para. 22.
[1044] Wilkinson, *supra* note 98, at 61.
[1045] *North Korea Report*, *supra* note 32, para. 68.
[1046] *CAR Preliminary Report*, *supra* note 768, para. 17; *Eritrea First Report*, *supra* note 567, para. 31; *Gaza Report*, *supra* note 766, para. 19; *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/23/58, 4 June 2013, para. 6 [*Syria Fifth Report*].
[1047] *Gaza Report*, *supra* note 766, para. 19, citing *North Korea Report* and *Eritrea Second Report*, *supra* note 569, para. 32.
[1048] *CAR Preliminary Report*, *supra* note 768, para. 17; *Eritrea First Report*, *supra* note 567, para. 31; *HRC Burundi TOR*, *supra* note 495, at IV.
[1049] *Timor-Leste Report*, *supra* note 376, paras. 12 and 110; *Darfur Report*, *supra* note 32, para. 15; *Goldstone Report*, *supra* note 633, para. 25.
[1050] *Darfur Report*, *supra* note 32, para. 15, citing practice of the ICTR and ICTY.

further investigations, which might lead to prosecutions.[1051] The Eritrea Commission further observed that this standard was "used by the ICC to review evidence prior to the issuance of an arrest warrant."[1052] The Commission was referring the rule that the ICC Pre-Trial Chamber must be satisfied that there are "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court" to issue an arrest warrant.[1053] Commissions' preferred standard of proof may be compared to that applied by the ICC Pre-Trial Chamber when assessing a request by the Prosecutor to initiate *proprio motu* investigations. The Chamber must decide whether there is a "reasonable basis to proceed",[1054] which entails "a reasonable basis to believe that a crime within the jurisdiction of the Court has or is being committed".[1055] These linkages with judicial standards reflect the function of promoting accountability for violations and their role as catalysts or precursors for criminal investigations.

4.4 Best practices

An emerging trend is the invocation of 'best practices' or 'international standards' of fact-finding or of international commissions of inquiry. Several commissions asserted that their working methods complied with standard UN practices. The Goldstone Commission stated that it based its work on "international investigative standards developed by the [UN]."[1056] Similar statements were made by commissions on Timor-Leste, Guinea, the CAR and Eritrea.[1057] The Syria Commission wrote that its methodology was based on "best practices of commissions of inquiry and fact-finding missions."[1058] The North Korea Commission reported that it applied 'best practices' regarding integrating gender into the exercise of its mandate,[1059] witness protection, outreach, rules of procedure, report writing, international investigation standards, and archiving.[1060]

Commissions often did not identify specific sources of these standards, rather asserting that they adhered to them. For instance, the above-cited statement by the Goldstone Commission was not accompanied by references, and it did not explain what 'international investigative standards' meant in practice. The Eritrea Commission referred to OHCHR's "standard policies"[1061] of protecting victims and witnesses but did not identify their source or content. Some recent commissions cited a manual on sexual violence investigations[1062] and *OHCHR*

[1051] *Eritrea First Report*, *supra* note 567, para. 32; *CAR Preliminary Report*, *supra* note 768, para. 32; *North Korea Report*, *supra* note 32, para. 68.
[1052] *Eritrea Second Report*, *supra* note 569, para. 32.
[1053] Rome Statute, *supra* note 1033, Art. 58(1).
[1054] *Ibid*., Arts. 15(3) and 15(4).
[1055] *Ibid*., Art. 53(1)(a).
[1056] *Goldstone Report*, *supra* note 633, para. 17. See paras. 158 and 161.
[1057] *Timor-Leste Report*, *supra* note 376, para. 14; *Guinea Report*, *supra* note 39, para. 22; *CAR Report*, *supra* note 32, para. 16; *Eritrea First Report*, *supra* note 567, para. 26.
[1058] *Syria Thirteenth Report*, *supra* note 928, para. 3.
[1059] *North Korea Report*, *supra* note 32, para. 17.
[1060] *Ibid*., para. 29.
[1061] *Eritrea Second Report*, *supra* note 569, para. 10.
[1062] *CAR Report*, *supra* note 32, footnote 215, citing ICTR Prosecutor, *Best Practices Manual on the Investigation and Prosecution of Sexual Violence Crimes in Post Conflict Regions*, 30 January 2014, available at http://w.unictr.org/sites/unictr.org/files/legal-library/140130_prosecution_of_sexual_violence.pdf (accessed 1 May 2018).

Guidance and Practice[1063] as sources of best practices. Adhering to best practices may go some way towards defusing objections that commissions' working methods are unfair or insufficiently rigorous.[1064] They give the impression of the development of coherent and consistent inquiry practice, which may bolster perceptions of the credibility and reliability of commissions' findings.

Conclusions

This Chapter examined how UN atrocity inquiries acted as engineers of their mandates, determining the technical requirements to implement the mandating authority's vision in light of practical constraints and in view of their roles and functions. Understanding impartiality as a crucial condition for formulating credible findings, commissions interpreted their mandates to include relevant actors and territories, while excising suggestions of prejudgment and bias. Commissions' independence was especially asserted when their interpretations departed significantly from the language of mandating resolutions. These efforts went some way to insulate commissions from elements of politicisation at the level of the mandating authority.

Commissions' approaches to mandate implementation were guided by principles of impartiality, a victim-centred outlook, and in many cases, accountability. The limited allocation of resources and time pressure for reporting necessitated selective information-gathering and consideration of feasibility in designing working methods. Security risks added further complexity. By focussing on serious violations, especially those amounting to international crimes, commissions prioritised scarce resources towards incidents that would trigger states' duties to investigate and prosecute and which would command the attention of the international community. Their efforts to collect and preserve information for use in criminal proceedings further concretised their roles as precursors of investigations of international crimes. Commissions provided a platform for victims' voices by holding public hearings and designing working methods that facilitated victim participation while protecting their safety to the extent possible. Interesting in this regard is commissions' burgeoning recognition of their limited abilities to protect witnesses and investigate SGBV. Such disclosures reflect a commitment to transparency and signal to mandating authorities that such tasks should not be expected to be undertaken by bodies with temporary mandates and scarce resources.

While commissions encouraged states to participate in their work, they found ways to gather and assess information in the absence of state cooperation, to recognise harms as experienced by victims and avoid frustrating their mandates. By according states highly visible opportunities to provide information, reporting on the extent of their non-cooperation and seeking states' views from alternative sources, commissions insulated themselves to some extent from critiques that they had discharged their mandates unfairly. Kirby recalls that in respect of the North Korea Commission, "transparency was the antidote to our exclusion

[1063] *Gaza Report*, *supra* note 766, footnote 3; *North Korea Report*, *supra* note 32, footnote 11; *Eritrea First Report*, *supra* note 567, para. 16.

[1064] E.g., 'Response of the Government of Eritrea to the report of the Commission of Inquiry', in *Note verbale dated 19 June 2015 from the Permanent Mission of Eritrea to the United Nations Office at Geneva addressed to the Office of the President of the Human Rights Council*, UN Doc. A/HRC/29/G/6, 24 June 2015, Annex II, para. 5 [*Eritrea Note Verbale*].

from, and non-cooperation by, the country subject to our inquiry."[1065] The drawing of adverse inferences was another strategy, especially where material information was exclusively held by states. While this practice allows commissions to reach findings of violations and thereby denounce states' conduct, it also gives rise to some concerns. Where states refuse to cooperate due to perceptions of bias, use of adverse inferences may be interpreted as further unfair targeting. The example of the Goldstone Commission shows how this practice might undermine an inquiry's work.[1066] This practice remains vulnerable to criticism that findings reflect political ends rather than the results of impartial fact-finding.

Commissions' design of their working methods was also informed by their roles and functions. Some commissions emphasised links with judicial procedure, not only to align their work with judicial bodies but to borrow from the hallmarks of judicial pedigree. Commissions' adoption of rules of procedure added a sense of formality to their work and, where rules were similar, promoted consistency across commissions. The adoption of standards of proof and best practices acted as means of quality-control. The development of a common standard of proof and best practices more generally reinforced consistency in inquiry practice while distinguishing commissions' work from that of judicial bodies. These initiatives convey that commissions are not simply arbitrary exercises or 'lite' judicial proceedings, but rather are principled endeavours occupying a distinct institutional space.

In short, commissions interpreted and implemented their mandates in an effort to create conditions for the production of authoritative findings. Such findings could challenge denials by concerned states, command the attention of the international community and galvanise accountability efforts.[1067] These functions also informed commissions' interpretations of legal dimensions of their mandates and the substantive applicability of fields of international law. These aspects are explored in next, in Chapter Four.

[1065] Michael Kirby, 'Foreword', in Henderson, *supra* note 94, vi-xiv, at xi.
[1066] Yihdego writes that Goldstone's retraction "arguably damaged UN fact-finding in general and the Mission in particular": Yihdego, *supra* note 96, at 21.
[1067] E.g., *UNCHR Gaza Report*, *supra* note 536, para. 104.

CHAPTER FOUR

IDENTIFICATION OF THE APPLICABLE LEGAL FRAMEWORK

Introduction

Previous chapters identified how roles and functions of UN atrocity inquiries were fashioned by mandating authorities and finessed by commissions when interpreting and operationalizing their mandates. It was also observed that commissions' mandates often had legal dimensions, such as through instructions to establish the facts of violations, determine responsibilities and propose accountability recommendations with regard to the nature and scope of violations.[1068] Some mandates mentioned specific legal fields, notably IHRL, IHL and ICL, as legal lenses [1069] of analysis. Building on these observations, Chapter Four zooms in on commissions' engagement with legal dimensions of their mandates. Commissions often termed relevant legal fields as the 'applicable' law.[1070] In the UN inquiry context, such 'applications' do not have direct legal effect; however, for ease of reference, similar language is used here. The Chapter examines how commissions' roles and functions informed their approaches toward identifying the legal framework law applicable to the situations under scrutiny.

Chapter Four is organised in the following way. Section 1 discusses how commissions identified legal dimensions of their mandates, including common rationales for interpreting mandates to include legal lenses beyond those specified by mandating authorities. The Chapter then moves to examine commissions' approaches towards the selection of law applicable to the situations and actors under scrutiny. Section 2 examines commissions' approaches in respect of IHRL, Section 3 examines the same in respect of IHL, and Section 4 discusses commissions' view of the applicability of ICL. The Conclusions section offers cross-cutting observations as to how commissions' roles and functions informed their approaches to the identification of the applicable legal framework.

1. Identification of Legal Dimensions of the Mandate

This Section discusses how commissions identified legal dimensions of their mandates. As these identifications were made independently of mandating authorities, they offer insights into commissions' own perceptions of their functions. Commissions' reasoning was expressed in their reports and was sometimes also articulated in other documents prepared by them, such as terms of reference and communications with states. This Section also examines commissioners' views as expressed in their academic writings and published interviews with journalists and scholars, as these resources offer further comprehension of their approaches.

[1068] See Chapter Two, Section 2.
[1069] Boutruche 2013, *supra* note 482.
[1070] E.g., *Yugoslavia Interim Report*, *supra* note 292, para. 36; *Goldstone Report*, *supra* note 633, para. 268; *Syria First Report*, *supra* note 32, para. 84; *Libya First Report*, *supra* note 968, para. 57 and *CAR Report*, *supra* note 32, para. 41.

Section 1.1 discusses how commissions interpreted mandates expressed in factual terms to include legal dimensions. Section 1.2 discusses the extent to which commissions interpreted their mandates conservatively, by confining the applicable law to fields specified in the written mandate. Section 1.3 discusses the more common practice of interpreting the mandate to include other legal fields and examines commissions' rationales for those interpretations. Section 1.4 brings these strands together to discuss how commissions' interpretations of legal dimensions of their mandates were shaped by their roles and functions.

1.1 Inclusion of legal dimensions in factual mandates

A few written mandates of UN atrocity inquiries did not explicitly mention international law. All these commissions interpreted their mandates to include legal dimensions. The approaches of two commissions are examined in more detail: the HRC-led Beit Hanoun Commission and the Palmer Commission. These commissions viewed the framework of international law as of significantly different relevance to their mandates.

The HRC instructed the Beit Hanoun Commission to "[a]ssess the situation of victims; address needs of survivors; and make recommendations on ways to protect Palestinian civilians against further Israeli assaults".[1071] The Commission saw the framework of international law as central, stating that "[i]n construing its mandate and the facts presented to it, the mission applied an international law framework, in particular [IHRL] and [IHL]".[1072] When interpreting its mandate, the Beit Hanoun Commission took into account the "context provided by the [mandating] resolution as a whole, with particular reference to collective punishment; the killing of civilians as a gross violation of human rights law and [IHL]; [IHL] applicable to medical personnel";[1073] and the "rights-based definition of 'victim'."[1074] The Commission treated its mandating authority's condemnation of violations as indications that an important part of its mandate was to evaluate atrocities on the basis of international law.

The Secretary-General instructed the Palmer Commission to identify the "facts, circumstances and context"[1075] of the Gaza flotilla incident and recommend ways of avoiding similar incidents in the future. The Commission depicted its mandate as concerned with matters beyond the scope of domestic inquiries by Israel and Turkey, which had reached opposite conclusions as to its legality.[1076] Its view of the utility of international law as a framework for the inquiry is apparent from its statement:[1077]

> The [Commission] will not add value for the [UN] by attempting to determine contested facts or by arguing endlessly about the applicable law. Too much legal analysis threatens to produce political paralysis. Whether what occurred here was legally

[1071] *Beit Hanoun Mandate*, *supra* note 317.
[1072] *Beit Hanoun Report*, *supra* note 620, para. 10.
[1073] *Ibid.*, para. 5(a).
[1074] *Ibid.*, para. 5(c).
[1075] *Palmer TOR*, *supra* note 316.
[1076] *Palmer Mandate*, *supra* note 315. See *Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010*, February 2011, available at http://www.mfa.gov.tr/data/Turkish%20Report%20Final%20-%20UN%20Copy.pdf (accessed 1 May 2018) [*Turkish Report*] and *Report of the Public Commission to Examine the Maritime Incident of 31 May 2010*, January 2011, available at http://www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf (accessed 1 May 2018) [*Turkel Report*].
[1077] *Palmer Report*, *supra* note 316, para. 15.

> defensible is important but in diplomatic terms it is not dispositive of what has become an important irritant not only in the relationship between two important nations but also in the Middle East generally.

The Palmer Commission also downplayed the authority of its legal views:[1078]

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

These statements indicate that the Palmer Commission was not seeking to impose its views on states, instead aiming to provide an account of events which both states could accept in order to move past their diplomatic rupture. Blank observes that in respect of the Gaza flotilla situation, different legal positions reinforced disagreements about wider narratives of the conflict,[1079] and that the law may be used "as a tool for further disputes".[1080] This observation may explain why the Commission did not dwell on legal dimensions of the conflict. The bulk of its report focussed on factual issues, but it also concluded that Israel's naval blockade was lawful[1081] and its actions when intercepting the vessels were "excessive and unreasonable".[1082] Other legal principles were discussed in an annex and not applied to the facts. Moreover, they were the limited to the views of the Chair and Vice-Chair, excluding representatives of Turkey and Israel.[1083] Recommendations were generally of a practical nature; the Commission considered the existence of practical alternatives and whether steps could be taken to remove the need for a blockade as "issues of importance to the wider international community."[1084]

1.2 Conservative interpretations of legal lenses

In a few cases, commissions only applied the legal fields specified in their written mandates. For instance, the UNCHR's Gaza Inquiry was instructed to investigate IHL and IHRL.[1085] That commission characterised incidents as violations of these fields, and only engaged with ICL in a general statement that targeted shootings would attract "international criminal responsibility".[1086] The Eritrea Commission narrowly interpreted the legal dimensions of its mandate. The HRC had requested the Commission to "investigate all alleged violations of human rights in Eritrea, as outlined in the reports of the Special Rapporteur".[1087] The Eritrea Commission compared its mandate with other HRC mandates which had requested commissions to investigate human rights violations and 'related crimes',[1088] concluding that its mandate did not include the investigation of international crimes.[1089] It recommended that

[1078] *Palmer Report*, *supra* note 316, para. 14.
[1079] Blank, *supra* note 481, at 102.
[1080] *Ibid.*, at 102.
[1081] *Palmer Report*, *supra* note 316, para. 81.
[1082] *Ibid.*, para. 117.
[1083] *Ibid.*, Appendix I, at 86.
[1084] *Ibid.*, para. 16.
[1085] *UNCHR Gaza Mandate*, *supra* note 339, para. 6 and *Israeli Settlements Mandate*, *supra* note 340, para. 9.
[1086] *UNCHR Gaza Report*, *supra* note 536, para. 119.
[1087] *Eritrea Mandate*, *supra* note 347, para. 8.
[1088] *Eritrea First Report*, *supra* note 567, para. 11.
[1089] *Ibid.*, para. 11. See *Eritrea Q&A*, *supra* note 89.

the HRC mandate an investigation "of the extent to which the abuses identified by the Commission constitute crimes against humanity".[1090] Nor did it apply IHL, finding that the Government's policy of 'no war, no peace' had no legal significance, and that Eritrea was not currently engaged in an armed conflict as defined in international law.[1091] After receiving its report, the HRC extended its mandate to investigate violations with a view to ensuring accountability, including where they "may amount to crimes against humanity".[1092] The Commission qualified violations as international crimes in its second report.[1093] The Eritrea Commission's interpretive approach suggests that it did not consider that it could – or should – stray beyond its written mandate. It may also have conveyed to the HRC that legal lenses should be specified in written mandates, to avoid potential claims that commissions had exceeded their jurisdiction.

1.3 Broad interpretations of legal lenses

Most commissions interpreted their mandates expansively, including legal fields in the applicable law beyond those stated in written mandates, particularly IHL and ICL. Commissions presented different – sometimes multiple – explanations for their interpretations, namely reference to resolutions of the mandating authority or other UN bodies (1.3.1); engagement with concerned states' views (1.3.2); objective applicability of legal fields to the situation on the ground (1.3.3); the interrelationship of fields of law (1.3.4) and the purpose of ensuring accountability (1.3.5).

1.3.1 Reliance on UN resolutions

Some commissions identified legal lenses by pointing to other aspects of their mandating resolutions. The Beit Hanoun Commission identified IHRL and IHL as relevant legal lenses, citing the HRC's reference to those fields in its mandating resolution.[1094] The Burundi Commission interpreted the instruction to identify "authors" of violations as including ICL within its applicable law.[1095] Another pertinent example is the Syria Commission, whose original mandate mentioned IHRL and crimes against humanity.[1096] Syria objected to the Commission's investigation of IHL violations as invoking "incorrect legal pretexts which fall beyond the scope of its mandate".[1097] In response, the Commission cited HRC Resolution 21/26 which affirmed the need to hold to account "those responsible for crimes against humanity and war crimes", pointing out, "[w]ar crimes are serious violations of IHL."[1098] OHCHR cites this resolution as expanding the Commission's mandate to include war

[1090] *Eritrea First Report*, *supra* note 567, para. 1542(c).
[1091] *Ibid.*, para. 190.
[1092] *Eritrea Mandate Extension*, *supra* note 503, para. 10.
[1093] *Eritrea Second Report*, *supra* note 569, para. 178 *et seq*.
[1094] *Beit Hanoun Report*, *supra* note 620, para. 10, citing *Beit Hanoun Mandate*, *supra* note 317, paras. 4-5.
[1095] *Burundi Detailed Report*, *supra* note 405, para. 703.
[1096] *Syria Mandate*, *supra* note 47.
[1097] *Letter from the Permanent Mission of the Syrian Arab Republic*, 7 January 2013, in *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/22/59, 5 February 2013, Annex I, at 31 [*Syria Fourth Report*].
[1098] *Letter from the International Commission of Inquiry on the Syrian Arab Republic*, 15 January 2013, in *Syria Fourth Report*, *supra* note 1097, Annex I, at 34.

crimes.[1099] While the resolution extended the Commission's temporal mandate, the reference to war crimes is more oblique. By contrast, the HRC instructed the Commission to continue updating its "mapping exercise" [1100] of human rights violations and to investigate massacres.[1101] The HRC has since expressly instructed the Commission to investigate war crimes.[1102]

The Yugoslavia Commission referred to other UN resolutions when construing its mandate.[1103] The Commission observed in its interim report that the Third Committee of the General Assembly adopted a draft resolution affirming that those committing crimes against humanity and grave breaches of the Geneva Conventions were individually responsible; the international community would seek to bring them to justice and relevant information should be provided to the Commission.[1104] The Commission concluded that its mandate "empowered it to engage in consultations on the refinement of the principle of personal responsibility".[1105]

1.3.2 Engagement with concerned states' views

In at least one case, critiques by a concerned state regarding the legal lenses selected by a commission may have informed its mandate interpretation. This example is the Syria Commission, which was instructed by the HRC to investigate violations of human rights and crimes against humanity.[1106] The Syrian Government argued that the Commission should examine terrorist acts, as well as foreign states' support of terrorist organisations. As the latter issue gives rise to questions of state responsibility, it is examined in Chapter Six. This Section explores whether the first prong of the state's critique encouraged the Syria Commission to examine acts of terrorism. In order to do so, it is necessary to closely read the Commission's reports and its correspondence with the Syrian Government.

At first, the Syria Commission did not engage with the concept of terrorism except as a pretext for the Syrian Government's use of force. In its first report in late 2011, the Commission made findings of human rights violations by the Government and crimes against humanity by its agents.[1107] It was critical of the Government's use of force against mostly peaceful protestors, depicting its justification of responding to 'terrorists' as largely pretext.[1108] In response, the Government accused the Commission of exceeding its mandate by "holding the Syrian Government fully accountable for what is going on in Syria, while you have given a blind eye to the violations of human rights committed by the terrorist

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[1099] OHCHR, 'Mandate', available at http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/CoIMandate.aspx (accessed 1 May 2018).
[1100] HRC Res. 21/26, para. 18.
[1101] *Ibid.*, para. 19.
[1102] HRC Res. 32/25, 1 July 2016, para. 22.
[1103] *Yugoslavia Mandate*, *supra* note 290, in conjunction with SC Res. 771 (1992).
[1104] *Yugoslavia Interim Report*, *supra* note 292, para. 7. See *Yugoslavia Final Report*, *supra* note 39, para. 4, citing GA Res. 47/147, 18 December 1992.
[1105] *Yugoslavia Interim Report*, *supra* note 292, para. 19.
[1106] *Syria Mandate*, *supra* note 47.
[1107] *Syria First Report*, *supra* note 32, paras. 109-111.
[1108] *Ibid.*, paras. 30, 45 and 104.

groups".[1109] The Commission replied that it was "firmly committed to reflecting violations and abuses on all sides".[1110]

In the Commission's second report of February 2012, it found that opposition forces had become more organised[1111] and that "instances of gross abuses" were committed by them.[1112] By contrast, "widespread and systematic"[1113] patterns of violations were found to be committed by State forces. The Commission did not qualify opposition attacks as 'terrorist acts', but did find that Government snipers and *de facto* agents known as *Shabbiha* had "terrorized the population".[1114] In April 2012, the Commission wrote again seeking cooperation, reminding the Government that the Commission was "the first body to investigate and report on human rights violations by armed opposition groups"[1115] and assuring that it would investigate all violations, including those committed against Syrian military and security forces. In August 2012, the Commission qualified the situation in Syria for the first time as a NIAC.[1116] It confirmed earlier findings of responsibility in respect of the Syrian Government and found that opposition groups had violated IHRL and IHL,[1117] but did not qualify incidents as terrorist acts.

In January 2013, the Syrian Government wrote again, stating that "[i]t remains unknown why the CoI continues to refuse to apply international law on combating terrorism – including relevant [Security Council] Resolutions, despite the fact that these are binding resolutions that are to be applied to what is happening in Syria."[1118] The Commission's reply did not wholly answer those concerns. On one hand, the Commission seemed to take Syria's views into account, stating that it would "welcome an exchange on the Government's concern as to the application of international law on combating terrorism, including relevant UN Security Council Resolutions".[1119] On the other hand, the Commission suggested that it had already engaged with this issue:[1120]

> Although the mandate of the CoI does not include 'terrorism', previous CoI reports have condemned bombings that did not appear directed toward military targets (See Periodic

[1109] *Note verbale dated 21 December 2011 from the Permanent Representative of the Syrian Arab Republic addressed to the commission* [*Syria note verbale 21 December 2011*], in *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/19/69, 22 February 2012, Annex II, at 27 [*Syria Second Report*]. See *Note verbale dated 23 January 2012 from the Permanent Representative of the Syrian Arab Republic addressed to the Commission*, paras. 6-9, in *Syria Second Report*, Annex XI, at 63-64.

[1110] *Note verbale dated 2 February 2012 from the Commission addressed to the Permanent Representative of the Syrian Arab Republic*, in *Syria Second Report*, *supra* note 1109, Annex XII, at 68.

[1111] *Syria Second Report*, *supra* note 1109, para. 17.

[1112] *Ibid*., para. 83.

[1113] *Ibid*.

[1114] *Syria Second Report*, *supra* note 1109, para. 39.

[1115] *Letter dated 22 June 2012 from the Chair of the Commission to the Minister of Foreign and Expatriates Affairs of the Syrian Arab Republic*, in *Syria Third Report*, *supra* note 564, Annex I, at 43.

[1116] *Syria Third Report*, *supra* note 564, para. 12.

[1117] *Ibid*., paras. 132-134.

[1118] *Note verbale dated 9 January 2013 from the Permanent Representative of the Syrian Arab Republic addressed to the Commission*, in *Syria Fourth Report*, *supra* note 1097, Annex I, at 32 [*Syria note verbale 9 January 2013*].

[1119] *Note verbale dated 15 January 2013 from the Commission addressed to the Permanent Representative of the Syrian Arab Republic*, in *Syria Fourth Report*, *supra* note 1097, at 36 [*Syria note verbale 15 January 2013*].

[1120] *Ibid*.

> Update 24 May, p. 5 repeated in HRC/20/CRP.1) (See also HRC/21/50, p. 78) and which appeared to have as 'a primary purpose spreading terror among the civilian population' which are prohibited under IHL. The CoI's subsequent report will contain additional findings in this area.

The documents cited above identified several explosions which killed "scores of civilians",[1121] but the Commission did not find that they were intentionally aimed at civilians, let alone qualifying as terrorist acts. On the contrary, the Commission reached the limited conclusion that while the explosions "may be linked to the [NIAC] and thus assessed under the applicable IHL rubric, lack of access to the crime scenes combined with an absence of information on the perpetrators hampered the Commission's ability to render such an assessment".[1122] The Commission's indication that its next report would make 'additional findings' in the area of terrorism may have sought to mollify the concerned state if it was of the view that the Commission had not yet considered those issues.

A change in approach is discernible in the Commission's fourth report, issued in February 2013. It recognised that some anti-Government groups as well as Government forces and "other perpetrators"[1123] had spread terror in violation of IHL. Shortly after the Commission's fourth report, UN bodies began to pay more attention to the involvement of terror groups in Syria. In March 2013, the HRC condemned "all violence, especially against civilians… including terrorist acts".[1124] In its fifth report, the Commission identified Jabhat Al-Nusra (Al-Nusra Front) and the Islamic State of Iraq and the Levant (Daesh or ISIS) as parties to the conflict, but did not make findings of terrorist acts by these actors.[1125] In its sixth report, the Commission acknowledged terrorism in a broader way, stating in its methodology section:[1126]

> The commission investigated a number of incidents that may be labelled as 'terrorist attacks' or 'terrorism'. Once the threshold of non-international armed conflict has been met, and the suspected perpetrators are parties to the conflict, the commission renders its assessment of an attack's legality under the rubric of [IHL] and [IHRL]. Any attack the sole purpose of which is to spread terror among the civilian population is prohibited.

The Commission qualified various attacks as acts of terror in violation of IHL.[1127] From 2014, the Commission's reports gave significant attention to terrorist acts by ISIS and the Al-Nusra Front,[1128] noting that the Security Council had deemed these actors as 'terrorist entities'.[1129]

[1121] *Syria Third Report*, *supra* note 564, Annex V, para. 55; *Oral Update of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. HRC/20/CRP.1, 26 June 2012, para. 102 [*Syria Oral Update*]; *Periodic Update of the Independent International Commission of Inquiry on the Syrian Arab Republic*, 24 May 2012, para. 24, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/PeriodicUpdate24May2012.pdf (accessed 1 May 2018).

[1122] *Syria Third Report*, *supra* note 564, para. 56. See *Syria Oral Update*, *supra* note 1121, para. 103.

[1123] *Syria Fourth Report*, *supra* note 1097, paras. 127 and 133-135.

[1124] HRC Res. 22/24, 22 March 2013, para. 3.

[1125] *Syria Fifth Report*, *supra* note 1046, para. 29.

[1126] *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/24/46, 16 August 2013, para. 11 [*Syria Sixth Report*].

[1127] *Syria Sixth Report*, *supra* note 1126, paras. 74, 134, and 148.

[1128] Syria Commission, *Rule of Terror: Living under ISIS in Syria*, 14 November 2014, para. 1. See *Syria Eighth Report*, *supra* note 983, para. 108 and findings at paras. 37 (ISIS), 107 (Al-Nusra Front) and 102 (Syrian Government).

The focus on terrorism in the Commission's later reports arguably reflects the deteriorating situation on the ground.[1130] However, the Commission's fourth report of February 2013 represents an interesting intermediate phase, as it made findings of terrorist acts prior to wider recognition of this dimension of the conflict. This focus might have represented an effort to assure the Syrian Government of its even-handedness while pointing out that the scale of violations was not equivalent between the parties. Perhaps the Commission hoped to encourage Syria's cooperation by examining acts of terrorism. If that was the case, it still did not fully accept the Government's approach, as it examined terrorism through the frameworks of IHL and IHRL rather than as discrete violations, as might have been suggested by the Government's invocation of Security Council resolutions. By requiring 'terrorist acts' to violate IHL, the Commission distinguished participation in hostilities against the Government from targeting of civilians. In this way, it avoided labelling all opposition forces as 'terror' groups. The Syria Commission is the sole instance to date of a commission adjusting its investigative focus in response to critiques by a concerned state. Its long-running mandate has also allowed more opportunities for engagement with the concerned state.

1.3.3 Applicability to the situation on the ground

Some commissions explained that fields of law came within their mandates as a result of their applicability to the situation on the ground, and that it was necessary to include them to conduct a comprehensive examination. For instance, the HRC-led Gaza Flotilla Commission had regard to *jus in bello* and *jus ad bellum* norms relevant to naval warfare, reasoning that these legal fields were of relevance to "issues raised by the mandate".[1131] The Israeli Settlements Commission found that because there was an ongoing situation of occupation in Palestine, that IHL was applicable.[1132] The North Korea Commission incorporated IHL into its applicable law to the extent relevant to the DPRK's residual obligations after the Korean War.[1133] After the HRC widened the Eritrea Commission's mandate to include crimes against humanity, the Commission examined whether Eritrea was engaged in an armed conflict as defined under international law, in order to determine whether IHL was applicable.[1134]

This rationale was notably adopted by commissions when expanding the applicable law to include IHL when their mandates had been formulated before violence escalated into armed conflict. For instance, in 2011 the HRC instructed the Syria Commission to investigate human rights violations.[1135] In March 2012, the Syria Commission reported that the situation amounted to a NIAC, so that IHL also applied.[1136] The Libya Commission took a similar

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[1129] SC Res. 2170 (2014) and SC Res. 2161 (2014).
[1130] E.g., US Department of State, 'The Global Coalition to Defeat ISIS', 10 September 2014, available at http://www.state.gov/s/seci (accessed 1 May 2018) and White House Office of the Press Secretary, 'Statement by the President on ISIL', 10 September 2014, available at http://obamawhitehouse.archives.gov/the-press-office/2014/09/10/statement-president-isil-1 (accessed 1 May 2018).
[1131] *Gaza Flotilla Report*, *supra* note 681, para. 48.
[1132] *Israeli Settlements Report*, *supra* note 572, para. 13.
[1133] *North Korea Report*, *supra* note 32, para. 64.
[1134] *Eritrea Second Report*, *supra* note 569, para. 190.
[1135] *Syria Mandate*, *supra* note 47.
[1136] *Syria Third Report*, *supra* note 564, para. 12 and Annex II, at 45, para. 3, *contra Syria Second Report*, *supra* note 1109, para. 13.

approach. Its mandate was drafted in February 2011 as the situation in Libya was rapidly deteriorating.[1137] The Commission included IHL in its applicable law after finding that armed conflicts had arisen in Libya.[1138] Philippe Kirsch, who chaired the Commission, explained that the application of IHL "could not have been anticipated by the [HRC] because there was no armed conflict when the commission was set up".[1139] From his perspective, had the Commission excluded IHL, "there is no question we would have been criticized for avoiding so many violations."[1140] The Burundi Commission prospectively recognized the potential applicability of IHL in its terms of reference. Noting that its written mandate referred to IHRL and ICL, the Commission also observed, "Burundi is party to the Geneva Conventions and their additional protocols. If the Commission were to reach the conclusion that aspects of the situation in Burundi fell under these conventions, they would also become part of the body of applicable law."[1141]

Some commissions identified the ICC's active jurisdiction as a reason to include ICL within the applicable law. The Libya Commission interpreted its mandate to consider "crimes perpetrated" as follows: "[g]iven the Security Council's referral of events in Libya to the [ICC], the Commission has also considered events in light of [ICL]."[1142] This perspective was reiterated by Kirsch writing academically: "[ICL] also applies to the [Libyan] situation, by virtue of the referral of the Security Council to the [ICC]…"[1143] The CAR Commission reported that ICL was a "central frame of reference" as the CAR had ratified the Rome Statute of the ICC (Rome Statute) in 2001.[1144]

Commissions utilized this rationale selectively. While IHL and ICL were commonly incorporated on this basis, other potentially relevant legal fields remained outside the mandate. For instance, the Gaza Commission examined the report of a Headquarters Board of Inquiry into damage to UN facilities[1145] for the purpose of assessing IHL violations,[1146] but did not examine whether the Convention on the Privileges and Immunities of the United Nations 1946 was violated, considering this body of law as beyond its mandate.[1147] Several commissions did not examine potential violations of *jus ad bellum*. For instance, the Syria Commission did not address *jus ad bellum* dimensions of military operations by third states conducted without Syria's consent, and the Libya Commission did not discuss whether NATO's operations complied with the scope of the Security Council's authorization of the use of force.[1148] Marko Milanovic observes in relation to regional human rights courts, "because *jus ad bellum* issues can be both politically and legally complex and controversial,

[1137] *Libya Mandate*, *supra* note 343.
[1138] *Libya First Report*, *supra* note 968, paras. 4, 52 and 56.
[1139] Interview conducted by Rob Grace on 22 March 2013 with Philippe Kirsch, quoted in Grace 2015, *supra* note 59, at 41 [*Kirsch interview*].
[1140] Grace 2015, *supra* note 59, at 41.
[1141] *HRC Burundi TOR*, *supra* note 495, at III(i).
[1142] *Libya First Report*, *supra* note 968, para. 4.
[1143] Kirsch, *supra* note 97, at 304.
[1144] *CAR Report*, *supra* note 32, para. 4.
[1145] *Summary by the Secretary-General of the report of the United Nations Headquarters Board of Inquiry into certain incidents that occurred in the Gaza Strip between 8 July 2014 and 26 August 2014*, UN Doc. S/2015/286, 27 April 2015.
[1146] *Gaza Report*, *supra* note 766, paras. 421 and 475.
[1147] *Ibid.*, para. 449.
[1148] *Libya Second Report*, *supra* note 853, paras. 603 and 613.

insulating human rights from the *jus ad bellum* can help preserve the integrity of human rights and the institutional competence of human rights bodies."[1149] Similar concerns might arise for inquiry bodies. Commissions might consider *jus ad bellum* as insufficiently connected to human rights, or perhaps as a matter reserved for other bodies, particularly the Security Council.

1.3.4 Links between fields of international law

Some commissions considered IHRL and IHL as sufficiently interconnected so as to fall within their mandates. Several commissions depicted IHL and IHRL as mutually reinforcing.[1150] Offering an additional basis for the Libya Commission's application of IHL, Philippe Kirsch states that the Commission concluded that "the broad human rights legal framework encompassed human rights and IHL as *lex specialis* applicable in times of armed conflicts."[1151]

This perspective of the interrelationship between IHL and IHRL is shared by scholars such as Thilo Marauhn, who writes that although the HRC was not originally established to address IHL violations, it may do so as a result of the overlap in these fields. Marauhn argues that the Syria Commission "can draw legitimacy for addressing [IHL] from the interface between the two bodies of law."[1152] Other scholars do not consider that a human rights mandate implicitly includes IHL.[1153]

1.3.5 Purpose of ensuring accountability

Some commissions depicted ICL as a means of ensuring individual accountability for serious violations of IHL and IHRL.[1154] This justification also has synergies with the above-mentioned rationale based on links between legal fields, as it posits that ICL comprises rules of individual responsibility for violations of IHL and IHRL. It also reflects the goal of promoting human rights protection and compliance.[1155] Some commissions whose written mandates did not mention ICL applied this legal field to promote accountability. For instance, the CAR Commission observed that although the Security Council did not mention ICL in its mandate, ICL was "an essential complement to both [IHRL] and [IHL], in that it establishes individual criminal liability for serious violations of those other two bodies of law."[1156] The Goldstone Commission explained its inclusion of ICL in the following way:[1157]

[1149] Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict', in Nehal Bhuta (ed.), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (Oxford: OUP, 2016) 55-88, at 86.

[1150] *Darfur Report*, *supra* note 32, para. 143; *Lebanon Report*, *supra* note 855, para. 64; *Syria Third Report*, *supra* note 564, Annex II, para. 5.

[1151] *Kirsch interview*, *supra* note 1139, at 40-41.

[1152] Marauhn, *supra* note 96, at 439.

[1153] See Chapter Two, Section 2.3.2.

[1154] E.g., *Libya Second Report*, *supra* note 853, para. 23; *CAR Report*, *supra* note 32, para. 111.

[1155] Ratner 2015, *supra* note 401, at 556; OHCHR, *Outcome of the Expert Consultation on the Issue of Protecting the Human Rights of Civilians in Armed Conflict*, UN Doc. A/HRC/11/31, 4 June 2009, para. 7.

[1156] *CAR Report*, *supra* note 32, para. 111.

[1157] *Goldstone Report*, *supra* note 633, para. 286.

> [ICL] has become a necessary instrument for the enforcement of IHL and IHRL. Criminal proceedings and sanctions have a deterrent function and offer a measure of justice for the victims of violations. The international community increasingly looks to criminal justice as an effective mechanism of accountability and justice in the face of abuse and impunity. The Mission regards the rules and definitions of [ICL] as crucial to the fulfilment of its mandate to look at all violations of IHL and IHRL by all parties to the conflict.

The Rwanda Commission was instructed to investigate 'grave violations' of IHL and genocide.[1158] Its mandating resolution recognised individual responsibility for serious violations of IHL and affirmed that individuals "should be brought to justice".[1159] The Commission wrote:[1160]

> The principle that the individual shall be held responsible for serious violations of human rights - firmly enforced by the Nuremberg Tribunal and today universally recognized by the international community - is the same principle that guides the operation of the [ICTY] and of the [Rwanda Commission] acting in conformity with [SC Res. 935 (1994)].

The Rwanda Commission's explanation evokes the statement at Nuremburg that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[1161]

Commissions have not expressly included IHL on the basis that it is necessary to ensure accountability, but this argument has been made in commentary. Some scholars argue that because IHL lacks enforcement mechanisms, it is important for commissions to assess IHL violations.[1162] Theodor Meron writes that because few expert bodies are mandated to apply IHL, human rights bodies "fill an institutional gap".[1163] Marauhn writes that if the Syria Commission did not investigate IHL violations, they would remain unaddressed, so "the Commission and the HRC deserve credit for taking up the issues".[1164]

1.4 Discussion

All UN atrocity inquiries examined legal dimensions of situations of concern. The contrasting examples of the Beit Hanoun Commission and the Palmer Commission illustrate how both commissions interpreted their mandates to include some legal content. They also show that commissions saw rather different roles for international law in light of the wider purposes of their mandates. The Beit Hanoun Commission took a human rights-based approach and sought to convey the suffering of victims. By contrast, the Palmer Commission was not

[1158] *Rwanda Mandate*, *supra* note 296, para. 1.
[1159] *Ibid.*, Preamble.
[1160] *Rwanda Interim Report*, *supra* note 298, para. 128.
[1161] *The Trial of Major War Criminals before the International Military Tribunal*, cited in Nollkaemper, *supra* note 787, at 313.
[1162] See in relation to special procedures mandates, Alston *et al*, *supra* note 533, at 184-185.
[1163] Meron, *supra* note 735, at 247.
[1164] Marauhn, *supra* note 96, at 455.

primarily concerned about determining legal responsibilities, and rather findings as a platform for practical suggestions to move Turkey and Israel beyond their diplomatic stalemate.

UN atrocity inquiries usually interpreted their mandates broadly to include relevant fields of international law. The Eritrea Commission stands rather alone in its conservative approach. The weight of commissions' practice indicates that they asserted their competence to interpret legal parameters of their mandates.[1165] This competence is not unlimited; commissions did identify certain legal areas as outside their mandates. However, commissions were generally comfortable in expanding their mandates to include IHL and ICL.

Different views have been expressed as to how mandates should be interpreted. The *Siracusa Principles* advocate a flexible approach, namely that a fact-finding body should be able to adapt to unexpected changes in circumstances, such as changes in the applicable law.[1166] The *HPCR Handbook* recommends that mandates be interpreted in light of the text, investigative purposes, principles of professional practice and practical considerations.[1167] It advises that commissioners examine the mandating authority's intent and "shifts in conditions on the ground that might require a different approach to fulfil the mandating authority's expectations".[1168] By contrast, the Special Rapporteur on Torture takes a stricter approach, advocating that mandates should be clearly drafted and only amended "in exceptional circumstances", so long as new elements are necessary and the decision is explained transparently.[1169]

In practice, not all commissions gave reasons for their interpretations of the applicable law. Further explanation as to how and why legal fields were selected might ward off critiques of overstepping the mandate and demonstrate commissions' commitment to transparency. This issue might be avoided if written mandates identified all (potentially) relevant legal fields. Conversely, ambiguity in the mandate permits flexibility, and might also foster political consensus. Grace sees benefits in fleshing out the mandate through terms of reference formulated by OHCHR so that interpretations are based on technical rather than political considerations, and their scope can be adapted more easily.[1170]

Commissions generally included IHL where it applied to the situation of concern, demonstrating an interest in raising alert of violations of humanitarian norms as well as human rights. Commissions tended to depict ICL as a vehicle for ensuring accountability for violations of IHRL and IHL. There are indeed normative links among IHRL, IHL and ICL. Crimes against humanity are sometimes depicted in scholarship as individualized prohibitions of IHRL violations,[1171] and the ICTY depicts human dignity as the common underpinning of

[1165] Alexander Orakhelashvili, 'Commissions of Inquiry and Traditional Mechanisms of Dispute Settlement', in Henderson, *supra* note 94, 119-143, at 134.
[1166] *Siracusa Guidelines*, *supra* note 34, Guideline 3.5.
[1167] *HPCR Handbook*, *supra* note 95, at 9.
[1168] *Ibid.*, at 11.
[1169] *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, UN Doc. A/HRC/19/61, 18 January 2012, para. 64.
[1170] Grace 2015, *supra* note 59, at 33-34.
[1171] E.g., Andrew Clapham, 'Human Rights and International Criminal Law', in William Schabas (ed.), *Cambridge Companion to International Criminal Law* (Cambridge: CUP, 2016) 11-33, at 16, and Thomas

IHRL and IHL.[1172] There are also significant structural and substantive differences. Schabas argues that IHL and IHRL rest on fundamentally different predicates with respect to aggressive war.[1173] Duty-bearers also differ across legal fields,[1174] and norms are overlapping, but not identical. For instance, Paola Gaeta observes that while both states and individuals may commit genocide, those responsibilities are triggered by "infringement of two different primary rules, each one shaped upon the particular nature of their addressees and the consequences of the illegal conduct attributed to them."[1175] Links between these legal fields do not necessarily explain why bodies mandated to examine violations in one field should examine others. As observed in Chapter Two, such an approach was not usually adopted by adjudicative human rights bodies.[1176] However, commissions' interpretations find synergies with special procedures mandate-holders, which sometimes included IHL and ICL in their applicable law.[1177] Reviewing the mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Alston observes:[1178]

> In general terms, the Commission and the [HRC] have chosen to create special procedures in response to particular violations which have generated pressure on the international community to take action to address specific problems. Thus the initial formulation of a mandate will often be narrow. But in relation to almost all mandates it quickly becomes apparent that a particular type of violation cannot be addressed in isolation, that the definition of the problem has been unduly restrictive, and that a systematic and potentially effective response to the goals set by the sponsors of the original resolution will require a more expansive approach.

As commissions are not linked to a particular treaty regime, they might take a broader approach in a similar manner as special procedures, in pursuit of the goals of the mandating authority.

2. Applicability of International Human Rights Law

Commissions considered several issues pertaining to the substantive applicability of IHRL, namely the general applicability of human rights treaties and the operation of derogation regimes (2.1), extraterritorial applicability (2.2), applicability in armed conflict (2.3) and to organised armed groups (2.4). Some concluding observations are then offered (2.5).

Margueritte, 'International Criminal Law and Human Rights', in William Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Oxon: Routledge, 2011) 435-452, at 446.

[1172] *Prosecutor v. Furundija*, 1T-95-17/1-T, Judgment, 10 December 1998, para. 183: "The general principle of respect for human dignity is... the very raison d'être of [IHL] and human rights law…"

[1173] William Schabas, 'Lex Specialis: Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum', (2007) 40(2) Isr L Rev 592-613, at 593 [Schabas 2007].

[1174] Frédéric Mégret, 'Nature of Obligations', in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford: OUP, 2010) 124-149.

[1175] Paola Gaeta, 'On What Conditions Can a State Be Held Responsible for Genocide?', (2007) 18(4) EJIL 631-648, at 637.

[1176] See Chapter Two, Section 2.3.2.

[1177] E.g., *Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights*, UN Doc. E/CN.4/1993/50, 10 February 1993 [*Yugoslavia SR Report*]; *DRC Joint Mission Report*, *supra* note 537 and *Somalia SR Report*, *supra* note 537.

[1178] *Extrajudicial Executions SR Report*, *supra* note 562, para. 52.

2.1 Applicability of human rights treaties

Commissions primarily identified as applicable those treaties that had been ratified by concerned states.[1179] Occasionally, commissions included treaties which states had signed but not ratified, pursuant to the customary rule that a state must refrain from acts defeating the purpose of a treaty it has signed until it makes its intention clear not to become a party.[1180] For instance, the Darfur Commission wrote that as Sudan was a signatory to the *Optional Protocol to the Convention on the Rights of the Child Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* (CRC-OP), it had to refrain from acts defeating its object and purpose.[1181]

When identifying the scope of applicability of human rights treaties, commissions examined the operation of derogation regimes. They did not accept other justifications for derogations; for instance, the Eritrea Commission rejected the Eritrean authorities' argument based on the so-called 'no war, no peace' situation in Eritrea, observing that "derogations and restrictions to human rights in exceptional situations are strictly regulated by the human rights treaties themselves."[1182]

Under the ICCPR, states may derogate from certain obligations to the extent strictly required "in times of public emergency threatening the life of nation".[1183] Commissions emphasized that certain rights could never be derogated from, such as the right to life, the prohibition of torture, and freedom of thought.[1184] In addition to expressly non-derogable rights,[1185] commissions found that other ICCPR rights impliedly had this character, such as the prohibitions of hostage-taking and forcible transfer of population,[1186] and the right to a remedy for serious violations.[1187]

When considering the ICCPR's applicability, commissions examined whether derogation conditions were satisfied.[1188] A state party wishing to derogate must inform the Secretary-General of the provisions from which it derogated and the reasons therefor.[1189] Commissions examined whether states had communicated derogations. For instance, the Darfur Commission observed that Sudan had declared a state of emergency but not that it would

[1179] Relevant treaties include the ICCPR, *supra* note 243; ICESCR, *supra* note 243; CAT, *supra* note 780; International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660 UNTS 195 [CERD]; Convention on the Elimination of All Forms of Discrimination against Women 1979, 1249 UNTS 13 and Convention on the Rights of the Child 1989, 1577 UNTS 3 [CRC].

[1180] Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, Art. 18 [VCLT]. E.g., *Darfur High-Level Report*, *supra* note 1027, para. 20.

[1181] *Darfur Report*, *supra* note 32, para. 154.

[1182] *Eritrea First Report*, *supra* note 567, para. 55.

[1183] ICCPR, *supra* note 243, Art. 4(1).

[1184] See, e.g., *Darfur Report*, *supra* note 32, para. 150; *Gaza Flotilla Report*, *supra* note 681, paras. 162 and 180, and *North Korea Report*, *supra* note 32, para. 165.

[1185] ICCPR, *supra* note 243.

[1186] *Darfur Report*, *supra* note 32, para. 151; *Lebanon Report*, *supra* note 855, para. 71; *Gaza Flotilla Report*, *supra* note 681, para. 72; *Libya Second Report*, *supra* note 853, footnote 1049.

[1187] *Darfur Report*, *supra* note 32, footnote 54.

[1188] See, e.g., *Guinea Report*, para. 170; *Goldstone Report*, *supra* note 633, para. 299; *Libya Second Report*, *supra* note 853, para. 16; *Syria First Report*, *supra* note 32, para. 25; *CAR Preliminary Report*, *supra* note 768, para. 57.

[1189] ICCPR, *supra* note 243, Art. 4(3).

derogate from the ICCPR.[1190] The Syria Commission observed that Syria had not declared a state of emergency nor sought to derogate, so the ICCPR similarly remained in full effect,[1191] including in periods of intense conflict such as the battle of Aleppo.[1192]

Where states had entered derogations, commissions examined whether they were lawfully invoked. The Lebanon Commission observed that Israel had declared a state of emergency since 1948 and had declared in 1991 that it was necessary to derogate from its obligations regarding the right to liberty.[1193] The Commission noted that the Human Rights Committee considered Israel's reservation as overly broad, and did not take the derogation into account when assessing violations concerning detained persons.[1194] The Sri Lanka Panel of Experts reported that although Sri Lanka had notified the Secretary-General of its derogations, their extent and duration were "a matter of concern".[1195] Doubting their validity, the Panel did not take Sri Lanka's derogations into account when assessing its compliance with the ICCPR.[1196] The approach taken by these commissions is similar to the strict approach to derogations taken by the Human Rights Committee in monitoring the implementation of the ICCPR.[1197]

The International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) does not have a formal derogations regime. Some commissions observed this fact.[1198] The ICESCR does however permit rights to be limited "in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."[1199] Gilles Giacca argues that this limitation clause could correspond to the ICCPR's general derogation clause.[1200] According to the ESCR Committee (CESCR), states parties have "a minimum core obligation" to ensure "minimum essential levels",[1201] and if a state blames failure to meet its obligations on a lack of resources, it must show that "every effort has been made to use all resources that are at its disposition".[1202] Commissions have affirmed the CESCR's view. For instance, the Syria Commission observed minimum core obligations to the rights to health[1203] and food.[1204] The Lebanon Commission recognised that "in times of armed conflict where resources are constrained" Economic, social and cultural rights could be limited, but restrictions had to be proportionate, pursuant to a legitimate aim and strictly necessary.[1205] The North Korea Commission observed that a state "cannot plead resource constraints to justify its failure to ensure minimum essential levels of socio-economic well-

[1190] *Darfur Report*, *supra* note 32, para. 153.
[1191] *Syria Third Report*, *supra* note 564, Annex II, para. 8.
[1192] *Syria Thirteenth Report*, *supra* note 928, Annex II, para. 3.
[1193] *Lebanon Report*, *supra* note 855, para. 73, noting Israel's derogation from ICCPR, *supra* note 243, Art. 9.
[1194] *Ibid.*, para. 197 and fn. 173.
[1195] *Sri Lanka Report*, *supra* note 29, para. 187.
[1196] *Ibid.*, para. 187.
[1197] CCPR, 'Chapter 1. Jurisdiction and Activities', para. 31, in *Report of the Human Rights Committee (Vol. 1)*, UN Doc. A/60/40, 3 October 2005.
[1198] *Goldstone Report*, *supra* note 633, para. 299.
[1199] ICESCR, *supra* note 243, Art. 4.
[1200] Gilles Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* (Oxford: OUP, 2014) at 72.
[1201] ICESCR Committee (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations*, UN Doc. E/1991/23, 14 December 1990, para. 10 [ESCR GC 3].
[1202] ESCR GC 3, *supra* note 1201, para. 10.
[1203] *Syria Seventh Report*, *supra* note 805, Annex VII, para. 2.
[1204] *Ibid.*, para. 132.
[1205] *Lebanon Report*, *supra* note 855, para. 72.

being... unless it can demonstrate that it has used all the resources at its disposal".[1206] Commissions generally interpreted ICESCR limitations narrowly, to maximize protection.

2.2 Territorial scope of applicability

Where states examined situations where states acted beyond their borders, they examined the extraterritorial applicability of IHRL obligations. Some commissions examined this issue in relation to IHRL generally. For instance, the CAR Commission wrote that "international forces in CAR are obliged to respect human rights in their activities and especially in relation to any individuals who are under their power or effective control, even when these forces are operating outside their national borders",[1207] citing in support a general comment of the Human Rights Committee.[1208]

Other commissions examined the question of territorial applicability by reference to human rights treaties, particularly the ICCPR and ICESCR. The ICCPR provides that a state party must ensure rights in respect of all individuals "within its territory and subject to its jurisdiction".[1209] Commissions which investigated Israel's actions in Palestine, Lebanon and on ships in the high seas found that Israel's ICCPR obligations applied wherever it exercised effective control, affirming the views of the International Court of Justice[1210] and the Human Rights Committee.[1211] While most states accept this view,[1212] the US, Israel and Turkey consider that the ICCPR only applies within their sovereign territories.[1213] In 2015, the Gaza Commission acknowledged[1214] but rejected Israel's view, pointing out that Israel had accepted to exercise its powers "with due regard to internationally-accepted norms and principles of human rights and the rule of law",[1215] and that the weight of authority favoured extra-territorial applicability.[1216] The North Korea Commission interpreted its mandate to include "violations that involve extraterritorial action originating from the DPRK".[1217]

[1206] *North Korea Report*, *supra* note 32, para. 638.
[1207] *CAR Report*, *supra* note 32, para. 567.
[1208] CCPR, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 10 [*CCPR GC 31*], cited in *CAR Report*, *supra* note 32, footnote 274.
[1209] ICCPR, *supra* note 243, Art. 2.
[1210] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Reports 136, para. 111 [*Wall Opinion*], cited in *Lebanon Report*, *supra* note 855, para. 74; *Goldstone Report*, *supra* note 633, para. 298; *Gaza Flotilla Report*, *supra* note 681, para. 73; *Israeli Settlements Report*, *supra* note 572, footnote 4 and *Gaza Report*, *supra* note 766, para. 41.
[1211] *CCPR GC 31*, *supra* note 1208, para. 10, cited in *Goldstone Report*, *supra* note 633, footnote 175; *Gaza Flotilla Report*, *supra* note 681, para. 73.
[1212] E.g., CCPR, *Concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, UN Doc. CCPR/C/GBR/CO/6, 30 July 2008, para. 14; Australia: *Replies to the List of Issues (CCPR/C/AUS/Q/5) to be Taken Up in Connection with the Consideration of the Fifth Periodic Report of the Government of Australia*, UN Doc. CCPR/C/AUS/Q/5/Add.1, 5 February 2009, para. 17.
[1213] US, *Fourth Periodic Report of the United States of America to the UN Committee on Human Rights*, 30 December 2011, para. 505, available at http://www.state.gov/j/drl/rls/179781.htm#i (accessed 1 May 2018) [*CCPR US Report*]; CCPR, *Concluding observations on the fourth periodic report of Israel*, UN Doc. CCPR/C/ISR/CO/4, 21 November 2014, para. 5 [*CCPR Israel Conclusions*]; CCPR, *Concluding observations on the initial report of Turkey adopted by the Committee at its 106th session*, UN Doc. CCPR/C/TUR/CO/1, 13 November 2012, para. 5.
[1214] *Gaza Report*, *supra* note 766, para. 39.
[1215] Agreement on the Gaza Strip and the Jericho Area 1994, Art. XIV.
[1216] *Gaza Report*, *supra* note 766, para. 41.
[1217] *North Korea Report*, *supra* note 32, para. 19.

Unlike the ICCPR, the ICESCR does not have a jurisdiction clause. Commissions' approaches reflected developments in authoritative interpretations of this treaty. As at the year 2000, there was little guidance as to the ICESCR's extraterritorial scope. The UNCHR's Gaza Inquiry found that Israel violated economic, social and cultural rights in Palestine while expressing doubt as to whether that treaty applied extra-territorially.[1218] In 2003, the CESCR affirmed that Israel's ICESCR obligations "apply to all territories and populations under its effective control."[1219] In 2004, the ICJ found that ICESCR obligations apply where states exercise "territorial jurisdiction."[1220] Subsequent commissions affirmed the extraterritorial applicability of the ICESCR with more confidence. The Goldstone Commission cited the CESCR when finding that Israel's obligations extended to the population in Palestine.[1221] The Israeli Settlements Commission found that Israel was bound to protect the rights of "all persons within its jurisdiction" because it was a party to several human rights treaties including the ICESCR.[1222] The Gaza Commission observed that in line with the position of the ICJ and treaty bodies, Israel's human rights obligations in Palestine endured "to the extent that it continues to exercise jurisdiction in those territories",[1223] and was obliged to not impede the exercise of those rights where competence had been transferred to Palestinian authorities. Commissions thus affirmed the ICESCR's extra-territorial applicability as legal authorities developed.

2.3 Applicability in situations of armed conflict

Commissions examined the applicability of IHRL in situations of armed conflict. Traditionally, IHL was considered as exclusively governing situations of armed conflict, with IHRL applying in peacetime.[1224] The contemporary view of the ICJ[1225] and treaty bodies[1226] is that IHL and IHRL are co-applicable. While most states accept this position, the US and Israel were opposed,[1227] though the US has since changed its view.[1228] Commissions' approaches reflect wider developments on this issue. The Yugoslavia Commission did not apply human rights treaties directly, instead having regard to human rights norms under the rubric of crimes against humanity.[1229] The Rwanda Commission took a similar approach, citing the Genocide

[1218] *UNCHR Gaza Report*, *supra* note 536, para. 93 and at 34, footnote 2.
[1219] CESCR, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Israel*, UN Doc. E/C.12/1/Add.90, 26 June 2003, para. 31 [*ESCR Israel Conclusions*].
[1220] *Wall Opinion*, *supra* note 1210, para. 112.
[1221] *Goldstone Report*, *supra* note 633, para. 298, citing *ESCR Israel Conclusions*, *supra* note 1219.
[1222] E.g., *Israeli Settlements Report*, *supra* note 572, para. 11.
[1223] *Gaza Report*, *supra* note 766, para. 41, citing *Wall Opinion*, *supra* note 1210, paras. 111-113.
[1224] Dan Kawali, ''Humanitarian Rights': how to ensure respect for human rights and humanitarian law in armed conflicts', in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham: Edward Elgar, 2013) 343-370, at 348.
[1225] *Nuclear Weapons Opinion*, *supra* note 557, para. 25; *Wall Opinion*, *supra* note 1210, para. 101; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment [2005] ICJ Reports 168, para. 216 [*Armed Activities Case*].
[1226] CCPR, *General Comment 29: Article 4: Derogations during a State of Emergency*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 3 [*CCPR GC 29*]; *CCPR GC 31*, *supra* note 1208, para. 11.
[1227] CAT Committee, *Conclusions and recommendations of the Committee against Torture: United States of America*, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para. 14; US, *Follow-Up Response to the Human Rights Committee by State Party*, UN Doc. CCPR/C/USA/CO/3/Rev.1/Add.1, 12 February 2008, at 3; *CCPR Israel Conclusions*, *supra* note 1213, para. 5.
[1228] *CCPR US Report*, *supra* note 1213, paras. 506-507; *US Law of War Manual*, *supra* note 575, at 22.
[1229] *Yugoslavia Interim Report*, *supra* note 292, para. 49.

Convention and the Apartheid Convention as recognising crimes against humanity.[1230] Differences in approach do not seem to reflect doctrinal divergence but rather differences in commissions' mandates which centred on IHL (and genocide, in the Rwandan case), and on species of violations attracting individual criminal responsibility.[1231]

In 1996, the ICJ issued its landmark *Nuclear Weapons* advisory opinion which found that the ICCPR did not cease to apply in wartime, save for the possible operation of the derogations regime.[1232] The Commission on East Timor in its 2000 report did not identify human rights treaties directly, instead describing human rights norms without identifying legal sources.[1233] This also may have been due to its mandate, which was to investigate "possible violations of human rights acts which might constitute breaches of [IHL]".[1234] In 2001, the UNCHR's Gaza Inquiry cited the ICCPR and ICESCR as sources of human rights applicable in situations of occupation.[1235] While the Commission did not directly cite the *Nuclear Weapons* opinion, its approach is substantively similar.

In 2001, the Human Rights Committee stated that the ICCPR continued to apply in situations of armed conflict,[1236] and reiterated that view in 2004.[1237] Also in 2004, the ICJ issued its seminal *Wall Opinion* which reaffirmed its finding in *Nuclear Weapons*.[1238] Subsequent commissions consistently affirmed the applicability of IHRL in armed conflict. For instance, the Gaza Commission rejected Israel's view that that it did not have human rights obligations in Palestine because IHL exclusively applied in armed conflict,[1239] instead adopting "the widely accepted interpretation" [1240] that states' human rights obligations continued in situations of armed conflict and occupation.

Some commissions also explained the interrelationship of these legal fields. Several commissions depicted IHRL and IHL as complementary and mutually reinforcing.[1241] Commissions generally cited the principle of *lex specialis derogat legi generali* (*lex specialis*) that was articulated by the ICJ in its *Nuclear Weapons* opinion to resolve normative conflict between these fields.[1242] For instance, the Goldstone Commission explained that IHRL would apply "as long as it is not modified or set aside by IHL", and would continue to "inform the application and interpretation" of IHL.[1243] The Syria Commission made similar observations, clarifying that it "deferred to the application of IHL under the principle of *lex specialis*."[1244] Commissions' interpretations of IHL and IHRL norms are explored further in Chapter Five.

[1230] *Rwanda Final Report*, *supra* note 297, paras. 133-134.
[1231] E.g., *Rwanda Final Report*, *supra* note 297, para. 102.
[1232] *Nuclear Weapons Opinion*, *supra* note 557, para. 25.
[1233] *East Timor Report*, *supra* note 338, paras. 20 and 142.
[1234] *East Timor Mandate*, *supra* note 338.
[1235] *UNCHR Gaza Report*, *supra* note 536, paras. 61 and 94.
[1236] *CCPR GC 29*, *supra* note 1226, para. 3.
[1237] *CCPR GC 31*, *supra* note 1208, para. 11.
[1238] *Wall Opinion*, *supra* note 1210, para. 106.
[1239] *Gaza Report*, *supra* note 766, para. 39.
[1240] *Ibid.*, para. 40.
[1241] *Darfur Report*, *supra* note 32, paras. 143-144; *Syria Thirteenth Report*, *supra* note 928, Annex I, para. 2; *CAR Report*, *supra* note 32, para. 106.
[1242] *Nuclear Weapons Opinion*, *supra* note 557, para. 25. See *Wall Opinion*, *supra* note 1210, para. 106.
[1243] *Goldstone Report*, *supra* note 633, para. 296.
[1244] *Syria Thirteenth Report*, *supra* note 928, Annex I, para. 2.

2.4 Applicability to organised armed groups

Several commissions examined whether human rights obligations applied to collective actors beyond the state, particularly organised armed groups (also termed 'armed non-state actors').[1245] Some commissions interpreted their mandates to include assessment of IHRL violations by non-state actors. For instance, the Burundi Commission interpreted the instruction to investigate 'human rights violations' as meaning violations by states, while the direction to investigate 'abuses' was interpreted as "actions committed by non-state entities or their members."[1246] Some commissions identified that all actors must abide by human rights recognised as peremptory norms.[1247] For instance, the Syria Commission wrote, "at a minimum, human rights obligations constituting peremptory international law (*ius cogens*) bind States, individuals and non-State collective entities, including armed groups."[1248] The Commission reached that view before it had classified the situation in Syria as an armed conflict, which raises questions of whether and how armed groups bear such obligations outside armed conflict.

Commissions examined whether armed groups bear treaty-based human rights obligations. The mainstream view in scholarship and practice is that these instruments create binding duties for states parties.[1249] The Darfur Commission saw armed groups' obligations as limited to IHL.[1250] However, several commissions examined whether the CRC-OP gave rise to binding obligations for these actors in the territories of states which had ratified this instrument. Article 4(1) of the CRC-OP provides that armed groups "should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years."[1251] Some commissions observed that because non-state actors could not be parties, they were not bound. The Libya Commission wrote that Libya's ratification obliged it to take feasible measures to prevent armed groups from using child soldiers, but did not identify a distinct duty for armed groups,[1252] reasoning that in comparison with the Rome Statute which "regulates the conduct of all parties to the conflict", the CRC-OP only imposed obligations on states parties.[1253] The Syria Commission at first shared this view,[1254] but later found that the

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[1245] E.g., Geneva Academy of International Humanitarian Law and Human Rights, 'Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council', *Geneva Academy Briefing No. 7*, December 2016, at 3, available at http://www.geneva-academy.ch/joomlatools-files/docman-files/InBrief7_web.pdf (accessed 1 May 2018) depicts armed non-state actors as "bound by the law of armed conflict".

[1246] *HRC Burundi TOR*, *supra* note 495, at II(i).

[1247] *South Sudan Second Report*, *supra* note 31, para. 122, citing UNMISS, *Conflict in South Sudan: A Human Rights Report*, 8 May 2014, para. 18, available at http://unmiss.unmissions.org/sites/default/files/unmiss_conflict_in_south_sudan_-_a_human_rights_report.pdf (accessed 1 May 2018).

[1248] *Syria Second Report*, *supra* note 1109, para. 106.

[1249] E.g., ICRC, *International Humanitarian Law and the challenges of contemporary armed conflicts*, 31st International Conference of the Red Cross and Red Crescent Movement, Geneva, 28 November to 1 December 2011, at 14, available at http://www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm (accessed 1 May 2018); Cedric Ryngaert, 'Human Rights Obligations of Armed Groups', (2008) 41 Rev BDI 355-381, at 365 and Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge: CUP, 2002) at 53 [Zegveld 2002].

[1250] *Darfur Report*, *supra* note 32, para. 174.

[1251] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000, 2173 UNTS 222, Art. 4(1) [CRC-OP].

[1252] *Libya Second Report*, *supra* note 853, para. 710.

[1253] *Ibid.*, para. 699.

CRC-OP "by its terms applies to non-State actors".[1255] This interpretation carried over into later reports where the Commission found that armed groups used children in hostilities "contrary to" the CRC-OP.[1256] That interpretation was lauded as 'progressive' in commentary.[1257] However, commentators have expressed doubt that the CRC-OP establishes a legal duty for armed groups,[1258] and the general theoretical basis for imposing human rights treaty obligations on armed groups is also contested.[1259] Commissions have not expounded on larger questions of the international legal capacity of armed groups, and analysis remains confined to the CRC-OP. As such, there is limited recognition in the inquiry context of armed groups' treaty-based human rights obligations.

By contrast, commissions have consistently supported the idea that armed groups have customary human rights obligations. Some commissions considered that armed groups had to respect human rights recognised as peremptory norms.[1260] Others found that armed groups owed customary human rights obligations as parties to a conflict.[1261] The dominant approach was to connect armed groups' human rights obligations with their fulfilment of certain conditions, namely exercise of territorial control[1262] and government-like functions.[1263] This approach linked groups' obligations with their capacity. For instance, the Libya Commission pointed to the exercise of territorial control "akin to that of a Government authority",[1264] and the Gaza Commission articulated the conditions as exercising "government-like functions and control over a territory".[1265] Commissions expressed these interpretations with varying degrees of confidence. The Goldstone Commission depicted recognition of armed groups' human rights obligations as "rapidly evolving"[1266] and the Sri Lanka Panel wrote that this principle was "increasingly accepted",[1267] while observing that differences in view remained. The Libya Commission acknowledged that this issue "remains contested as a matter of international law" but was "increasingly accepted".[1268] The CAR Commission found that

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[1254] *Syria Third Report*, *supra* note 564, Annex X, para. 35.
[1255] *Syria Fourth Report*, *supra* note 1097, Annex X, para. 44.
[1256] *Syria Seventh Report*, *supra* note 805, para. 84. See *Syria Eighth Report*, *supra* note 983, para. 92.
[1257] Tilman Rodenhäuser, 'Progressive Development of International Human Rights Law: The Reports of the Independent International Commission of Inquiry on the Syrian Arab Republic', *EJIL:Talk*, 13 April 2013, available at http://www.ejiltalk.org/progressive-development-of-international-human-rights-law-the-reports-of-the-independent-international-commission-of-inquiry-on-the-syrian-arab-republic (accessed 1 May 2018).
[1258] UNICEF, 'Guide to the Optional Protocol on the Involvement of Children in Armed Conflict', (2003), available at http://www.unicef.org/protection/option_protocol_conflict.pdf (accessed 1 May 2018); ICRC, 'Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000', available at http://ihl-databases.icrc.org/ihl/INTRO/595?OpenDocument (accessed 1 May 2018) and Daniel Helle, 'Optional Protocol on the involvement of children in armed conflict to the Convention on the Rights of the Child', (2000) 82 IRRC 797-823, at 806.
[1259] Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups', (2014) 20(1) J Conflict Security Law 101-131, *contra* Giacca, *supra* note 1200, at 234-235.
[1260] *Yugoslavia Interim Report*, *supra* note 292, para. 46; *Syria Second Report*, *supra* note 1109, para. 106.
[1261] *Lebanon Report*, *supra* note 855, para. 67; *Darfur High-Level Report*, *supra* note 1027, para. 76; *Goldstone Report*, *supra* note 633, para. 310.
[1262] *Sri Lanka Report*, *supra* note 29, para. 188; *Libya Second Report*, *supra* note 853, para. 181; *Syria Third Report*, *supra* note 564, Annex II, para. 10; *CAR Report*, *supra* note 32, para. 107.
[1263] *Goldstone Report*, *supra* note 633, para. 305.
[1264] *Libya First Report*, *supra* note 968, para. 62.
[1265] *Gaza Report*, *supra* note 766, para. 45.
[1266] *Goldstone Report*, *supra* note 633, para. 305.
[1267] *Sri Lanka Report*, *supra* note 29, para. 188.
[1268] *Libya First Report*, *supra* note 968, para. 62.

earlier debates had been "replaced by a general understanding" that armed groups exercising territorial control must respect human rights.[1269]

Commissions' use of authorities in support of their interpretations offers interesting insights. They cited diverse authorities, including a seminal text by Clapham,[1270] special rapporteur reports[1271] and a Security Council resolution condemning human rights 'abuses' by rebel groups.[1272] Commissions also cited previous inquiry reports as authorities. The Sri Lanka Panel's report was cited by several commissions.[1273] The Panel itself did not cite any supporting authorities. This practice is rare; it is one of the only issues in respect of which commissions cited other commissions' reports as authorities.

While many commissions affirmed the general applicability of customary human rights obligations to armed groups in control of territory, they did not much identify particular norms that were applicable.[1274] The Goldstone Commission wrote that most provisions of the Universal Declaration of Human Rights (UDHR) were customary but did not identify which ones.[1275] In some cases commissions' views can be inferred through their findings of violations. For instance, the Syria Commission found that opposition forces had committed human rights violations of murder, extrajudicial execution and torture.[1276] By contrast, the Sri Lanka Panel only categorised violations by the Liberation Tigers of Tamil Eelam under IHL, and did not consider their human rights abuses outside the conflict zone "because of the uncertainty surrounding whether non-state actors have obligations beyond the territories they control."[1277] Thus, commissions generally supported the broad idea that organised armed groups must respect customary human rights, but have not analysed the content of those obligations in detail.

2.5 Discussion

Commissions' interpretations of the applicability of IHRL reveal a general commitment to a human-rights based approach. Commissions found that states must protect human rights wherever they have effective control over territory or persons, including in armed conflicts. Commissions interpreted the operation of the ICCPR derogation regime strictly and affirmed the existence of non-derogable rights in the ICCPR and minimum core obligations in the ICESCR.

[1269] *CAR Report*, *supra* note 32, para. 107.

[1270] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: OUP, 2006), cited in *Libya First Report*, *supra* note 968, footnote 50; *Syria Third Report*, *supra* note 564, Annex II, footnote 8; *Goldstone Report*, *supra* note 633, footnote 700, *Lebanon Report*, *supra* note 855, footnote 41; *CAR Report*, *supra* note 32, footnote 51.

[1271] *Combined report of Special Rapporteurs*, UN Doc. A/HRC/10/22, 29 May 2009, cited in *Goldstone Report*, *supra* note 633, footnotes 186 and 700, and *Gaza Report*, *supra* note 766, footnote 50; *Combined report of Special Rapporteurs*, UN Doc. A/HRC/2/7, 2 October 2006, cited in *Gaza Report*, *supra* note 766, footnote 50.

[1272] *CAR Mandate*, *supra* note 304, para. 17, cited in *CAR Report*, *supra* note 32, footnote 53.

[1273] *CAR Report*, *supra* note 32, para. 107, footnote 52; *Libya First Report*, *supra* note 968, para. 62; *Syria Third Report*, *supra* note 564, Annex II, para. 10 and Annex I, footnote 6.

[1274] E.g., *Libya Second Report*, *supra* note 853, paras. 17-18.

[1275] *Goldstone Report*, *supra* note 633, para. 1576.

[1276] *Syria Third Report*, *supra* note 564, para. 134.

[1277] *Sri Lanka Report*, *supra* note 29, para. 243.

When examining these issues, commissions frequently cited the ICJ and treaty bodies.[1278] Commissions consistently affirmed treaty bodies' general comments as authoritative. The ICJ has also given weight to treaty bodies' views to promote clear and consistent international law.[1279] Commentators have described general comments as normatively authoritative but also point to methodological weaknesses which might reduce their persuasiveness. [1280] Nevertheless, commissions' reliance upon them promotes "doctrinal convergence"[1281] and a coherent outlook across institutional contexts. It may also help to further marginalize the positions of states disagreeing with those interpretations. In general, commissions endorsed a broad reach of human rights treaties, while seeking to remain in-step with other legal authorities.

Commissions' findings that armed groups can hold customary human rights obligations in certain circumstances reflects a broad view of human rights protection, and a willingness to identify responsibility despite an absence of tangible enforcement mechanisms. Some commentators see these interpretations as commendable[1282] while others argue that they stray into *lex ferenda*.[1283] Clapham writes that recognition of such obligations has generally emerged from a desire to address activities of non-state actors that cannot be framed under IHL and that UN commissions identified human rights obligations on the part of organised armed groups to achieve "balanced reporting".[1284] Commissions' practice of citing other inquiry reports on this issue might indicates the paucity of guidance by traditional sources of authority. While many commissions recognised that the matter of human rights obligations of organised armed groups is a developing area of law, they adopted interpretations which sought to enhance the protective scope of human rights.[1285]

3. Applicability of International Humanitarian Law

IHL governs situations of armed conflict, so its applicability "hinges on the status of the conflict".[1286] In order for IHL treaties and customary international law to be applicable to a situation, it must amount to either an international armed conflict (IAC), non-international armed conflict (NIAC), or situation of occupation. Where not classified as such, a situation is

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[1278] *Lebanon Report*, *supra* note 855, footnote 47; *Gaza Flotilla Report*, *supra* note 681, para. 73 and *Gaza Flotilla Report*, *supra* note 681, para. 68, citing *CCPR GC 29*, *supra* note 1226.

[1279] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment [2010] ICJ Reports 639, para. 66 [*Diallo Case*].

[1280] Christine Chinkin, 'Sources', in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford: OUP, 2010), 103-123, at 119 and Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights', (2009) 92 Vand J Transnat'l L 905-947, at 924.

[1281] Beth van Schaack, 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change', (2014) 90 *International Legal Studies* 20-65, at 22.

[1282] Jean-Marie Henckaerts and Cornelius Wiesener, 'Human Rights Obligations of Non-State Armed Groups: A Possible Contribution from Customary International Law?', in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights And Humanitarian Law* (Cheltenham: Edward Elgar, 2013) 146-169; Tilman Rodenhäuser, 'Human Rights Obligations of Non-State Armed Groups in Other Situations of Violence: The Syria Example', (2012) 3 *International Humanitarian Legal Studies* 263-290, at 280.

[1283] James Devaney, 'Killing Two Birds with One Stone: Can Increased use of Article 34(2) of the ICJ Statute Improve the Legitimacy of UN Commissions of Inquiry & the Court's Fact-finding Procedure?', *Sant'Anna Legal Studies STALS Research Paper No. 2/2013*, at 13, available at http://www.stals.sssup.it/files/Devaney%20STALS%202%202013.pdf (accessed 1 May 2018).

[1284] Clapham forthcoming, *supra* note 513, at 3.

[1285] *Goldstone Report*, *supra* note 633, para. 305.

[1286] *Rwanda Final Report*, *supra* note 297, para. 105.

governed by the 'peacetime' legal paradigm of IHRL. The lion's share of IHL, including the four Geneva Conventions and Additional Protocol I, applies in IAC,[1287] which occurs "whenever there is a resort to armed force between States".[1288] A NIAC is 'internationalized' when a third state exercises "overall control" over an organised armed group.[1289] IHL applicable in IAC also applies to situations of occupation.[1290] According to the Hague Regulations, territory is occupied when "actually placed under the authority of the hostile army", and "extends only to the territory where such authority has been established and can be exercised."[1291] The ICTY in *Naletilić* identified some non-exhaustive indicia to determine when territory is occupied, including that the occupying power can substitute its own authority; enemy forces have withdrawn; the occupying power has "the capacity to send troops within a reasonable time to make the authority of the occupying power felt",[1292] and establishment of a temporary administration. *Naletilić* also held that the application of the law of occupation "as it effects 'individuals' as civilians protected under [Geneva Convention IV] *does not require that the occupying power have actual authority*. For the purposes of those individuals' rights, a state of occupation exists upon their falling into 'the hands of the occupying power'."[1293] *Naletilić* thus distinguishes situations of occupation governed by the Hague Regulations from the broader applicability of Geneva Convention IV.

IHL also applies in situations of NIAC. This concept was not defined in IHL treaties. The ICTY in *Tadić* defined NIAC as "protracted armed violence between governmental authorities and organised armed groups or between such groups".[1294] This definition has been accepted as authoritative and was cited by several commissions.[1295] Fewer treaty rules govern NIAC. Common Article 3 to the Geneva Conventions (CA 3) sets down protections applicable in all NIACs, and Additional Protocol II 1977 provides more detailed rules for specific types of NIAC.[1296] Rules applicable in IAC may also apply in NIAC when the parties to the conflict

[1287] Common Article 1 to the Geneva Conventions, *supra* note 178 [CA 1] and *Additional Protocol I*, *supra* note 33, Art. 1. The latter also applies to wars of national liberation, which would otherwise be non-international in nature. See Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge: CUP, 2004) at 90.

[1288] *Commentary on the Geneva Conventions*, *supra* note 173, at 32.

[1289] *Prosecutor v. Tadić*, IT-94-1-A, Appeals Judgement, 15 July 1999, paras. 156-157 [*Tadić Appeal Judgment*]. The 'overall control' threshold is generally accepted for conflict classification purposes: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment [2007] ICJ Reports 43, para. 404 [*Bosnia Genocide Case*]; *Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment pursuant to Article 74 of the Statute', ICC-01/04-01/06-2842, TC I, 14 March 2012, para. 541 [*Lubanga Judgment*].

[1290] CA 1, *supra* note 1287.

[1291] *Hague Regulations*, *supra* note 130, Art. 42.

[1292] *Prosecutor v. Naletilić and Martinović*, IT-98-34, Trial Judgement, 31 March 2003, para. 217 [*Naletilić Judgment*].

[1293] *Naletilić Judgment*, *supra* note 1292, para. 221 (emphasis added).

[1294] *Prosecutor v. Tadić*, IT-94-1-A, 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction', 2 October 1995, para. 70 [*Tadić Interlocutory Appeal*].

[1295] ICRC, 'How is the term "armed conflict" defined in international humanitarian law?' available at http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf (accessed 1 May 2018). See, e.g., *Darfur Report*, *supra* note 32, para. 74; *Libya First Report*, *supra* note 968, para. 53 and *Sri Lanka Report*, *supra* note 29, para. 181.

[1296] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts 1977, 1125 UNTS 609, Art. 1 [*Additional Protocol II*].

agree.[1297] Many rules found in IHL treaties apply in both IAC and NIAC as customary law.[1298]

This Section examines how commissions approached the applicability of IHL to situations of concern. When determining whether IHL treaties and custom applied, commissions considered whether the situation amounted to an armed conflict (3.1). Some commissions also examined the applicability of IHL to non-state armed groups (3.2) and multinational peace-enforcement operations (3.3). Some general observations are then offered (3.4).

3.1 Legal classifications of armed conflict

This Section discusses commissions' different approaches to classifying situations as armed conflict for the purpose of identifying the IHL substantively applicable. It distinguishes broad (3.1.1), narrow (3.1.2) and ambivalent (3.1.3) approaches to conflict classification.

3.1.1 Broad approaches to conflict classification

Some commissions interpreted the elements of conflict classification broadly, which had the effect of expanding the applicable IHL. The Yugoslavia Commission, qualifying the conflict prior to the ICTY's seminal *Tadić* decision, found that "the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian issues that the parties have concluded among themselves, justify an approach whereby it applies the law applicable in [IAC] to the entirety of the armed conflicts".[1299] In its final report, the Commission wrote, "when these conflicts are internal and when they are international is a difficult task because the legally relevant facts are not yet generally agreed upon", and stated that this was a task for the ICTY.[1300] The ICTY classified the conflict in Bosnia as IAC, not due to its complexity but the degree of control exercised by the Yugoslav Army over Bosnian Serb forces.[1301]

Some commissions adopted a two-step approach, first considering whether there was an 'armed conflict' and then examining whether the conflict was IAC or NIAC. For instance, the Rwanda Commission considered whether there was an "armed conflict" between government forces and the Rwandan Patriotic Front (RPF), and then whether it was IAC or NIAC.[1302] It concluded that there was an armed conflict due to the "means and methods employed" and the "scale of atrocities",[1303] which was non-international as hostilities remained within Rwanda's borders and did not involve active participation of third states.[1304] The Commission found that the conflict was governed by Additional Protocol II because individuals under responsible

[1297] Common Article 3(2) to the Geneva Conventions, *supra* note 178 [CA 3].
[1298] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: CUP, 2005) Vol. I [*ICRC Customary IHL Study*].
[1299] *Yugoslavia Interim Report*, *supra* note 292, para. 45; *Yugoslavia Final Report*, *supra* note 39, para. 44.
[1300] *Yugoslavia Final Report*, *supra* note 39, para. 43.
[1301] *Tadić Appeal Judgment*, *supra* note 1289, paras. 156-157.
[1302] *Rwanda Interim Report*, *supra* note 298, para. 89. See *Rwanda Final Report*, *supra* note 297, para. 106.
[1303] *Ibid.*, para. 89.
[1304] *Ibid.*, para. 91.

command conducted military operations "involving strategic planning and tactical sophistication".[1305]

The Lebanon Commission adopted a two-step analysis, identifying the existence of 'armed conflict' before classifying it as IAC or NIAC. Citing *Tadić*, the Commission assessed the intensity of violence and found an 'armed conflict'.[1306] It identified *sui generis* features[1307] justifying its classification as IAC, even though active hostilities occurred between Israel and Hezbollah.[1308] The Commission identified many factors deemed relevant to its decision, including that Hezbollah "participates in the constitutional organs of the State";[1309] acted as a resistance movement against Israel's occupation of Lebanese territory;[1310] the Lebanese President approved of its activities[1311] and Israel had attacked Lebanon's assets and civilian population.[1312] The Commission's analysis does not reflect the established test for the 'internationalization' of NIAC.[1313] Its view that the conflict was *sui generis* implies that it was not appropriate to classify it pursuant to traditional IAC/NIAC distinctions. The Commission's broad classification of the conflict as IAC expanded the substantive IHL applicable to the four Geneva Conventions.

The Palmer Commission also departed from the orthodox approach when assessing the Israeli-Palestinian conflict. It considered that the situation had "all the trappings of an international armed conflict".[1314] The Commission observed that classifying the conflict as IAC was "disputed", but reasoned that circumstances of Gaza were "unique" and that "the law does not operate in a political vacuum, and it is implausible to deny that the nature of the armed violence between Israel and Hamas goes beyond purely domestic matters".[1315] The Commission treated the conflict as international "for the purposes of the law of blockade" and wrote that its analysis "goes no further than is necessary for the Panel to carry out its mandate".[1316] These statements demonstrate the Commission's pragmatic desire to avoid engaging with wider implications of conflict classification in this context.

Several commissions interpreted the applicability of occupation law expansively, citing the ICTY's broad interpretation in *Naletilić* of the protective reach of provisions in Geneva Convention IV.[1317] Following Israel's military withdrawal from the Gaza Strip in 2005, it argued that it no longer occupied Gaza.[1318] However, several commissions found that Israel

[1305] *Ibid.*, para. 94.
[1306] *Lebanon Report*, *supra* note 855, para. 51.
[1307] *Ibid.*, para. 55.
[1308] *Ibid.*, paras. 8-9.
[1309] *Ibid.*, para. 56.
[1310] Geneva Convention III, *supra* note 178, Art. 4(2(b).
[1311] *Lebanon Report*, *supra* note 855, para. 57.
[1312] *Ibid.*, para. 58.
[1313] *Tadić Appeal Judgment*, *supra* note 1289, para. 137. See Stewart, *supra* note 96, at 1042.
[1314] *Palmer Report*, *supra* note 316, para. 73.
[1315] *Ibid*.
[1316] *Ibid*.
[1317] *Naletilić Judgment*, *supra* note 1292, para. 221.
[1318] Israel Ministry of Foreign Affairs, 'The Background to the 2014 Gaza Conflict', para. 45, available at http://mfa.gov.il/ProtectiveEdge/Documents/HamasBackground.pdf (accessed 1 May 2018).

continued to be an 'occupying power', citing *Naletilić*. In 2009, the Goldstone Commission recognized the broad applicability of Geneva Convention IV:[1319]

> While the drafters of the Hague Regulations were as much concerned with protecting the rights of the State whose territory is occupied as with protecting the inhabitants of that territory, the drafters of [Geneva Convention IV] sought to guarantee the protection of civilians… in times of war regardless of the status of the occupied territories. That [Geneva Convention IV] contains requirements in many respects more flexible than the Hague Regulations and thus offering greater protections was recognized… in the *Naletilić* case, where the Trial Chamber applied the test contained in article 6 of [Geneva Convention IV]: the protections provided for in Geneva Convention IV become operative as soon as the protected persons fall 'in the hands' of a hostile army or an occupying Power, this being understood not in its physical sense but in the broader sense of being 'in the power' of a hostile army.

The Goldstone Commission also found that Israel continued to exercise effective control over the Gaza Strip,[1320] pointing to the latter's geopolitical configuration, Israel's control of borders and conditions of life, military incursions and regulation of taxes and the local monetary market as indicating that "ultimate authority… still lies with Israel."[1321] While recognizing a *de facto* local administration, the Commission found that this was just one factor and concluded that "essential elements of occupation are present in the Gaza Strip".[1322]

In 2015, the Gaza Commission adopted a similar analytical approach as the Goldstone Commission. It wrote that exercise of effective control was central to determining occupation, but that "continuous presence of soldiers on the ground is only one criterion to be used in determining effective control."[1323] The Commission observed that occupation law also applies where a state has the "capacity to send troops within a reasonable time to make its power felt",[1324] citing *Naletilić*. In addition to Israel's fulfilment of this criterion, the Commission found that Israel "continues to exercise effective control of the Gaza Strip through other means",[1325] pointing to similar facts as the Goldstone Commission, so that the Hague Regulations also applied. Commissions' broad approaches to classifying the situation in Gaza as an occupation meant that civilian protections in Geneva Convention IV were applicable.

3.1.2 Narrow approaches to conflict classification

Some commissions were cautious when classifying conflicts, identifying a sequence of classifications, a patchwork of co-existing conflicts, or emphasizing the applicability of certain regimes within IHL. In 2017, the Burundi Commission found that the situation of violence did not amount to armed conflict, because it was sporadic.[1326] In 2000, the UNCHR's

[1319] *Goldstone Report*, *supra* note 633, para. 275, citations omitted, citing *Naletilić Judgment*, *supra* note 1292, para. 221.
[1320] *Ibid.*, para. 276.
[1321] *Ibid.*, para. 279.
[1322] *Ibid.*, para. 280.
[1323] *Gaza Report*, *supra* note 766, para. 26.
[1324] *Naletilić Judgment*, *supra* note 1292, para. 217.
[1325] *Gaza Report*, *supra* note 766, para. 29.
[1326] *Report of the Commission of Inquiry on Burundi*, UN Doc. A/HRC/36/54, 11 August 2017, para. 11 [*HRC Burundi Report*]. See *HRC Burundi Detailed Report*, *supra* note 405, paras. 35-36.

Gaza Inquiry observed that while Israel treated the situation in Gaza as a NIAC, the Palestinian side characterised it as a largely unorganized civilian uprising. The Commission agreed with the latter, finding a lack of organisation on the part of Palestinian participants.[1327] Nor was the situation an IAC, as Palestine "still falls short of the accepted criteria of statehood."[1328] The Commission did find a situation of occupation, so that Geneva Convention IV applied. But even if the situation were categorized as armed conflict, "entitling the IDF to greater latitude in the exercise of its powers", it was still required to abide by IHL and IHRL,[1329] and "there is general agreement that [human rights] norms are to be applied in the case of prolonged occupation."[1330] By de-coupling occupation from armed conflict, the Commission gave primacy to IHRL and greater limitations on lethal force, even though IHL applicable in IAC technically applied as a consequence of the occupation.

The Libya Commission found co-existing separate armed conflicts. The Commission found that hostilities between the Libyan Government and *thuwar* rebels amounted to a NIAC. In its first report, the Commission acknowledged that it had more information regarding the intensity of violence and the exercise of territorial control by opposition forces, rather than their organisation. Nonetheless, it reached the "preliminary view" that a NIAC had come into existence which was governed by both CA 3 and Additional Protocol II.[1331] The Commission also found that airstrikes conducted by a coalition of states pursuant to Security Council resolution 1973 (2011) gave rise to a separate IAC with Libyan forces. The Commission reasoned that as the coalition's objective was to enforce the SC resolution and did not exercise 'overall control' over the parties, the conflict remained legally separate.[1332] It observed that Libya and "most states" in the coalition had ratified Additional Protocol I, "bringing its provisions into effect."[1333] It could have further clarified that Additional Protocol I only applied vis-à-vis state parties, excluding Turkey and the US.

The Syria Commission reported in February 2012 that while violence appeared to have requisite intensity, it could not verify that opposition groups were sufficiently organised, so IHL was not applicable.[1334] In August 2012, the Commission reported that opposition forces had increased their organisational capabilities, so that the situation amounted to a NIAC.[1335] In support of its finding, the Commission cited the ICRC and President Assad, who described Syria as in a state of war.[1336] Since 2012, the conflict in Syria has grown in complexity with the participation of new armed actors and third states. The Commission observed that these developments rendered the conflict a "multisided proxy war steered from abroad by an intricate network of alliances",[1337] but did not assess whether those developments altered the

[1327] *UNCHR Gaza Report*, *supra* note 536, para. 40.
[1328] *Ibid.*, para. 39.
[1329] *UNCHR Gaza Report*, *supra* note 536, para. 43.
[1330] *Ibid.*, para. 43.
[1331] *Libya First Report*, *supra* note 968, para. 55.
[1332] *Ibid.*, para. 56.
[1333] *Libya Second Report*, *supra* note 853, para. 21.
[1334] *Syria Second Report*, *supra* note 1109, para. 13.
[1335] *Syria Third Report*, *supra* note 564, para. 3.
[1336] *Ibid.*, footnote 3.
[1337] *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/31/68, 11 February 2016, para. 17 [*Syria Eleventh Report*].

conflict classification. For instance, in 2017, the Commission did not address whether the US attack on a Syrian airbase generated a co-existing IAC.[1338]

The CAR Commission also took a cautious approach, identifying several phases to the conflict. Adopting factors identified at the ICTY,[1339] the Commission found several NIACs: one between the Seleka rebel group and governmental forces from January to March 2013;[1340] an intervening period of relative peace in which IHL did not apply; and resumption of hostilities from December 2013 between the Seleka and other armed groups.[1341] The Commission identified a separate NIAC between armed groups and French forces in the CAR.[1342] The Commission noted that while the ICTY had cautioned against making many changes in conflict classification,[1343] it considered that it was important to classify conflicts correctly to avoid thwarting prosecutions as a result of incorrect conflict classifications, citing *Haradinaj*.[1344] Balancing these concerns, the CAR Commission considered it better to "avoid blunt classifications that may provide a greater degree of legal certainty and facilitate the continuing and uninterrupted application of [IHL] but that do not accurately reflect the nature of the events on the ground."[1345]

Finally, the Cote d'Ivoire Commission took a geographically narrow approach, finding that "the conflict was not waged throughout the full expanse of the country, so that [IHL] applies solely to the area where an armed conflict not of an international character actually took place."[1346] This interpretation conflicts with the position of the ICTY and the ICRC that in situations of NIAC, IHL applies to the entire territory of the concerned state.[1347]

3.1.3 Ambivalence towards conflict classification

Some commissions were ambivalent in their approaches to classifying conflicts, on the basis that IHL rules are converging across conflicts. The Goldstone Commission noted that hostilities between the IDF and groups "loosely affiliated with the Fatah movement in control of the Palestine Authority"[1348] had been classified by the Israeli Supreme Court as IAC due to its cross-border nature and the situation of occupation.[1349] It also noted that armed conflicts involving resistance movements against occupation are deemed as international in nature

[1338] *Syria Fourteenth Report*, *supra* note 982, footnote 2. See Stephanie Nebehay, 'Exclusive: Situation in Syria constitutes international armed conflict - Red Cross', *Reuters*, 8 April 2017, available at http://www.reuters.com/article/us-mideast-crisis-syria-redcross/exclusive-situation-in-syria-constitutes-international-armed-conflict-red-cross-idUSKBN17924T (accessed 1 May 2018).
[1339] *CAR Report*, *supra* note 32, para. 86, and citations therein.
[1340] *Ibid.*, para. 39.
[1341] *Ibid.*, para. 95.
[1342] *Ibid.*, para. 98
[1343] *Ibid.*, para. 99.
[1344] *Prosecutor v. Haradinaj and others*, IT-04-84bis-T, Trial Judgement, 29 November 2012, para. 410.
[1345] *CAR Report*, *supra* note 32, para. 101.
[1346] *HRC Côte d'Ivoire Report*, *supra* note 810, para. 89.
[1347] ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, 32nd International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 8-10 December 2015, at 13, available at http://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts (accessed 1 May 2018) and *Tadić Interlocutory Appeal*, *supra* note 1294, paras. 69–70.
[1348] *Goldstone Report*, *supra* note 633, para. 282.
[1349] *Ibid.*, para. 282, citing *Public Committee against Torture in Israel v. Government of Israel* (*Targeted Killings case*), HCJ 769/02, 13 December 2006.

pursuant to Additional Protocol I.[1350] However, the Commission wrote that the question of conflict classification "may not be too important", as "concern for the protection of civilians and those *hors de combat* in all kinds of conflicts has led to an increasing convergence in the principles and rules applicable to [IAC] and [NIAC]".[1351] The Commission cited the ICJ's finding that "many similar norms and principles govern both types of conflicts"[1352] and the ICTY's view that "what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife."[1353] The Commission found that this related to civilian protection as well as means and methods of warfare,[1354] and did not provide a firm conclusion as to the classification of the conflict.

As mentioned above, the Gaza Commission found a situation of occupation in the West Bank and the Gaza strip.[1355] It also observed that the 'State of Palestine' had ratified several IHL treaties,[1356] which invites the question of whether the conflict should be classified as IAC in recognition of Palestinian statehood. The Commission did not answer this question, instead observing that "there are very little substantive differences"[1357] in customary IHL rules applicable in IAC and NIAC[1358] and analysing the conduct of hostilities on the basis of customary law. The Commission did acknowledge that conflict classification was relevant for other contexts, such as the war crimes provisions in the Rome Statute.[1359] This represents an alternative approach the 'sui generis conflict' reasoning of earlier commissions, which seems to have been generated in order to assess the sophisticated Israel-Palestine conflict beyond the very basic provisions of Common Article 3.

3.2 Applicability to organised armed groups

IHL obligations are held by the parties to armed conflicts.[1360] Commissions readily accepted that in situations of NIAC, organised armed groups had obligations under IHL. While the theoretical basis for armed groups' treaty-based obligations remains "misty",[1361] it is accepted in practice.[1362] Most commissions did not expressly consider the theoretical basis of organised armed groups' IHL obligations. The Goldstone Commission stated that the issue of whether organized armed groups were bound by IHL did not arise, "the question being settled some time ago".[1363] That Commission and the Syria Commission cited the SCSL's view that "it is well settled that all parties to an armed conflict, whether States or non-State actors, are

[1350] *Ibid*., para. 308, citing *Additional Protocol I*, *supra* note 33, Art. 1(4).
[1351] *Ibid*., para. 283.
[1352] *Ibid*., at 14, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment [1986] ICJ Reports 64 [*Nicaragua Case*].
[1353] *Tadić Interlocutory Appeal*, *supra* note 1294, para. 119.
[1354] *Goldstone Report*, *supra* note 633, para. 283.
[1355] *Gaza Report*, *supra* note 766, para. 25.
[1356] *Ibid*., para. 32.
[1357] *Ibid*., para. 34.
[1358] *Ibid*., para. 37.
[1359] *Ibid*., para. 50 and citations therein.
[1360] CA 3, *supra* note 1297.
[1361] Andrew Clapham, 'Human rights obligations of non-state actors in conflict situations', (2006) 88(863) IRRC 491-523, at 499. See Ryngaert, *supra* note 1249, at 357.
[1362] Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC/Nijhoff, 1987), para. 4444 [*Commentary to Additional Protocols*].
[1363] *Goldstone Report*, *supra* note 633, para. 304.

bound"[1364] by IHL. The Darfur Commission considered that armed groups had international legal personality when they "reached a certain threshold of organization, stability and effective control of territory", so that such actors were "bound by the relevant rules of customary international law on internal armed conflicts".[1365] The Darfur Commission also recognised that organised armed groups could enter into international agreements under customary international law, and that armed groups in Darfur had entered into such agreements with the Sudanese Government in which they agreed to comply with IHL.[1366]

3.3 Applicability to peace-enforcement missions

A handful of UN atrocity inquiries considered the applicability of IHL to multinational peace-enforcement missions involved in situations of conflict. The recent CAR Commission found that "[i]t is uncontested that the [UN] is bound by at least the customary rules of IHL when engaged in hostilities."[1367] It also found that the Security Council required peacekeeping forces in the CAR to carry out their mandates in compliance with IHL, pursuant to the mandating resolution.[1368]

The Libya Commission discussed the applicability of IHL to NATO, flowing from its finding that an IAC existed between Qadhafi's forces and states participating in the military operation authorised by SC Resolution 1973.[1369] The Commission examined NATO's control over operations, finding that by 24 March 2011, NATO controlled operations within the no-fly zone, but that NATO member states controlled airstrikes by their own forces. This changed on 31 March 2011, when NATO assumed command of all offensive operations.[1370] The Commission explained that NATO had to abide by IHL:[1371]

> The legal regime applicable to NATO's actions in Libya based upon principles of [IHL] set out elsewhere in this report… Principles of distinction, proportionality, precautions, humanity and military necessity can be found in multiple legal sources, including the Hague and Geneva Conventions. They form part of customary international law.

This statement suggests that the Commission considered NATO as bound by customary IHL, but not treaty law. It contrasts with the Commission's earlier statement that the "full provisions of the four Geneva Conventions" and customary IHL applied in the IAC "that ensued once the international forces engaged the Qadhafi forces".[1372]

3.4 Discussion

Commissions' approaches to conflict classification indicate an interplay of different aims and objectives. Some commissions found that conflicts not of an international nature should be

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[1364] SCSL, *Prosecutor v. Sam Hinga Norman*, 'Decision on preliminary motion based on lack of jurisdiction (child recruitment)', SCSL-2004-14-AR72(E), 31 May 2004, para. 22, cited in *Goldstone Report*, *supra* note 633, para. 304 and *Syria Thirteenth Report*, *supra* note 928, Annex I, footnote 7.
[1365] *Darfur Report*, *supra* note 32, para. 172.
[1366] *Darfur Report*, *supra* note 32, para. 174.
[1367] *CAR Report*, *supra* note 32, para. 568.
[1368] *Ibid.*, para. 569, citing *CAR Mandate*, *supra* note 304.
[1369] *Libya First Report*, *supra* note 968, para. 56.
[1370] *Libya Second Report*, *supra* note 853, para. 603.
[1371] *Ibid.*, para. 613.
[1372] *Ibid.*, para. 21.

treated as international nature due to their complexity to their *sui generis* characteristics. Others interpreted situations of occupation broadly, finding protections in occupation law applicable in situations beyond those governed by the Hague Regulations. Affirming the applicability of the more detailed IAC regime might be thought to better regulate hostilities and enhance civilian protection. However, it might erode the IAC/NIAC distinction, which is fundamental to IHL. Other commissions were more cautious when analysing whether a situation amounted to NIAC, by identifying different phases or co-existing separate conflicts and arguing that that in prolonged occupation, IHRL should govern the use of force. These narrower approaches indicate an awareness of IHL's greater permissiveness of lethal force and concern not to hinder prosecutions with incorrect classifications.

While a narrower approach may be more precise, it may also result in what Meron terms "a crazy quilt of norms".[1373] Some commissions sought to overcome this difficulty by taking a third way, expressing ambivalence towards conflict classification in light of the convergence of customary IHL across conflicts. This approach did not blur legal categories while avoiding the 'patchwork approach' to conflict classification. This approach also has certain drawbacks. The ICTY's observation about the convergence of IHL was made in relation to war crimes, rather than IHL as a whole. Some rules such as combatant privilege remain wedded to IAC, and the extent to which customary rules are applicable in NIAC may be questioned. Such an approach may be suitable if commissions focus their efforts on violations attracting individual criminal responsibility; yet the war crimes regime in the Rome Statute preserves the distinction between IAC and NIAC.[1374] An approach which presents an 'essentialised' IHL may over-simplify the law and de-emphasise rules whose violation does not attract individual sanction.

Perhaps because it is uncontroversial that IHL applies to the parties to a conflict, commissions have not examined in much detail the theoretical basis for the attachment of IHL obligations to organised armed groups. More difficult questions arise in respect of the scope of IHL applicable to peace-enforcement missions and troop-contributing states. Commissions have not yet examined these issues often, nor in depth.

4. Applicability of International Criminal Law

The substantive applicability of ICL has been less discussed in commissions' reports. Recent commissions readily accepted that individuals are responsible under ICL. For instance, the Syria Commission wrote, "[t]he principle of individual criminal responsibility for international crimes is well established in customary international law."[1375] The proposition that individuals can be found internationally responsible for violations was discussed by UN inquiries in the 1990s, prior to the proliferation of international criminal courts and tribunals. The Yugoslavia Commission did not mention ICL in its final report, instead identifying an array of norms giving rise to criminal responsibility. A year later, the Rwanda Commission examined the general basis for individual responsibility under international law. The Commission wrote, "attribution of responsibility to the individual *in propria personam* is not

[1373] Theodor Meron, 'Classification of Armed Conflict in Former Yugoslavia: Nicaragua's Fallout', (1998) 92 AJIL 236-242, at 238.
[1374] Rome Statute, *supra* note 1033, Art. 8.
[1375] *Syria Third Report*, *supra* note 564, Annex II, para. 27.

entirely new", pointing to trials from the Middle Ages and early recognition of international crimes of slave trading and piracy.[1376] While acknowledging that "international responsibility is predominately, even almost exclusively, centred around States rather than other entities", the Rwanda Commission found that the Nuremberg trials established that individuals could be "held responsible in international law for war crimes, crimes against peace or crimes against humanity."[1377]

Commissions did consider the applicability of sources of ICL norms to situations of concern. Some commissions reasoned that the Rome Statute was applicable on the basis of the concerned state's ratification (in the case of the CAR)[1378] or a Security Council referral (in the case of Libya).[1379] The Burundi Commission observed that Burundi's notification of intention to withdraw from the Rome Statute did not affect its applicability, as withdrawal did not release Burundi from its obligations while it was party, and would not come into effect for until one year after its notification. The Burundi Commission concluded that it could "base its work on the Rome Statute which will remain in force throughout its mandate".[1380] The commissions on Syria and Darfur also applied the Rome Statute, noting that these states had signed but not ratified this treaty.[1381] The Darfur Commission also observed that Sudan's signature meant that it had to "refrain from "acts which would defeat the object and purpose" of the Statute."[1382] Commissions which were established before the ICC came into existence identified customary ICL as applicable.[1383] Some recent commissions also found that customary ICL applied due to the non-ratification of the Rome Statute by concerned states, but also had regard to provisions of the Rome Statute considered to reflect custom.[1384] On occasion, commissions considered the *rationae personae* applicability of ICL.[1385]

Conclusions

UN atrocity inquiries' interpretations of the legal dimensions of their mandates were informed by their roles and functions. The examples of the Beit Hanoun Commission and the Palmer Commission illustrate how commissions' roles and functions informed their emphasis on qualifying facts as violations of international law. Commissions' broad interpretations of the applicable law link with functions of raising alert and ensuring accountability. The inclusion of IHL reflects a concern to authoritatively report on the types and extent of violations, and to raise alert regarding the need for corrective action. Commissions' depictions of ICL as a necessary tool to ensure responsibility for violations at the level of the individual and their incorporation of this legal lens into the applicable law reflect an accountability function.

Commissions' understandings of IHRL as applicable across borders and in armed conflicts aligned with the position of treaty bodies and the ICJ, promoting consistent interpretations

[1376] *Rwanda Final Report*, *supra* note 297, para. 169.
[1377] *Ibid.*, para. 171. See *Rwanda Interim Report*, *supra* note 298, para. 127.
[1378] *CAR Report*, *supra* note 32, para. 4.
[1379] *Libya First Report*, *supra* note 968, para. 4.
[1380] *HRC Burundi TOR*, *supra* note 495, at III(i).
[1381] *Syria First Report*, *supra* note 32, para. 111.
[1382] *Darfur Report*, *supra* note 32, para. 145.
[1383] *Yugoslavia Interim Report*, *supra* note 292, para. 54 and *Rwanda Final Report*, *supra* note 297, para. 134.
[1384] *North Korea Report*, *supra* note 32, para. 65 and *Eritrea Final Report*, para. 179.
[1385] *Syria First Report*, *supra* note 32, para. 111, citing Rome Statute, *supra* note 1033, Art. 27.

across institutional contexts. Several commissions also found that customary human rights obligations applied to organised armed groups in some circumstances. The examination of human rights violations of armed groups conveyed an even-handed approach. This approach was further emphasised in situations not amounting to armed conflict. As a matter of law, it is unclear whether armed groups have international legal personality outside of armed conflict. In any event, this approach promoted a broad protective reach of IHRL beyond the state.

Commissions' roles and functions also informed their classifications of armed conflicts. Several commissions avoided wading into political debates surrounding the Israel/Palestine conflict by classifying this conflict as international due to its *sui generis* nature, or by avoiding the classification issue by pointing to the general convergence of customary IHL across conflicts. Other commissions interpreted the applicability of IHL narrowly in order to limit use of lethal force yet broadly in situations of occupation in order to promote expansive protection of the civilian population. Thus, apparently divergent approaches can reflect the same purpose: to promote the expansive reach of human rights and humanitarian protections. Some commissions also demonstrated a concern to conduct rigorous conflict classification so as not to undermine possible future judicial proceedings. This concern evokes the role of a pre-investigative body that facilitates criminal investigations and prosecutions.

Commissions' interpretations of the applicable law thus sought to promote the broad protective reach of fundamental rights and freedoms, a commitment to impartiality, and operational realities, reflecting principled and pragmatic considerations. The next Chapter continues the study of legal dimensions of inquiry mandates by examining how commissions' applications of international legal norms were informed by their roles and functions.

CHAPTER FIVE

LAW-APPLICATION IN THE INQUIRY CONTEXT

Introduction

When assessing atrocities in light of international law, UN atrocity inquiries conduct 'norm-to-fact application'.[1386] This activity involves legal interpretation, as "the question of the determination of the content of international legal rules arises each time one is called upon to apply a rule."[1387] As noted by Henderson, commissions "often go beyond 'merely' identifying violations… to making in fact quite detailed determinations on points of international law, a function traditionally associated with more formal and permanent legal adjudicative bodies."[1388] Yet their findings remain non-legal in fundamental ways. Chapter Five examines how commissions interpreted and applied international law (collectively 'legal analysis') in light of their roles and functions.

Commissions' approaches to legal analysis are first illuminated through a thematic analysis. Pertinent topics in the fields of IHRL, IHL and ICL are selected to focus the discussion, namely violations of economic, social and cultural rights (Section 1), violations arising from lethal attacks in armed conflict, focusing on IHL principles and their interaction with the right to life (Section 2), sexual and gender-based violence (Section 3), genocide (Section 4) and crimes against humanity (Section 5). These topics display the range of legal approaches taken by commissions and key challenges faced when legally appraising facts. Drawing on discussions from earlier chapters, it is critically assessed whether commissions are well-suited to assess those violations, considering their institutional architecture. Next, Section 6 conducts a cross-cutting analysis of three characteristics of commissions' approaches, namely their focus on discrete incidents; the degree of certainty of findings of violations; and the rigour of their legal analysis. It discusses how these characteristics reflect commissions' roles and functions. The Chapter concludes by reflecting on the idea that commissions analyse international law from outlooks of advocacy and adjudication, in a liminal normative space which speaks to both law and politics.

1. Violations of Economic, Social and Cultural Rights

Fact-finding guidelines emphasize that violations of economic, social, and cultural rights (ESCR) must not be overlooked.[1389] OHCHR cautions that such violations "can have consequences as serious as many violations of civil and political rights".[1390] Commissions have recognised the applicability of human rights treaties protecting ESCR as well as civil and political rights.[1391] Rights of particular relevance include health, work, education, adequate

[1386] Mechlem, *supra* note 1280, at 913.
[1387] Jean d'Aspremont, *Formalism and the Sources of International Law* (Oxford: OUP, 2011) at 157.
[1388] Henderson 2014, *supra* note 100, at 293.
[1389] *OHCHR Guidance and Practice*, *supra* note 63, at 63.
[1390] OHCHR, *Training Manual on Human Rights Monitoring - Chapter XVII: Monitoring Economic, Social and Cultural Rights* (2001), para. 13, available at http://hrlibrary.umn.edu/monitoring/chapter17.html#C (accessed 1 May 2018).
[1391] E.g., *Darfur Report*, *supra* note 32, para. 147.

housing, water and freedom from hunger. States' obligations to respect, protect and ensure ESCR are framed differently from civil and political rights. The ICESCR provides that states parties must take steps "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant".[1392] ESCR may only be limited "solely for the purpose of promoting the general welfare in a democratic society."[1393] States parties have a "minimum core obligation" to ensure "minimum essential levels"[1394] of rights. If a state blames its failure on a lack of resources, it must show that "every effort has been made to use all resources that are at its disposition".[1395]

Commissions sometimes presented socio-economic factors as part of the broader social and political context or background, rather than assessing them as violations of ESCR.[1396] This is particularly the case for inquiries into armed conflicts. For instance, the Syria Commission wrote that while it "focused on most serious violations of human rights, it wishes to note the overall deteriorating human rights situation", and that "[t]he Syrian population is generally deprived of basic [ESCR]."[1397] The CAR Commission acknowledged that armed conflicts are generally examined under the frameworks of ICL and IHL, and that "[w]hen a human rights lens is applied, it generally focuses only on civil and political rights".[1398] The Commission recognised that warfare severely impedes ESCR, which may be deliberately violated.[1399] Though not trying to analyse the "full range of such violations",[1400] in a section of its report dedicated to ESCR, the Commission only found one such violation, namely the right to housing.[1401] While recognizing that rights to food, water and access to health services were jeopardized, the Commission stopped short of finding that parties had violated those rights. Its analysis of ESCR violations remained somewhat limited.

UN atrocity inquiries generally found violations of ESCR in three broad scenarios. First, commissions found ESCR violations in respect of incidents which also violated civil and political rights, IHL, or ICL. Several commissions found that rape violated the prohibition on torture and the right to health.[1402] The Darfur Commission found that the destruction of homes violated the right to housing[1403] and that forced displacement of civilians was incompatible with the ICESCR.[1404] The CAR Commission found that attacks against humanitarian personnel and medical objects violated the right to health[1405] and the Syria Commission found that starvation of the civilian population as a method of warfare violated "core obligations under the right to adequate food and the right to the highest attainable standard of health."[1406]

[1392] ICESCR, *supra* note 243, Art. 2(1).
[1393] *Ibid*., Art. 4.
[1394] ESCR GC 3, *supra* note 1201, para. 10.
[1395] *Ibid*., para. 10.
[1396] E.g., *Syria Third Report*, *supra* note 564, paras. 32-36.
[1397] *Syria Third Report*, *supra* note 564, para. 37. See *Syria Fourth Report*, *supra* note 1097, para. 30.
[1398] *CAR Report*, *supra* note 32, para. 507.
[1399] *Ibid*., paras. 508-509.
[1400] *Ibid*., para. 510.
[1401] *Ibid*., para. 517.
[1402] *Darfur Report*, *supra* note 32, para. 356; *Syria Third Report*, *supra* note 564, para. 59; *Libya Second Report*, *supra* note 853, para. 500; *Eritrea Second Report*, *supra* note 569, para. 123.
[1403] *Darfur Report*, *supra* note 32, para. 318.
[1404] *Ibid*., paras. 330-331.
[1405] *CAR Report*, *supra* note 32, paras. 596-602.
[1406] *Syria Seventh Report*, *supra* note 805, para. 132.

Secondly, commissions identified violations of ESCR which were discrete and measurable. For instance, the Syria Commission found that the Government's occupation of schools and hospitals violated the rights to education and health.[1407] Thirdly, commissions found pervasive violations of ESCR where states failed to meet minimum core obligations.[1408] Perhaps the best example is the North Korea Commission's finding that the DPRK failed to fulfill its obligation to use all the resources at its disposal to satisfy freedom from hunger.[1409]

This survey of practice shows that commissions assessed violations of ESCR to some extent, and that their reports indicate certain concentrations of focus. Commentators observe that fact-finders tend to focus on civil and political rights rather than ESCR, which are often relegated to the background[1410] or mentioned "in passing, by paying lip-service to the mantra of universality… of all human rights, and then apologetically highlighting that the nature of ESC-rights allegedly differs fundamentally from [civil and political] rights."[1411] In conflict situations, commissions tended to assess ESCR violations arising from physically violent incidents which were also expressed as prohibitions under IHL and ICL. Other findings of ESCR violations were usually discrete, rather than systemic or chronic. Commissions generally focused on the 'tip of the iceberg' of the obligation to progressively realize ESCR by focusing on states' failures to fulfill minimum core obligations.

This selective focus links to commissions' institutional features. In order to identify violations arising from policies or patterns of discrimination, it may be necessary to analyse complex statistical and quantitative data. OHCHR observes that monitoring ESCR "tends to be confused with assessing general trends about basic needs"[1412] and that assessments of violations may require "statistics and quantitative information to prove that the State has not complied with its obligations, despite having the resources."[1413] Where concerned states refuse to cooperate, it may be very difficult to obtain such information. For instance, the Eritrea Commission could not determine whether Eritrea complied with its ICESCR obligations, due to a lack of information. The Commission reported, "[i]n the absence of public financial information and statistics, it is difficult for the Commission to assess any progress in the areas of economic and social rights reported by the Government."[1414] Its findings of IHRL violations were almost entirely civil and political in nature.[1415] By contrast, although Israel refused to cooperate with the Goldstone Commission, the latter evaluated Israel's compliance with ESCR on the basis of reports by international agencies. Even where commissions enjoyed cooperation, they faced difficulties in analyzing complex data in the

[1407] *Syria Third Report*, *supra* note 564, para. 124.
[1408] E.g., *Beit Hanoun Report*, *supra* note 620, para. 58 and *Goldstone Report*, *supra* note 633, para. 1312.
[1409] *North Korea Report*, *supra* note 32, para. 1124.
[1410] Evelyne Schmid and Aoife Nolan, ''Do No Harm'? Exploring the Scope of Economic and Social Rights in Transitional Justice', (2014) 8 *International Journal of Transitional Justice* 362-382, at 376.
[1411] Eibe Riedel, 'Economic, Social, and Cultural Rights in Armed Conflict', in Andrew Clapham and Paola Gaeta (eds), *Oxford Handbook of International Law in Armed Conflict* (Oxford: OUP, 2014) 441-469, at 443.
[1412] OHCHR, *Manual on Human Rights Monitoring: Chapter 20: Monitoring Economic, Social and Cultural Rights* UN Doc. HR/P/PT/7/Rev.1 (2011) at 11, available at http://www.ohchr.org/Documents/Publications/Chapter20-48pp.pdf (accessed 1 May 2018) [*Manual on Human Rights Monitoring*].
[1413] *Ibid*., at 25. See Audrey Chapman, 'A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights', (1996) 18 HRQ 23-66, at 31.
[1414] *Eritrea Second Report*, *supra* note 569, para. 155.
[1415] *Ibid*., para. 343.

short timeframe required to produce reports. Thus, there are many practical obstacles to the assessment of ESCR violations in the inquiry context.

2. Violations Arising from Lethal Attacks in Armed Conflict

Situations of armed conflict are governed by IHL as well as IHRL. This Section discusses how commissions interpreted and applied these fields of law when assessing attacks in armed conflict which resulted in loss of life.[1416] In IHL, attacks are defined as "acts of violence against the adversary, whether in offence or in defence".[1417] This Section discusses how commissions interpreted the right to life and its interaction with IHL norms (2.1). Next, it examines how commissions assessed the legality of lethal attacks in light of cardinal IHL principles (2.2). Finally, this Section discusses challenges faced by commissions in applying IHL and strategies adopted in response (2.3).

2.1 Right to life in armed conflict

Commissions consistently affirmed that IHRL continues to apply in armed conflict alongside IHL.[1418] Beyond this basic premise, questions arise as to how human rights are to be interpreted, particularly where they diverge from IHL. The ICCPR provides, "[n]o one shall be arbitrarily deprived of his life."[1419] In peacetime, lethal force may only be used to protect life; it must be reasonable and proportionate to the threat and must be a method of last resort.[1420] IHL is by contrast more permissive. While attacks must not be directed against protected civilians, IHL accepts that some use of force is inherent in the waging of war and that an adversary may be lethally targeted.[1421] This Section discusses how commissions articulated the general relationship between IHRL and IHL (2.1.1) and interpreted the scope of the right to life in armed conflict (2.1.2).

2.1.1 Interrelationship of IHRL and IHL

In general, commissions depicted IHL and IHRL as complementary and mutually applicable. For instance, the Syria Commission wrote, "[t]he onset of IHL applicability does not replace existing obligations under IHRL; both regimes remain in force and are generally considered as complementary and mutually reinforcing. Where both IHL and IHRL apply, and can be applied consistently, parties to a conflict are obliged to do so."[1422] This view has synergies

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[1416] IHL also applies in situations of occupation. While it may be queried whether states have more extensive IHRL obligations in occupation absent active hostilities, this is outside the scope of this Section, which focuses on attacks in the theater of combat.

[1417] *Additional Protocol I*, *supra* note 33, Art. 49(1). This concept excludes non-violent military operations, but is not limited to attacks against enemy forces: Michael Schmitt, ''Attack' as a Term of Art in International Law: The Cyber Operations Context', in Christian Czosseck, Rain Ottis, Katharina Ziolkowski (eds), *Proceedings of the 4th International Conference on Cyber Conflict* (NATO, 2012) 283-293, at 290.

[1418] See Chapter Four, Section 2.3.

[1419] ICCPR, *supra* note 243, Art. 6(1).

[1420] CCPR, *Suarez de Guerrero v. Colombia*, UN Doc. CCPR/C/15/D/45/1979, 31 March 1982, paras. 13.1-13.3; *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston*, A/HRC/14/24/Add.6, 28 May 2010, paras. 32-33 and *McCann Case*, *supra* note 780.

[1421] ICRC, *Expert Meeting: The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms* (2013), available at http://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf (accessed 1 May 2018).

[1422] *Syria Third Report*, *supra* note 564, Annex II, para. 5. See *Israeli Settlements Report*, *supra* note 572, para. 12 and *UNCHR Gaza Report*, *supra* note 536, para. 43.

with the Human Rights Committee's position that "more specific" IHL rules may be relevant for the purposes of interpreting the ICCPR, but that "both spheres of law are complementary".[1423] Seeing IHRL as 'filling the gaps' in humanitarian protections reflects a desire to "humanize"[1424] IHL. Several commissions found that some atrocities in armed conflict violated both IHL and IHRL, such as torture[1425] and targeting of civilian homes.[1426] The Sri Lanka Panel framed its findings of violations under IHL[1427] but acknowledged that many incidents would also violate IHRL.[1428] Commissions applied IHL and IHRL in a complementary way where situations were protected by both fields, in particular detention.[1429] The Eritrea Commission also interpreted IHRL by reference to more detailed IHL rules: when assessing whether Eritrea violated the prohibition of forced labour, the Commission examined the types of non-military work permitted for prisoners of war under Geneva Convention III.[1430]

Where IHRL and IHL norms were co-applicable but could not be applied consistently, commissions utilised the *lex specialis* principle.[1431] Commissions invoked different meanings of *lex specialis*, reflecting wider academic debates.[1432] Usually, commissions accorded general priority to IHL as the *lex specialis* of armed conflict. For instance, the CAR Commission wrote, "[i]n times of armed conflict, [IHL] is generally assumed to be the *lex specialis*."[1433] The Goldstone Commission explained that IHRL applied "as long as it is not modified or set aside by IHL".[1434] The Palmer Commission and Darfur Commission adopted similar views.[1435] On occasion, commissions invoked a narrower form of *lex specialis* to accord priority to the norm more specifically regulating a given situation. For instance, the Syria Commission explained that parties "must abide by the legal regime which has a more specific provision on point. The analysis is fact specific and therefore each regime may apply, exclusive of the other, in specific circumstances".[1436] Several scholars advocate this approach, reasoning that otherwise IHRL could be 'read out' of the armed conflict paradigm altogether.[1437]

[1423] *CCPR GC 31*, *supra* note 1208, para. 11.
[1424] Meron, *supra* note 735.
[1425] *Libya First Report*, *supra* note 968, para. 119.
[1426] *Lebanon Report*, *supra* note 855, para. 319.
[1427] *Sri Lanka Report*, *supra* note 29, paras. 185 and 243.
[1428] *Ibid.*, para. 18.
[1429] E.g., *Darfur Report*, *supra* note 32, para. 403; *Palmer Report*, *supra* note 316, Appendix 1, para. 63; *Goldstone Report*, *supra* note 633, para. 284; *Syria Third Report*, *supra* note 564, Annex II, para. 43. See ICRC, 'Internment in Armed Conflict: Basic Rules and Challenges', November 2014, available at http://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges (accessed 1 May 2018).
[1430] *Eritrea First Report*, *supra* note 567, paras. 1399-1401 and footnote 1912.
[1431] *Syria Third Report*, *supra* note 564, Annex II, para. 5.
[1432] E.g., Marko Milanovic, 'The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law', in Jens David Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge: CUP 2016) 78-117 and Schabas 2007, *supra* note 1173.
[1433] *CAR Report*, *supra* note 32, para. 231.
[1434] *Goldstone Report*, *supra* note 633, para. 296.
[1435] *Palmer Report*, *supra* note 316, Appendix I, para. 63; *Darfur Report*, *supra* note 32, para. 143.
[1436] *Syria Third Report*, *supra* note 564, Annex II, footnote 4; *Syria Thirteenth Report*, *supra* note 928, footnote 2.
[1437] E.g., Marko Milanovic, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law', in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford: OUP, 2011) 95-128 and Marco Sassòli and Laura Loson, 'The legal relationship between

2.1.2 Interpretation of the scope of the right to life

Commissions uniformly recognised that in the 'peacetime' or 'law enforcement' paradigm of IHRL, states' use of lethal force was governed by strict parameters of reasonableness, proportionality, and necessity.[1438] Several commissions found that in armed conflict, the right to life was to be interpreted by reference to IHL targeting rules as *lex specialis*.[1439] For instance, the Syria Commission wrote:[1440]

> … IHRL standards differ to a degree from those applicable to fighters/combatants during an armed conflict under IHL. For example, one would not expect soldiers to warn their enemies before an attack. So long as all applicable IHL, [customary international law] and IHRL requirements are met, killing an enemy fighter during an armed conflict is not illegal. The converse is also true: fighters/combatants causing another person's death, even that of the enemy, during armed conflict can be unlawful when the applicable law is breached…

The Gaza Commission noted that civilian deaths did not necessarily violate IHL because parties may "carry out proportionate attacks against military objectives, even when it is known that some civilian deaths or injuries will occur."[1441]

The Libya Commission took a different approach. While accepting that IHL operates as *lex specialis*[1442] and deeming fighters as "legitimate targets",[1443] the Commission stated that IHRL could limit the use of lethal force in armed conflict in some circumstances:[1444]

> This is particularly the case where the circumstances on the ground are more akin to policing than combat. For example, in encountering a member of the opposing forces in an area far removed from combat, or in situations where that enemy can be arrested easily and without risk to one's own forces, it may well be that the [IHL] regime is not determinative. In such situations, combatants/fighters should ensure their use of lethal force conforms to the parameters of [IHRL].

The Libya Commission's interpretation is more akin to the 'mutually applicable and complementary' approach rather than *lex specialis*. However, it does not seem to have applied its interpretation to the facts; its findings of arbitrary deprivations of life were all made in relation to civilians or those rendered *hors de combat*.[1445] At first glance, the Commission's approach might be thought to have synergies with the ICRC's view that a party should avoid using lethal force against a civilian directly participating in hostilities when it is possible to "neutralize the military threat posed by that civilian through… non-lethal means without

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international humanitarian law and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflict', (2008) 780 IRRC 599-627.

[1438] E.g., *Syria Third Report*, *supra* note 564, Annex II, paras. 30-31; *Libya Second Report*, *supra* note 853, para. 144.

[1439] *Gaza Flotilla Report*, *supra* note 681, para. 69; *Palmer Report*, *supra* note 316, Appendix I, paras. 62-63; *UNCHR Gaza Report*, *supra* note 536, para. 62.

[1440] *Syria Third Report*, *supra* note 564, Annex II, para. 32.

[1441] *Gaza Report*, *supra* note 766, para. 22.

[1442] *Libya First Report*, *supra* note 968, para. 61 and *Libya Second Report*, *supra* note *supra* note 853, footnote 24.

[1443] *Libya Second Report*, *supra* note 853, footnote 173.

[1444] *Ibid.*, para. 145 (footnotes omitted).

[1445] *Ibid.*, paras. 36 and 251-254.

additional risk to the operating forces or the surrounding civilian population".[1446] The ICRC based its reasoning on IHL concepts of military necessity and humanity, writing that while these principles were unlikely to restrict use of force against military targets in active combat zones, they "may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing."[1447] The ICRC's analysis reaches a similar end point, but arrives there via IHL. The idea of a use-of-force continuum even within IHL is criticized by W. Hays Parks as beyond settled law.[1448] Nor does is the Human Rights Committee in favour of the Libya Commission's approach, stating in a recent draft general comment that uses of lethal force compliant with IHL are "in principle, not arbitrary"[1449] deprivations of life.

Commentators caution that the humanizing trend within IHL, epitomised by the Libya Commission, may have deleterious consequences. Shany cautions the tendency of human rights bodies to engage in "normative overreaching"[1450] by viewing armed conflict through a human rights lens, which risks uncoupling law-application from conditions of warfare. Richemond-Barak similarly cautions that such approaches may not only weaken IHL norms but also reduce compliance, as "states may regard these standards as out of sync with the reality of the battlefield and be less inclined to comply with them."[1451] An interpretive approach which disturbs the equilibrium struck in IHL between humanity and military necessity might erode parties' willingness to comply with the law and decrease the protection felt on the ground.

2.2 Assessment of lethal attacks under IHL

This Section discusses how commissions interpreted and applied cardinal IHL principles of distinction (2.2.1), proportionality (2.2.2) and precautions (2.2.3) when assessing lethal attacks carried out in armed conflict.

2.2.1 Distinction

The principle of distinction requires that parties distinguish protected civilians from military objectives.[1452] Deliberate attacks on civilians and persons *hors de combat* are forbidden, and attacks not directed at a specific military objective or whose effects cannot be so limited are prohibited.[1453] Most armed conflicts under examination have been non-international in nature, where combatant status is not formally recognised. IHL applicable in NIAC provides that civilian protection is lost for such time as an individual directly participates in hostilities

[1446] Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: ICRC, 2009) at 80 [*ICRC Interpretive Guidance*].
[1447] *ICRC Interpretive Guidance*, *supra* note 1446, at 80.
[1448] W. Hays Parks, 'Part IX of the ICTC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise, and Legally Incorrect', (2010) NYU J Int'l L & Pol 769-830.
[1449] *Draft GC 36*, *supra* note 1000, para. 67.
[1450] Shany, *supra* note 1513, at 29.
[1451] Richemond-Barak, *supra* note 513, at 18.
[1452] *Additional Protocol I*, *supra* note 33, Arts. 48, 51(2) and 52(2); *ICRC Customary IHL Study*, *supra* note 1298, Rule 1.
[1453] CA 3, *supra* note 1297; *Additional Protocol I*, *supra* note 33, Arts. 51, 52 and 57; *Additional Protocol II*, *supra* note 1296, Art. 13; *ICRC Customary IHL Study*, *supra* note 1298, Rules 1, 6 and 12.

(DPH);[1454] this concept is activity-based and narrow.[1455] Rules pertaining to status-based loss of protection in NIAC are less defined. The ICRC's *Commentary on Additional Protocols* advises that persons belonging to armed forces or armed groups "may be attacked at any time".[1456] Some states treat all members of armed groups as without protection, regardless of their role.[1457] By contrast, the ICRC's concept of 'continuous combat function' provides that only members of armed groups holding a continuous function involving DPH may be lawfully targeted.[1458] This Section discusses how commissions interpreted and assessed the scope of protection from direct attack, and complexities arising in situations of asymmetric warfare.

Commissions articulated status-based targeting in NIAC in different ways. Some commissions considered membership in an armed group as sufficient to lose protection from direct attack,[1459] defining the parameters of membership carefully. For instance, the Goldstone Commission distinguished membership in Hamas, which comprises political, military and social welfare components,[1460] from membership in its armed wing.[1461] The Gaza Commission cited the concept of the 'continuous combat function', observing that this concept had been criticized both for broadening the definition of DPH and overly restricting targeting rules.[1462] It disagreed with Israel's position that all Hamas members lacked civilian protection.[1463] It also rejected the term 'enemy civilian' as not recognised in international law, and reiterated that "a civilian is a civilian regardless of nationality, race or the place where he or she lives."[1464] Other commissions appear to have implicitly identified combat function as the touchstone for continuous loss of protection by using the term 'fighter'.[1465] The Lebanon Commission wrote that attacks against houses of "family, friends, *members* or relatives – *but not fighters* – of Hezbollah"[1466] violated international law. The CAR Commission also used the term 'fighter' but it is unclear whether it endorsed status-based targeting. It found that targeting civilians not DPH was a war crime, and that this also applied to "unarmed fighters, not taking part in the hostilities", so that killings of "unarmed recruits"[1467] would be a war

[1454] *Additional Protocol II*, *supra* note 1296, Art. 13(3).
[1455] *Commentary to Additional Protocols*, *supra* note 1362, paras. 1944-1945 and 4787-4789.
[1456] *Ibid.*, para. 4789.
[1457] E.g., *US Law of War Manual*, *supra* note 575, paras. 5.8.1 and 5.8.3; *Gherebi v. Obama*, 609 F. Supp. 2d 43, 68 (D.D.C. 2009); Israel Ministry of Foreign Affairs, 'The 2014 Gaza Conflict: Factual and Legal Aspects', (2015), para. 264, available at http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf (accessed 1 May 2018).
[1458] *ICRC Interpretive Guidance*, *supra* note 1446, at 33. There is limited state practice in support of this concept, e.g., Germany Federal Ministry of Defence, *Humanitäres Völkerrecht in bewaffneten Konflikten*, ZDv15/2, DSK AV230100262 (Berlin, 2013), para. 1308.
[1459] E.g., *Sri Lanka Report*, *supra* note 29, at 194; *Goldstone Report*, *supra* note 633, para. 431; *Darfur Report*, *supra* note 32, paras. 264 and 292.
[1460] *Goldstone Report*, *supra* note 633, para. 382.
[1461] *Ibid.*, para. 428.
[1462] *Gaza Report*, *supra* note 766, para. 220 and footnote 30. See Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC 'Direct Participation in Hostilities' Interpretive Guidance', (2010) 42 NYU J Int'l L & Pol 641-695.
[1463] *Gaza Report*, *supra* note 766, para. 220.
[1464] *Ibid.*, para. 395, reflecting *Tadić Appeal Judgment*, *supra* note 1289, para. 168.
[1465] *Syria Third Report*, *supra* note 564, Annex II, para. 32; *Syria Fourth Report*, *supra* note 1097, para. 42; *Libya Second Report*, *supra* note 853, para. 138; *Gaza Report*, *supra* note 766, footnote 30.
[1466] *Lebanon Report*, *supra* note 855, para. 318 (emphasis added).
[1467] *CAR Report*, *supra* note 32, para. 352.

crime. The Commission did not specify whether this was because the recruits did not yet hold a continuous combat function, or because it rejected status-based targeting more generally.

Commissions also considered whether civilians who were not members of armed groups had lost protection by DPH.[1468] Commissions did not offer a general definition of this concept but were cautious as to what would trigger loss of protection in concrete situations. For instance, the Darfur Commission found that since most tribes in Darfur possessed weapons to defend their land and cattle, the fact that attacked civilians had weapons was not necessarily evidence of DPH.[1469] The UNCHR's Gaza Inquiry cautioned that it was prohibited to kill civilians "on the basis of suspicion or even on the basis of evidence of their supposedly menacing activities or possible future undertakings".[1470] It found that political assassinations violated IHRL and were grave breaches of Geneva Convention IV.[1471] The question of DPH was pertinent for Gaza flotilla incident, where several passengers onboard the *Mavi Marmara* were killed and many more were injured. Israel considered passengers who engaged in violence as DPH, reasoning that they had lost protection as they directed violence against Israel as a party to the conflict and were trying to transport cement, deemed as having a military purpose in breach of the blockade and in support of Hamas.[1472] The Gaza Flotilla Commission found that there was a situation of occupation in Gaza to which IHL applied, but that passengers were protected civilians.[1473] It did not elaborate much on its reasoning, but found that the deaths of passengers who were injured or "not participating in activities that represented a threat to any Israeli soldier"[1474] were violations of IHRL and grave breaches of Geneva Convention IV. The Palmer Commission found that Israeli soldiers faced organized violent resistance which justified use of force in self-defence[1475] but that the extent of loss of life and injury was "unacceptable".[1476] Further legal discussion was relegated to an appendix, and the Commission did not assess violations, reflecting an emphasis on policy analysis.[1477]

The Syria Commission was instructed to investigate "massacres",[1478] and defined this term by reference to international law:[1479]

> [I]ntentional mass killing of civilians not directly participating in hostilities, or *hors de combat* fighters, by organized armed forces or groups in a single incident, in violation of international human rights or humanitarian law.

Thilo Marauhn writes that this definition refers to IHL and IHRL "indifferently"[1480] and cautions that the Commission may have "blurred the lines"[1481] by applying these legal fields

[1468] E.g., *Syria Third Report*, *supra* note 564, Annex V, para. 17.
[1469] *Darfur Report*, *supra* note 32, para. 292.
[1470] *UNCHR Gaza Report*, *supra* note 536, para. 63.
[1471] *Ibid.*, para. 61.
[1472] *Turkel Report*, *supra* note 1076, at 233-242 and 278.
[1473] *Gaza Flotilla Report*, *supra* note 681, paras. 62-66.
[1474] *Ibid.*, para. 170.
[1475] *Palmer Report*, *supra* note 316, para. 133.
[1476] *Ibid.*, para. 134.
[1477] See Palmer, *supra* note 480, at 605.
[1478] HRC Res. 21/26, para. 19.
[1479] *Syria Fourth Report*, *supra* note 1097, para. 42.
[1480] Marauhn, *supra* note 96, at 443.
[1481] *Ibid.*, at 443.

alongside one another. In its analysis, the Syria Commission appeared to be sensitive to IHL concepts, distinguishing protected from unprotected persons. Some incidents qualified as 'massacres' appeared to neatly fit its definition, such as mass summary executions.[1482] Other 'massacres' involved several phases which might have included active combat and in respect of which the Commission lacked material information. For instance, when reporting on a 'massacre' at Temseh, the Commission stated that it could not determine whether some of those killed were "civilians or fighters";[1483] whether some civilians directly participated in hostilities; [1484] and whether civilians were "inadequately protected, or deliberately targeted".[1485] The latter scenario would be a serious violation of IHL, while in the former scenario, analysis of proportionality and precautions might be required. The Commission broadly qualified some complex events as massacres in violation of IHL and IHRL while also facing challenges in substantiating key facts.

IHL requires that, where feasible, parties avoid locating military objectives in or near densely populated areas.[1486] Where a party to the conflict does not or cannot do so, issues arise as to how to assess attacks by the other party causing significant civilian casualties. [1487] Commissions which investigated hostilities in densely populated Gaza faced such complexities. The Gaza Commission wrote, "Gaza's small size and its population density makes it particularly difficult for armed groups always to comply with these requirements."[1488] The Goldstone Commission found that Israel deliberately attacked civilians and civilian objects, and that while Hamas operated in a densely populated area, it did not intend to shield its operations with the civilian population.[1489] Those findings are critiqued by scholars who see Hamas' failure to distinguish itself from the civilian population as to blame for high rates of civilian casualties.[1490] Richard Rosen writes that the Goldstone Commission effectively "placed the onus of avoiding civilian casualties entirely on Israel."[1491] As noted by Blank, "context does not excuse overt violations of the law nor does it alter the fundamental legal framework,"[1492] but it might influence evaluations of compliance with IHL. Difficulties at the level of legal analysis were compounded by the fact that neither commission enjoyed Israel's cooperation and lacked access to sensitive information which might have informed operational targeting decisions.[1493] Strategies adopted by commissions in response to these challenges are discussed in Section 2.3.

[1482] E.g., Events at Jedaydet Artouz, 1 August 2012: *Syria Fourth Report*, *supra* note 1097, Annex IV, at 47.
[1483] *Syria Fourth Report*, *supra* note 1097, Annex IV, Part 1A, para. 5.
[1484] *Ibid*., para. 8.
[1485] *Ibid*., para. 12.
[1486] *Additional Protocol I*, *supra* note 33, Art. 58(b); *ICRC Customary IHL Study*, *supra* note 1298, Rule 23.
[1487] See Robin Geiß, 'Asymmetric conflict structures', (2006) 88(864) IRRC 757-777.
[1488] *Gaza Report*, *supra* note 766, para. 473.
[1489] E.g., *Goldstone Report*, *supra* note 633, paras. 389, 483-488, and 1026.
[1490] Laurie Blank, 'The Application of IHL in the Goldstone Report: A Critical Commentary', in Gerald Steinberg and Anne Herzberg (eds), *The Goldstone Report 'Reconsidered': A Critical Analysis* (Jerusalem: NGO Monitor, 2011) 203-264, at 216 and Richard Rosen, 'Goldstone Reconsidered', (2012) 21 J Transnat'l L & Pol'y 35-103, at 91.
[1491] Rosen, *supra* note 1490, at 91.
[1492] Blank, *supra* note 1490, at 216.
[1493] *Goldstone Report*, *supra* note 633, para. 162.

2.2.2 Proportionality

Under IHL, it is prohibited to launch an attack expected to cause incidental civilian harm that is excessive in relation to the concrete and direct military advantage anticipated.[1494] The proportionality test is prospective; judicial assessments generally adopt the *ex-ante* perspective of the 'reasonable military commander'.[1495] The proportionality principle is notoriously difficult to apply in practice;[1496] this is borne out in commissions' reports.

While some commissions' articulations of the proportionality principle mirror its codification in Additional Protocol I,[1497] others omitted its forward-looking nature.[1498] For instance, the Darfur Commission described proportionality as "a largely subjective standard, based on a balancing between the expectation and anticipation of military gain and the *actual loss* of civilian life or destruction of civilian objects."[1499] The balancing of actual civilian loss implies an *ex-post* rather than *ex-ante* assessment, more akin to IHRL.[1500] When applying the proportionality test, the Darfur Commission found that assuming that some rebels were hiding in villages, the destruction of those villages was disproportionate because "the military force used was manifestly disproportionate to any threat posed by the rebels".[1501] The Commission did not weigh anticipated military advantage against expected civilian harm, as required in Additional Protocol I, but rather against the military threat itself.

Some commissions found disproportionate attacks without identifying a specific military advantage.[1502] For instance, the Syria Commission found that attacks by Government forces against anti-Government armed groups often did not distinguish between civilian and military targets, and that Government shelling was indiscriminate. The Commission went on to find:[1503]

> [T]he attacks, especially shelling, caused incidental loss of civilian life and injury to civilians, as well as damage to civilian objects. There are reasonable grounds to believe that the damage was excessive when compared to the anticipated military advantage.

The Syria Commission did not identify the military advantage, nor articulated that its analysis of civilian harm was *ex-ante*. It seems to have 'piggybacked' its finding of disproportionate attack onto its finding of indiscriminate attack. If attacks are indiscriminate, the question of proportionality is moot.

[1494] *ICRC Customary IHL Study*, *supra* note 1298, Rule 14. See Michael Newton and Larry May, *Proportionality in International Law* (Oxford: OUP, 2014).
[1495] E.g., *Gaza Report*, *supra* note 766, para. 296; *ICRC Customary IHL Study*, *supra* note 1298, Rule 14; *Prosecutor v. Galić*, IT-98-29-T, Trial Judgement, 5 December 2003, para. 58.
[1496] Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: CUP, 2004) at 22.
[1497] E.g., *Gaza Report*, *supra* note 766, para. 37.
[1498] *Syria Third Report*, *supra* note 564, para. 29; *Palmer Report*, *supra* note 316, para. 78. Elsewhere, the Syria Commission articulated the principle correctly: *Syria Third Report*, *supra* note 564, para. 37.
[1499] *Darfur Report*, *supra* note 32, para. 260 (emphasis added).
[1500] E.g., Dominik Steiger, 'Enforcing International Humanitarian Law through Human Rights Bodies', in Heike Krieger (ed.), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (Cambridge: CUP, 2015) 263-299, at 290.
[1501] *Darfur Report*, *supra* note 32, para. 267.
[1502] E.g., *Syria Third Report*, *supra* note 564, Annex VI, para. 25 and *Libya Second Report*, *supra* note 853, para. 600, *contra Gaza Report*, *supra* note 766, paras. 368-370 and 393-394.
[1503] *Syria Third Report*, *supra* note 564, para. 95.

Commissions' varied understandings of elements of the proportionality test have led to varied outcomes. For instance, the Palmer Commission and the HRC's Gaza Flotilla Commission viewed the scope of 'attack' differently, generating opposite legal conclusions. The Palmer Commission assessed the effects of Israel's naval blockade separately to its land closure policy, finding that the naval blockade did not have a "significant humanitarian impact",[1504] so was proportionate. By contrast, the Gaza Flotilla Commission considered that the blockade was "implemented in support of the overall closure regime"[1505] so formed part of a wider attack, including land closures. It concluded that Israel's "policy of blockade or closure"[1506] was disproportionate. Commissions have also valued the weight of risks to one's own side differently. Andreas Zimmermann argues that when finding that Israeli shelling of a Hezbollah-controlled town was disproportionate, the Lebanon Commission did not consider whether conquering the town using ground forces would significantly increase troop risks.[1507] The Gaza Commission recognised that "the issue of force protection of the attacking force as an element in assessing proportionality is still unresolved",[1508] but should not be an overriding concern. It found that although force protection might be taken into account, the IDF's means and methods would likely result in excessive civilian casualties.[1509] By reducing the weight of force protection, a lower level of civilian harm is tolerated. In this sense, such an approach is 'humanizing', as it moves the balance further in the direction of protected persons.

2.2.3 Precautions

Parties to a conflict must take all feasible precautions to avoid or minimize incidental civilian harm.[1510] Precautions include verifying the military nature of targets and giving effective advance warning to civilians, where circumstances permit.[1511] Commissions have not always examined the question of precautions, as such analysis is only required if attacks *prima facie* comply with the principle of distinction. Many incidents examined by commissions fell at this first hurdle. In situations involving sophisticated military forces, commissions have examined compliance with this principle in more detail.

Several commissions examined the 'effectiveness' of warnings. The Lebanon Commission identified that to be 'effective', a warning should give clear time slots for evacuation and link to guaranteed safe humanitarian exit corridors.[1512] The Goldstone Commission was criticized for taking applying an unduly high standard for measuring the effectiveness of warnings; judging effectiveness based on whether warning were heeded, rather than successfully communicated; and wrongly applying a proportionality analysis when determining whether warnings were effective.[1513] The Goldstone Commission also linked the principle of

[1504] *Palmer Report*, *supra* note 316, para. 79.
[1505] *Gaza Flotilla Report*, *supra* note 681, para. 59.
[1506] *Ibid.*, para. 59.
[1507] Andreas Zimmermann, 'The Second Lebanon War: *Jus ad Bellum*, *Jus in Bello* and the Issue of Proportionality', (2007) 11 *Max Planck Yearbook of United Nations Law* 99-141, at 140.
[1508] *Gaza Report*, *supra* note 766, para. 296.
[1509] *Ibid.*, para. 296.
[1510] *ICRC Customary IHL Study*, *supra* note 1298, Rule 15.
[1511] *Additional Protocol I*, *supra* note 33, Art. 57.
[1512] *Lebanon Report*, *supra* note 855, para. 157.
[1513] Blank, *supra* note 1490, at 247, citing *Goldstone Report*, *supra* note 633, para. 529. See Yuval Shany, 'Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror', in Orna Ben-

precautions to the right to life, finding that Israel's failure to take precautions violated the ICCPR's 'due diligence' requirement to prevent arbitrary deprivation of life.[1514] Yuval Shany argues that this approach "leads to a reversal of the *lex specialis* rule"[1515] by replacing IHL's greater tolerance for operational mistakes with the higher standard of care in IHRL.

Recent commentary discussing the Syria Commission's finding that the United States violated the principle of precautions illustrates how such findings are subject to critique. The Commission found that a US airstrike in the village of Al-Jinah, intended to target an Al Qaeda meeting, instead killed 38 civilians at a religious gathering.[1516] The Commission found that the targeted building was part of a mosque complex and used for religious purposes.[1517] While it could have been subject to attack if an Al Qaeda meeting was taking place, US intelligence to that effect was three days old and additional verification of target activities should have been carried out as the building was a protected object.[1518] In commentary, two senior members of the US military, Lt. Col. Shane Reeves and Lt. Col. Ward Narramore, write that the Syria Commission tried to "impose an absolute requirement" to minimize incidental civilian loss, which reflected "a common conflation perpetrated by those who attempt to usurp [IHL] by injecting some version of human rights laws."[1519] In response, Adil Haque points out that the Commission's articulation of the principle of precautions is consistent with the ICRC and the US Department of Defence; and US forces admitted that the targeting team was erroneously not informed that the building was a religious complex, which would have required additional steps to verify its use for military purposes.[1520]

In addition to arguing that the Syria Commission applied the wrong legal test, Reeves and Narramore argue that it did not have enough information make such a finding, which "erodes its authority in this and future investigations."[1521] The authors point to the Commission's witness interviews as insufficiently corroborated and irrelevant, because "what matters is what the commander reasonably knew at the time the decision was made to attack the building."[1522] This argument warrants further consideration. While villagers' accounts can indicate the extent of civilian harm which occurred, they cannot necessarily show that a reasonable commander ought to have known that the building was a mosque. However, the Commission also cited a transcript of a media briefing by US Central Command in which the above-mentioned errors were admitted.[1523] This example shows how a commission's authority may

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Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford: OUP, 2011) 13-33, at 30.

[1514] *Goldstone Report*, *supra* note 633, para. 862.

[1515] Shany, *supra* note 1513, at 31.

[1516] *Syria Fourteenth Report*, *supra* note 982, para. 52.

[1517] *Ibid.*, para. 60.

[1518] *Ibid.*, para. 61.

[1519] Shane Reeves and Ward Narramore, 'The UNHRC Commission of Inquiry on Syria Misapplies the Law of Armed Conflict,' *Lawfare*, 15 September 2017, available at http://www.lawfareblog.com/unhrc-commission-inquiry-syria-misapplies-law-armed-conflict (accessed 1 May 2018).

[1520] Adil Haque, 'A Careless Attack on the UN's Commission of Inquiry on Syria', *Just Security*, 21 September 2017, available at http://www.justsecurity.org/45213/syria-commission-inquiry (accessed 1 May 2018).

[1521] Reeves and Narramore, *supra* note 1519.

[1522] *Ibid*.

[1523] *Syria Fourteenth Report*, *supra* note 982, footnote 11. The unofficial transcript is available at 'Transcript of Pentagon's Al Jinah Investigation media briefing', *Airwars*, 27 June 2017, http://airwars.org/news/transcript-of-al-jinah-investigation-briefing (accessed 1 May 2018).

be challenged both on the basis of its legal analysis and its approach to fact-finding. Particular challenges faced when establishing the facts of attacks in armed conflict are discussed next.

2.3 Fact-finding challenges and strategies

Fact-finding in armed conflict gives rise to specific challenges, including "access to the battlefield; the need for forensic, ballistic, and other technical evaluations; issues of security, credibility, and partiality of witnesses; and the obtainment of sensitive internal information that is relevant to weighing the lawfulness of attacks".[1524] The type and extent of detail required to assess attacks in armed conflict is illustrated by the Gaza Commission's report:[1525]

> Israel was asked to explain the specific contribution of each building to the military actions of the Palestinian armed groups and how its destruction represented a military advantage for the IDF; what were the ranks and combat functions of members of armed groups if they were the target of the attack; what precautionary measures, including warnings and the choice of weapons, were employed; what was the number of fatalities resulting from each of the incidents; and whether any investigations had been initiated in relation to these strikes.

Commissions' information-gathering efforts were impeded for various reasons, including lack of territorial access,[1526] less than full cooperation from parties to the conflict[1527] and security concerns.[1528] Commissions adopted three broad strategies when faced with information-gathering barriers: entering strong findings of violations on a limited basis; making broad findings of violations on a qualified basis; or stating that findings could not be reached. The first and third strategies result in more robust but truncated findings, while the second has led to critiques that findings were unreliable. Each strategy is discussed in turn.

Some commissions entered convincing findings of IHL violations on a limited basis. Boutruche observes that fact-finding bodies tend to focus on "manifest and clear-cut incidents or patterns"[1529] of disproportionate attacks, in light of the difficulties in assessing such violations. For instance, the Darfur Commission found that civilian harm would be "*patently* excessive"[1530] in relation to the expected military advantage. The Lebanon Commission wrote that if there were Hezbollah members among civilians who left villages in convoys, attacks against those convoys would be "utterly disproportionate and beyond any concept of military necessity or the principle of distinction."[1531] The advantage of this 'low-hanging fruit' approach is that findings are less susceptible to reproach on the basis that commissions failed to consider material but unavailable information. However, it also means that more complex or sophisticated attacks are less likely to be scrutinized and recognised as in violation of IHL.

[1524] PoKempner, *supra* note 96, at 149.
[1525] E.g., *Gaza Report*, *supra* note 766, para. 114.
[1526] *Gaza Report*, *supra* note 766, para. 18.
[1527] E.g., *Goldstone Report*, *supra* note 633, paras. 438-429 and 1339 regarding 'Gaza authorities'; *Darfur Report*, *supra* note 32, para. 38 regarding rebel groups and *Letter to Judge Kirsch dated 23 January 2012 from Peter Olson, NATO Legal Adviser*, at 8, in *Libya Second Report*, *supra* note 853, Annex II [*NATO letter 23 January 2012*] regarding NATO's refusal to provide some video footage which was classified. See Chapter Three, Section 3.
[1528] E.g., *CAR Report*, *supra* note 32, paras. 7 and 20-21 and *Libya First Report*, *supra* note 968, para. 145.
[1529] Boutruche 2013, *supra* note 482, at 33.
[1530] *Darfur Report*, *supra* note 32, para. 266 (emphasis added).
[1531] *Lebanon Report*, *supra* note 855, para. 153.

More often, particularly where concerned states refused to cooperate, commissions made broad but tentative findings of IHL violations. For instance, the Syria Commission made findings of massacres while acknowledging that could not verify that all those killed were protected persons.[1532] The Goldstone Commission found some IHL violations with the caveat that they were reached on the basis of "available information"[1533] or "in the absence of any information refuting the allegations".[1534] Some scholars criticized the Goldstone Commission for finding disproportionate attacks in the absence of full information.[1535] Others, including Cassese, praised its report as systematically analyzing facts in light of the applicable law[1536] and adhering to standards of legality in 'the fog of war' and in the face of Israeli non-cooperation. [1537] The Gaza Commission made similar caveats in its findings of disproportionate attack.[1538]

As discussed in Chapter 3,[1539] some commissions made qualified findings of violations by drawing adverse inferences or reversing the evidentiary burden where attacks were *prima facie* directed against civilians and civilian objects. The Gaza Commission wrote, "[t]he onus is on Israel to make available information about those objectives and explain how attacking them contributed to military action",[1540] as only then could legality be assessed. While accepting that there may be limits to disclosure, the Commission required "a minimum level of transparency"[1541] to assist victims' rights to the truth and a remedy. Benjamin Wittes and Yishai Schwartz are critical of the Gaza Commission's approach: "[h]aving put the burden on Israel to prove every attack legitimate and having no access to Israeli decision-making, it is no wonder that the commission regularly finds that many of the strikes it examines may have been war crimes."[1542] Israel argues that IHL does not require disclosure of sensitive information, and it "cannot publicize detailed reasoning behind every attack without endangering intelligence sources and methods".[1543] The Commission rejected Israel's view, as "accepting that logic would undermine any efforts to ensure accountability".[1544] The strategies of the Gaza Commission and Goldstone Commission reflect a more human rights-oriented approach by reaching *prima facie* findings in the absence of information from the concerned state, in order to promote accountability and the rights to truth and a remedy.

[1532] See Chapter Five, Section 2.2.1.
[1533] *Goldstone Report*, *supra* note 633, paras. 32, 75, 389, 437, 494, 629, 652, 701, 1102, 1167.
[1534] *Ibid.*, paras. 595, 838, 1167.
[1535] E.g., Abraham Bell, 'A Critique of the Goldstone Report and its Treatment of International Humanitarian Law', (2010) 104 Am Soc'y Int'l L Proc 79-86 and Blank, *supra* note 1490.
[1536] Antonio Cassese, 'We Must Stand behind the UN Report on Gaza', *Financial Times*, 14 October 2009, cited in Yihdego, *supra* note 96, at 47.
[1537] Falk, *supra* note 1007, at 97.
[1538] *Gaza Report*, *supra* note 766, para. 221.
[1539] See Chapter Three, Section 3.4.
[1540] *Gaza Report*, *supra* note 766, para. 228.
[1541] *Ibid.*, para. 217.
[1542] Benjamin Wittes and Yishai Schwartz, 'What to Make of the UN's Special Commission Report on Gaza?', *Lawfare*, 24 June 2015, available at http://www.lawfareblog.com/what-make-uns-special-commission-report-gaza (accessed 1 May 2018).
[1543] Israel Ministry of Foreign Affairs, 'Israel's Investigation of Alleged Violations of the Law of Armed Conflict', at 27, cited in *Gaza Report*, *supra* note 766, para. 215. Note: this quote does not appear in the document available at http://mfa.gov.il/ProtectiveEdge/Documents/IsraelInvestigations.pdf (accessed 1 May 2018).
[1544] *Gaza Report*, *supra* note 766, para. 215.

In other cases, commissions acknowledged limits to their abilities to assess compliance with IHL due to a lack of information.[1545] For instance, the Libya Commission wrote that while it established that many civilians were harmed, it could not "determine the full circumstances of the attacks in order to be able to evaluate whether the attacks were intentional, indiscriminate and/or disproportionate."[1546] It was rather conservative in its analysis of NATO strikes, finding a few incidents where "NATO's response to the Commission has not allowed it to draw conclusions on the rationale for, or the circumstances of the attacks", so that it could not assess whether all feasible precautions were taken.[1547] The Goldstone Commission refrained from making findings in respect of some incidents involving complicated assessments. In a letter quoted by Israeli authorities, Goldstone wrote that the Commission avoided calling a witness who could testify as to conditions of warfare in Gaza:[1548]

> [M]ainly because in our Report we did not deal with the issues he raised regarding the problems of conducting military operations in civilian areas and second-guessing decisions made by soldiers and their commanding officers 'in the fog of war'. We avoided having to do so in the incidents we decided to investigate.

For Israel, this response showed that the Goldstone Commission "*deliberately selected* incidents so as to evade the complex dilemmas of confronting threats in civilian areas."[1549] Nigel Rodley surmises, "[t]he Israeli response seems to imply that concentrating on incidents where facts are relatively clear, rather than on those where they may not be, is somehow reprehensible."[1550] While in politically volatile situations, pragmatic selection of incidents might be interpreted by the parties as evidence of bias, such objections may also resemble the *tu quoque* fallacy when parties refuse to provide information.[1551]

Commissions experienced significant difficulties in gathering and assessing information in ongoing conflicts. This was especially the case in respect of the principles of proportionality and precautions, which involve a difficult balancing of military necessity and humanity. Without cooperation from the parties, it could be very difficult to understand the conditions of the theater of combat and the intelligence relied upon when making targeting decisions. Commissions generally faced less criticism of findings of deliberate attacks against civilians, perhaps due to the absolute nature of this prohibition. An exception may be seen in respect of hostilities in densely populated areas, where it may be more difficult to determine whether civilians were directly targeted or incidentally harmed.

[1545] E.g., *Gaza Report*, *supra* note 766, para. 223.
[1546] *Libya First Report*, *supra* note 968, para. 156.
[1547] *Libya Second Report*, *supra* note 853, para. 89.
[1548] *Letter from Richard Goldstone dated 21 September 2009*, cited in *Israel Response to Goldstone Report*, *supra* note 871, para. 18.
[1549] *Israel Response to Goldstone Report*, *supra* note 871, para. 18 (emphasis in original).
[1550] Nigel Rodley, 'Assessing the Goldstone Report', (2010) 16 *Global Governance* 191-202, at 197.
[1551] M. Cherif Bassiouni, *Introduction to International Criminal Law* (Leiden: Brill, 2012) at 465 and Sienho Yee, 'The tu quoque argument as a defence to international crimes, prosecution or punishment', (2004) 3(1) Chinese J Int'l L 87-134.

3. Violations involving Sexual and Gender-Based Violence

Violence committed against an individual on the basis of his or her sex or gender is a common occurrence in situations of conflict and has been used as a 'weapon of war'.[1552] The meaning and interrelationship of 'sex' and 'gender' are discussed at length in scholarship.[1553] UN policy documents often bundle these terms as 'sexual and gender-based violence' (SGBV). For instance, the UN High Commissioner for Refugees defines SGBV as:[1554]

> [A]ny act that is perpetrated against a person's will and is based on gender norms and unequal power relationships. It encompasses threats of violence and coercion. It can be physical, emotional, psychological, or sexual in nature, and can take the form of a denial of resources or access to services.

Other UN and judicial definitions contain similar elements. Some definitions are made in the context of violence against women and girls,[1555] but SGBV may also be committed against men and boys.[1556] SGBV encompasses sexual and non-sexual physical and mental violence based on a person's gender. Some definitions of SGBV also include broader types of harm such as economic harm and denial of resources.[1557] This Chapter uses this expansive definition to discuss how commissions engaged with different gendered dimensions of violations. This Section examines how commissions recognised SGBV as violations of international law and the victims of such atrocities (3.1) and assessed these types of violations (3.2).

3.1 Recognition of violations and victims

Some scholars criticize IHL treaties and early war crimes trials for not sufficiently acknowledging SGBV as violations of international law.[1558] Early international atrocity inquiries recognised that sexual violence violated international law in a cursory way. The

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[1552] GA Res. 48/143, 20 December 1993, Preamble; SC Res. 1820 (2008).

[1553] E.g., Gloria Gaggioli, 'Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law', (2014) 96(894) IRRC 503-538 and Charlotte Lindsey-Curtet, Florence Holst-Roness and Letitia Anderson, *Addressing the Needs of Women Affected by Armed Conflict: An ICRC Guidance Document* (Geneva: ICRC, 2004) at 7, available at http://www.icrc.org/eng/assets/files/other/icrc_002_0840_women_guidance.pdf (accessed 1 May 2018).

[1554] UNHCR, 'Sexual and Gender-Based Violence', available at http://www.unhcr.org/sexual-and-gender-based-violence.html (accessed 1 May 2018).

[1555] *UN Declaration on the Elimination of Violence Against Women*, GA Res. 48/104, 20 December 1993, Art. 1; CEDAW Committee, *General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, UN Doc. CEDAW/C/GC/35, 26 July 2017, para. 14 [*CEDAW GR 35*] and *General Recommendation No. 19, Violence against Women*, UN Doc. HRI/GEN/1/Rev.6, 12 May 2003, para. 6 [*CEDAW GR 19*].

[1556] E.g., *Prosecutor v. Češic*, IT-95-10/1-S, Sentencing Judgement, 11 March 2007, paras. 13-14 and ICC Prosecutor, 'Policy Paper on Sexual and Gender-Based Crimes', (2014), para. 16, available at http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf (accessed 1 May 2018).

[1557] E.g., UNHCR, *supra* note 1554 and *CEDAW GR 35*, *supra* note 1555, para. 14: gender-based violence includes "acts or omissions intended or likely to cause or result in death or physical, sexual, psychological or economic harm or suffering to women, threats of such acts, harassment, coercion and arbitrary deprivation of liberty."

[1558] Judith Gardam, 'Women, Human Rights and International Humanitarian Law', (1998) 324 IRRC 421-432, *contra* Gaggioli, *supra* note 1553, at 511 and Fionnuala Ní Aoláin, 'The Gender Politics of Fact-Finding in the Context of the Women, Peace and Security Agenda', in Alston and Knuckey, *supra* note 94, 89-105, at 93.

1919 Commission identified rape and forced prostitution as violations of IHL attracting criminal sanction.[1559] The Inter-Allied Commission of Inquiry on occupied Serbia devoted a section of its report to rape.[1560] The Smyrna Commission made findings of rape but did not qualify them as legal violations.[1561] In the UN context, the Mozambique Commission made brief findings that women were raped and that some pregnant women were disemboweled,[1562] but its recognition of these acts as legal violations was quite generalized. It found that "massacres and other atrocities described in this report"[1563] violated the right to life, liberty, and security of the person under the UDHR and the prohibition of mutilation, cruel treatment, and torture under Geneva Convention IV.[1564]

From the 1990s, UN atrocity inquiries examined legal prohibitions of sexual violence in detail. The Yugoslavia Commission observed that most domestic legal systems considered rape as "a crime of violence of a sexual nature against the person" and that the "characteristic of violence of a sexual nature also applies to other forms of sexual assault against women, men and children, when these activities are performed under coercion or threat of force".[1565] The inquiries on Yugoslavia and Rwanda both found that rape and sexual assault were prohibited as war crimes and underlying acts of crimes against humanity and genocide.[1566] Commissions now routinely recognise rape and sexual violence as underlying acts of international crimes, reflecting developments from the *ad hoc* tribunals and the ICC.[1567] Some commissions also recognised that sexual violence violates other legal norms such as the prohibition against torture[1568] and the right to health.[1569]

Inquiry reports indicated increasing appreciation of gender-based violence, but uneven recognition of their legal prohibition. Neither the Rwanda or Yugoslavia commissions mentioned the term 'gender'. While the Darfur Commission mentioned 'gender violence', it defined this as non-penetrative sexual violence.[1570] By contrast, the Beit Hanoun Commission recognised that in conflict situations, gender-related violence might be given less attention:[1571]

> The particular position of women and gender-specific harm may be invisible where a whole society is facing gross violations of human rights and of [IHL], as there is a sense of unity that prevents identification of and focus on women's situations.

The Beit Hanoun Commission and the Lebanon Commission recognised gender-specific harms suffered from the breakdown of communities, such as domestic violence and sexual

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[1559] *1919 Report*, *supra* note 119, at 114.
[1560] *Occupied Serbia Report*, *supra* note 120, at 13.
[1561] Smyrna Commission, *'Document 3: Account of Events that took place following the Occupation, which were established during the Inquiry between 12 August and 6 October 1919'*, point 15.
[1562] *Mozambique Report*, *supra* note 253, paras. 69 and 86.
[1563] *Ibid.*, para. 140.
[1564] *Ibid.*, paras. 149 and 155.
[1565] *Yugoslavia Final Report*, *supra* note 39, para. 103 (footnotes omitted).
[1566] *Yugoslavia Final Report*, *supra* note 39, para. 107; *Rwanda Final Report*, *supra* note 297, paras. 140-145.
[1567] E.g., *Darfur Report*, *supra* note 32, paras. 177-178 and 358; *Libya First Report*, *supra* note 968, para. 203.
[1568] E.g., *Syria Third Report*, *supra* note 564, Annex II, para. 61.
[1569] *Guinea Report*, *supra* note 39, para. 175; *Syria Third Report*, *supra* note 564, para. 59, citing ICESCR, *supra* note 243, Art. 12.
[1570] *Darfur Report*, *supra* note 32, para. 359.
[1571] *Beit Hanoun Report*, *supra* note 620, para. 63.

abuse.[1572] The Lebanon Commission acknowledged that legal and financial issues related to property and social benefits could be particularly severe for women, "who may be marginalized or isolated from social support networks."[1573] Neither commission expressly linked such harms to legal prohibitions, however. The CAR Commission defined gender-based violence as "any harmful act directed against individuals or groups of individuals on the basis of their gender", including "sexual violence, domestic violence, trafficking, forced/early marriage and harmful traditional practices".[1574] However, it only discussed prohibitions of sexual violence.[1575] By contrast, the North Korea Commission discussed gender-based persecution as a crime against humanity[1576] and found that in addition to its expression in the Rome Statute, this prohibition was "crystalizing into customary international law."[1577]

3.2 Assessment of violations

Commissions consistently remarked that it was very difficult to evaluate SGBV, especially in conflict situations, but also due to social, cultural, and religious beliefs.[1578] The Yugoslavia Commission wrote:[1579]

> Owing to the social stigma attached - even in times of peace - rape is among the least reported crimes. For this reason, it is very difficult to make any general assessment of actual numbers of rape victims… The overall reluctance to report rape is aggravated by war, especially if the perpetrators are soldiers and also where there is a general condition of chaos and a breakdown in law and order. The victims may have little confidence in finding justice. The strong fear of reprisal during wartime adds to the silencing of victims. The perpetrators have a strong belief that they can get away with their crimes.

The Eritrea Commission observed that in addition to the general trauma and shame felt by victims, the patriarchal nature of Eritrean society contributed to under-reporting and under-acknowledgement of gender-based violence.[1580]

Despite these difficulties, some commissions devoted considerable effort to assessing SGBV. The Yugoslavia Commission conducted a study of rape and sexual assault[1581] and reported that it had identified almost 800 victims by name or number and 600 alleged perpetrators by name.[1582] In 2016, the Eritrea Commission "decided to devote specific attention to [SGBV], including violence against women and girls, and to assess the gender dimension and impact of other violations."[1583] In 2018, the Syria Commission issued a thematic report centring on

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[1572] *Beit Hanoun Report*, *supra* note 620, para. 66; *Lebanon Report*, *supra* note 855, para. 280.
[1573] *Lebanon Report*, *supra* note 855, para. 277.
[1574] *CAR Report*, *supra* note 32, para. 483.
[1575] *Ibid.*, paras. 483-488. The CAR Commission recognised the norm of gender-based persecution but only discussed persecution on religious, political or racial grounds: para. 431.
[1576] *North Korea Report*, *supra* note 32, para. 1059.
[1577] *Ibid.*, footnote 1576.
[1578] E.g., *Darfur Report*, *supra* note 32, para. 336; *Syria Third Report*, *supra* note 564, para. 97; *Libya First Report*, *supra* note 968, para. 202 and *Libya Second Report*, *supra* note 853, para. 70.
[1579] *Yugoslavia Final Report*, *supra* note 39, para. 234.
[1580] *Eritrea Second Report*, *supra* note 569, paras. 20-29.
[1581] *Yugoslavia Final Report, Annex II, Rape and sexual assault: a legal study*, UN Doc. S/1994/674/Add.2, 28 December 1994.
[1582] *Yugoslavia Final Report*, *supra* note 39, para. 236.
[1583] *Eritrea Second Report*, *supra* note 569, para. 18.

SGBV.[1584] Some commissions found that sexual violence was perpetrated against men and boys as well as women and girls.[1585]

In other cases, commissions only made brief findings of SGBV. The Rwanda Commission's findings of SGBV amounted to one sentence, namely that "disturbing reports"[1586] of rape had been filed. Its lack of attention to sexual violence stands in contrast to findings of the prevalence of sexual violence in the Rwandan genocide[1587] and the strong focus on such violations at the ICTR[1588] following significant witness testimony in the *Akayesu* case.[1589] Linda Bianchi observes that ICTR investigators needed cultural training to elicit accurate information and understand what they were being told as Rwandan victims tended to refer to rape indirectly.[1590] It is not clear from the Rwanda Commission's report whether it interviewed victims of SGBV or examined allegations in depth. If it had, it may well have faced similar obstacles.

Occasionally, commissions identified gendered dimensions to sexual violence, recognizing that victims were targeted because of their gender. For instance, the Guinea Commission found that acts of sexual violence violated CEDAW "since they were clearly directed against women as such."[1591] The North Korea Commission found that forced abortions violated women's physical integrity and sexual and reproductive rights, and constituted gender-based persecution.[1592] The Eritrea Commission identified gender-based violence such as forced marriage of underage girls[1593] and gender-specific torture of women in detention, such as preventing mothers from breastfeeding, beating women to induce abortions and refusing to provide sanitary pads.[1594]

Gender-based violations distinct from sexual violations were generally recognised to a lesser extent. For instance, the Cambodia Commission did not examine SGBV, even though forced marriage was a feature of the Khmer Rouge regime and such allegations were investigated by

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[1584] Syria Commission, *"I lost my dignity": Sexual and gender-based violence in the Syrian Arab Republic*, UN Doc. A/HRC/37/CRP.3, 8 March 2018.

[1585] *Ibid*., paras. 43-50; *Yugoslavia Final Report*, *supra* note 39, paras. 230(o) and 235; *Syria Third Report*, *supra* note 564, para. 100 and *Eritrea Second Report*, *supra* note 569, para. 127.

[1586] *Rwanda Final Report*, *supra* note 297, para. 136. The remainder of its discussion on this topic focussed on issues of law.

[1587] E.g., *Report on the Situation of Human Rights in Rwanda submitted by Mr René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994*, UN Doc. E/CN.4/1996/68, 29 January 1996, paras. 16-24.

[1588] Of 87 indictees, 40 were charged with rape and sexual violence crimes: Linda Bianchi, 'The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR', in Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Cambridge: Intersentia, 2013) 123-149, at 128.

[1589] ICTR, 'Amicus Brief Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and Other Sexual Violence Within the Competence of the Tribunal', May 1997, available at http://www.iccwomen.org/publications/briefs/docs/Prosecutor_v_Akayesu_ICTR.pdf (accessed 1 May 2018) and UN Women, 'Sexual Violence and Armed Conflict: United Nations Response', (1998), available at http://www.un.org/womenwatch/daw/public/cover.pdf (accessed 1 May 2018).

[1590] Bianchi, *supra* note 1588, at 132.

[1591] *Guinea Report*, *supra* note 39, para. 178, citing *CEDAW GR 19*, *supra* note 1555.

[1592] *North Korea Report*, *supra* note 32, para. 434.

[1593] *Eritrea Second Report*, *supra* note 569, para. 126.

[1594] *Ibid*., para. 267.

the Extraordinary Chambers in the Courts of Cambodia.[1595] The CAR Commission used the term SGBV[1596] but only made findings of rape.[1597] Inquiries into authoritarian regimes gave some attention to non-sexual gender-based violations, such as the Eritrea Commission's finding that women's forced domestic servitude in military training camps was gendered enslavement.[1598] Some commissions identified gendered dimensions of other violations. The Beit Hanoun Commission wrote that in a society where women had limited freedom of movement, soldiers' intrusions into homes violated women's privacy and dignity.[1599] The North Korea Commission recognised that men and women suffered differently from enforced disappearances during and after wartime. Wartime abductions of POWs affected women whose families were left without breadwinners, while post-war, women were abducted because of their gender.[1600]

Recently, commissions have identified the intersectionality[1601] of SGBV with other violence. For instance, the Syria Commission examined ISIS's treatment of Yazidi women and girls, finding that their practice of sexual enslavement constituted serious bodily and mental harm under the Genocide Convention.[1602] The Commission emphasized:[1603]

> Yazidi women and girls are not, however, simply vessels through which ISIS seeks to achieve the destruction of the Yazidi religious group. Rape and sexual violence, when committed against women and girls as part of a genocide, is a crime against a wider protected group, but it is equally a crime committed against a female, as an individual, on the basis of her sex.

This statement recognises that women and girls were subject to sexual violence on the basis of gender as well as ethnicity. The North Korea Commission found that discrimination arising out of North Korea's *songbun* class system "intersects with gender based discrimination, which is equally pervasive".[1604] Persecution on political grounds also intersected with gender-based persecution; for instance, women were forced to have abortions to prevent the reproduction of "class enemies".[1605] The Eritrea Commission found that discrimination against women interacted with other violations, such as being forced into marriage to avoid the possibility of sexual abuse during military training.[1606] Heightened sensitivity to gender issues has also manifested in recognition of limitations in assessing SGBV, with some recent

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[1595] Extraordinary Chambers in the Courts of Cambodia, 'Case 002 Closing Order', para. 843, available at http://www.eccc.gov.kh/en/articles/public-version-case-002-closing-order (accessed 1 May 2018) and Transcultural Psychosocial Organization Cambodia, *A Study about Victims' Participation at the Extraordinary Chambers in the Courts of Cambodia and Gender-Based Violence under the Khmer Rouge Regime*, September 2015, available at http://tpocambodia.org/wp-content/uploads/2014/06/TPO_GBV-under-the-Khmer-Rouge_Report_20151.pdf (accessed 1 May 2018).
[1596] *CAR Report*, *supra* note 32, para. 462.
[1597] *Ibid*., paras. 464-482.
[1598] *Eritrea Second Report*, *supra* note 569, para. 224.
[1599] *Beit Hanoun Report*, *supra* note 620, para. 64.
[1600] *North Korea Report*, *supra* note 32, paras. 1004-1014.
[1601] Atrey, *supra* note 103.
[1602] Syria Commission, "*They came to destroy": ISIS Crimes Against the Yazidis*, UN Doc. A/HRC/32/CRP.2, 15 June 2016, para. 122 [*They Came to Destroy*].
[1603] *They Came to Destroy*, *supra* note 1602, para. 124.
[1604] *North Korea Report*, *supra* note 32, para. 346.
[1605] *Ibid*., para. 1059.
[1606] *Eritrea Second Report*, *supra* note 569, para. 126.

commissions cautioning that their reports might have only partially captured the extent of SGBV.[1607]

Some feminist scholars critique IHL as reproducing structural gender inequalities by depicting women as "objects of vulnerability".[1608] That recent commissions were concerned to recognise the agency of those who suffered SGBV is reflected in a linguistic shift, through the use of the term 'survivor' rather than 'victim'. Some feminist scholars and activists deliberately use this term to recognise agency.[1609] For instance, the Eritrea Commission wrote:[1610]

> Prior, during, and after interviews with women and girls, the Commission highlighted the importance of their participation in its work, thereby contributing to the empowerment of survivors of sexual and gender-based violence through participation in the documenting/justice process. The Commission wishes to acknowledge the courage and strength of the Eritrean survivors who spoke in detail of the rapes they suffered.

The South Sudan Commission also used the term 'survivor' in relation to SGBV.[1611] This change in terminology is noticeable; most other commissions used the term 'survivor' to refer to those who escaped death.[1612] These developments have occurred along with increased recognition of gender issues at the UN generally[1613] and provision of gender expertise to UN atrocity inquiries.[1614] We see a development that commissions are giving more attention to SGBV while also gaining awareness of their own limitations in evaluating such violations.

While inquiry reports reveal increasing awareness of the different ways in which SGBV violates international law, there is some unevenness in commissions' investigative focus. Commissions which examined violations in the context of authoritarian regimes gave more attention to non-sexual gender-based violence as well as gendered dimensions of other violations. By contrast, investigations of conflict situations tended to focus on sexual violations involving physical violence. Fionnuala Ní Aoláin writes that focussing on sexual violence reinforces the "presumed extremity of certain harms (physical sexual for women) over other less documented violations (economic and equality based)."[1615] From this perspective, if commissions focus on sexual violence and overlook other gendered violence,

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[1607] *North Korea Report*, *supra* note 32, para. 17; *Eritrea First Report*, *supra* note 567, para. 52.
[1608] Ní Aoláin, *supra* note 1558, at 91. See Gardam, *supra* note 1558.
[1609] Anne-Marie de Brouwer, 'What the International Criminal Court Has Achieved and Can Achieve for Victims/Survivors of Sexual Violence', (2009) 16 *International Review of Victimology* 183-209, at 184.
[1610] *Eritrea Second Report*, *supra* note 569, para. 25.
[1611] *South Sudan First Report*, *supra* note 30, paras. 36, 39 and 71.
[1612] E.g., *CAR Report*, *supra* note 32, paras. 250, 313 and 366; *Syria Fourteenth Report*, *supra* note 982, paras. 45 and 59; *Libya Second Report*, *supra* note 853, para. 147. An exception is Syria Commission, *They Came to Destroy*, which uses the term 'survivors' in relation to SGBV: *supra* note 1602, paras. 114 and 117.
[1613] E.g., UN Sustainable Development Goal 5 (gender equality and women's empowerment); Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, SC Res. 1888 (2009); OHCHR, 'Human Rights Council holds annual discussion on the integration of a gender perspective in its work', 15 September 2014, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15037&LangID=E (accessed 1 May 2018).
[1614] E.g., HRC Res. 23/25, para. 17; *CAR Report*, *supra* note 32, para. 19; *HRC Burundi Mandate*, *supra* note 349, para. 25; *Myanmar Mandate*, *supra* note 2, para. 13.
[1615] Ní Aoláin, *supra* note 1558, at 90.

this can shape ideas of the types of harm experienced by women and imply that physical harm is more serious than socioeconomic harm.

4. Genocide

Several commissions examined whether atrocities amounted to genocide. According to the Genocide Convention, this international crime entails killing; causing serious bodily or mental harm; deliberately inflicting conditions of life calculated to bring about physical destruction; imposing measures intended to prevent births; or forcibly transferring children to another group, with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".[1616] This Section examines how commissions interpreted and applied pertinent facets of the prohibition of genocide, namely protected groups (4.1), special intent, or *dolus specialis* (4.2) and genocidal policy or a pattern of conduct (4.3). It then addresses possible reasons for the cautious approach taken by commissions in respect of findings of genocide (4.4).

4.1 Protected groups

The Genocide Convention requires that prohibited acts be committed against a "national, ethnical, racial or religious" group.[1617] The Rwanda Commission hinted at the possibility of subjective group identification when stating, "it is not necessary to presume or posit the existence of race or ethnicity itself as a scientifically objective fact."[1618] Later commissions endorsed the idea that protected groups may be subjectively identifiable.[1619] The Darfur Commission took a wider interpretation, citing ICTR's view that the Genocide Convention applied to "all stable and permanent groups".[1620] The Darfur Commission reasoned that this interpretation was well-accepted in international case law and state practice, so as to reflect custom. Schabas writes that this suggestion was "surely overstating the case",[1621] as such an approach was not supported at the ICTY or in subsequent ICTR case law. Moreover, it was not necessary to reach such a conclusion, as the Janjaweed subjectively considered the victims to belong to one of the enumerated groups.[1622]

Some commissions distinguished 'colloquial' or 'non-technical'[1623] understandings of genocide from the narrower legal concept and discussed the possibility of 'political' or 'cultural' genocide. The North Korea Commission and the CAR Commission considered that although it might be beneficial to include political groups, there was insufficient evidence that the customary prohibition had evolved to include such groups.[1624] The North Korea Commission found that extermination on political grounds and social class was beyond the

[1616] Genocide Convention, *supra* note 780, Art. 2; Rome Statute, *supra* note 1033, Art. 6.
[1617] *Ibid.*, Art. 2.
[1618] *Rwanda Final Report*, *supra* note 297, para. 159.
[1619] E.g., *They Came to Destroy*, *supra* note 1602, para. 104.
[1620] *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgement, 2 September 1998, paras. 511, 516 and 701-702, cited in *Darfur Report*, *supra* note 32, para. 498.
[1621] William Schabas, 'Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry's Findings on Genocide', (2006) 27(4) Cardozo L Rev 1703-1721, at 1712 [Schabas 2006].
[1622] Schabas 2006, *supra* note 1621, at 1713.
[1623] *They Came to Destroy*, *supra* note 1602, para. 13 and *North Korea Report*, *supra* note 32, para. 1158.
[1624] *They Came to Destroy*, *supra* note 1602, para. 13.

definition of genocide, but that such atrocities "[evoke] notions akin to 'genocide'"[1625] and "might be described as a 'politicide'."[1626] While sympathetic to the idea of expanding the definition of genocide, it was not considered necessary as atrocities could be characterised as crimes against humanity. Recalling this view, Michael Kirby explains:[1627]

> …[W]here international law was in a possible state of evolution (as in the availability of the international crime of genocide in cases of annihilation of a section of the population on grounds of political belief) the [North Korea Commission] held back from expressing a conclusion on the possible infringement of such a law. However, it did indicate its inclination in that respect. There was already so much material (and findings on so many human rights violations and crimes against humanity) that this approach of prudent restraint appeared to be appropriate.

The CAR Commission cited the North Korea Commission's view that it was not necessary to make findings of genocide, in light of its findings of crimes against humanity.[1628] The Darfur Commission aside, commissions exhibited caution when considering whether to expand protected groups beyond those specified in the Genocide Convention.

4.2 Dolus specialis

Commissions distinguished genocide from other species of international crimes by virtue of *dolus specialis*, namely "intent to destroy, in whole or in part" a protected group. According to the Darfur Commission, *dolus specialis* requires that "the perpetrator consciously desired the prohibited acts he committed"[1629] to result in the destruction of the group. Christine Byron writes that the reference to 'desire' "may confuse motive with intent".[1630] Other commissions distinguished intent from motive more clearly. In 1993, the Yugoslavia Commission reasoned that evidence that a defendant was aware of the consequences of his or her conduct could establish intent, but not necessarily motive.[1631] The Rwanda Commission similarly found, "the presence of political motive does not negate the intent to commit genocide if such intent is established in the first instance."[1632] The Syria Commission recognised that perpetrators with special intent "may also be fuelled by multiple other motives such as capture of territory, economic advantage, sexual gratification, and spreading terror."[1633]

When commissions appraised facts, they were rather cautious in identifying *dolus specialis*. The Cambodia Commission found that the Khmer Rouge committed genocide against minority ethnic groups and the Buddhist monkhood,[1634] but decide whether genocide was committed against the general population of Cambodia. While finding that the Khmer people constituted a 'national group', the Commission found that the question of whether genocide

[1625] *North Korea Report*, *supra* note 32, para. 1157.
[1626] *Ibid.*, para. 1158.
[1627] Kirby, *supra* note 97, at 8.
[1628] *CAR Report*, *supra* note 32, para. 460.
[1629] *Darfur Report*, *supra* note 32, para. 491.
[1630] Christine Byron, 'Comment on the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General', (2005) 5(2) Hum Rts L Rev 351-360, at 356.
[1631] *Yugoslavia Final Report*, *supra* note 39, para. 97.
[1632] *Rwanda Final Report*, *supra* note 297, para. 159.
[1633] *They Came to Destroy*, *supra* note 1602, para. 10.
[1634] *Cambodia Report*, *supra* note 324, para. 63.

was committed against them "turns on complex interpretive issues, especially concerning the Khmer Rouge's intent with respect to its non-minority-group victims", and reserved the question for a tribunal to consider, in the event that leaders were charged with genocide against the Khmer people.[1635] The CAR Commission considered whether atrocities by the *anti-balaka* against Muslims in amounted to genocide or alternatively as crimes against humanity of persecution and forcible population transfer.[1636] It assessed whether the *anti-balaka* "possessed the specific intent to destroy the Muslim community"[1637] as an element of genocide. The Commission considered that its 'reasonable grounds to believe' standard of proof was similar to that required to issue an ICC arrest warrant.[1638] While acknowledging that the ICC did not require genocidal intent to be the "only reasonable conclusion"[1639] to meet that threshold, the Commission considered that it should draw the conclusion with the greater evidentiary basis. It found insufficient evidence to establish that perpetrators acted with intent to destroy the targeted group.[1640] Boutruche observes that generally, fact-finding practitioners found it very difficult to gather information indicating *dolus specialis*.[1641]

4.3 Genocidal policy or pattern of conduct

Whether a genocidal 'policy' is a required element of genocide is controversial. The Yugoslavia Commission considered that ethnic cleansing, which it defined as a policy to violently remove another ethnic or religious group from certain geographic areas, could "fall within the meaning of the Genocide Convention".[1642] The Rwanda Commission suggested that a policy of systematic rape could amount to genocide.[1643] The Darfur Commission was the first to discuss the legal relevance of genocidal policy in detail, positing that such an element demonstrated *dolus specialis* on the part of governmental authorities.[1644] On the facts, the Commission found that the Sudanese Government's "policy of attacking, killing and forcibly displacing members of some tribes" did not indicate genocidal intent; rather, attacks were conducted in order to "drive the victims from their homes, primarily for purposes of counter-insurgency warfare"[1645] and "drive a particular group out of an area on persecutory and discriminatory grounds for political reasons."[1646] The Commission concluded that the Government had not committed genocide in Darfur due to the lack of a genocidal policy.[1647] The Commission cautioned that specific individuals might have had genocidal intent and be

[1635] *Ibid*., para. 65.
[1636] *CAR Report*, *supra* note 32, para. 453.
[1637] *Ibid*., para. 455.
[1638] *Ibid*., para. 456, citing Rome Statute, *supra* note 1033, Art. 58(1)(a).
[1639] *Ibid*., citing *Prosecutor v. Omar Al Bashir*, 'Decision on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir',' ICC-02/05-01/09OA, PTC I, 3 February 2010, para. 37.
[1640] *CAR Report*, *supra* note 32, para. 457.
[1641] Boutruche 2013, *supra* note 482, at 30.
[1642] *Yugoslavia Interim Report*, *supra* note 292, para. 56.
[1643] *Rwanda Final Report*, *supra* note 297, para. 145.
[1644] *Darfur Report*, *supra* note 32, para. 518.
[1645] *Ibid*., para. 518.
[1646] *Ibid*., para. 519.
[1647] *Ibid*., para. 522.

responsible for genocide on an individual basis,[1648] but that "it would be for a competent court to make such a determination on a case by case basis".[1649]

This aspect of the Darfur Commission's report provoked strong reactions in commentary.[1650] Nöelle Quénivet writes that the Commission gave the impression that it did not want to enter the fray with respect to whether Sudan was responsible for genocide, while seeming less reluctant in suggesting individual criminal responsibility. She surmises:[1651]

> To some extent, it is less dangerous for the [Darfur] Commission to declare that while some individuals may be held responsible for the crime of genocide, the State *per se* cannot be held accountable on the international level. The conclusion of the [Darfur] Commission is all the more disappointing as the group of experts had been commissioned to ascertain whether *inter alia* acts of genocide had occurred in Darfur.

By contrast, Schabas considers the Commission's affirmation of the centrality of a policy for the purposes of state responsibility as "helpful", as when instructing the Commission to investigate whether genocidal acts were committed, "the Security Council wanted to know whether genocide was being committed pursuant to a plan or policy of the State."[1652] Moreover, state responsibility for genocide must involve a policy: "Individuals have specific intent. States have policy. The term specific intent is used to describe the inquiry, but its real subject is State policy".[1653]

Other commissions have not discussed whether policy is a required element of state-sponsored genocide, nor engaged in much depth with the ICC's requirement that unless genocidal conduct could in itself destroy the targeted group, it must occur "in the context of a manifest pattern of similar conduct".[1654] The CAR Commission wrote that Rome Statute's definition of genocide reproduced that in the Genocide Convention[1655] and identified the 'manifest pattern' element, but did not discuss whether this was a new element or its relation to the idea of genocidal policy.[1656] Other commissions which cited Article 6 of the Rome Statute did not refer to the requirement for a manifest pattern.[1657] These elements remain rather unexplored in commissions' reports.

[1648] *Ibid.*, para. 520.
[1649] *Ibid.*, para. 520.
[1650] E.g., Ademola Abass, 'Proving State Responsibility for Genocide: The ICJ in *Bosnia v. Serbia* and the International Commission of Inquiry for Darfur', (2008) 31(871) Fordham Int'l LJ 871-910 and Andrew Loewenstein and Stephen Kostas, 'Divergent Approaches to Determining Responsibility for Genocide', (2007) 5 JICJ 839-858.
[1651] Noëlle Quénivet, 'The Report of the International Commission of Inquiry on Darfur: The Question of Genocide', (2006) *Human Rights Review* 39-68, at 52.
[1652] Schabas 2006, *supra* note 1621, at 1710.
[1653] William Schabas, 'State Policy as an Element of International Crimes', (2008) 98(3) J Crim L & Criminology 953-982, at 970.
[1654] *ICC Elements of Crimes*, Art. 6(a), para. 4.
[1655] *CAR Report*, *supra* note 32, para. 449.
[1656] *Ibid.*, para. 450.
[1657] E.g., *North Korea Report*, *supra* note 32, para. 1156 and *They Came to Destroy*, *supra* note 1602, para. 9.

4.4 Caution in making findings of genocide

Commissions generally assessed allegations of genocide with caution. It may be that the infamy of genocide as the 'crime of crimes' encouraged commissions to tread carefully.[1658] Such reservations are rarely found in inquiry reports, however, where crimes against humanity are acknowledged as potentially as serious and stigmatising as acts of genocide.[1659]

Some commentators suggest that some commissions' reticence to report findings of genocide in fact reflect policy considerations. The Sri Lanka Panel apparently chose not to report its finding that genocide had not occurred as "given the inflammatory nature of the issue, the practitioners figured that if the report mentioned genocide, no matter what the report said, the report was likely to be misinterpreted."[1660] The desire of the Security Council Inquiry on Burundi for a supportive relationship with the concerned state led it to revise its findings; after it "found both Tutsis and Hutus guilty of genocide, Burundi's Tutsi-led government opposed the release of the Commission's final report".[1661] The revised report found that the 1993 massacre of Tutsis amounted to genocide[1662] and that indiscriminate killings of Hutus was not stopped, but also not "centrally planned".[1663] A US official responsible for drafting the Commission's mandate opines that it "made a political decision that the government of Burundi had to approve the report" which led it to omit "any mention of Tutsis killing Hutus."[1664] It cannot be extrapolated that such considerations influenced all commissions, but these examples illustrate the special power that findings of genocide can carry.

Commissions have been criticized for avoiding issuing findings of genocide. Quénivet writes that the Darfur Commission's report gives the impression that it "did not wish to enter into the hot debate as to whether Sudan was, as a State, involved in the genocide",[1665] while also dodging the question of individual responsibility by stating that this was a question for a judicial body. Makane Mbengue and Brian McGarry are also critical of the Darfur Commission's refusal to make findings of individual responsibility, arguing that the terms of its mandate squarely put this question within its competence, and that:[1666]

> Passing the question of individual criminal responsibility to bodies such as the ICC may suggest an inherent structural weakness in quasi-judicial bodies *vis-à-vis* their conventional judicial counterparts. Therefore, despite the Commission's stated mandate 'to identify the perpetrators of such violations,' one may fairly wonder whether the UN Security Council's establishment of a commission of inquiry or other quasi-judicial body is, in fact, an appropriate response to an escalating humanitarian crisis.

[1658] Boutruche 2013, *supra* note 482, at 30. See Schabas 2006, *supra* note 1621, at 1717.
[1659] *CAR Report*, *supra* note 32, para. 78; *Darfur Report*, *supra* note 32, para. 506; *North Korea Report*, *supra* note 32, para. 1158 and *North Korea Report*, *supra* note 32, para. 1158.
[1660] Rob Grace, 'Communication and Report Drafting in Monitoring, Reporting, and Fact-finding Mechanisms', *HPCR Working Paper*, July 2014, at 50, available at http://ssrn.com/abstract=2462590 (accessed 1 May 2018), citing 'Interview conducted by the author on 5-1-2013 with Steven Ratner – Member, Secretary-General's Panel of Experts on Sri Lanka'.
[1661] Grace and Bruderlein, *supra* note 26, at 16-17.
[1662] *SC Burundi Report*, *supra* note 307, para. 483.
[1663] *Ibid*., para. 486.
[1664] Grace and Bruderlein, *supra* note 26, at 17, citing 'HPCR interview on 9/14/11 with Gregory Stanton, Mandate Drafter for the International Commission of Inquiry on Burundi'.
[1665] Quénivet, *supra* note 1651, at 52.
[1666] Mbengue and McGarry, *supra* note 775, at 457.

Whether commissions indeed consider genocide as the 'crime of crimes' or are concerned that audiences will perceive it as such, the upshot is that inquiry reports have taken a more cautious tone to assessing genocide than other violations.

5. Crimes Against Humanity

The final substantive legal area to be discussed is crimes against humanity. This Section discusses how commissions interpreted the contextual elements of this species of international crime (5.1) and qualified atrocities as crimes against humanity (5.2). Modes of liability and other elements of ICL are addressed in Chapter Six, which examines responsibility regimes.

5.1 Interpretation of contextual elements

Commissions agree that certain atrocities may amount to crimes against humanity when carried out in the context of a widespread or systematic attack against a civilian population.[1667] Commissions also considered other contextual elements, namely a nexus with armed conflict and that an attack be conducted pursuant to a state or organisational policy. Each is discussed in turn.

The question of whether crimes against humanity must have a nexus with armed conflict was raised from the IMT Charter's definition of crimes against humanity as committed "before or during the war".[1668] The Yugoslavia and Rwanda Commissions saw a nexus with armed conflict as necessary, writing that such crimes were "committed by persons demonstrably linked to a party to the conflict".[1669] The ICTY Statute reflects this view, providing that the ICTY may prosecute crimes against humanity "committed in armed conflict".[1670] However the ICTY subsequently ruled that a connection to armed conflict was not required, and that its statutory definition was narrower than the customary definition.[1671] Subsequently, commissions have affirmed that crimes against humanity may also occur in peacetime.[1672]

Commissions have taken different views as to whether attacks must be carried out pursuant to a state or organisational policy (commonly referred to as the 'policy requirement'), as stated in the Rome Statute.[1673] The Syria Commission cited the Rome Statute definition but omitted the policy element even though it found a state policy to commit violations on the facts.[1674] By contrast, the HRC's Burundi Commission discussed the ICC's interpretation of the policy requirement in detail and applied it to the facts.[1675] Commissions disagreed as to whether the policy requirement was part of the customary definition of crimes against humanity. The Eritrea Commission found that the policy requirement was implicitly part of the customary

[1667] E.g., *Cambodia Report*, *supra* note 324, para. 66(b); *Darfur Report*, *supra* note 32, para. 178 and *Sri Lanka Report*, *supra* note 29, para. 249.
[1668] IMT Charter, Art. 6(c) (emphasis added).
[1669] *Yugoslavia Interim Report*, *supra* note 292, para. 49; *Yugoslavia Final Report*, *supra* note 39, para. 75 and *Rwanda Final Report*, *supra* note 297, para. 135.
[1670] ICTY Statute, Art. 5.
[1671] *Tadić Interlocutory Appeal*, *supra* note 1294, para. 141.
[1672] E.g., *CAR Report*, *supra* note 32, para. 113; *Darfur Report*, *supra* note 32, para. 178; *Goldstone Report*, *supra* note 633, para. 293; *Cambodia Report*, *supra* note 324, para. 71; *Sri Lanka Report*, *supra* note 29, para. 250.
[1673] Rome Statute, *supra* note 1033, Art. 7(2)(a).
[1674] *Syria Third Report*, *supra* note 564, para. 57, Annex II, para. 16 and Annex V, para. 41.
[1675] *HRC Burundi Detailed Report*, *supra* note 405, paras. 675-678.

definition, "as it is difficult to conceive of international individual criminal liability for crimes that were random rather than organised."[1676] The Darfur Commission and Sri Lanka Panel considered that evidence of a policy or plan was relevant but unnecessary.[1677] The North Korea Commission took a hybrid approach, applying the "lowest common denominator"[1678] so that its findings would satisfy any definition and reasoned that the policy requirement ensured that crimes against humanity excluded "isolated or haphazard" atrocities.[1679] However, it did not conclude whether a policy was generally required, as it found a state policy on the facts.[1680]

Commissions also considered whether crimes against humanity were committed by members of armed groups. This gives rise to a question of the meaning of 'organisational' policy in the Rome Statute.[1681] In a split decision of an ICC Trial Chamber, two possible interpretations were identified. The broad approach of the majority included any group with "capability to perform acts which infringe on basic human values", regardless of the level of organisation,[1682] while Judge Hans-Peter Kaul in the minority would require that a group be "state-like".[1683] To adopt the minority view would narrow the scope of crimes against humanity. Commissions have not interpreted the meaning of 'organisational' policy, for various reasons. Some examined the conduct of states, so this issue was not material. Others ostensibly adopted the Rome Statute's definition but did not mention the policy requirement.[1684] Heller writes that the Libya Commission's omission of this requirement was "bizarre" as Bassiouni chaired the drafting committee which adopted the policy requirement, and that the omission was "anything but harmless… the policy requirement may limit the *thuwar*'s responsibility for crimes against humanity."[1685] Some commissions stated that atrocities were carried out in pursuit of a policy without discussing the meaning of this requirement.[1686]

5.2 Assessment of crimes against humanity

When assessing whether atrocities amounted to crimes against humanity, commissions first characterised violations as 'underlying acts' enumerated in the Rome Statute or the ICTY and ICTR Statutes.[1687] The Yugoslavia Commission did not identify underlying acts in its interim

[1676] *Eritrea Second Report*, *supra* note 569, para. 182.
[1677] *Darfur Report*, *supra* note 32, para. 179 and *Sri Lanka Report*, *supra* note 29, para. 250 and footnote 127.
[1678] *North Korea Report*, *supra* note 32, at 321, footnote 1541.
[1679] *Ibid*., footnote 1619, citing *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Decision on the Confirmation of Charges', ICC-01/04-01/07, PTC I, 30 September 2008, para. 396.
[1680] *North Korea Report*, *supra* note 32, at 321, footnote 1542.
[1681] E.g., Claus Kreß, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement. Some Reflections on the March 2010 ICC Kenya Decision', (2010) 23 LJIL 855.
[1682] *Situation in the Republic of Kenya*, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya', ICC-01/09-19, PTC III, 31 March 2010, para. 90 [*Kenya Investigation Decision*].
[1683] *Ibid*., 'Dissenting Opinion of Judge Kaul to the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya', para. 66.
[1684] E.g., *CAR Report*, *supra* note 32, para. 113; *Syria Third Report*, *supra* note 564, paras. 48-50; *supra* note 853, para. 25.
[1685] Heller, *supra* note 96, at 34.
[1686] E.g., *Syria Fourth Report*, *supra* note 1097, para. 109.
[1687] E.g., *Goldstone Report*, *supra* note 633, para. 294.

report, and in its final report cited acts in the ICTY Statute.[1688] Atrocities were characterised as crimes against humanity when underlying acts were carried out in a widespread or systematic way.[1689] Where contextual elements were not satisfied in situations of armed conflict, commissions tended to qualify atrocities as war crimes.[1690]

Commissions inferred the existence of a policy from evidence of coordination or patterns of attacks. For instance, the North Korea Commission found that "inhumane acts perpetrated in the DPRK's political prison camps occur on a large scale and follow a regular pattern giving rise to the inference that they form part of an overarching State policy."[1691] The Syria Commission found in respect of unlawful killings by Government forces, that the "coordination and active participation of Government institutions indicated the attacks were institutionalized and conducted as a matter of policy."[1692] The Guinea Commission considered that facts which supported the "systematic and widespread nature of the attack also support the conclusion that the attack should be deemed to have been committed pursuant to or in furtherance of a State or organizational policy".[1693] Where attacks were considered systematic, the 'policy requirement' was not an additional hurdle. Some commissions also recognised limits to their characterisations of crimes against humanity by indicating that only judicial bodies could enter definitive findings.[1694]

6. Cross-Cutting Analysis

The foregoing discussion demonstrated how commissions' legal analysis connected to their institutional features in relation to different bodies of law and types of violations. This Section conducts a cross-cutting analysis of commissions' interpretations and applications of international law. It discusses commissions' focus on incident-based violations (6.1), the certainty of their findings of violations (6.2) and the rigour of their legal analysis (6.3), and how these aspects are informed by commissions' roles and functions.

6.1 Focus on incident-based violations

Commissions tended to focus their legal analysis on incident-based violations involving specific victims and perpetrators rather than systemic or chronic harms. This tendency is reflected in commissions' focus on violations of civil and political rights, specific types of ESCR violations, and violations capable of being characterised as international crimes. Allison Corkery writes that fact-finding methods remain "predominantly legalistic and events-based" so that fact-finders are "poorly equipped to analyze the multidimensional factors and multitude of actors that create, perpetuate, or exacerbate chronic and entrenched violations."[1695] Eibe Reibel distinguishes micro and macro dimensions of ESCR: the micro-level concerns minimum core obligations to realize rights, while the macro-level "addresses

[1688] *Yugoslavia Final Report*, *supra* note 39, para. 81.
[1689] E.g., *CAR Report*, *supra* note 32, para. 195; *supra* note 853, paras. 63 and 536.
[1690] E.g., *Syria Third Report*, *supra* note 564, para. 89 and *Libya Second Report*, *supra* note 853, para. 64.
[1691] *North Korea Report*, *supra* note 32, para. 1062.
[1692] *Syria Sixth Report*, *supra* note 1126, para. 44.
[1693] *Guinea Report*, *supra* note 39, footnote 35.
[1694] E.g., *Sri Lanka Report*, *supra* note 29, paras. 51 and 260; *Goldstone Report*, *supra* note 633, para. 1335; *Guinea Report*, *supra* note 39, para. 180; *North Korea Report*, *supra* note 32, para. 1023.
[1695] Allison Corkery, 'Investigating Economic, Social and Cultural Rights Violations', in Alston and Knuckey, *supra* note 94, at 377-378.

the need for substantial system changes".[1696] Commissions tended to focus on micro dimensions of ESCR violations due to the practical difficulties in gathering information, carrying out systemic analysis and qualifying macro-level deficiencies as violations.

The functions of promoting accountability and encouraging compliance through naming and shaming invite a focus on violations involving identifiable victims and perpetrators. OHCHR observes that "[g]enerally, documenting a human rights violation involves gathering information to determine 'who did what to whom'."[1697] Reflecting on human rights fact-finding strategies, Kenneth Roth writes that to effectively shame a government into changing its behaviour:[1698]

> [C]larity is needed around three issues: violation, violator, and remedy. We must be able to show persuasively that a particular state of affairs amounts to a violation of human rights standards, that a particular violator is principally or significantly responsible, and that a widely accepted remedy for the violation exists. If any of these three elements is missing, our capacity to shame is greatly diminished. We tend to take these conditions for granted in the realm of civil and political rights because they usually coincide… In the realm of ESC rights, the three preconditions for effective shaming operate much more independently…

Such selectivity may unintentionally prioritize certain types of violations. Dustin Sharp cautions that if "direct victims and perpetrators occupy the foreground in most INGO reporting, broader or structural drivers of conflict and injustice tend to receive comparatively little emphasis",[1699] and that a focus on civil and political rights, "whether on the basis of self-imposed methodological restrictions or not, continues to have the effect of reifying historical hierarchies of rights".[1700] The accountability function also encourages a focus on violations that may be characterised as international crimes, which more readily translate to the international judicial context. Lars Waldorf suggests that ICL's emphasis on individual responsibility rather than structural causes might explain the lack of prosecutions for massive ESCR violations.[1701]

6.2 Level of certainty of findings of violations

Where a commission aims to provoke enforcement action, it may be less important for findings to have a high degree of certainty, in light of the expectation that further investigations will follow. For instance, the Darfur Commission justified its low standard of proof on the basis that the Commission "would obviously not make final judgments as to criminal guilt; rather, it would make an assessment of possible suspects that would pave the way for future investigations, and possible indictments, by a prosecutor."[1702] Mégret

[1696] Riedel, *supra* note 1411, at 445.
[1697] *Manual on Human Rights Monitoring*, *supra* note 1412, at 20.
[1698] Kenneth Roth, 'Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization', (2004) 26(1) HRQ 63-73, at 67-68.
[1699] Sharp, *supra* note 103, at 75.
[1700] *Ibid*., at 73.
[1701] Lars Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs', (2012) 21(2) *Social and Legal Studies* 171-186 at 173.
[1702] *Darfur Report*, *supra* note 32, para. 15 (citations omitted).

distinguishes facts needed for action from those needed for adjudication, and the dilemma for fact-finding:[1703]

> Facts needed for action are merely quasi-facts, facts as they can best be ascertained in the circumstances; there is a recognition that time is of the essence, that decisions cannot afford to wait for certainty. Facts as needed for adjudication are more in the manner of incontrovertible, demonstrable, or highly probable truth because of the negative consequences they portend for persons or institutions and because one does not have, unlike political action, the excuse that time is pressing. Human rights fact-finding, and therein lies some of its challenges, now more often than not identifies a dual space: providing facts both for the political decision-maker and potentially for the adjudicator.

Adding further complexity is the fact that commissions' findings of violations not only serve as stepping-stones for corrective action; they have also been cited by adjudicative bodies. For instance, the Gaza Flotilla Commission's finding of disproportionate use of force was cited in a dissenting opinion in a decision of the ICC PTC.[1704] The ECHR cited the Syria Commission's findings of serious violations of IHRL and IHL when assessing whether Russia would violate the principle of non-refoulement by forcibly returning the applicants to Syria.[1705] The Human Rights Committee cited the Cote d'Ivoire Commission's findings that the applicant suffered torture and that conditions of detention failed to meet human rights standards.[1706] Commissions' cognisance of the potential future use of their findings in judicial and adjudicative contexts may motivate them to devote resources towards reaching findings with a high degree of certitude. However, this may mean that commissions cannot communicate the full range or scope of violations, reducing the rhetoric impact of the report.

When making a case for corrective action and seeking to give a voice to victims, communicating the seriousness of violations may be prized over certainty. This is especially so where there is an urgent need for action to prevent violence; investigations are conducted under time pressure or with scarce resources; or where states refuse to cooperate. UN atrocity inquiries often operate under all three conditions. One strategy adopted by commissions in such cases is to find serious violations or patterns of atrocities on a qualified basis. Examples include the Goldstone Commission's findings reached on the basis of 'available information' and the Syria Commission's characterisation of complex events as massacres in violation of IHL and IHRL while noting the need for further investigations.

Commissions which made *prima facie* findings based on available information or drew adverse inferences were presented with a conundrum: concerned states could refuse to cooperate and then seek to benefit from criticizing the credibility of findings. There is no easy solution as to which approach a commission should choose. If broad or qualified findings are

[1703] Mégret 2016, *supra* note 460, at 43.

[1704] *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, 'Decision on Request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation: Partly Dissenting Opinion of Judge Peter Kovacs', ICC-01/13-34-Anx, PTC I, 16 July 2015, para. 38.

[1705] ECtHR, *L.M. and others v. Russia*, No. 40081/14, Judgment, 15 October 2015, paras. 76 and 113, citing *Syria Eighth Report*, *supra* note 983.

[1706] CCPR, *Traoré v. Ivory Coast*, UN Doc. CCPR/C/103/D/1759/2008, 31 October 2011, para. 3.4, citing *SC Côte d'Ivoire Report*, *supra* note 67.

subsequently shown to be incorrect, a commission's credibility may be diminished and its catalysing influence neutralised.[1707] However, as noted by the Gaza Commission, "[t]o empower noncooperating parties would be to defeat international fact-finding entirely."[1708] In assessing violations, therefore, commissions may face a trade-off between prioritising certainty at the cost of expressing the extent of harm; or making findings which command attention and demand action, whose credibility may be undermined. In practice, most commissions adopted the latter course of action, indicating a more advocatory rather than adjudicative approach which corresponds to functions of raising alert and provoking the mandating authority and other stakeholders to take corrective action.

6.3 Rigour of legal analysis

Commissions interpreted and applied international law with varying degrees of rigour. Some commissions discussed legal authorities at length before applying them to the facts, such as the Darfur Commission's examination of genocide. Yihdego argues that the Goldstone Commission's extensive legal analysis "raises the issue of whether the exercise was really fact-finding as opposed to 'law-finding'."[1709] Others, such as the HRC-led inquiry into Côte d'Ivoire, mentioned the applicable law very briefly and made findings of violations without discussing the content of legal norms.[1710] This Section discusses how the rigour of commissions' legal analysis corresponds to different roles and functions.

Rigorous legal reasoning may render a report less vulnerable to political challenge. Alston writes that the Darfur Commission's robust legal analysis galvanized "public opinion and inter-governmental action"[1711] and suggests that having to respond to a "carefully documented and powerfully argued analytical report"[1712] made it more difficult for the Security Council to avoid taking action. Van den Herik writes that in politically sensitive situations, commissions must "interpret and apply the law quite meticulously" and "such rigor adds to the authority of the report", which may "help to forestall, or at least de-legitimize, unilateral dismissal on legal grounds."[1713] Such an approach might also represent a degree of moral accountability where legal avenues for redress are unavailable for legal or political reasons.

Commissions exercised the most caution when interpreting elements of international crimes. With respect to genocide, they were hesitant to expand protected groups beyond those enumerated in the Genocide Convention and scrutinised the meaning of *dolus specialis*. More flexibility was shown in relation to the elements of crimes against humanity, but commissions still based their interpretations on a detailed analysis of legal authorities. Commissions' views were particularly diverse with respect to the policy requirement. As this element may be difficult to prove, commissions which omitted this requirement might reach findings of crimes against humanity more easily but may not satisfy the Rome Statute's definition. The North Korea Commission's decision to adopt stricter elements of crimes against humanity accepted

[1707] Zeray, *supra* note 96, at 48.
[1708] PoKempner, *supra* note 96, at 155.
[1709] Yihdego, *supra* note 96, at 47.
[1710] E.g., *HRC Côte d'Ivoire Report*, *supra* note 810, paras. 9-10 and 69-93.
[1711] Alston 2005, *supra* note 96, at 604.
[1712] *Ibid*., at 606.
[1713] Van den Herik, *supra* note 74, at 29.

the possibility of fewer findings of crimes in exchange for conclusions which would satisfy all definitions. This cautious approach could reduce the likelihood of inconsistent findings, should the DRRK come within the jurisdiction of an international court or tribunal. Such concerns may account for commissions' more conservative interpretations of elements of international crimes, in comparison with legal questions less likely to be adjudicated.

A commission aiming to promote a broad reach of human rights and IHL protections might adopt a more advocative approach rather than cleaving to settled legal authority. However, if legal analysis is perceived as beyond settled law, the authority of the report may be reduced. Hellestveit argues that the temptation to offer a progressive interpretation of international law in an inquiry report should be resisted, as it may interfere with the core objective of producing an authoritative report of facts upon which the international community can rely.[1714] For instance, the Libya Commission's view that IHL targeting rules might be displaced by the right to life is described by Kevin Heller as a "radical position".[1715] Marauhn writes that when commissions blur the lines between IHL and IHRL, they "not only put compliance with both bodies of law at risk by blurring the lines, but they also put their own credibility at risk."[1716] In the IHL context, principles of proportionality and precautions were not applied entirely consistently, such as by expressing the proportionality test as *ex post* rather than *ex-ante*, not identifying anticipated military advantage, or judging the effectiveness of warnings by whether they prompted evacuation. Concerned states may seek to undermine commissions' competence by pointing to such errors.[1717]

The rigour of a commission's legal analysis raises questions about its potential function of developing international law.[1718] Many scholars observe that commissions' legal analysis can be influential in practice.[1719] International courts and tribunals have been somewhat cognizant of inquiry reports as legal authorities. Legal interpretations of the Yugoslavia Commission were cited by *ad hoc* criminal tribunals[1720] and occasionally by regional human rights courts[1721] and the ICJ.[1722] Other inquiry reports were cited occasionally by the ICTR and the

[1714] Hellestveit, *supra* note 20, at 369.
[1715] Heller, *supra* note 96, at 27.
[1716] Marauhn, *supra* note 96, at 455.
[1717] E.g., Israel Ministry of Foreign Affairs, 'Israeli response to the UNHRC Commission of Inquiry', 22 June 2015, Point 3, available at http://mfa.gov.il/MFA/PressRoom/2015/Pages/Israeli-response-to-the-UNHRC-Commission-of-Inquiry-22-Jun-2015.aspx (accessed 1 May 2018).
[1718] Boutruche 2013, *supra* note 482, at 21.
[1719] Akande and Tonkin, *supra* note 777; Koutroulis, *supra* note 1730, at 613 and Frulli, *supra* note 102, at 1239; Grace and Coster van Voorhout, *supra* note 937, at 14; Boutruche 2013, *supra* note 482, at 21.
[1720] *Prosecutor v. Tadić*, IT-94-1-T, Trial Judgement, 7 May 1997, para. 638; *Prosecutor v. Jelisić*, IT-95-10, Trial Judgement, 14 December 1999, para. 55; *Prosecutor v. Martić*, IT-95-11-A, Appeals Judgement, 8 October 2008, para. 306; *Prosecutor v. Delalić and others*, IT-96-21-T, Trial Judgement, 16 November 1998, para. 90; *Prosecutor v. Strugar*, IT-01-42-T, Decision on Defence Motion Requesting Judgement of Acquittal pursuant to Rule 98 bis, 12 June 2004, para. 193 and *Prosecutor v. Prlić and others*, IT-04-74-T, Trial Judgement, 9 May 2013, para. 248; *Prosecutor v. Milutinović and others*, IT-99-37-PT, 'Decision on Motion Challenging Jurisdiction', 6 May 2003, para. 33 and *Prosecutor v. Brima and others*, SCSL-04-16-T, Trial Judgement, 20 June 2007, para. 692.
[1721] ECtHR, *Vasiliauskas v. Lithuania*, No. 35343/05, Judgment, Grand Chamber, 20 October 2015, para. 96 and IACHR, *Martí de Mejía v. Perú*, Case 10.970, Report No. 5/96, 1 March 1996, at 157.
[1722] *Bosnia Genocide Case*, *supra* note 1289, para. 190, citing *Yugoslavia Interim Report*, *supra* note 292.

ICC.[1723] Reviewing ICTY jurisprudence, David Re finds that UN fact-finding reports were "undoubtedly catalysts in developing [ICL], at least in facilitating investigations" but that reports "ultimately were probably more politically and historically important than judicially influential."[1724] Judicial expressions of commissions' legal authority are rather lukewarm.[1725] The ICTY Appeals Chamber described the authority of the Darfur Commission's report as "at best persuasive."[1726] In practice, judicial reliance has clustered around specific reports, reflecting the degree of judicial guidance available at the time. Darcy argues that commissions largely contributed to ICL when this field was still developing, and that future contributions will be "inconspicuous and inadvertent".[1727]

Scholars have engaged with inquiry reports that raise interesting or contentious issues of law and findings of violations.[1728] Commentary has converged around legal propositions not much addressed in judicial settings, such as state responsibility for genocide and human rights obligations of armed groups. Certain inquiry reports stimulated significant debate.[1729] Scholars engaged deeply with the legal analysis of commissions led by legal heavyweights such as Cherif Bassiouni, Philippe Kirsch and Antonio Cassese.

How is commissions' legal authority to be theorised? Some scholars argue that inquiry reports fall within the ambit of Article 38(1) of the ICJ Statute which reflects the classic theory of sources of international law. Vaios Koutroulis conceives of UN inquiry reports as "informed doctrine, due to the expertise of the missions' members".[1730] Darcy writes that commissions' reports can be considered subsidiary sources or should be analogised as such, as a hybrid of doctrine and jurisprudence.[1731] A formal account may alternatively rest on delegated state authority.[1732]

[1723] *Prosecutor v. Jean-Pierre Bemba Gombo*, 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute', ICC-01/05-01/08, PTC II, 15 June 2009, para. 431, citing *Yugoslavia Final Report*.

[1724] David Re, 'Fact-finding in the Former Yugoslavia: What the Courts Did', in Bergsmo, *supra* note 94, 279-323, at 286.

[1725] E.g., *Prosecutor v. Omar Al Bashir*, 'Second Decision on the Prosecution's Application for a Warrant of Arrest: Separate and Partly Dissenting Opinion of Judge Anita Ušacka', ICC-02/05-01/09, para. 6.

[1726] *Prosecutor v. Popović and others*, IT-05-88-A, Appeals Judgement, 30 January 2015, para. 464.

[1727] Darcy, *supra* note 101, at 256.

[1728] E.g., Schabas 2006, *supra* note 1621, Abass, *supra* note 1650, Clapham forthcoming, *supra* note 513, Henckaerts and Wiesener, *supra* note 1282, Yael Ronen, 'Human Rights Obligations of Territorial Non-State Actors', (2013) 46(1) Cornell Int'l LJ 21-50 and George Fletcher and Jens Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', (2005) 3 JICJ 539. For a formalist critique of this practice, see d'Aspremont, *supra* note 1387, at 133.

[1729] E.g., Alston 2005, *supra* note 96; Mbengue and McGarry, *supra* note 775 and William Schabas, 'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide', (2005) 18 LJIL 871-903, at 877, discussing the *Darfur Report*; Marauhn, *supra* note 96 and Rodenhäuser, *supra* note 1282 discussing reports of the Syria Commission; and Bell, *supra* note 1535, Falk, *supra* note 1007, PoKempner, *supra* note 96, Rosen, *supra* note 1490, Shany, *supra* note 1513 and Yihdego, *supra* note 96 discussing the *Goldstone Report*.

[1730] Vaios Koutroulis, 'The Prohibition of the Use of Force in Arbitrations and Fact-Finding Reports', in Marc Weller (ed.), *Oxford Handbook of the Use of Force in International Law* (Oxford: OUP, 2015) 605-626, at 612.

[1731] Darcy, *supra* note 101, at 234.

[1732] Kirby and Gopalan, *supra* note 60, at 236 and Ian Johnstone, 'Law-Making by International Organizations: Perspectives from IL/IR Theory', in Jeffrey Dunoff and Mark Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: CUP, 2013) 266-292, at 268.

Conversely, socio-legal scholars conceive of commissions as participants in the argumentative practice of international law.[1733] This practice is mediated through an 'interpretive community'[1734] where "the use of international law is part of a broader discursive process in which norms are invoked to explain, defend, justify and persuade."[1735] To exercise persuasive discursive power[1736] commissions must adhere to the disciplining rules of the interpretive community, including principles of legal interpretation. Ingo Venzke writes that actors contribute to the development of international law by exercising 'semantic authority', which is the "capacity to establish reference points for legal discourse that other actors can hardly escape".[1737] Sociological institutionalists similarly posit that ideas spread through the 'logic of arguing'[1738] but may also be propagated through "less cerebral processes, involving struggle, pressure, and trend-following."[1739] Hun Joon Kim argues that UN atrocity inquiries participate in norm diffusion as "[t]he process of comparing actions with standards to determine the appropriate response to norm violators feeds back into norm development by elaborating and entrenching the norm in question."[1740] Discursive approaches have also been adopted to explain the legal authority of other actors such as special rapporteurs[1741] and treaty bodies.[1742]

[1733] E.g., W. Michael Reisman, 'International Law-making: A Process of Communication', (1981) 75 Am Soc'y Int'l L Proc 101-120; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: OUP, 1995); José Alvarez, *International Organizations as Law-Makers* (Oxford: OUP, 2005) at 258; Martti Koskenniemi, 'Methodology of International Law', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2011) para. 1; Ian Johnstone, *The Power of Deliberation* (Oxford: OUP, 2011) at 14 and Jürgen Habermas, *Between Facts and Norms* (Cambridge: Polity Press, 1996) at 226.

[1734] Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1990); Harold Koh, 'How is International Human Rights Law Enforced?', (1999) 74(4) Ind LJ 1397-1417 and Michael Waibel, 'Interpretive Communities in International Law', in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (Oxford: OUP, 2015) 147-165.

[1735] Ian Johnstone, 'Security Council Deliberations: The Power of the Better Argument', (2003) 14(3) EJIL 437-480, at 439.

[1736] Sikkink, *supra* note 355, at 119.

[1737] Ingo Venzke, 'Semantic Authority, Legal Change and the Dynamics of International Law', (2015) 12 *No Foundations* 1 at 3 [Venzke 2015], citing Max Weber, *Economy and Society* (Oakland: University of California Press, 1978) at 36.

[1738] Hun Joon Kim and J. C. Sharman, 'Accounts and Accountability: Corruption, Human Rights, and Individual Accountability Norms', (2014) 68 *International Organization* 417-448, at 430. See Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change', (1998) 52(4) *International Organization* 887-917 and Kathryn Sikkink and Hun Joon Kim, 'The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations', (2013) 9 *Annual Review of Law and Social Science* 269-285.

[1739] Sikkink, *supra* note 355, at 261.

[1740] Hun Joon Kim, 'The Role of UN Commissions of Inquiry in Developing Global Human Rights: Prospects and Challenges', (2016) 14(2) *Korean Journal of International Studies* 241-264, at 252. See Susan Park, 'Theorizing Norm Diffusion Within International Organizations', (2006) 43(3) *International Politics* 342-361.

[1741] E.g., Christophe Golay, Claire Mahon and Ioana Cismas, 'The Impact of the UN Special Procedures on the Development and Implementation of Economic, Social and Cultural Rights', (2011) 15(2) *The International Journal of Human Rights* 299-318 and Tania Baldwin-Pask and Patrizia Scannella, 'The Unfinished Business of a Special Procedures System', in Bassiouni and Schabas, *supra* note 97, 419-478

[1742] E.g., Mechlem, *supra* note 1280; Nigel Rodley, 'The Role and Impact of Treaty Bodies', in Dinah Shelton (ed.), *Oxford Handbook of International Human Rights Law* (Oxford: OUP, 2013) 621-648; Birgit Schlutter, 'Aspects of Human Rights Interpretation by UN Treaty Bodies', in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies Law and Legitimacy* (Cambridge: CUP, 2012) 261-319 and Dinah Shelton, 'The Legal Status of Normative Pronouncements of Human Rights Treaty Bodies', in Holger Hestermeyer *et al* (eds), *Coexistence, Cooperation and Solidarity* (Leiden: Martinus Nijhoff, 2011) 553-575.

Where a commission adheres to conventions of legal interpretation, such as by identifying relevant legal authorities, applying principles of interpretation and providing detailed reasoning, its approach resembles that of courts and tribunals. Some scholars argue that commissions enjoy legal authority when they display 'quasi-judicial'[1743] or 'adjudicative'[1744] characteristics of producing "reasoned decisions in accordance with accepted legal principles".[1745] Such an approach is seen in commissions' detailed and cautious analyses of crimes against humanity and genocide, in respect of which coherence was sought with existing legal authorities. Commissions' role as a type of legal authority may also be linked to commissioners' identities as esteemed judges, as was the case for the inquiries into Darfur, Libya and North Korea. Authority could be linked both to commissioners' personal standing and the influence of their experience on the bench for their legal analysis and reporting.

By contrast, 'progressive' interpretations which depart from settled legal authority or pronounce upon novel legal questions reflect an outlook of advocacy as commissions seek to move international law in a particular direction. Examples include 'humanized' interpretations of IHL, such as the Libya Commission's view that IHRL may modify targeting rules, and the Goldstone Commission's view that compliance with the principle of precautions should be assessed by reference to a due diligence standard. Russell Buchan argues that where a commission adopts a progressive interpretation, it should be "substantiated by clear legal reasoning and justified in light of previous decisions in alternative adjudicatory forums."[1746] Darcy argues that "an overly creative approach which seeks to progress the law's development"[1747] could undermine the quality of commissions' legal analysis and reduce their credibility. James Devaney argues that the Syria Commission's 'progressive' interpretation of human rights obligations of armed groups could be seen as "attempting to extend the law to apply it to entities it was not intended to, and most crucially, to be doing so in a way that lacks rigor and legal justification"[1748] and cautions that it might undermine the report's legitimacy. If a commission's interpretation departs from settled authority, it may produce a smaller 'normative ripple',[1749] although its findings of violations may still build momentum for corrective action. In short, whether and how commissions may contribute to the incremental development of international law is shaped by their advocatory or adjudicative approach.

Conclusions

Commissions have interpreted and applied a wide array of international legal norms. Some legal areas, such as violations of economic, social and political rights and gender-based violence, have not been much adjudicated for several reasons, including practical challenges in building and bringing a case in respect of such violations, considerations of litigation strategy and cultural biases and assumptions. The inquiry context represents a dynamic new environment in which such norms can be affirmed, their content elaborated, and their

[1743] Darcy, *supra* note 101, at 234; Buchan 2014, *supra* note 372, at 481.
[1744] Henderson 2014, *supra* note 100, at 294.
[1745] Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: OUP, 2007) at 301. See Koutroulis, *supra* note 1730, at 612.
[1746] Buchan 2017, *supra* note 101, at 282.
[1747] Darcy, *supra* note 101, at 256.
[1748] Devaney, *supra* note 1283, at 13.
[1749] Alvarez, *supra* note 1733, at 122.

violation censured. Commissions also assessed commonly adjudicated legal norms, including violations of civil and political rights, IHL violations amounting to war crimes and other species of international crimes. In respect of such norms, commissions add their voices to the existing cacophony, and their legal analysis is more likely to catalyse corrective action than to develop international law.

Through the interpretation and application of legal norms, commissions tilt most directly away from politics and towards the realm of law. Classifying atrocities as violations channels follow-up action towards legal institutions and processes.[1750] Yet there are also pragmatic aspects of this turn to international law. At a basic level, the invocation of international law has strategic value. Classifying atrocities as violations appeals to the "symbolic power"[1751] of international law. Van den Herik observes that commissions use the language of international law "in a quest to make the facts more objective and to create political effects."[1752] Hellestveit sees their primary objective as to "move issues at the international level, influencing political processes", [1753] and Richard Falk writes that the Goldstone Commission's findings of violations were "influential with respect to world public opinion and help to mobilize solidarity initiatives in civil society".[1754]

Van den Herik observes that commissions "aim to stir, to evoke action, to opine and to condemn."[1755] These different functions call for different approaches to international law. A more adjudicative approach which borrows from judicial pedigree may be perceived as highly authoritative. Such an approach may boost the authority of findings and ward off critiques of unreliability or bias. In exchange, findings of violations may be truncated and not fully convey the scale or gravity of suspected atrocities. By contrast, from an advocatory perspective, *prima facie* findings of violations make a case for action but are vulnerable to rebuttal and channel attention towards violations which are more obviously justiciable. While plainly progressive legal interpretations may be deemed *de lege ferenda*, commissions may yet contribute to a groundswell in legal discourse with repercussions for normative development. These choices and tensions arising therefrom reflect the fact that commissions are poised between outlooks of advocacy and adjudication, suspended in a normative twilight zone between the realms of international law and politics.

[1750] See Chapter Two, Section 6.1.
[1751] Ingo Venzke, *How Interpretation Makes International Law* (Oxford: OUP, 2012) at 59.
[1752] Van den Herik, *supra* note 74, at 30.
[1753] Hellestveit, *supra* note 20, at 369.
[1754] Falk, *supra* note 1007, at 85.
[1755] Van den Herik, *supra* note 74, at 30.

CHAPTER SIX

TRANSLATING VIOLATIONS TO RESPONSIBILITY REGIMES IN AN 'ERA OF ACCOUNTABILITY'

Introduction

In 2010, citing developments in international criminal law, the UN Secretary-General heralded the birth of a new "age of accountability" and the demise of the "old era of impunity".[1756] The concept of accountability frequently appears in commissions' mandates, often in the form of instructions to determine responsibilities, identify perpetrators and make recommendations with a view to ensuring that those responsible are held accountable. On account of the strong emphasis on accountability in contemporary inquiry practice, this Chapter zooms in on commissions' roles and functions with respect to the concept of accountability, in light of the institutional and political contexts in which they operate.

Chapter Six is organised as follows. Section 1 discusses how commissions understood different dimensions of the concept of accountability and the interplay with responsibility for violations of international law. Section 2 examines how commissions assessed responsibilities for violations of international law. Which actors were put in the spotlight, and to what extent did commissions engage with responsibility regimes? Section 3 discusses how commissions formulated accountability recommendations in light of their institutional features and constraints. Section 4 steps back to discuss commissions' roles and functions with respect to different dimensions of accountability. Conclusions are then drawn as to commission's roles and functions with respect to ensuring accountability for violations of international law.

1. Dimensions of Accountability

Commissions identified different dimensions of accountability and its relationship with legal responsibility. Commissions generally identified a duty to enforce legal responsibilities for violations in IHL and IHRL.[1757] Some explained that accountability referred to a range of measures to enforce responsibility for violations, including but not limited to prosecutions. The Libya Commission wrote that accountability "incorporates various methods including criminal prosecutions, disciplinary measures, administrative procedures and victim compensation measures"[1758] and should not be limited to prosecutions. Accountability may be sought via judicial and non-judicial means. Commissions also emphasised the need for responsibilities to be enforced in practice. For instance, the Sri Lanka Panel wrote that

[1756] Secretary-General, 'The Age of Accountability', 27 May 2010, available at http://www.un.org/sg/en/content/sg/articles/2010-05-27/age-accountability (accessed 1 May 2018) and Secretary-General, 'In 'New Age of Accountability', International Criminal Court, Security Council Can Work Together to 'Deliver both Justice and Peace', Secretary-General Says', UN Docs. SG/SM/14589-SC/10794-L/3200, 17 October 2012, available at http://www.un.org/press/en/2012/sgsm14589.doc.htm (accessed 1 May 2018).

[1757] E.g., *Gaza Report*, *supra* note 766, para. 602.

[1758] *Libya Second Report*, *supra* note 853, para. 763.

assigning responsibility is an important but insufficient pre-condition for accountability, which attaches "consequences to individuals or institutions deemed responsible".[1759]

Some commissions recognised broader dimensions to accountability beyond enforcing responsibilities for specific violations. The Syria Commission wrote that a holistic approach to accountability was needed as "judicial measures alone do not suffice to sustainably address serious violations"[1760] and that measures must be tailored towards "a sustainable culture of accountability and rule of law."[1761] In a different formulation, the Sri Lanka Panel wrote that accountability is "a broad process that addresses the political, legal and moral responsibility of individuals and institutions for past violations of human rights and dignity".[1762] The Panel identified non-legal dimensions of responsibility, which were to be addressed through the process of accountability. Recommendations in pursuit of aims such as durable peace and a culture of the rule of law are more political in nature and reflect key goals of transitional justice, defined by the UN as "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."[1763]

Different dimensions of accountability have also been identified by other UN actors and scholars. The Secretary-General stated that as the R2P principle "encompasses legal, moral and political responsibilities, so too must our approach to accountability."[1764] Lisa Yarwood identifies legal, moral and political accountability on the part of states for internationally wrongful acts.[1765] Ted Piccone proposes a similar typology of accountability in the inquiry context.[1766] Piccone writes that legal' accountability centres on prosecutions of international crimes; 'moral' accountability gives effect to the right to truth and 'political' accountability includes naming and shaming, lustration, targeted sanctions, memorialisation, compensation to victims, and guarantees of non-recurrence.[1767] This typology indicates the interrelatedness of such dimensions, as several measures categorised by Piccone as 'moral' or 'political' in nature are recognised as legal remedies for violations. However, such typologies usefully illustrate the multifaceted nature of accountability. Having made these preliminary observations, the discussion turns to commissions' engagement with responsibility regimes.

[1759] *Sri Lanka Report*, *supra* note 29, para. 299.
[1760] *Syria Fourth Report*, *supra* note 1097, Annex XIV, at 127.
[1761] *Ibid*., at 128. See *Syria First Report*, *supra* note 32, para. 85.
[1762] *Sri Lanka Report*, *supra* note 29, para. 8.
[1763] *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, March 2010, at 4, available at http://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf (accessed 1 May 2018) [*Transitional Justice Guidance Note*]. See Yasmin Sooka, 'Dealing with the past and transitional justice: building peace through accountability', (2006) 88(862) IRRC 311-325.
[1764] *Report of the Secretary-General: Implementing the Responsibility to Protect: Accountability for Prevention*, UN Doc. S/2017/556, 10 August 2017, para. 11 [*Implementing R2P*].
[1765] Lisa Yarwood, S*tate Accountability under International Law: Holding States Accountable for a Breach of* Jus Cogens *Norms* (Oxon: Routledge, 2011) at 159.
[1766] Ted Piccone, 'U.N. human rights commissions of inquiry: The quest for accountability', *The Brookings Institution*, December 2017, available at http://www.brookings.edu/wp-content/uploads/2017/12/fp_20171208_un_human_rights_commisions_inquiry.pdf (accessed 1 May 2018).
[1767] *Ibid*., at 3-4.

2. Responsibility Under International Law

Commissions have observed that international responsibilities of different actors may be triggered by the same incident.[1768] For instance, the Gaza Flotilla Commission observed that "individual criminal liability and State responsibility may arise from the same act."[1769] Commissions framed responsibility assessments in light of their institutional setting. The non-binding nature of their reports and low standard of proof of 'reasonable basis to believe'[1770] meant that their findings were not final determinations but instead placed actors on notice of the need for corrective action. Commissions also disavowed a prosecutorial function.[1771] For instance, the North Korea Commission was "neither a judicial body nor a prosecutor";[1772] instead its findings of crimes against humanity would merit a criminal investigation. The CAR Commission observed that it "is not a judicial body but it views its work as a vital step towards encouraging and facilitating criminal investigations and prosecutions".[1773] Commissions embraced their mandates to assess responsibilities while distinguishing their work from judicial determination. This Section discusses commissions' engagement with responsibilities of different actors, namely states (2.1), international organisations (2.2), collective non-state actors (2.3) and individuals (2.4). Some general observations in respect of commissions' approaches to responsibility are then made (2.5).

2.1 State responsibility

Commissions generally paid significant attention to the responsibility of states for violating international law, reflecting the fact that these actors bear extensive obligations, especially towards populations under their jurisdiction.[1774] Not all commissions examined state responsibility; exceptions include inquiries focussing on individual criminal responsibility.[1775] This Section discusses how wide commissions cast their nets in scrutinising states' actions (2.1.1) and their engagement with rules of attribution (2.1.2).

2.1.1 Territorial and third states

Commissions chiefly focussed on responsibilities of territorial states and states with a direct presence in situations of concern. Such presence could arise through occupation, such as the several inquiries into Israeli responsibility arising out of the occupation of Palestinian territories. States were also scrutinised where they participated in armed conflict. For instance, the Syria Commission examined responsibilities arising out of Russian and US military operations in the Syrian armed conflict.[1776] Erika de Wet argues that states' invited participation in armed conflict may give rise to complicity liability where the inviting State is

[1768] E.g., *Libya Second Report*, *supra* note 853, para. 326; *Darfur Report*, *supra* note 32, para. 593; *Sri Lanka Report*, *supra* note 29, para. 191.
[1769] *Gaza Flotilla Report*, *supra* note 681, para. 47.
[1770] See Chapter Three, Section 4.3.
[1771] E.g., *Sri Lanka Report*, *supra* note 29, para. 260; *CAR Report*, *supra* note 32, para. 16; *Timor-Leste Report*, *supra* note 376, at 2.
[1772] *North Korea Report*, *supra* note 32, para. 1023.
[1773] *CAR Report*, *supra* note 32, para. 24, citing *CAR Mandate*, *supra* note 304.
[1774] E.g., *Darfur Report*, *supra* note 32, para. 628.
[1775] E.g., *Yugoslavia Mandate*, *supra* note 290; *Rwanda Mandate*, *supra* note 296 and *Cambodia Mandate*, *supra* note 323.
[1776] E.g., *Syria Fourteenth Report*, *supra* note 982, para. 61; *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/37/72, 1 February 2018, para. 31.

implicated in serious violations of IHL and IHRL.[1777] Commissions have not yet considered this potential type of liability.

Third states' responsibilities for contributing to situations of atrocities have been addressed to varying extents. For instance, the North Korea Commission examined China's practice of forcibly repatriating North Koreans, finding that China violated the principle of non-refoulement.[1778] Some commissions examined third states' involvement in conflicts, but did not usually enter findings of responsibility. For instance, the Libya Commission observed that militias fighting the Gadhafi regime were believed to have received equipment from states including Qatar and France,[1779] but did not discuss their responsibilities. Heller writes that it is surprising that the Commission did not assess whether those actions breached the Security Council's arms embargo.[1780] The Syria Commission also examined the role of third states, albeit to a limited extent. It found that several states had supplied weapons used to perpetrate violations[1781] and identified an obligation not to do so when there was a risk of such use,[1782] but stopped short of finding responsibility. Instead, such matters were framed as recommendations to cease supplying arms in increasingly strong terms.[1783] In 2013, the Syrian Government had critiqued the Commission's lack of attention to states that "finance, arm, train and harbour"[1784] terror groups. In response, the Commission noted that the Chair had criticised the supply of arms to the parties to the conflict;[1785] however, those remarks did not mention other forms of support or financing.[1786] Later, the Commission identified Jabhat Al-Nusra and ISIS as parties to the conflict, observing that support for the latter was growing in terms of recruits and equipment.[1787] However, it did not discuss whether states had provided such support, and framed other remarks as recommendations to curb the influence of extremist factions[1788] and prevent the financing of terrorism.[1789] In short, commissions referred to states' ancillary involvement in situations of atrocities to some extent, but their focus usually remained on territorial states and states with some physical presence in situations of concern.

It may be queried whether state responsibility may also arise in connection with obligations held *erga omnes*. The ILC Articles on State Responsibility for Internationally Wrongful Acts

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[1777] Erika de Wet, 'Complicity in the Violations of Human Rights and Humanitarian Law by Incumbent Governments through Direct Military Assistance on Request', (2018) 67(2) ICLQ 287-313.
[1778] *North Korea Report*, *supra* note 32, para. 490.
[1779] *Libya Second Report*, *supra* note 853, para. 70.
[1780] Heller, *supra* note 96, at 46, citing SC Res. 1970 (2011), para. 9.
[1781] E.g., *Syria Eighth Report*, *supra* note 983, para. 139.
[1782] E.g., *Syria Seventh Report*, *supra* note 805, para. 153.
[1783] 'Curb': *Syria Fourth Report*, *supra* note 1097, para. 175(b); 'restrict': *Syria Fifth Report*, *supra* note 1046, para. 164(d); 'stop': *Syria Sixth Report*, *supra* note 1126, para. 203(c); *Syria Seventh Report*, *supra* note 805, para. 153; 'refrain': *Syria Fourteenth Report*, *supra* note 982, para. 90(a).
[1784] *Syria note verbale 9 January 2013*, *supra* note 1118, at 33. See *Syria note verbale 21 December 2011*, *supra* note 1109.
[1785] *Syria note verbale 15 January 2013*, *supra* note 1119, at 35.
[1786] 'Statement by Paulo Pinheiro, Chair of the Independent International Commission of Inquiry on the Syrian Arab Republic, at the HRC 21st regular session', 17 September 2012, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/Statement17September2012.pdf (accessed 1 May 2018).
[1787] *Syria Fifth Report*, *supra* note 1046, para. 29.
[1788] *Ibid*., para. 164(d); *Syria Sixth Report*, *supra* note 1126, para. 203(d).
[1789] *Syria Seventh Report*, *supra* note 805, para. 153.

(*Articles on State Responsibility*) provide that serious breaches of peremptory norms[1790] engender positive duties on the part of the international community of states to cooperate to lawfully bring them to an end and refuse to recognize situations arising out of such breaches as lawful.[1791] Commissions recognised the prohibitions of torture, genocide, and crimes against humanity as peremptory norms.[1792] They did not however assess potential responsibilities of third states for failing to bring such situations to an end. Instead, such matters were framed as ongoing obligations and addressed in recommendations.[1793]

2.1.2 Attribution of conduct

Commissions readily found that states could be responsible for violating international law. However, their extent of engagement with rules of state responsibility is another matter. The HRC's Burundi Commission set out state responsibility rules in some detail[1794] but most commissions only referred to them in passing, if at all. Where violations were carried out by *de jure* state organs such as the armed forces or government officials, commissions did not usually spell out the basis for responsibility. The Burundi Commission, Goldstone Commission and Gaza Flotilla Commission did expressly attribute the conduct of officials.[1795]

Commissions examined questions of attribution more closely where violations were ostensibly carried out by non-state actors. For instance, the Darfur Commission considered whether violations by Janjaweed militias were attributable to Sudan. Where militias were incorporated into Sudan's armed forces, the Commission found that they were state organs.[1796] Where not incorporated, the Commission considered whether they were "acting on the instructions of, or under the direction or control"[1797] of Sudan. In considering the requisite degree of control to attribute responsibility, the Darfur Commission cited the *Tadić Appeal Judgment* which requires an armed group to be under the state's "overall control",[1798] entailing "a role in organising, coordinating or planning the [group's] military actions"[1799] alongside other forms of support. On the facts, the Commission found that most Janjaweed attacks occurred with officials' acquiescence and sometimes their participation;[1800] and that the coordination of attacks showed "clear links" between them.[1801] The Commission's preference for the 'overall control' test is perhaps not surprising given that its Chair endorsed this standard judicially at the ICTY[1802] and extra-judicially.[1803] It diverges from the ICJ's

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[1790] VCLT, *supra* note 1180, Art. 53.
[1791] ILC, *Articles on State Responsibility for Internationally Wrongful Acts*, GA Res. 56/83, 12 December 2001, Art. 41 [ARSIWA].
[1792] E.g., *Yugoslavia Final Report*, *supra* note 39, para. 107; *Darfur Report*, *supra* note 32, para. 376; *Goldstone Report*, *supra* note 633, para. 1549; *North Korea Report*, *supra* note 32, para. 1195.
[1793] ARSIWA, *supra* note 1791, Art. 41(1) and (2). See, e.g., *North Korea Report*, *supra* note 32, footnote 1672 and *Israeli Settlements Report*, *supra* note 572, para. 116.
[1794] *HRC Burundi Detailed Report*, *supra* note 405, paras. 66-72.
[1795] *Ibid*., para. 203; *Goldstone Report*, *supra* note 633, para. 814; *Gaza Flotilla Report*, *supra* note 681, para. 46.
[1796] *Darfur Report*, *supra* note 32, para. 124; see ARSIWA, *supra* note 1791, Art. 4.
[1797] ARSIWA, *supra* note 1791, Art. 8.
[1798] *Tadić Appeal Judgment*, *supra* note 1289, para. 120. The Commission's reasoning is not entirely clear; it wrote that when militias attacked with the Sudanese army they were under its "effective control" but cited *Tadić*: *Darfur Report*, *supra* note 32, para. 125.
[1799] *Tadić Appeal Judgment*, *supra* note 1289, para. 137.
[1800] *Darfur Report*, *supra* note 32, paras. 125 and 302-303.
[1801] *Ibid*., para. 111.
[1802] *Tadić Appeal Judgment*, *supra* note 1289.

more rigorous tests of acting pursuant to a state's 'specific instructions' or under its 'complete dependence' or 'effective control'.[1804] If the ICJ's standards were applied, it is unlikely that the Janjaweed's actions would be attributable to Sudan. By contrast, the HRC's Burundi Commission adopted the ICJ's standards of 'effective control' and 'total dependence' when assessing whether violations by the *Imbonerakure* (youth wing of the ruling political party) could be attributed to Burundi,[1805] and found that these standards were met on the facts.[1806] The Commission also found Burundi responsible for violations by *Imbonerakure* members by adopting their conduct as its own.[1807]

Some commissions attributed armed groups' conduct to states without explaining the basis of attribution. For instance, the Guinea Commission found evidence of a coordinated attack against protestors by security forces, military police and militias,[1808] and concluded that Guinea was also responsible for violations by militias who "cooperated"[1809] with security forces. The Syria Commission wrote that although the *Shabbiha* militia's structure was opaque, its members "acted with the acquiescence of, in concert with or at the behest of Government forces".[1810] Neither inquiry cited legal standards for attribution. Coordination and cooperation might amount to overall control but would not likely satisfy the effective control standard.

2.2 Responsibility of international organisations

International organisations may also be responsible for internationally wrongful acts.[1811] Commissions frequently directed recommendations to international organisations but rarely assessed their legal responsibilities. Notably, an inquiry by the Secretary-General into the UN's actions in respect of the Rwandan genocide[1812] recommended that the UN "acknowledge its part of the responsibility for not having done more to prevent or stop the genocide"[1813] but did not identify legal liability, and also used the term 'responsibility' in a moral sense.[1814]

Some commissions examined the actions of multinational forces, particularly when acting as parties to the conflict. As discussed in Chapter Four, UN atrocity inquiries identified that

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[1803] Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', (2007) 18(4) EJIL 649-668.

[1804] *Bosnia Genocide Case*, *supra* note 1289, paras. 392 and 400; *Nicaragua Case*, *supra* note 1352, paras. 110 and 115; ILC, *Commentary to Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/CN.4/SER.A/2001/Add.1, at 47-48 [*ARSIWA Commentary*] and Marko Milanovic, 'State Responsibility for Genocide', (2006) 17 EJIL 553-604, at 585.

[1805] *HRC Burundi Detailed Report*, *supra* note 405, para. 208.

[1806] *Ibid*., paras. 209-219.

[1807] *Ibid*., paras. 220-221.

[1808] *Guinea Report*, *supra* note 39, paras. 183, 192, 200 and 222.

[1809] *Ibid*., para. 201.

[1810] *Syria Third Report*, *supra* note 564, para. 133.

[1811] *Reparation for Injuries Opinion*, *supra* note 198, at 174 and DARIO, *supra* note 14. See Rosalyn Higgins, Philippa Webb, Dapo Akande, Sandesh Sivakumaran and James Sloan (eds), 'Responsibility of the United Nations', in *Oppenheim's International Law: United Nations* (Oxford: OUP, 2017) 429-451.

[1812] *UN Rwanda Mandate*, *supra* note 375.

[1813] *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, UN Doc. S/1999/1257, 16 December 1999, Recommendation 14.

[1814] *Ibid*., at 37.

these actors must abide by customary IHL when engaged in hostilities.[1815] The CAR Commission examined the responsibility of UN forces for violations during peacekeeping operations, and specifically discussed IHRL violations by national contingents of Chad and the Republic of Congo. Its creative accountability recommendations in respect of these actors are discussed in Section 3. Other commissions examined the conduct of multinational forces but did not make findings of responsibility, such as the Libya Commission's investigation of NATO's air campaign in Libya. NATO opposed that line of inquiry, arguing first that the Commission's mandate was limited to IHRL violations[1816] and later that the Commission's examination of the parties to the conflict should not include NATO.[1817] Nonetheless, the Commission did investigate, finding that some NATO attacks caused civilian casualties where targets "showed no evidence of military utility".[1818] However, it did not feel able to draw conclusions on the basis of information provided by NATO.[1819] Nor did it make findings of responsibility; its recommendation for compensation was based on NATO guidelines for payments provided "without reference to the question of legal liability."[1820] Heller remarks that the Commission's assessment of NATO's responsibility was "remarkably conservative" and ventures that "although it did not prevent the Commission from expanding its mandate, NATO's pressure on the Commission to downplay potential violations of IHL was at least partially successful."[1821]

2.3 Responsibility of collective non-state actors

Although state responsibility dominated discussion in inquiry reports, commissions occasionally considered responsibilities of collective non-state actors, namely organised armed groups (2.3.1) and corporations (2.3.2).

2.3.1 Organised armed groups

The international legal rules deemed by commissions as applicable to organised armed groups were traversed in Chapter Four. To recap, commissions recognised that these actors have IHL obligations when acting as parties to armed conflict[1822] and considered whether they might bear human rights obligations. While most commissions did not consider that armed groups held treaty-based obligations, some identified customary obligations where groups exercised effective control over territory.[1823] In determining whether armed groups could be collectively responsible, commissions examined their structure and organisation. For instance, the Darfur Commission wrote that rebel groups had "a certain threshold of organization, stability and effective control of territory, [to] possess international legal personality"[1824] so as to be bound by IHL. Due to operational difficulties, the HRC's Burundi Commission could not determine

[1815] *CAR Report*, *supra* note 32, paras. 568-569; *Libya Second Report*, *supra* note 853, para. 613.
[1816] *NATO letter 23 January 2012*, *supra* note 1527. NATO reiterated its concerns in *NATO letter 15 February 2012*, *supra* note 997, at 1.
[1817] *NATO letter 15 February 2012*, *supra* note 997, at 1.
[1818] *Libya Second Report*, *supra* note 853, para. 812.
[1819] *Ibid*., para. 812.
[1820] *Ibid*., para. 130(b), citing NATO, *Non-Binding Guidelines for Payments in Combat-Related Cases of Civilian Casualties or Damage to Civilian Property* (2010), Guideline 9 [*NATO Guidelines*].
[1821] Heller, *supra* note 96,at 50.
[1822] See Chapter Four, Section 3.2.
[1823] See Chapter Four, Section 2.4.
[1824] *Darfur Report*, *supra* note 32, para. 172.

whether the *Imbonerakure* was sufficiently organised so as to attract collective responsibility but signalled the legal relevance of this issue.[1825]

Commissions did not identify specific rules of responsibility applicable to armed groups. For instance, the Libya Commission observed that *thuwar* militias had human rights obligations[1826] but also that "liability for violations generally attaches to state parties rather than non-state entities such as the *thuwar*."[1827] The Commission seemed to disconnect substantive obligations from their enforceability. Indeed, the ICRC writes that because armed groups must respect IHL it can be argued that they incur responsibility, yet "the consequences of such responsibility are not clear."[1828] The extent to which commissions engaged with enforcement action in respect of such actors is discussed in Section 3.

2.3.2 Corporations

There is emerging recognition of international rights and duties on the part of corporations.[1829] The UN *Guiding Principles on Business and Human Rights* (*Ruggie Principles*) recognise corporate responsibility to respect certain human rights[1830] but note that this responsibility is "distinct from issues of legal liability and enforcement, which remain defined largely by national law".[1831] The potential liability of such actors is recognised in the UN's *Principles on the Right to a Remedy*.[1832] However, commissions have not identified international legal obligations for business enterprises. The Israeli Settlements Commission referred to the *Ruggie Principles* but did not address their legal status.[1833]

Commissions occasionally found that transnational corporations and private enterprises contributed to situations of violations. For instance, the Eritrea Commission acknowledged the importance of private enterprises in supporting that authoritarian regime.[1834] The Sri Lanka Panel observed that the Tamil Tigers engaged in "mafia style tactics abroad" to generate funds, including using private businesses as front organisations.[1835] Having found that Israeli settlements in Palestinian territories were illegal,[1836] the Israeli Settlements Commission wrote that businesses "enabled, facilitated and profited from the construction and growth of the settlements"[1837] by providing supplies and services in "full knowledge of the

[1825] *HRC Burundi Detailed Report*, *supra* note 405, paras. 224-226.
[1826] *Libya Second Report*, *supra* note 853, para. 18.
[1827] *Ibid*., para. 261.
[1828] *ICRC Customary IHL Study*, *supra* note 1298, Rule 149.
[1829] E.g., José Alvarez, 'Are Corporations Subjects of International Law?', (2011) 9 Santa Clara J Int'l L 1-36 and Larissa van den Herik and Jernej Letnar Černič, 'Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again', (2010) 8(3) JICJ 725-743.
[1830] OHCHR, *Guiding Principles on Business and Human Rights*, UN Doc. HR/PUB/11/04 (2011) [*Ruggie Principles*]. See *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN Doc. A/HRC/17/31, 21 March 2011, Principle 12.
[1831] *Ruggie Principles*, *supra* note 1830, Commentary to Principle 12.
[1832] *Principles on the Right to a Remedy*, *supra* note 540, Principle 15.
[1833] *Israeli Settlements Report*, *supra* note 572, para. 117.
[1834] *Eritrea Second Report*, *supra* note 569, paras. 154 and 234.
[1835] *Sri Lanka Report*, *supra* note 29, para. 419.
[1836] *Israeli Settlements Report*, *supra* note 572, para. 104.
[1837] *Ibid*., para. 96.

current situation and the related liability risks".[1838] While not assigning international responsibility to these actors, commissions addressed their conduct through recommendations. These proposals are discussed in Section 3.

2.4 Individual responsibility

Individuals may bear responsibility for certain conduct prohibited under international law. Commissions recognised that individuals may bear international criminal responsibility, with some inquiries focussing strongly on individual responsibility for violations.[1839] In making these assessments, commissions pointed out that they were not exercising a prosecutorial or judicial function.[1840] Some authors suggest that individuals might also bear international *civil* liability.[1841] This possibility was left open in the ILC's Commentary on state responsibility,[1842] and civil liability for international legal violations is possible in some domestic jurisdictions.[1843] While non-penal consequences such as reparations may follow conviction for international crimes in some jurisdictions,[1844] whether individuals have international civil obligations is a different matter.[1845] As commissions have not discussed civil liability,[1846] this Section focuses on criminal responsibility. It discusses commissions' engagement with elements of ICL (2.4.1) and the issue of identification of suspected perpetrators (2.4.2).

2.4.1 Engagement with international criminal law

Commissions readily accepted that individuals may be responsible for international crimes.[1847] When assessing such responsibility, commissions engaged with elements of ICL to differing extents. At one end of the spectrum, some commissions referred to criminal responsibility in a general way, without identifying specific crimes.[1848] For instance, the

[1838] *Israeli Settlements Report*, *supra* note 572, para. 97.
[1839] E.g., *Rwanda Final Report*, *supra* note 297, para. 3.
[1840] E.g., *Sri Lanka Report*, *supra* note 29, para. 260; *Guinea Report*, *supra* note 39, para. 180; *CAR Report*, *supra* note 32, para. 16 and *North Korea Report*, *supra* note 32, para. 1023.
[1841] E.g., Andrew Clapham, 'The Role of the Individual in International Law', (2010) 21(1) EJIL 25-30, at 30 and Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge: CUP, 2016) at 152.
[1842] *ARSIWA Commentary*, *supra* note 1804, at 142.
[1843] E.g., UNTAET Regulations provide for civil proceedings based on suspected crimes: UNTAET Regulation No. 2000/30 on Transitional Rules of Criminal Procedure, UN Doc. UNTAET/REG/2000/30, 25 September 2000, ss. 49(1) and 49(2). The Alien Tort Statute 28 USC § 1350 (US) provides a tortious cause of action for violations of international law.
[1844] E.g., Rome Statute, *supra* note 1033, Art. 75.
[1845] Some authors use the term 'individual civil responsibility' to refer to consequences beyond imprisonment for international crimes, such as reparations orders: e.g., Friedrich Rosenfeld, 'Individual Civil Responsibility for the Crime of Aggression', (2012) 10(1) JICJ 249-265. This Study views reparations ordered on the basis of a criminal conviction as part of criminal responsibility, as the order stems from a breach of penal law.
[1846] Rosenfeld argues that the Darfur Commission alluded to individual civil liability: Rosenfeld, *supra*, footnote 24, citing *Darfur Report*, *supra* note 32, para. 600. The Commission identified a collective responsibility of 'international non-state entities' to pay compensation and a trend towards recognising victims' rights to compensation "from the individual who caused his or her injury": para. 175 and footnote 217. The authorities cited therein recognised individual liability for reparations arising out of criminal conviction: *Letter dated 12 October 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General*, UN Doc. S/2000/1063, 3 November 2000, para. 20.
[1847] E.g., *Syria Third Report*, *supra* note 564, Annex II, para. 27 and *Rwanda Final Report*, *supra* note 297, paras. 169-171.
[1848] E.g., *UNCHR Gaza Report*, *supra* note 536, para. 119.

Israeli Settlements Commission stated that the transfer of Israeli citizens into Palestine was "prohibited under [IHL] and [ICL]".[1849] Some commissions went slightly further, identifying species of crimes without classifying specific incidents. For instance, the Gaza Flotilla Commission found that Israeli forces' violations of IHL, including wilful killing and torture, were "within the terms of article 147 of [Geneva Convention IV]".[1850] The Lebanon Commission identified species of war crimes and "violations of a number of core human rights"[1851] as giving rise to criminal responsibility. That approach did not discuss differences between underlying violations and crimes, such as the need for criminal intent.

Further along the continuum, some commissions identified different elements of international crimes.[1852] The commissions on Libya and Syria quoted from the ICC's Elements of Crimes when assessing murder as a war crime and a crime against humanity.[1853] The Goldstone Commission wrote that objective elements were established in respect of all its findings of criminal responsibility, and that it could determine whether *mens rea* was satisfied in almost all cases.[1854] Most commissions identified knowledge and intent as required *mens rea*,[1855] but a few considered advertent recklessness as sufficient in custom.[1856] Commissions generally gave more attention to subjective elements of crimes requiring *dolus specialis*.[1857]

Some commissions also acknowledged modes of liability but did not always apply them to specific incidents. Superior responsibility was frequently identified,[1858] reflecting its relevance in situations of mass atrocities where crimes were committed through collective entities and structures.[1859] Some commissions limited their discussion to superior responsibility[1860] or only briefly alluded to other modes of liability. For instance, the Syria Commission wrote that in addition to direct commission, "those who order these crimes to be committed (or plan, instigate, incite, aid or abet) are also liable."[1861] It did not analyse modes of liability in connection with specific incidents. The Sri Lanka Panel also identified different modes of liability[1862] but did simply stated that leaders were responsible "under these forms of liability."[1863] The Cambodia Commission took a similar approach, reasoning that its mandate was to determine whether there was sufficient evidence to justify bringing Khmer Rouge

[1849] *Israeli Settlements Report*, *supra* note 572, para. 38.
[1850] *Gaza Flotilla Report*, *supra* note 681, para. 182.
[1851] *Lebanon Report*, *supra* note 855, para. 347.
[1852] E.g., *Guinea Report*, *supra* note 39, paras. 180, 197 and 213-214; *HRC Burundi Detailed Report*, *supra* note 405, para. 672.
[1853] *Libya Second Report*, *supra* note 853, paras. 140-142; *Syria Third Report*, *supra* note 564, Annex II, para. 33.
[1854] *Goldstone Report*, *supra* note 633, para. 172.
[1855] E.g., *Syria Third Report*, *supra* note 564, para. 135; *North Korea Report*, *supra* note 32, para. 1042; *Libya Second Report*, *supra* note 853, footnote 176.
[1856] *Darfur Report*, *supra* note 32, para. 180 and 541; *Goldstone Report*, *supra* note 633, para. 172; *Sri Lanka Report*, *supra* note 29, paras. 197, 198 and 251(a) *contra North Korea Report*, *supra* note 32, paras. 1029 and 118, and footnotes 1544 and 1558.
[1857] E.g., *Darfur Report*, *supra* note 32, para. 180 (genocide), and *Libya Second Report*, *supra* note 853, para. 385 (persecution as a crime against humanity).
[1858] E.g., *Rwanda Interim Report*, *supra* note 298, para. 124; *Cambodia Report*, *supra* note 324, para. 81.
[1859] Darryl Robinson, 'How Command Responsibility Got So Complicated: A Culpability Contradiction, its Obfuscation, and a Simple Solution', (2013) 13 MJIL 1-58.
[1860] E.g., *Yugoslavia Final Report*, *supra* note 39, paras. 55-58; *Libya Second Report*, *supra* note 853, para. 95.
[1861] *Syria Third Report*, *supra* note 564, para. 135.
[1862] *Sri Lanka Report*, *supra* note 29, para. 253.
[1863] *Ibid*., para. 255.

leaders to trial rather than reviewing "evidence to make judgements regarding the involvement of particular individuals".[1864] By contrast, the Eritrea Commission indicated that it examined modes of liability when drawing up a confidential list of suspects.[1865]

Commissions' more abridged engagement with ICL stands in contrast to the approach taken by the Darfur Commission, which perhaps reflects the high-water mark in terms of ICL analysis by commissions of inquiry. The Commission wrote, "[t]o render any discussion on perpetrators intelligible, two legal tools are necessary: the categories of crimes for which they may be suspected to be responsible, and the enumeration of the various modes of participation in international crimes under which the various persons may be suspected of bearing responsibility."[1866] It analysed elements of crimes and modes of liability in detail, specifying the number of state officials and members of armed groups it deemed responsible for international crimes pursuant to different modes of liability.[1867] Frulli writes that the Darfur Commission was a "watershed for prosecution oriented fact-finding".[1868]

Defences and mitigating circumstances were generally considered by earlier inquiries, particularly those on Yugoslavia, Rwanda, and Cambodia. These commissions discussed superior orders as a defence or mitigating circumstance,[1869] duress, mistake of fact,[1870] mental defect, and self-defence.[1871] The Yugoslavia Commission found that superior orders did not appear to be available on the facts but reiterated that individual cases "will have to be judged on their respective merits in accordance with the statute of the [ICTY]."[1872] The Cambodia Commission considered that the defence of mistake of law could not apply to "crimes that are so patently atrocious that such ignorance is never an excuse."[1873] More recent commissions considered the availability of certain defences, such as the Goldstone Commission's view that targeting errors could give rise to a mistake of fact which would negate the intent required for wilful killing.[1874] The Libya Commission did not consider defences at length, but noted that superior orders was not available for international crimes.[1875] The Guinea Commission stated that there could be no legal justification for acts of violence by Guinean security forces.[1876]

In examining criminal responsibility, commissions had limited engagement with principles of criminal law. They acknowledged the high standard of proof of 'beyond a reasonable doubt' necessary to secure criminal conviction and contrasted this with their lower standard of proof of 'reasonable grounds to believe'.[1877] Some commissions acknowledged the presumption of

[1864] *Cambodia Report*, *supra* note 324, para. 50. See also para. 80.
[1865] *Eritrea Second Report*, *supra* note 569, para. 332.
[1866] *Darfur Report*, *supra* note 32, para. 530.
[1867] *Ibid*., paras. 7, 123, 125, 533-557, and 558-564.
[1868] Frulli, *supra* note 102, at 1330.
[1869] *Yugoslavia Final Report*, *supra* note 39, para. 61 (as a defence); *Rwanda Final Report*, *supra* note 297, para. 175 and *Cambodia Report*, *supra* note 324, paras. 82-83 (as a mitigating circumstance).
[1870] *Rwanda Final Report*, *supra* note 297, para. 176.
[1871] *Cambodia Report*, *supra* note 324, para. 82.
[1872] *Yugoslavia Final Report*, *supra* note 39, para. 318.
[1873] *Cambodia Report*, *supra* note 324, para. 83.
[1874] *Goldstone Report*, *supra* note 633, para. 861.
[1875] *Libya Second Report*, *supra* note 853, para. 769.
[1876] *Guinea Report*, para. 198.
[1877] *CAR Report*, *supra* note 32, para. 16 and *Timor-Leste Report*, *supra* note 376, para. 110.

innocence[1878] and were concerned that their findings should not prejudice the fairness of future trials, in recognition of the rights of the accused.[1879] These principles are discussed further in Section 2.4.2, as they were also taken into account in deciding whether to identify suspects. By contrast, few commissions invoked the principle of legality. The Cambodia Commission is an exception; it identified legality as fundamental to criminal responsibility, writing, "[a]s affirmed at Nuremberg, leaders would be held to have known of the criminality of their acts vis-à-vis earlier Cambodian law or international law. These legal factors are relevant to our recommendations below regarding the appropriate targets of inquiry for any court."[1880] The Eritrea Commission also cited the *nullum crimen sine lege* principle when considering whether the crime against humanity of enforced disappearance existed prior to the Rome Statute.[1881] No commission invoked the principle of strict construction; however commissions did not generally refer to principles of interpretation, so such an omission is not unusual.[1882] Considering the frequency with which commissions made findings of international crimes, it is perhaps surprising that principles of criminal law were not referred to more often. However, such engagement might invite perceptions that inquiries are *de facto* criminal investigations.

2.4.2 Identification of suspected perpetrators

In evaluating responsibility for international crimes, UN atrocity inquiries considered whether to publicly identify suspected perpetrators.[1883] Many commissions were expressly mandated to identify perpetrators in pursuit of accountability.[1884] This function is not limited to commissions. In the truth commission context, 'naming names' has been seen as a truth-telling and accountability measure.[1885] For instance, the El Salvadorian truth commission determined that "the whole truth cannot be told without naming names".[1886] The *Principles Against Impunity* foresee the 'naming of names', providing that before truth commissions or commissions of inquiry do so, they must corroborate information and afford an opportunity for a right of reply.[1887] These stipulations reflect the fact that public naming can have serious

[1878] *Goldstone Report*, *supra* note 633, para. 25 and *HRC Burundi Detailed Report*, *supra* note 405, para. 705.
[1879] E.g., *Darfur Report*, *supra* note 32, para. 526 and *Libya Second Report*, *supra* note 853, para. 760.
[1880] *Cambodia Report*, *supra* note 324, para. 83.
[1881] *Eritrea Second Report*, *supra* note 569, para. 250.
[1882] A few commissions cited principles of interpretation when interpreting the Genocide Convention: *Yugoslavia Final Report*, *supra* note 39, paras. 88-95; *Rwanda Final Report*, *supra* note 297, paras. 157 and 164 and *Darfur Report*, *supra* note 32, para. 494.
[1883] Catherine Harwood and Carsten Stahn, 'What's the Point of 'Naming Names' in International Inquiry? Counseling Caution in the Turn Towards Individual Responsibility', *EJIL:Talk*, 11 November 2016, available at http://www.ejiltalk.org/whats-the-point-of-naming-names-in-international-inquiry-counseling-caution-in-the-turn-towards-individual-responsibility (accessed 1 May 2018).
[1884] E.g., *Guinea Mandate*, *supra* note 311; *Libya Mandate*, *supra* note 343; *Syria Mandate*, *supra* note 47; *HRC Burundi Mandate*, *supra* note 349; *Darfur Mandate*, *supra* note 303 and *CAR Mandate*, *supra* note 304.
[1885] Priscilla Hayner, 'Fifteen Truth Commissions – 1974 to 1994: A Comparative Study', (1994) 16(4) HRQ 597-655, at 647; Margaret Popkin and Naomi Roht-Arriaza, 'Truth as Justice: Investigatory Commissions in Latin America Symposium: Law and Lustration: Righting the Wrongs of the Past', (1995) 20(1) *Law and Social Inquiry* 79-116, at 105.
[1886] *From Madness to Hope: the 12-year War in El Salvador: Report of the Commission on the Truth for El Salvador*, 1993, at 18, available at http://www.usip.org/sites/default/files/file/ElSalvador-Report.pdf (accessed 1 May 2018).
[1887] *Principles Against Impunity*, *supra* note 54, Principle 9. See Alison Bisset, 'Principle 9. Guarantees for Persons Implicated', in Frank Haldemann and Thomas Unger (eds), *The United Nations Principles to Combat Impunity: A Commentary* (Oxford: OUP, 2018) 123-128.

negative consequences; "[w]hile public identification is neither a criminal sanction nor a civil one, it can have negative effects on the reputation, career, and political prospects of individuals."[1888] Proponents advocate that a truth commission should identify suspected perpetrators, particularly where judicial accountability is unlikely, while critics argue that such practices threaten due process.[1889] Public identification has also occurred in the context of UN sanctions. Individuals suspected of being responsible for violations of IHL and IHRL have also been publicly identified by some expert groups assisting UN sanctions committees.[1890] In 2015, a high-level review of UN sanctions recommended that the names of individuals suspected of breaching sanctions or proposed for listing by expert groups should be conveyed in confidence and should not be included in public reports.[1891]

In the inquiry context, Grace observes that commissions have "differently weighed the aims of the mandate; the due process rights of the accused and the interests of victims, witnesses and the overall affected community."[1892] Interviews by HPCR indicate that fact-finding practitioners are also concerned about concrete consequences for named individuals.[1893] These considerations led to diverse inquiry practice relating to the identification of individuals.

At one end of the spectrum, a handful of commissions publicly identified individuals suspected of committing international crimes. The commissions on Libya and Côte d'Ivoire kept most individuals' names off the face of their public reports but did identify certain leaders by name.[1894] The Timor-Leste Commission publicly identified several individuals reasonably suspected of committing crimes under domestic law.[1895] The Guinea Commission identified three leaders, including the President, as suspected perpetrators but clarified that their involvement should be judicially examined;[1896] and six others whose involvement warranted further investigation.[1897] The Commission's decision to publicly name high-level suspects arguably made it easier to scrutinise whether Guinean authorities were investigating those 'most responsible', which in turn assisted the ICC Prosecutor's preliminary examination into Guinea. The ICC Prosecutor reported that the indictment of several named individuals indicated Guinea's genuine intention to prosecute those most responsible.[1898]

At the other end of the spectrum, some commissions did not identify suspected perpetrators either publicly or confidentially. For instance, the Sri Lanka Panel wrote that its mandate excluded individual liability and that further investigation would be required to identify those

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[1888] Popkin and Roht-Arriaza, *supra* note 1885, at 105.
[1889] E.g., Hayner, *supra* note 40, at 139 and Martin Imbleau, 'Initial Truth Establishment by Transitional Bodies and the Fight Against Denial', (2004) 15(1-2) *Criminal Law Forum* 159-192, at 186.
[1890] See, e.g., Larissa van den Herik, 'Peripheral hegemony in the quest to ensure Security Council accountability for its individualized UN sanctions regimes', (2014) 19(3) J Conflict & Sec L 427-449 [Van den Herik 2014].
[1891] *Compendium: High Level Review of United Nations Sanctions*, Recommendation 18, annexed to *Letter dated 12 June 2015 from the Permanent Representatives of Australia, Finland, Germany, Greece and Sweden to the United Nations addressed to the Secretary-General*, UN Docs. A/69/941-S/2015/432, 12 June 2015.
[1892] Grace 2015, *supra* note 59, at 52.
[1893] *Ibid*., at 51.
[1894] *Libya Second Report*, *supra* note 853, para. 760; *HRC Côte d'Ivoire Report*, *supra* note 810, para. 117.
[1895] *Timor-Leste Report*, *supra* note 376, paras. 113-134.
[1896] *Guinea Report*, *supra* note 39, paras. 215-243.
[1897] *Ibid*., para. 253.
[1898] ICC Prosecutor, 'Report on Preliminary Examination Activities 2013', para. 193, available at http://www.icc-cpi.int/OTP%20Reports/otp-report-2013.aspx#guinea (accessed 1 May 2018).

responsible and assess *mens rea*.[1899] Some commissions linked their decision not to identify individuals with the presumption of innocence and their low standard of proof.[1900] For instance, the Gaza Commission wrote that "[a]s the 'reasonable ground' threshold is lower than the standard required in criminal trials, the commission does not make any conclusions with regard to the responsibility of specific individuals".[1901]

In an intermediate approach, several commissions identified suspects confidentially in documents handed to the High Commissioner for Human Rights or the Secretary-General, depending on the mandating authority,[1902] for use by competent authorities. These commissions favoured confidentiality to protect the presumption of innocence, safeguard due process and protect witnesses and victims.[1903] The Syria Commission adopted this intermediate approach because it deemed its methodology as not meeting "normal requirements of due process".[1904] However, after investigating for four years, the Commission signalled a potential change, writing that "not to publish names at this juncture… would be to reinforce the impunity that the Commission was mandated to combat."[1905] The Commission wrote that it should interpret its mandate to give effect to the right to truth and that "putting alleged perpetrators on notice will serve to maximize the potential deterrent effect".[1906] At the time of writing, the Commission had not published such information, but had shared information with states willing to exercise national jurisdiction over crimes committed in Syria.[1907] The Commission also signalled its readiness to share information with states willing to exercise universal jurisdiction over suspected perpetrators.[1908] The Commission shares information with the IIIM, which will in turn share information with competent authorities.[1909]

Some commissions drew up simple lists of suspects[1910] while others compiled files of evidence against individuals.[1911] Some commissions also established databases of crime base information which could be transferred to competent authorities. For instance, the Yugoslavia Commission created a database of war crimes which was transferred to ICTY's Office of the Prosecutor.[1912] The CAR Commission likewise compiled a database of all known incidents of human rights and IHL violations[1913] which was submitted to the Secretary-General along with

[1899] *Sri Lanka Report*, *supra* note 29, para. 244.
[1900] *Goldstone Report*, *supra* note 633, para. 25.
[1901] *Gaza Report*, *supra* note 766, para. 20.
[1902] *HRC Côte d'Ivoire Report*, *supra* note 810, para. 118; *Libya Second Report*, *supra* note 853, para. 760 and *Syria Third Report*, *supra* note 564, para. 131.
[1903] *Darfur Report*, *supra* note 32, paras. 526-529; *HRC Burundi Detailed Report*, *supra* note 405, para. 705 and *Libya Second Report*, *supra* note 853, para. 760.
[1904] *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/28/69, 5 February 2015. para. 140 [*Syria Ninth Report*].
[1905] *Ibid.*, para. 140.
[1906] *Ibid.*, para. 141.
[1907] *Ibid.*, para. 106.
[1908] *Ibid.*, para. 107.
[1909] *IIIM Mandate*, *supra* note 330, para. 4; *IIIM Report*, *supra* note 335, para. 41.
[1910] *Darfur Report*, *supra* note 32, para. 526; United Nations, 'Secretary-General gives list of Darfur war crimes suspects to international court', 5 April 2005, available at http://www.un.org/apps/news/story.asp?NewsID=13871#.WfM7D4N9670 (accessed 1 May 2018).
[1911] *Eritrea Second Report*, *supra* note 569, paras. 332- 333; *CAR Report*, *supra* note 32, para. 24.
[1912] *Yugoslavia Final Report*, *supra* note 39, paras.21-22.
[1913] *CAR Report*, *supra* note 32, para. 14.

a list of suspects.[1914] The Syria Commission deposited with the High Commissioner for Human Rights "a comprehensive database containing all evidence"[1915] which may be disclosed to competent authorities.

Another approach which may indirectly identify individuals, especially those in leadership positions, is to name military units or state institutions implicated in serious violations.[1916] For instance, the Darfur Commission identified military groups which should be criminally investigated.[1917] The North Korea Commission identified state institutions implicated in crimes against humanity.[1918] The South Sudan Commission identified individuals by military rank, though not by name.[1919] Some commissions additionally wrote to heads of state, warning of their potential responsibilities for international crimes, including on the basis of superior responsibility.[1920] Such letters have more than symbolic value. By publicly placing individuals in leadership positions on notice, they might evince their knowledge of international crimes and their ongoing failure to prevent and punish them, relevant to superior responsibility.[1921]

2.5 Concluding observations

Commissions engaged with responsibility regimes to differing extents with respect different types of actors. They focussed on the responsibilities of states, organised armed groups, and individuals. We also see some selectivity with respect to *which* states were under scrutiny. States with territorial jurisdiction or effective control over situations of concern received the lion's share of attention. Commissions did have some regard to third states' involvement in situations of atrocities but did not always frame them as violations attracting responsibility. This was particularly the case for states' provision of arms and other forms of support to armed groups. While such actions might violate the principle of non-intervention,[1922] commissions did not usually invoke this norm. The focus on concerned states corresponds to the mandating authority's intention to limit scrutiny to the situation of immediate concern. For instance, in observing that the Libya Commission focussed on the actions of Libya rather than other states, Heller writes:[1923]

> The [HRC] created the Commission to focus on the crimes of the Qadhafi government, and that is exactly what it did – even if not with the single-minded focus that the Council intended. That partiality in no way discredits the Commission's work; its

[1914] *CAR Report*, *supra* note 32, para. 24.
[1915] *Syria Second Report*, *supra* note 1109, para. 88.
[1916] E.g., *HRC Burundi Detailed Report*, *supra* note 405, para. 705; *Syria Second Report*, *supra* note 1109, para. 87.
[1917] *Darfur Report*, *supra* note 32, para. 532.
[1918] *North Korea Report*, *supra* note 32, para. 1193.
[1919] *South Sudan Second Report*, *supra* note 31, para. 33: "eight Lieutenant Generals, 17 Major Generals, eight Brigadier Generals, five Colonels and three State Governors".
[1920] E.g., *Letter from Michael Kirby to Kim Jong Un, Supreme Leader of the DPRK, 20 January 2014*, in *Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, UN Doc. A/HRC/25/63, at 23 and 25 and *Letter dated 7 June 2016 transmitting an advance edited version of the report of the Commission of Inquiry to President Isaias Afwerki*, in UN Doc. A/HRC/32/CRP.1, Annex III, at 91.
[1921] Rome Statute, *supra* note 1033, Art. 28.
[1922] UN Charter, Art. 2(1); *Nicaragua Case*, *supra* note 1352, paras. 212 and 241.
[1923] Heller, *supra* note 96, at 51.

> reports provide the most detailed and compelling account of the Libyan conflict to date. But it serves as a stark reminder that even the most seemingly independent and impartial international commission of inquiry can never escape politics completely.

Commissions generally gave less attention to responsibilities of international organisations and corporate entities. This difference in focus perhaps reflects the more truncated or nebulous normative framework governing those entities, and a lack of mechanisms available to enforce those obligations. Commissions have however addressed these actors in recommendations.

Almost all commissions examined international crimes to some extent, with a few inquiries exclusively focussing on individual responsibility. There was significant variance in commissions' engagement with different aspects of the ICL framework. Some identified species of crimes while others went further to identify contextual elements, elements of crimes, modes of liability and even defences. Such details distinguish criminal responsibility from other responsibility regimes. It may be queried to what extent is it useful for commissions to assess these more detailed elements, especially where perpetrators are unknown. As recognised by many commissions, their mandate is not to conclusively determine criminal liability. To carry out detailed assessments might duplicate or even contradict the work of a judicial body. Yet to omit these details might wrongly imply that international crimes are conceptually identical to serious violations of IHL or IHRL. It might be beneficial for commissions to acknowledge elements of criminal responsibility and articulate the extent to which they were assessed when reaching findings of crimes. Such an approach is reflected where commissions assessed objective elements and recalled that *mens rea* would also need to be satisfied to attach criminal responsibility and where they identified potential modes of liability. Such approaches have synergies with the authorization of investigations at the ICC. The Pre-Trial Chamber must be satisfied that there is "a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed".[1924] When authorising investigations, Pre-Trial Chambers have decided that in light of the stage of the proceedings and because there was no suspect before the Court, they could not assess the mental elements, and focused on the physical elements of crimes against humanity.[1925] Such an approach might similarly allow commissions to make findings in respect of the relevant crime base while articulating the complexity of the ICL framework.

Commissions took different views as to whether to publicly name suspected perpetrators. Potential benefits include upholding a moral dimension to accountability, especially where legal avenues for prosecution appear elusive; or alternatively guiding the focus of criminal proceedings before the ICC or pursuant to universal jurisdiction. There may even be some deterrent value, should public naming become a standard practice of UN atrocity inquires. However, commissions frequently positioned their findings of responsibility as part of a broader accountability process. Viewed in this light, contemporary commissions' practice of publicly identifying implicated institutions and listing suspects confidentially strikes a balance

[1924] Rome Statute, *supra* note 1033, Art. 53(1)(a).

[1925] *Situation in the Republic of Burundi*, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi', ICC-01/17-X-9-US-Exp, PTC III, 25 October 2017, footnote 43 [*Burundi Investigation Decision*] and *Kenya Investigation Decision*, *supra* note 1682, paras. 79 and 140.

in respect of different interests, including denunciation, assistance to future accountability mechanisms, and concerns around procedural fairness and witness protection.

3. Accountability Recommendations

This Section discusses different accountability measures recommended by commissions, namely prosecutions of international crimes (3.1), restitution and compensation (3.2), truth-seeking (3.3), other measures of satisfaction (3.4) and guarantees of non-repetition (3.5). This structure loosely reflects the categories of remedies for serious violations of IHRL and IHL reflected in the General Assembly's *Principles on the Right to a Remedy*. This structure was chosen in light of commissions' frequent invocation of this instrument; the immediate relevance of enumerated remedies for the harms at issue; and the fact that the *Principles* depart in key respects from the general reparations regime articulated in the *Articles on State Responsibility*. This Section concludes by offering general observations as to commissions' approaches in respect of recommending accountability measures and mechanisms (3.6).

3.1 Prosecutions of international crimes

Commissions identified a duty under customary international law for states to investigate and prosecute international crimes.[1926] The North Korea Commission depicted the duty to prosecute crimes against humanity as a peremptory norm.[1927] Some commissions linked the duty to investigate and prosecute with the right to a remedy and the 'Responsibility to Protect' (R2P) principle, which is elaborated upon in Section 3.4.[1928] Commissions depicted prosecutions of international crimes as imperative to foster compliance with international law. Some commissions also linked prosecutions with general deterrence of violations.[1929] The Darfur Commission wrote that determining criminal responsibility "is a critical aspect of the enforceability of rights and of protection against their violation."[1930] Most recommendations to prosecute were directed at states or UN bodies which could establish criminal justice mechanisms, notably the Security Council. A few commissions also identified an obligation to investigate and prosecute on the part of non-state actors with government-like functions.[1931]

Commissions consistently rejected claims that criminal justice might endanger reconciliation or peace-building, arguing that reconciliation "can never be achieved without truth and justice".[1932] The South Sudan Commission remarked that some voices calling for peace-building to take precedence hoped that justice would be prevented, rather than delayed.[1933] Commissions opposed the use of amnesties for international crimes as part of peace negotiations or truth-seeking processes.[1934] However, they took different views as to whether

[1926] E.g., *CAR Report*, *supra* note 32, para. 81; *Libya Second Report*, *supra* note 853, para. 769.
[1927] *North Korea Report*, *supra* note 32, footnote 1672.
[1928] E.g., *North Korea Report*, *supra* note 32, para. 1210; *Gaza Flotilla Report*, *supra* note 681, para. 258; *Darfur High-Level Report*, *supra* note 1027, paras. 76 and 77(a).
[1929] E.g., *Beit Hanoun Report*, *supra* note 620, para. 80; *Goldstone Report*, *supra* note 633, para. 1966.
[1930] *Darfur Report*, *supra* note 32, para. 407.
[1931] *Goldstone Report*, *supra* note 633, paras. 1836 and 1843; *Gaza Report*, *supra* note 766, para. 666; *Libya First Report*, *supra* note 968, para. 62.
[1932] *South Sudan First Report*, *supra* note 30, para. 80. See *Cambodia Report*, *supra* note 324, paras. 2-3 and *Yugoslavia Final Report*, *supra* note 39, para. 320.
[1933] *South Sudan First Report*, *supra* note 30, para. 80.
[1934] *North Korea Report*, *supra* note 32, para. 1202 (3); *Darfur Report*, *supra* note 32, para. 618; *CAR Report*, *supra* note 32, paras. 32-35.

prosecutions should be comprehensive or selective. The CAR Commission considered that impunity would not be avoided by prosecuting a "handful of perpetrators"; rather, as many as possible should be prosecuted.[1935] By contrast, the Cambodia Commission considered that because "a reopening of the events through criminal trials on a massive scale" would impede reconciliation,[1936] prosecutions should only be pursued against those "most responsible".[1937]

Rather than simply advocating that international crimes be prosecuted, many commissions also suggested appropriate venues, taking into account the needs of concerned states, community interests, costs, and feasibility. For instance, while recognising benefits of local trials, such as access to evidence and responsiveness to the needs of local communities, the Rwanda Commission favoured an international tribunal to guarantee independence and impartiality in light of the emotionally and politically-charged nature of the crimes and because their gravity was of concern to the international community as a whole.[1938] The Cambodia Commission also opposed local trials due to security concerns and corruption.[1939] It recommended that an *ad hoc* tribunal be established by the Security Council or the General Assembly.[1940]

After the Rome Statute's entry into force, several commissions recommended the ICC as a venue, with jurisdiction to be triggered by the Security Council if necessary.[1941] For instance, the Darfur Commission preferred the ICC as the most appropriate venue due to the nature of the crimes, the authority of suspected perpetrators, the ICC's authority and impartiality, and considerations of delay and cost associated with *ad hoc* tribunals.[1942] The Syria Commission similarly discussed the merits of different judicial avenues, comparing the ICC favourably with local trials or an *ad hoc* tribunal.[1943] Other commissions adopted a tandem approach, suggesting some prosecutions could be pursued at the ICC while others would take place in national courts[1944] or before hybrid or regional bodies. For instance, the Eritrea Commission recommended that in addition to an ICC referral, the AU should establish a mechanism to prosecute crimes against humanity.[1945] The CAR Commission considered that the CAR's Special Criminal Court should deal with the bulk of criminal cases, while the ICC could deal with more controversial or serious crimes.[1946] Recommendations for modalities of prosecutions generally tracked the proliferation of international criminal tribunals. The implementation of such recommendations is another matter, discussed in Section 4.1.

[1935] E.g., *CAR Report*, *supra* note 32, para. 81.
[1936] *Cambodia Report*, *supra* note 324, para. 106.
[1937] *Ibid*., para. 110.
[1938] *Rwanda Interim Report*, *supra* note 298, paras. 134, 136 and 138.
[1939] *Cambodia Report*, *supra* note 324, paras. 126-130.
[1940] *Ibid*., para. 148.
[1941] E.g., *Goldstone Report*, *supra* note 633, paras. 1969(b)-(e); *North Korea Report*, *supra* note 32, para. 1225(a); *Eritrea Second Report*, *supra* note 569, para. 361(b); *Guinea Report*, *supra* note 39, paras. 266 and 278.
[1942] *Darfur Report*, *supra* note 32, paras. 573-582.
[1943] *Syria Fourth Report*, *supra* note 1097, Annex XIV.
[1944] *Darfur High-Level Report*, *supra* note 1027, para. 77(k); *Goldstone Report*, *supra* note 633, paras. 1969(c) and (e); *Syria Fourth Report*, *supra* note 1097, Annex XIV, at 127; *Eritrea Second Report*, *supra* note 569, para. 363(f).
[1945] *Eritrea Second Report*, *supra* note 569, para. 362.
[1946] *CAR Report*, *supra* note 32, para. 71.

Some commissions proposed follow-up mechanisms to facilitate investigations and prosecutions. For instance, the Goldstone Commission recommended that a follow-up committee report on parties' fulfilment of their duties to investigate and prosecute. It directed this proposal to the Security Council, recommending that if prosecutions did not materialise, the situation should be referred to the ICC.[1947] Ultimately, the HRC established such a committee,[1948] which found little evidence of accountability action.[1949] The HRC requested the Secretary-General to continue to report on progress[1950] and eventually, its attention shifted to other crises. While the follow-up committee did not motivate the parties to act, Daragh Murray writes that it usefully "specified a framework for monitoring and assessing criminal investigations."[1951] The North Korea Commission's proposal that OHCHR establish a field-based structure to help to ensure accountability, including by collecting evidence,[1952] led to the establishment of an OHCHR field office at Seoul.[1953] The HRC also established a group of experts to explore ways to secure accountability in the DPRK.[1954] The Eritrea Commission similarly proposed an OHCHR structure to promote accountability,[1955] but the HRC instead renewed the mandate of the Special Rapporteur on Eritrea to report on implementation of its recommendations.[1956]

3.2 Restitution and compensation

Restitution and compensation are well-known remedies in the field of state responsibility.[1957] The right of victims of serious IHL and IHRL violations to reparation is affirmed in several instruments,[1958] although scholars disagree as to whether such a right is fully recognised as a matter of international law.[1959] The *Principles on the Right to a Remedy* provide that full reparation for serious violations of IHRL and IHL includes restitution and compensation.[1960]

[1947] *Goldstone Report*, *supra* note 633, paras. 1969(b)-(e).
[1948] HRC Res. 13/9, 25 March 2010, para. 9.
[1949] *Report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9*, UN Doc. A/HRC/15/50, 23 September 2010 and UN Doc. A/HRC/16/24, 5 May 2011.
[1950] HRC Res. 19/18, 22 March 2012; *Report of the Secretary-General: Progress made in the implementation of the recommendations of the Fact-Finding Mission by all concerned parties, including United Nations bodies*, UN Doc. A/HRC/21/33, 21 September 2012.
[1951] Daragh Murray, 'Investigating the Investigations: A Comment on the UN Committee of Experts Monitoring of the 'Goldstone Process'', in Chantal Meloni and Gianni Tognoni (eds.), *Is there a Court for Gaza?* (The Hague: TMC Asser Press, 2012) 145-160, at 160.
[1952] *North Korea Report*, *supra* note 32, para. 1225(c).
[1953] HRC Res. 25/25, para. 10 and OHCHR, 'UN Human Rights Chief opens new office in Seoul', 26 June 2015, available at http://www.ohchr.org/EN/NewsEvents/Pages/UNHRChiefopensnewofficeinSeoul.aspx (accessed 1 May 2018).
[1954] Group of Independent Experts on Accountability on the situation of human rights in the DPRK, established by HRC Res. 31/18, 23 March 2016, para. 11.
[1955] *Eritrea Second Report*, *supra* note 569, para. 358(e).
[1956] HRC Res. 32/24; *Report of the Special Rapporteur on the situation of human rights in Eritrea, Sheila B. Keetharuth*, UN Doc. A/HRC/35/39, 7 June 2017.
[1957] ARSIWA, *supra* note 1791, Art. 36.
[1958] ICCPR, *supra* note 243, Arts. 3, 9(5) and 14(6); CAT, *supra* note 780, Art. 14; CERD, *supra* note 1179, Art. 6; CRC, *supra* note 1179, Art. 39; International Convention for the Protection of All Persons from Enforced Disappearance 2006, 2716 UNTS 3, Art. 24(4); *Principles on the Right to a Remedy*, *supra* note 540; *Principles Against Impunity*, *supra* note 54.
[1959] E.g., Christian Tomuschat, 'Darfur – Compensation for the Victims', (2005) 3 JICJ 579-589 at 587 *contra* Liesbeth Zegveld, 'Victims' Reparations Claims and International Criminal Courts: Incompatible Values?', (2010) 8(1) JICJ 79-111, at 85.
[1960] *Principles on the Right to a Remedy*, *supra* note 540, Principle 18.

This Section discusses commissions' recommendations for restitution and compensation directed at states (3.2.1) and other actors, particularly international organisations, armed groups and individuals (3.2.2).

3.2.1 Recommendations to states

Several commissions linked the duty to provide reparations pursuant to the rules of state responsibility with victims' rights to a remedy[1961] and the need for reparations to be victim-centred.[1962] Commissions' recommendations reflected these different elements. The Guinea Commission recommended that Guinea provide healthcare and symbolic reparations as well as financial compensation.[1963] The Syria Commission recommended that Syria establish a reparation fund "for victims of serious human rights violations."[1964] The Palmer Commission not style its recommendations as in pursuit of accountability for legal violations, but recommended that Israel "offer payment for the benefit of the deceased and injured victims and their families, to be administered by [Turkey and Israel] through a joint trust fund".[1965]

Some commissions recommended that the international community assist concerned states meet their obligations in light of their precarious financial situations.[1966] The CAR Commission proposed that the CAR and Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) adopt a policy to restore property rights of those forced to flee from violence, and if this was not possible, "a comprehensive program of compensation should be put in place, along with appropriate grievance mechanisms."[1967] Several commissions proposed that UN bodies should establish compensation mechanisms. The Darfur Commission made a detailed proposal for an international compensation commission[1968] which was not adopted by the Security Council.[1969] The Lebanon Commission recommended that the HRC consider creating "a commission competent to examine individual claims"[1970] and establish a "follow-up procedure on the measures to be taken, notably for the rebuilding of Lebanon and above all reparations for victims".[1971] The HRC asked OHCHR to consult with Lebanon on the recommendations;[1972] ultimately, no such mechanism was established.[1973] The Goldstone Commission recommended that the General Assembly establish an escrow fund to pay compensation to Palestinian victims, and that Israel should pay into that fund.[1974] In making this proposal, the Commission cited the inquiries on

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[1961] *East Timor Report*, *supra* note 338, para. 148; *Goldstone Report*, *supra* note 633, paras. 1861-1864; *Sri Lanka Report*, *supra* note 29, para. 276; *Libya Second Report*, *supra* note 853, paras. 765-766.
[1962] *Sri Lanka Report*, *supra* note 29, para. 276.
[1963] *Guinea Report*, *supra* note 39, para. 270.
[1964] *Syria First Report*, *supra* note 32, para. 112(l).
[1965] *Palmer Report*, *supra* note 316, para. 169. See Palmer, *supra* note 480, at 605.
[1966] E.g., *Abidjan Report*, *supra* note 43, para. 91; *Guinea Report*, *supra* note 39, paras. 271 and 279; *Syria Second Report*, *supra* note 1109, para. 138.
[1967] *CAR Report*, *supra* note 32, Recommendation 2(a).
[1968] *Darfur Report*, *supra* note 32, para. 590.
[1969] SC Res. 1593 (2005), para. 5 encouraged the creation of "institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes".
[1970] *Lebanon Report*, *supra* note 855, para. 31(n).
[1971] *Ibid*., para. 31(e).
[1972] HRC Res. 3/3, 8 December 2006, para. 2.
[1973] *Report of the UN High Commissioner for Human Rights on the follow-up to the report of the Commission of Inquiry on Lebanon*, UN Doc. A/HRC/5/9, 4 June 2007, para. 47.
[1974] *Goldstone Report*, *supra* note 633, para. 1971(b).

Darfur and Lebanon as having expressed similar concern that the international community must provide compensation where recourse from concerned states was unlikely.[1975] While the HRC recommended that OHCHR explore modalities for an escrow fund, this was not established.[1976] None of these recommendations bore fruit.

3.2.2 Recommendations to other actors

While the ILC has identified a duty to provide reparation for internationally wrongful acts on the part of international organisations,[1977] such obligations were not much discussed in inquiry reports. Some commissions addressed compensatory recommendations to these actors but did not always link them to legal liability. For instance, the Libya Commission recommended that NATO apply its non-binding guidelines on payments for civilian losses, where payments are provided "without reference to the question of legal liability."[1978] These guidelines were formulated for the International Security Assistance Force in Afghanistan. NATO opposed this recommendation, writing that since damages were not owed for harm caused by lawful military operations and it was not standard practice to provide compensation programmes in such cases, questions of compensation were "of a political character."[1979] It does not appear that NATO applied its guidelines on *ex gratia* payments to its activities in Libya.

The CAR Commission examined violations by international peacekeeping forces, finding that existing inquiry and reporting arrangements "[fail] to satisfy the rights of the family members of the victims to an effective remedy."[1980] It recommended that the Security Council establish a mechanism to hear complaints of IHRL violations by peacekeeping forces[1981] similar to the Human Rights Advisory Panel (HRAP), which could hear complaints of violations allegedly attributable to the United Nations Mission in Kosovo (UNMIK) and recommend redress, including compensation.[1982] As UNMIK did not implement HRAP's recommendations,[1983] its utility may be queried. Nonetheless, both the Libya Commission and the CAR Commission sought to address concerns regarding accountability of peacekeeping missions by suggesting measures which had previously attracted political support.[1984]

[1975] *Ibid*., para. 1873.

[1976] HRC Res. 16/32, 25 March 2011, para. 6; *Report of the United Nations High Commissioner for Human Rights on follow-up to the report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/15/52/Add.1, 11 October 2010; *Progress report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolution 16/32*, UN Doc. A/HRC/18/50, 11 August 2011 and *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, paras. 15 and 55.

[1977] DARIO, *supra* note 14, Art. 31.

[1978] *Libya Second Report*, *supra* note 853, para. 130(b); *NATO Guidelines*, *supra* note 1820, Guideline 9.

[1979] *NATO letter 15 February 2012*, *supra* note 997, at 2-3.

[1980] *CAR Report*, *supra* note 32, para. 574.

[1981] *Ibid*., Recommendation 4(f).

[1982] Human Rights Advisory Panel, established by UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel, UN Doc. UNMIK/REG/2006/12, 23 March 2006.

[1983] *Human Rights Advisory Panel History and Legacy, Kosovo, 2007-2016, Final Report*, 30 June 2016, para. 241: "the biggest failure of the entire HRAP experience was the fact that UNMIK did not follow the Panel's recommendations."

[1984] *Ibid*., paras. 4-5 and SC Res. 2272 (2016).

Turning to *de facto* regimes and armed groups, commissions generally invoked obligations to provide compensation in respect of actors with state-like characteristics. In contrast to the multifaceted reparatory recommendations directed to states, commissions' recommendations to non-state actors were less detailed. While the Goldstone Commission recommended that Israel pay compensation, it did not make a reciprocal recommendation to the Palestinian side.[1985] The Gaza Commission did not specifically identify a duty on the part of Hamas to provide compensation, but generally called upon "all parties" to establish accountability mechanisms, noting that victims' right to a remedy "including full reparations, must be ensured without further delay."[1986] The Libya Commission considered in its first report that the National Transitional Council (NTC) exercised "*de facto* control over territory akin to that of a Governmental authority"[1987] and recommended that it grant reparations to victims.[1988] In its second report, the Commission noted that the NTC was recognised as the interim Government, so treated it as the state.[1989]

The Darfur Commission took the view that compensation may also be owed by armed groups without state-like characteristics, writing that serious violations invoked the international responsibility of "the international non-state entity to which those authors belong as officials", so that the "non-state-entity may have to pay compensation to the victims".[1990] The Commission sourced this duty in the Hague Regulations and grave breaches provisions of the Geneva Conventions and Additional Protocol I.[1991] Noting that these obligations were originally owed between states, the Commission observed that an individual right to a remedy had since emerged from human rights doctrines.[1992] It concluded that Sudan was obliged to pay compensation for crimes perpetrated by its agents or *de facto* organs, and that a "similar obligation is incumbent upon rebels for all crimes they may have committed, whether or not the perpetrators are identified and punished."[1993] The Commission envisaged that rebels' violations should be compensated through a trust fund, to be funded by international voluntary contributions.[1994] This proposal arguably reflects the principle in the *Principles on the Right to a Remedy* that states must provide reparations where "parties liable for the harm suffered are unable or unwilling to meet their obligation".[1995]

Commissions more commonly addressed responsibilities of armed groups indirectly via investigation and prosecution of their individual members. As noted by Zegveld, international bodies have "largely ignored the accountability of the groups in favour of the accountability

[1985] *Goldstone Report*, *supra* note 633, para. 1843.
[1986] *Gaza Report*, *supra* note 766, para. 677.
[1987] *Libya First Report*, *supra* note 968, para. 62.
[1988] *Ibid*., para. 259(c).
[1989] *Libya Second Report*, *supra* note 853, para. 30.
[1990] *Darfur Report*, *supra* note 32, para. 175.
[1991] *Ibid*., footnote 213.
[1992] *Ibid*., paras. 595-597.
[1993] *Ibid*., para. 600.
[1994] *Ibid*., para. 603.
[1995] *Principles on the Right to a Remedy*, *supra* note 540, Principle 16. See Luke Moffett, 'Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda', in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings* (Leiden: Brill, 2015) 323-346, at 331.

of individual members."[1996] This lack of attention reflects a constellation of difficulties, including uncertainty regarding applicable primary rules, underdeveloped rules governing responsibility, a lack of forums in which to seek recourse, and practical impediments such as the absence of collectively held assets.[1997] Luke Moffett argues that responsibility of armed groups should not be modelled on state responsibility due to their wide diversity, and proposes a "third type of responsibility" that rests collectively on the members of an impugned group.[1998] Such a possibility was raised in the report of the Darfur Commission.

Finally, commissions infrequently recognised an obligation to provide compensation on the part of convicted individuals. The Darfur Commission observed "a clear trend in international law to recognize a right to compensation in the victim to recover from the individual who caused his or her injury",[1999] citing the Rome Statute and international declarations. The Cambodia Commission considered that the wealth of convicted Khmer Rouge leaders should be given as reparations to victims of the regime, observing that this measure was recognised at the ICC and *ad hoc* tribunals.[2000] The Commission recommended convicted leaders should pay from their own wealth or otherwise through a "special trust fund", and that states holding Khmer Rouge assets should arrange their transfer to meet defendants' obligations.[2001] Most commissions did not expressly link the obligation to provide reparations to criminal conviction, perhaps because enforcement regimes vary across jurisdictions.

3.3 Truth-seeking measures

The right to the truth in respect of serious violations of IHRL and IHL has been recognised by the General Assembly,[2002] the HRC,[2003] certain international judicial bodies,[2004] and in some academic writings.[2005] The *Principles on the Right to a Remedy* frame truth-seeking measures as a means of satisfaction.[2006] Inquiry reports depict truth-seeking as essential for accountability and complementary to prosecutions;[2007] however they engaged with the modalities of such mechanisms to differing extents.

Some commissions identified the need for a truth-seeking process but left the modalities of such processes open. The CAR Commission considered it important to produce a detailed

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[1996] Zegveld 2002, *supra* note 1249, at 223.
[1997] Matthew Happold, 'Protecting Children in Armed Conflict: Harnessing the Security Council's "Soft Power"', (2010) 43 Isr L Rev 360-380, at 374.
[1998] Moffett, *supra* note 1995, at 332.
[1999] *Darfur Report*, *supra* note 32, footnote 217.
[2000] *Cambodia Report*, *supra* note 324, para. 212. E.g., Rome Statute, *supra* note 1033, Art. 75; ICTY Statute, Art. 24(3) and ICTR Statute, Art. 23(3).
[2001] *Cambodia Report*, *supra* note 324, para. 212.
[2002] GA Res. 68/165, para. 1.
[2003] HRC Res. 21/7, para. 1.
[2004] *Almonacid-Arellano*, *supra* note 553, paras. 129 and 150.
[2005] E.g., Théo Boutruche, 'Seeking the Truth About Serious Human Rights and Humanitarian Law Violations: The Various Facets of a Cardinal Notion of Transitional Justice', in Marielle Matthee, Brigit Toebes and Marcel Brus (eds), *Armed Conflict and International Law: In Search of the Human Face* (The Hague: TMC Asser Press, 2013) 339-375; Yasmin Navqi, 'The right to the Truth in International Law: Fact or Fiction?', (2006) 88(862) IRRC 245-273 and Merryl Lawry-White, 'The Reparative Effect of Truth Seeking in Transitional Justice', (2015) 64(1) ICLQ 141-177.
[2006] *Principles on the Right to a Remedy*, *supra* note 540, Principle 22(b).
[2007] E.g., *Sri Lanka Report*, *supra* note 29, at 285 and 429; *Guinea Report*, *supra* note 39, para. 210; *Darfur Report*, *supra* note 32, para. 624.

account of violations and permit victims to tell their stories in light of the reality that many crimes would go unpunished.[2008] It recommended that the Government invite the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence to recommend the most effective truth-seeking strategy in the circumstances.[2009] The Sri Lanka Panel recommended that Sri Lanka initiate a process to examine the root causes and conduct of the conflict, patterns of violations and institutional responsibilities,[2010] and to acknowledge its role and responsibility for civilian casualties.[2011] The Syria Commission identified "investigation panels, documentation of violations or the securing of archives"[2012] as possible measures in addition to truth commissions as ways to realise the right to truth.

A few commissions recommended the establishment of truth commissions.[2013] The Darfur Commission identified the added value of such a mechanism: "[c]riminal courts, by themselves, may not be suited to reveal the broadest spectrum of crimes that took place during a period of repression, in part because they may convict only on proof beyond a reasonable doubt."[2014] Conversely, other commissions were less confident about the utility of truth commissions in situations under investigation. The Cambodia Commission warned that a truth commission might not be appropriate in the near future due to enduring divisions in Cambodia that could frustrate its work, and also cautioned the simultaneous operation of a truth commission and a judicial body, as it could create public confusion and lead to difficulties for the fair conduct of trials.[2015] The Eritrea Commission stated that a truth commission would not be "a viable option in the current circumstances",[2016] but did not explain why. It recommended that the Government provide victims with redress, "including the right to truth",[2017] but did not elaborate as to how this right should be realised. The North Korea Commission considered that a truth commission which would allow amnesties in exchange for truth to be "eminently unsuitable to a situation where crimes against humanity are being committed unabated."[2018] It indicated that truth-seeking measures might be possible after "profound political and institutional reforms within the DPRK".[2019]

3.4 Other measures of satisfaction

The *Principles on the Right to a Remedy* provide that in addition to compensation and restitution, measures of satisfaction may be required to remedy serious violations of IHRL and IHL. In this respect, the *Principles* depart from general rules of state responsibility, whereby satisfaction is secondary to other forms of reparation.[2020] In this context, satisfaction includes

[2008] *CAR Report*, *supra* note 32, Recommendation 1(c).
[2009] Ibid.
[2010] *Sri Lanka Report*, *supra* note 29, Recommendation 3A.
[2011] *Ibid*., Recommendation 3B.
[2012] *Syria Fourth Report*, *supra* note 1097, Annex XIV, at 128.
[2013] E.g., *Abidjan Report*, *supra* note 43, para. 90(d).
[2014] *Darfur Report*, *supra* note 32, para. 617.
[2015] *Cambodia Report*, *supra* note 324, para. 203.
[2016] *Eritrea Second Report*, *supra* note 569, para. 338.
[2017] *Ibid*., para. 357(a).
[2018] *North Korea Report*, *supra* note 32, para. 1202(3).
[2019] *North Korea Report*, *supra* note 32, para. 1203.
[2020] ARSIWA, *supra* note 1791, Art. 37 (1).

cessation of ongoing violations, public apology, judicial and administrative sanctions against perpetrators, and commemorations to victims, as well as truth-seeking measures.[2021]

Several commissions recognised satisfaction measures as components of reparations.[2022] For instance, the Beit Hanoun Commission recommended that Israel offer "a memorial to the victims that constitutes a response to the needs of survivors",[2023] such as a physiotherapy clinic. While the Palmer Commission disconnected recommendations from legal liability, some resembled satisfaction, such as the proposal that Israel offer an "appropriate statement of regret… in respect of the incident in light of its consequences".[2024] The Timor-Leste Commission recommended a national reparations programme to award measures including acknowledgement of wrongdoing, public disclosure of events and rehabilitation.[2025]

Lustration and vetting were also recommended to remove individuals who had participated in violations from public authority and prevent them from holding public office to "(re-)establish civic trust and (re-)legitimize public institutions".[2026] Lustration refers to the policy to remove implicated personnel, while vetting is the process by which the policy is implemented.[2027] The Cambodia Commission recommended that those convicted of international crimes be precluded from public office.[2028] The CAR Commission recommended that candidates for national political office must attest that they were not implicated in serious violations.[2029] Other commissions advocated that those allegedly responsible for serious violations of IHRL or IHL be removed from security, military, and judicial institutions.[2030] The UN also conducts a screening process for all UN personnel to exclude perpetrators of serious criminal offences and those involved in the commission of violations of IHRL or IHL.[2031]

Several commissions recommended that sanctions be applied against suspects in leadership roles who were implicated in atrocities as a way to end ongoing violations.[2032] For instance, the HRC's Burundi Commission recommended that UN member states institute sanctions against those suspected of committing serious violations of IHRL and international crimes in the absence of improvement in the human rights situation.[2033] As noted by Van den Herik, originally "UN sanctions were conceived of as political measures addressing a determined

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[2021] *Principles on the Right to a Remedy*, *supra* note 540, Principle 22.
[2022] E.g., *Gaza Report*, *supra* note 766, para. 606; *Sri Lanka Report*, *supra* note 29, para. 266; *Goldstone Report*, *supra* note 633, para. 1866.
[2023] *Beit Hanoun Report*, *supra* note 620, para. 78.
[2024] *Palmer Report*, *supra* note 316, para. 169. See Orakhelashvili, *supra* note 1165, at 133.
[2025] *Timor-Leste Report*, *supra* note 376, para. 217.
[2026] OHCHR, *Rule of law tools for post-conflict states: Vetting: An operational framework*, UN Doc. HR/PUB/06/5 (2006) at 4, available at http://www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf (accessed 1 May 2018).
[2027] US Department of State, 'Transitional Justice Initiative: Lustration and Vetting', available at http://www.state.gov/documents/organization/257775.pdf (accessed 1 May 2018).
[2028] *Cambodia Report*, *supra* note 324, para. 210.
[2029] *CAR Report*, *supra* note 32, para. 27, Recommendation 1(d).
[2030] E.g., *Libya Second Report*, *supra* note 853, para. 127(q); *Syria Second Report*, *supra* note 1109, para. 136; *North Korea Report*, *supra* note 32, para. 1220(a).
[2031] United Nations, *Human Rights Screening of United Nations Personnel*, 11 December 2012, available at http://police.un.org/sites/default/files/policy_on_human_rights_screening_of_un_personnel_december_2012.pdf (accessed 1 May 2018).
[2032] E.g., *Guinea Report*, *supra* note 39, paras. 272-273; *Eritrea Second Report*, *supra* note 569, para. 361(c); *HRC Burundi Detailed Report*, *supra* note 405, para. 741.
[2033] *HRC Burundi Detailed Report*, *supra* note 405, para. 746.

threat to the peace rather than legal responses to identified violations of international law."[2034] She identifies three purposes of sanctions: "(i) to coerce or change behaviour, (ii) to constrain access to resources needed to engage in proscribed activities, or (iii) to signal and stigmatize."[2035] Sanctions such as asset freezes and travel bans may be experienced as deprivations of rights or benefits. While sanctions have a detrimental impact, their purpose is preventive.[2036] In 2012, the Secretary-General reported that a workshop on the Security Council's role in accountability suggested the Council might authorise the use frozen assets for reparations payments.[2037] Such a proposal has not been made by commissions to date.

Occasionally, commissions addressed the role of private enterprises in ending violations. Some recommendations were made to actors with oversight over businesses.[2038] For instance, the High-Level Mission on Darfur recommended that the General Assembly compile "a list of foreign companies that have an adverse impact on the situation of human rights in Darfur"[2039] and called upon UN bodies to avoid transacting with listed entities. Recommendations were occasionally addressed to private companies. Notably, the Israeli Settlements Commission recommended that businesses evaluate the human rights impact of their activities and take all necessary steps to ensure that they did not adversely impact human rights, including terminating their business interests in Israeli settlements.[2040] Having found that proceeds from mining operations owned jointly by Eritrea and a transnational corporation were an important source of state revenue,[2041] the Eritrea Commission recommended that transnational corporations operating in Eritrea carry out human rights impact assessments to prevent future violations.[2042]

Commissions also invited the international community of states to take steps to end situations of violations. Some commissions linked these measures to states' legal obligations to repress violations of peremptory norms[2043] and ensure respect for IHL.[2044] Others invoked the 'responsibility to protect' (R2P) principle,[2045] which provides that states must protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and that other states have a responsibility to use peaceful means to help protect populations from such atrocities. Where a state manifestly fails to protect its population and peaceful means are inadequate, states may take collective action through the Security Council, in accordance with

[2034] Van den Herik 2014, *supra* note 1890, at 431.
[2035] *Ibid*., at 433, citing Thomas Biersteker, Sue Eckert and Marcos Tourinho (eds), 'Designing United Nations Sanctions', *Targeted Sanctions Consortium*, August 2012, available at http://graduateinstitute.ch/files/live/sites/iheid/files/sites/internationalgovernance/shared/PSIG_images/Sanctions/Designing%20UN%20Targeted%20Sanctions.pdf (accessed 1 May 2018) and Francesco Giumelli, *Coercing, Constraining and Signaling: Explaining UN and EU Sanctions after the Cold War* (Colchester: ECPR Press, 2011).
[2036] *Ibid*., at 434.
[2037] *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc. S/2012/376, 22 May 2012, para. 70.
[2038] *Israeli Settlements Report*, *supra* note 572, para. 117.
[2039] *Darfur High-Level Report*, *supra* note 1027, para. 77(j).
[2040] *Israeli Settlements Report*, *supra* note 572, para. 117.
[2041] *Eritrea Second Report*, *supra* note 569, para. 154.
[2042] *Ibid*., para. 364.
[2043] *Israeli Settlements Report*, *supra* note 572, para. 116.
[2044] E.g., *Gaza Report*, *supra* note 766, para. 684(a), citing CA 1, *supra* note 1287.
[2045] E.g., *Goldstone Report*, *supra* note 633, paras. 1875 and 1913; *Beit Hanoun Report*, *supra* note 620, para. 19.

the Charter.[2046] The North Korea Commission considered "the accountability of the international community"[2047] in light of R2P and found that a "corresponding legal obligation is also emerging"[2048] under rules of state responsibility. The Commission wrote that the international community must ensure that crimes against humanity ceased,[2049] including by ensuring that prison camps were dismantled.[2050]

Some commissions identified wider political action as a means to end situations of violations. The Syria Commission repeatedly stated that a politically-negotiated solution was the only way to end the Syrian conflict.[2051] The North Korea Commission considered ways to promote reconciliation between the DPRK and the Republic of Korea[2052] and recommended that urgent accountability measures "be combined with a reinforced human rights dialogue, the promotion of incremental change through more people-to-people contact and an inter-Korean agenda for reconciliation".[2053] The Eritrea Commission found that the non-implementation of the Algiers Agreement 2000 and the ruling on the demarcation of the Eritrean-Ethiopian border were pretexts for Eritrea's repressive practices[2054] and recommended that the international community assist those states "in solving border issues through diplomatic means".[2055] Eritrea objected to this as violating the terms of the Agreement, which obliged both states to accept the border delimitation decision as final.[2056] Dispute resolution was not the dominant function of these commissions, but such considerations came within their ambit where conflicts and disputes perpetuated situations of ongoing violations.

Occasionally, stronger enforcement measures were advocated. In respect of violations by ISIS, the Syria Commission recommended that the Security Council consider "engaging its Chapter VII powers, given the acknowledged threat ISIS imposes to international peace and security".[2057] Such recommendations did not always go unchallenged. Eritrea argued that the Eritrea Commission's recommendation that the Security Council decide that the situation in the concerned state threatened international peace and security[2058] was a "purely political determination"[2059] outside its mandate. To date, the Security Council has not made such a decision.[2060]

[2046] *World Summit Outcome Document*, *supra* note 287, paras. 138-139.
[2047] *North Korea Report*, *supra* note 32, para. 1166.
[2048] *Ibid*., footnote 1682.
[2049] *Ibid*., para. 1164.
[2050] *Ibid*., para. 1067.
[2051] E.g., *Syria Third Report*, *supra* note 564, paras. 150-151; *Syria Fifth Report*, *supra* note 1046, para. 159; *Syria Ninth Report*, *supra* note 1904, para. 137 and *Syria Thirteenth Report*, *supra* note 928, para. 109(e).
[2052] *North Korea Report*, *supra* note 32, para. 1222.
[2053] *Ibid*., para. 1220.
[2054] *Eritrea First Report*, *supra* note 567, para. 1524.
[2055] *Ibid*., para. 1536(j).
[2056] 'Response of the Government of Eritrea to the report of the Commission of Inquiry', in *Note verbale dated 19 June 2015 from the Permanent Mission of Eritrea to the United Nations Office at Geneva addressed to the Office of the President of the Human Rights Council*, UN Doc. A/HRC/29/G/6, 24 June 2015, Annex II, at 23 [*Eritrea Note Verbale*].
[2057] *They Came to Destroy*, *supra* note 1602, para. 207(b).
[2058] *Eritrea Second Report*, *supra* note 569, para. 361(a).
[2059] *Eritrea Press Release*, *supra* note 1012.
[2060] Arms sanctions in respect of Eritrea pertain to its suspected support of Al-Shabaab: SC Res. 2385 (2017).

3.5 Guarantees of non-repetition

Guarantees of non-repetition are another type of remedy recognised in the *Principles on the Right to a Remedy*. Such measures include institutional rule of law reforms, education and training in IHRL and IHL, and codes of conduct for governmental institutions and economic enterprises.[2061] As guarantees of non-repetition aim to avert future atrocities, accountability has synergies with prevention,[2062] although some commentators raise queries as to causality.[2063]

Commissions which investigated atrocities in states with weak, unstable, or authoritarian systems of governance recommended institutional rule of law reforms.[2064] For instance, the CAR Commission's first recommendation was that the Government of the CAR rebuild its legal system.[2065] Where violations were deemed endemic to systems of governance, commissions recommended fundamental reforms, which were often interpreted by concerned states as attempted regime change. The North Korea Commission found that crimes against humanity were "ingrained into the institutional framework"[2066] of the DPRK and that accountability "requires profound institutional reforms starting at the very top and centre of the nation's institutions".[2067] The DPRK rejected the report, stating that it would "strongly respond to the end to any attempt of regime-change and pressure under the pretext of 'human rights protection'."[2068] The Syria Commission stated that accountability was a "fundamental component of a transitional period leading to a State founded on the principles of rule of law, democracy and human rights".[2069] Syria objected to this statement as a veiled reference to regime change.[2070] The Syria Commission replied that its statement "does not refer to the founding of a new state, and [it] would never imply such an outcome."[2071] Instead, the text was said to refer to rule of law reforms that were underway or planned in Syria.[2072]

3.6 Concluding observations

UN atrocity inquiries' accountability recommendations reflect both retributive and restorative conceptions of justice, advocating prosecutions of international crimes as well as remedies recognising and compensating harm to victims. Some remedies proposed by commissions

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[2061] *Principles on the Right to a Remedy*, *supra* note 540, Principle 23.
[2062] *Transitional Justice Guidance Note*, *supra* note 1763, at 4.
[2063] Bass, *supra* note 135, at 294-295; Niki Frencken and Goran Sluiter, 'The United Nations Tribunals for Yugoslavia and Rwanda', in Gentian Zyberi (ed.), *An Institutional Approach to the Responsibility to Protect* (Cambridge: CUP, 2013) 386-410 and David Wippman, 'Atrocities, Deterrence, and the Limits of International Justice', (1999) 23 Fordham Int'l LJ 473-488.
[2064] E.g., *Syria Second Report*, *supra* note 1109, para. 136; *Abidjan Report*, *supra* note 43, para. 90(a), (b) and (e).
[2065] *CAR Report*, *supra* note 32, Recommendation 1(a).
[2066] *North Korea Report*, *supra* note 32, para. 1193.
[2067] *Ibid*., para. 1194.
[2068] 'North Korea: We totally reject the U.N. report', *USA Today*, 18 February 2014, available at http://www.usatoday.com/story/opinion/2014/02/18/democratic-peoples-republic-of-korea-editorials-debates/5591393 (accessed 1 May 2018) [*North Korea response*].
[2069] 'Press Release by Commission of Inquiry on Syria,' 16 April 2012, available at http://newsarchive.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12059&LangID=E (accessed 1 May 2018).
[2070] *Syria Third Report*, *supra* note 564, Annex I, at 30-34.
[2071] *Letter from Paulo Sergio Pinheiro to the Minister of Foreign and Expatriates Affairs of the Syrian Arab Republic dated 1 May 2012*, in *Syria Third Report*, *supra* note 564, Annex I, at 36.
[2072] *Ibid*.

aimed to end violations and guarantee their non-recurrence, linking accountability with prevention. Others went beyond immediate victims and perpetrators by seeking to correct root causes of atrocities through institutional reforms. Such recommendations show that commissions did not conceive of accountability as limited to the enforcement of specific legal responsibilities, but as a broader concept promoting the rule of law and durable peace.

Commissions addressed a range of actors beyond their mandating authorities, reflecting a conception of accountability in which many sectors of society play a role, including regional organisations, peace enforcement missions, and private enterprises. It is notable that many HRC-led commissions addressed the Security Council, suggesting that their recommendatory function transcends their immediate institutional setting. Such recommendations invite the Council's engagement where its own dynamics prevented action. Some HRC commissions informally briefed Council members,[2073] and situations of concern were occasionally added to its agenda.[2074] At the same time, the Council has been reluctant to act upon HRC-led commissions' recommendations.[2075]

Commissions' formulations of recommendations also indicated their awareness of the limits to their mandates, as well as institutional and political factors relevant to implementation. One strategy was to formulate discrete recommendations whose implementation would be highly visible. Such proposals would also channel advocacy efforts and reduce the need for negotiation of operational details and thereby risking political impasse. Such an approach is evident in the Darfur Commission's comprehensive proposal for an international compensation commission, although it was ultimately not implemented. Another strategy was to escalate recommendations as a situation deteriorated. For instance, the Syria Commission first made broad recommendations that Syria be referred to 'international justice',[2076] but as the situation deteriorated, it recommended ICC referral.[2077] After Russia blocked a draft referral,[2078] the Commission criticised the Council's lack of consensus as enabling impunity[2079] and proposed alternative ways to prosecute through an *ad hoc* tribunal[2080] and support of the IIIM.[2081] The Syria Commission's escalating recommendations reflected a desire to ensure accountability with or without the support of the Security Council.

Appreciation of political sensibilities was also reflected in commissions' invocations of R2P, which the the Secretary-General has described as encompassing "legal, moral and political

[2073] *North Korea Arria-Formula Meeting*, *supra* note 453.
[2074] *SC Press Release*, *supra* note 281; *Letter dated 5 December 2014 from the representatives of Australia, Chile, France, Jordan, Lithuania, Luxembourg, the Republic of Korea, Rwanda, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council*, UN Doc. S/2014/872, 5 December 2014.
[2075] E.g., the Security Council imposed sanctions on the DPRK following the North Korea Commission's report, but the resolution did not mention human rights: SC Res. 2270 (2016).
[2076] *Syria Second Report*, *supra* note 1109, para. 139; *Syria Third Report*, *supra* note 564, para. 156.
[2077] E.g., *Syria Fourth Report*, *supra* note 1097, para. 180(b); *Syria Sixth Report*, *supra* note 1126, 206(d); *Syria Seventh Report*, *supra* note 805, para. 163(b); *Syria Eighth Report*, *supra* note 983, para. 148(b).
[2078] *Syria Eighth Report*, *supra* note 983, Annex II, para. 6.
[2079] *Syria Ninth Report*, *supra* note 1904, para. 132.
[2080] E.g., *ibid*., paras. 139 and 146(b); *Syria Eleventh Report*, *supra* note 20301337, para. 161(d) and *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/33/55, 11 August 2016, para. 147(c).
[2081] *Syria Thirteenth Report*, *supra* note 928, para. 109(a); *Syria Fourteenth Report*, *supra* note 982, para. 90(c).

responsibilities"[2082] to prevent atrocities. By invoking R2P, commissions appealed to states on the basis of international law as well as their political commitment to act.[2083] Finally, commissions' cognizance of political realities was reflected in proposals for immediate follow-up measures to monitor and report on recommendation uptake. However, where no accountability measures are taken, such mechanisms reflect a "circuit of responses"[2084] rather than inducing compliance. These tensions and others arising from commissions' institutional and normative positioning are explored further below.

4. Accountability Roles and Functions

This Section discusses commissions' roles and functions in relation to different dimensions of accountability for violations of international law. It does not seek to measure the general 'impact' of inquiry reports or establish causality between recommendations and implementation, in light of the significant methodological difficulties of such exercises.[2085] Rather, it highlights commissions' key roles and functions with respect to accountability by drawing on examples from practice. As discussed in Section 1, the concept of accountability has legal, moral, and political dimensions. As these dimensions are interrelated, there is some conceptual overlap. However, this typology allows for different elements of accountability to be foregrounded. This Section is structured as follows. Section 4.1 discusses how commissions facilitate 'legal' accountability, understood as binding enforcement of legal responsibilities. Section 4.2 discusses the 'moral' accountability function of inquiry, including uncovering the truth of violations and the potential expressive role of findings of responsibility. Section 4.3 discusses commissions' 'political' accountability function and the interplay with the politics of accountability more broadly.

4.1 Legal accountability

Inquiry reports can facilitate the enforcement of legal responsibilities in judicial proceedings. Scholars refer to such roles as 'force multipliers[2086] or 'catalysts'[2087] of judicial accountability. This role is reflected in the Darfur Commission's view that its assessment of international crimes represented "a first step towards accountability"[2088] and "will pave the way for future investigations, and possible indictments, by a prosecutor, and convictions by a court of law."[2089] The CAR Commission similarly saw its task as "to provide the foundations for a full-fledged criminal investigation".[2090]

[2082] *Implementing R2P*, *supra* note 1764, para. 11.
[2083] Lyal Sunga, 'The Human Rights Council', in Gentian Zyberi (ed.), *An Institutional Approach to the Responsibility to Protect* (Cambridge: CUP, 2013) 156-178.
[2084] Chinkin, *supra* note 97, at 495.
[2085] Rob Grace, 'Recommendations and Follow-up Measures in Monitoring, Reporting, and Fact-finding Missions', *HPCR Working Paper*, August 2014, at 15, available at http://ssrn.com/abstract=2480824 (accessed 1 May 2018) [Grace 2014].
[2086] David Kaye, 'Human Rights Prosecutors? The UN High Commissioner for Human Rights, International Justice, and the Example of Syria', in Felice Gaer and Christen Broecker, *The United Nations High Commissioner for Human Rights: Conscience for the World* (Leiden: Martinus Nijhoff, 2014) 245-265, at 262.
[2087] Devereux, *supra* note 409, at 119.
[2088] *Darfur Report*, *supra* note 32, para. 19.
[2089] *Ibid*., para. 524.
[2090] *CAR Report*, *supra* note 32, para. 16.

Some inquiry reports facilitated the establishment of international criminal tribunals or triggered international criminal jurisdiction. The Yugoslavia Commission's recommendation for prosecutions before an *ad hoc* tribunal[2091] was followed by the establishment of the ICTY.[2092] A similar course of events occurred in relation to the ICTR,[2093] though arguably the Rwanda Commission was created in service to the Security Council's desire to establish another *ad hoc* criminal tribunal.[2094] The Cambodia Commission's proposal for an *ad hoc* tribunal was not adopted, but its report informed negotiations between Cambodia and the UN, leading to the establishment of the Extraordinary Chambers in the Courts of Cambodia.[2095]

Inquiry reports have also been utilised by various actors triggering the ICC's jurisdiction. When referring Sudan to the ICC, the Security Council 'took note' of the Darfur Commission's report "on violations of [IHL] and [IHRL] in Darfur".[2096] The Union of the Comoros invoked the Gaza Flotilla Commission's report as evidence of crimes against humanity and war crimes when referring the situation onboard its flagged vessel to the ICC.[2097] The ICC Prosecutor has cited inquiry reports as sources of information in preliminary examinations.[2098] The General Assembly also cited inquiry reports when recommending that the Security Council refer the DPRK to the ICC[2099] and deciding to establish the IIIM in pursuit of criminal accountability.[2100]

In addition to acting as force multipliers for international criminal proceedings, some inquiry reports guided criminal investigations and were cited as evidence.[2101] For instance, the Yugoslavia Commission's database of evidence helped to "establish the location, character and scale of violations"[2102] at the ICTY, and information from the Darfur Commission allowed the ICC Prosecutor to plan the criminal investigation.[2103] In ICC proceedings, commissions' factual findings have been cited in decisions to authorize investigations,[2104] arrest warrant decisions,[2105] and confirm charges against defendants.[2106] While inquiry reports have not yet been cited in trial judgments, the Court's acceptance of NGO reports for

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[2091] *Yugoslavia Interim Report*, *supra* note 292, para. 74.
[2092] SC Res. 808 (1993).
[2093] *Rwanda Interim Report*, *supra* note 298, para. 150; SC Res. 955 (1994).
[2094] Bassiouni 2001, *supra* note 98, at 43 and Kaufman 2009, *supra* note 300, at 231.
[2095] 'Negotiations between the UN and Cambodia regarding the establishment of the court to try Khmer Rouge leaders', 8 February 2002, available at http://www.un.org/News/dh/infocus/cambodia/corell-brief.htm (accessed 1 May 2018); GA Res. 57/228, 18 December 2002; *Report of the Secretary-General on Khmer Rouge Trials*, UN Doc. S/57/769, 31 March 2003, Summary; GA Res. 57/228B, 13 May 2003.
[2096] SC Res. 1593 (2005), Preamble.
[2097] Union of the Comoros, *Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation*, 14 May 2013, available at http://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf (accessed 1 May 2018).
[2098] E.g., ICC Prosecutor, 'Report on Preliminary Examination Activities 2014', para. 158, citing *Guinea Report*, available at http://www.icc-cpi.int/iccdocs/otp/otp-pre-exam-2014.pdf (accessed 1 May 2018).
[2099] GA Res. 69/188, para. 8.
[2100] *IIIM Mandate*, *supra* note 330, Preamble.
[2101] Stahn and Jacobs, *supra* note 99, at 255-280.
[2102] Sunga 2011, *supra* note 733, at 193.
[2103] Moreno Ocampo, *supra* note 936, at 15.
[2104] E.g., *Burundi Investigation Decision*, *supra* note 1925.
[2105] E.g., *Prosecutor v. Omar Al Bashir*, 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir', ICC-02/05-01/09, PTC I, 4 March 2009, para. 8.
[2106] *Prosecutor v. Laurent Gbagbo*, 'Decision on the confirmation of charges against Laurent Gbagbo', ICC-02/11-01/11, PTC I, 12 June 2014, para. 75(i), citing *HRC Côte d'Ivoire Report*, *supra* note 810.

corroborative purposes[2107] and citations of reports by peacekeeping missions[2108] suggests that UN inquiry reports may play a similar role. At the same time, the ICC has cautioned that human rights reports generally have less probative value, considering the different context and purpose for which they were prepared.[2109]

An emerging way in which commissions may facilitate legal accountability is in civil proceedings against states, individuals, and private enterprises. Throughout the *Bosnia Genocide* judgment, the ICJ cited the Yugoslavia Commission's factual findings, including estimated numbers of casualties.[2110] Inquiry reports have also been cited in civil suits against private actors in domestic courts. For instance, a case was brought in the US on the basis of the Alien Tort Statute against Jean Bosco Barayagwiza for inciting the Rwandan genocide. The US District Court referred to the Rwanda Commission's finding that between 500,000 and 1 million civilians were murdered in Rwanda.[2111] A recent development is a civil claim by members of the Eritrean diaspora against mining company Nevsun in Canada, alleging that the latter was liable for human rights violations in Eritrea. The Supreme Court of British Columbia admitted the Eritrea Commission's report into evidence in order to provide a contextual framework in which to assess first-hand evidence of violations.[2112] The Court cited the Commission's findings of lack of due process in the Eritrean judicial system[2113] and allowed the case to proceed to trial.[2114] In these cases, inquiry reports provided general information rather than evidence of specific violations However, such information might assist plaintiffs to establish the context of violations.[2115] Use in proceedings against private entities remains limited, as it depends on the availability of causes of action, the existence of an inquiry report and acceptance of the report into evidence. Should states further recognise civil liability for human rights violations, such use may expand in the future.

While it is theoretically possible for inquiry reports to facilitate enforcement of state responsibility, commissions' contributions in this respect have been less pronounced in practice. This may be partly due to issues of availability and access to mechanisms through which to determine and enforce state responsibility. However, concrete proposals for compensation schemes by the Darfur Commission and the Goldstone Commission[2116] were

[2107] *Prosecutor v. Jean-Pierre Bemba Gombo*, 'Judgment pursuant to Article 74 of the Statute', ICC-01/05-01/08, TC III, 21 March 2016, para. 270.
[2108] *Lubanga Judgment*, *supra* note 1289, citing reports of the UN Organization Mission in the Democratic Republic of the Congo.
[2109] *Prosecutor v. Mathieu Ngudjolo Chui*, 'Judgment pursuant to article 74 of the Statute', ICC-01/04-02/12, TC II, 18 December 2012, para. 294.
[2110] *Bosnia Genocide Case*, *supra* note 1289. The ICJ cited reports of special rapporteurs in a similar manner: *Armed Activities Case*, *supra* note 1225, paras. 206-207 and *Wall Opinion*, *supra* note 1210, para. 133.
[2111] *Louise Mushikiwabo and others v. Jean Bosco Barayagwiza*, No. 94 CIV. 3627 (JSM), 9 April 1996 (US).
[2112] *Araya and others v. Nevsun Resources Ltd*., 2016 BCSC 1856, para. 138 (Canada), upheld on appeal: 2017 BCCA 401.
[2113] *Ibid*., para. 97.
[2114] *Ibid*., para. 296.
[2115] UK Foreign and Commonwealth Office, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (2nd ed, 2017) at 76.
[2116] *Goldstone Report*, *supra* note 633, para. 1971(b); GA Res. 64/10, 5 November 2009 and GA Res. 64/254, 25 March 2010. The HRC called on the High Commissioner for Human Rights to "determine the appropriate modalities for the establishment of an escrow fund for the provision of reparations": HRC Res. 13/9, para. 8.

not taken up by the Security Council and General Assembly, respectively. Political implications of this selectivity are discussed further at Section 4.3 below.

While commissions may promote legal accountability, implementation ultimately remains in the hands of political actors.[2117] There is a track record of uneven uptake of recommendations. For instance, the Security Council did not establish a mechanism to prosecute international crimes in Burundi,[2118] nor acted upon several HRC commissions' recommendations for ICC referrals.[2119] Many states did not fulfil their obligations to investigate and prosecute. Commissions are aware of this important limitation and appealed to stakeholders to act. A mission established upon the request of the Security Council in respect of the situation of Burundi cautioned:[2120]

> [T]he United Nations can no longer engage in establishing commissions of inquiry and disregard their recommendations without seriously undermining the credibility of the Organization in promoting justice and the rule of law.

The Gaza Commission also criticised the lack of implementation of recommendations of earlier fact-finding bodies in respect of the Israeli-Palestinian conflict as "[lying] at the heart of the systematic recurrence of violations in Israel and the Occupied Palestinian Territory."[2121] The Commission recommended that the HRC comprehensively review the implementation of recommendations by UN human rights bodies since 2009 and "explore mechanisms to ensure their implementation."[2122] In 2017, OHCHR reported that the rate for full implementation of recommendations was very low: 0.4 per cent for Israel, 1.3 per cent for Palestinian duty bearers, and 17.9 per cent for the international community and the UN.[2123]

Some scholars argue that it is counterproductive to establish inquiries when binding enforcement action does not follow. Zachary Kaufman questions whether the use of non-binding investigations represents "strength and creativity or weakness and superficiality in the pursuit of accountability".[2124] Frulli argues that it may be unhelpful for the HRC to establish accountability-oriented inquiries as it cannot take direct action, and suggests that such bodies be established by the Security Council.[2125] Frulli cautions that the HRC "runs the risk of getting tangled up in fact-finding activities, becoming an end in themselves and not a means to achieve accountability."[2126] Devereux writes that if recommendations are not implemented, commissions "are at risk of languishing to become 'historical markers', referred to in order to

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[2117] Bassiouni 2001, *supra* note 98, 48; Grace 2014, *supra* note 2085, at 5.
[2118] *SC Burundi Report*, *supra* note 307, para. 496.
[2119] E.g., Syria Commission, North Korea Commission, and Goldstone Commission.
[2120] *Burundi Assessment Report*, *supra* note 609, para. 72.
[2121] *Gaza Report*, *supra* note 766, para. 676.
[2122] *Ibid*., para. 685.
[2123] *Ensuring accountability and justice for all violations of international law in the Occupied Palestinian Territory, including East Jerusalem: comprehensive review on the status of recommendations addressed to all parties since 2009*, UN Doc. A/HRC/35/19, 12 June 2017, paras. 60-62. See *Ensuring accountability and justice for all violations of international law in the Occupied Palestinian Territory, including East Jerusalem*, UN Doc. A/HRC/37/41, 19 March 2018, pursuant to HRC Res. 34/28, 24 March 2017.
[2124] Kaufman 2018, *supra* note 439, at 106-107.
[2125] Frulli, *supra* note 102, at 1333.
[2126] *Ibid*., at 1336.

illustrate the absence of action".[2127] From this perspective, a commission whose recommendations are not implemented represents tolerance of impunity.

4.2 Moral accountability

The term 'moral accountability' is used here to refer to dimensions of accountability for violations of international law which may be achieved through processes which are not legally binding. Moral dimensions include truth-seeking and expressivist functions of findings of responsibility. While such functions may also be associated with binding judicial proceedings, they are arguably not limited to this context. This Section discusses the extent to which commissions' findings of violations and responsibilities have truth-seeking and expressivist functions.

Commissions' findings have value as an official record of atrocities and go some way towards giving effect to the right to the truth of serious violations. As written by the Special Rapporteur on the right to truth, while the fact of violations may already generally be known, truth-seeking mechanisms "make an indispensable contribution in officially and publicly acknowledging these facts".[2128] Cassese writes that UN atrocity inquiries "significantly contributed to uncovering the truth."[2129] Some commissions articulated that they carried out this function. For instance, the Eritrea Commission wrote that its objectives included providing a "comprehensive account of violations which could serve as a historical record for future accountability".[2130] The Beit Hanoun Commission sought "to draw on the accounts given to the mission to bring to the [HRC] as accurate a picture as possible of the shelling and its ongoing impact on victims and survivors."[2131]

The Sri Lanka Panel did not articulate its role as finding *the* truth but rather offering an alternative account that challenged the Sri Lankan Government's denial of perpetrating atrocities:[2132]

> This report makes clear that the Panel's view of the events leading up to the defeat of the LTTE and in the immediate aftermath is fundamentally different from that of the Government… By denying that its military operations resulted in tens of thousands of civilian deaths, and intimidating and threatening those who challenge that view, the Government is effectively closing off the opportunity to open a serious, national dialogue on the recent past and the needs of the future.

Ratner writes that the Panel aimed to "offer an alternative narrative to the Sri Lankan government's position that it had caused no civilian casualties and a new focal point for

[2127] Devereux, *supra* note 409, at 120.
[2128] *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff*, UN Doc. A/HRC/21/46, 9 August 2012, para. 30.
[2129] Antonio Cassese, 'Gathering up the Main Threads', in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford: OUP, 2012) 645-684, at 675.
[2130] *Eritrea Q&A*, *supra* note 89, at 1.
[2131] *Beit Hanoun Report*, *supra* note 620, para. 24.
[2132] *Sri Lanka Report*, *supra* note 29, para. 403.

discussion".[2133] In this context, official recognition of violations was essential for any transitional justice process to be fruitful.

There are also limits to commissions' truth-seeking function. Not all commissions sought to produce an authoritative narrative, as evidenced by the Palmer Commission's statement that its legal views were "no more authoritative"[2134] than those of Israel and Turkey. Secondly, commissions cannot comprehensively uncover the truth of violations. Their truth-seeking role is more modest than that of truth commissions, as evidenced by frequent recommendations that truth commissions should be established following their reports. On a practical level, resource shortages and lack of territorial access may significantly limit victims' participation.

It may also be queried to what extent findings of legal responsibility resemble 'truth'. Zegveld writes, "law is not about finding the truth. Law is a reasoned application of rules to presented and substantiated facts."[2135] Findings of legal responsibility are a particular type of narrative. Even comprehensive truth-seeking bodies cannot find 'the' truth; judgements must be made in respect of relevant facts in view of the purpose of the exercise and the intended audience.[2136] Blank writes that where parties distrust the legitimacy of an inquiry or when multiple entities conduct investigations, legal conclusions may reinforce pre-existing perceptions and the law may be used as a tool for "further disputes, and the struggle for control of the narrative."[2137]

Inquiry reports might also make expressive contributions by animating frameworks of IHRL, IHL and ICL and stigmatising serious violations. The theory of legal expressivism essentially provides that law and legal institutions can change or reinforce social meanings and by extension, people's attitudes, and behaviour;[2138] and that the "goal of trial and punishment is the expression of messages, often about moral or legal wrongdoing."[2139] This theory finds linkages with moral philosophy.[2140]

Several scholars ascribe an expressive function to international criminal courts and tribunals. While some authors focus on the expressive function of punishment,[2141] others also identify this function in the trial process.[2142] For instance, Margaret deGuzman argues that the ICC should focus on "expressing global norms"[2143] and identifies an expressive function in the Prosecutor's selection of situations and cases. Mirjan Damaška writes that the primary function of criminal tribunals should be didactic, bearing in mind their limited deterrent

[2133] Ratner, *supra* note 102, at 71.
[2134] *Palmer Report*, *supra* note 316, para. 14.
[2135] Zegveld 2012, *supra* note 1010, at 166.
[2136] Naqvi, *supra* note 2005, at 249-254 and Atrey, *supra* note 103.
[2137] Blank, *supra* note 481, at 102.
[2138] Cass Sunstein, 'On the Expressive Function of Law', (1996) 144 U Pa L Rev 2021-2053, at 2051; Matthew Adler, 'Expressive Theories of Law: A Skeptical Overview', (2000) 148 U Pa L Rev 1363-1501 and Tim Meijers and Marlies Glasius, 'Trials as Messages of Justice: What Should Be Expected of International Criminal Courts?', (2016) 30(4) *Ethics & International Affairs* 429-447, at 432.
[2139] Meijers and Glasius, *supra* note 2138, at 433.
[2140] Andrew Koppelman, 'On the Moral Foundations of Legal Expressivism', (2001) 60 Md L Rev 777-784.
[2141] Joel Feinberg, "The Expressive Function of Punishment," (1965) 49(3) *Monist* 397-423; Robert Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law', (2007) 43 Stan J Int'l L 39-94.
[2142] Meijers and Glasius, *supra* note 2138, at 435 and Margaret deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court, (2012) 33(2) Mich J Int'l L 265-320, at 313.
[2143] DeGuzman, *supra* note 2142, at 270, and citations therein.

ability, arguing that courts should "aim their denunciatory judgments at strengthening a sense of accountability for international crime by exposure and stigmatization of these extreme forms of inhumanity".[2144] However, the successful exercise of such a role requires that courts "be perceived by their constituencies as a legitimate authority. Lacking coercive power, their legitimacy hangs almost entirely on the quality of their decisions and their procedures."[2145]

Commissions might similarly affirm legal values and provide a sense of accountability by exposing and denouncing violations. Findings of responsibility express the elementary idea that actors are bound by international law and subject to scrutiny. Damaška's linkage of perceptions of legitimacy with legal rationality and fair process holds true for commissions to a greater degree in light of their *ad hoc* establishment by political bodies. However, it may be queried whether expressivism necessarily transposes from the trial context to non-binding inquiry. Antony Duff distinguishes the investigation of criminal conduct from the trial context:[2146]

> [T]rial is not just an inquiry on an alleged wrongdoer, which aims to determine the truth or otherwise of the proposition that she committed a specified wrong; it is a process through which she is called to answer—to answer to the charge that she committed this crime, and to answer for such wrongful conduct as is proved against her.

An inquiry cannot call suspected perpetrators to answer to allegations in the same manner as a criminal trial. It may be that the legally binding nature of a trial and judgment is essential for an expressive role. However, Mark Drumbl writes:[2147]

> Trials can educate the public through the spectacle of theater—there is, after all, pedagogical value to performance and communicative value to dramaturgy. This performance is made all the more weighty by the reality that, coincident with the closing act, comes the infliction of shame, sanction, and stigma upon the antagonists.

While inquiry reports do not directly produce legal sanctions, they may well inflict 'shame, sanction, and stigma', in the sense of reputational costs. In this sense, the expressivist function links with the idea of accountability as "having to answer for one's actions in terms of human rights and humanitarian standards, with some measure of sanction if violations are found".[2148]

Much has been written about how shaming can induce actors to comply with obligations.[2149] Michael Kirby and Sandeep Gopalan observe that a "proper appreciation of shaming

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[2144] Mirjan Damaška, 'What is the Point of International Criminal Justice?', (2008) 83(1) Chi-Kent L Rev 329-365, at 345.

[2145] *Ibid*.

[2146] Antony Duff, 'Can we Punish the Perpetrators of Atrocities?', in Thomas Brudholm and Thomas Cushman (eds), *The Religious in Responses to Mass Atrocity: Interdisciplinary Perspectives* (New York: CUP, 2009) 79-104, at 82.

[2147] Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: CUP, 2007) at 175.

[2148] Christine Bell, 'Post-Conflict Accountability and the Reshaping of Human Rights and Humanitarian Law', in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford: OUP, 2011) 328-370 at 331, citing Nico Krisch, 'The Pluralism of Global Administrative Law', 17 EJIL (2006) 247-278, at 249.

[2149] E.g., James Franklin, 'Human Rights Naming and Shaming: International and Domestic Processes', in H. Friman (ed.), *The Politics of Leverage in International Relations: Name, Shame, and Sanction* (Basingstoke: Palgrave Macmillan, 2015) 43-60 and Emilie Hafner-Burton, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem', (2008) 62 *International Organization* 689-716.

illustrates the powerful role that the institution of [inquiry] can play in international law."[2150] They argue that shaming and negative publicity can induce compliance by the concerned state and oblige the international community to acknowledge violations and take corrective action.[2151] Abbott and others write that institutions that report on compliance with legal norms create "implicit sanctions for states that wish to be seen as trustworthy members of an international community."[2152]

Commissions' findings can also counteract denials by concerned states and provoke them into 'rhetorical entrapment', whereby denial gives way to instrumental engagement with norms, which are eventually internalized.[2153] For instance, following the North Korea Commission's report, several states condemned the concerned state's human rights record[2154] and Botswana terminated its diplomatic relations.[2155] Although the DPRK dismissed the report as fabricated by 'hostile forces',[2156] Pyongyang dispatched its foreign minister to the General Assembly for the first time in fifteen years[2157] and issued its own human rights report.[2158] The timing of these events invites the view that the DPRK was responding to sharpened pressure levelled at it as a result of the Commission's report. Conversely, some scholars observe that the language of international law may not always be effective in encouraging compliance, but instead lead to a hardening of positions and resistance. Patricia Goedde writes that North Korea perceives human rights discourse as 'lawfare' and that "rights diffusion may be more successfully localized if it resonates within an easily understood cultural context", using alternative discourses and frameworks.[2159] Inquiry reports may induce actors to strategically utilise the international legal framework but whether they encourage norm internalization is another matter.

Some authors identify limits to the expressive functions of international criminal courts which might be shared by commissions of inquiry. These obstacles include barriers to communication with different audiences[2160] and Western cultural assumptions arguably latent

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[2150] Kirby and Gopalan, *supra* note 60, at 294.
[2151] *Ibid*., at 284 and 294.
[2152] Abbott *et al*, *supra* note 8, at 418.
[2153] Stanley Cohen, 'Government Responses to Human Rights Reports: Claims, Denials, and Counterclaims', (1996) 18 HRQ 517-543.
[2154] E.g., US Department of State, 'Release of the Final Report of the UN Commission of Inquiry into the Human Rights Situation in the D.P.R.K.', 17 February 2014, available at http://2009-2017.state.gov/r/pa/prs/ps/2014/02/221710.htm (accessed 1 May 2018); UK Foreign and Commonwealth Office, 'DPRK Human Rights Violations Condemned', 28 March 2014, available at http://www.gov.uk/government/news/dprk-human-rights-violations-condemned (accessed 1 May 2018); New Zealand Parliament, 'Motions – Human Rights – Democratic People's Republic of Korea', (10 May 2016) 713 NZPD 10879.
[2155] Kwanwoo Jun, 'Botswana Cuts North Korea Ties', *Wall Street Journal*, 20 February 2014, available at http://blogs.wsj.com/korearealtime/2014/02/20/botswana-cuts-north-korea-ties (accessed 1 May 2018).
[2156] *North Korea response*, *supra* note 2068.
[2157] Oliver Hotham, 'DPRK foreign minister to attend UN General Assembly', *NK News*, 1 September 2014, available at http://www.nknews.org/2014/09/dprk-foreign-minister-to-attend-un-general-assembly (accessed 1 May 2018).
[2158] *Report of the DPRK Association for Human Rights Studies*, 23 September 2014, available at http://www.kfausa.org/report-dprk-association-human-rights-studies (accessed 1 May 2018).
[2159] Patricia Goedde, 'Human Rights Diffusion in North Korea: The Impact of Transnational Legal Mobilization', (2017) *Asian Journal of Law and Society* 1-29, at 20.
[2160] Meijers and Glasius, *supra* note 2138, at 433.

in ICL.[2161] Shiri Krebs issues a more fundamental challenge to the expressivist role of commissions which make findings of legal responsibility. She argues that commissions engage in the 'legalization of truth', defined as "adoption of legal discourse to construct and interpret facts outside the courthouse",[2162] in the belief that "legal reports uniformly inform the relevant publics with an authoritative account of what happened and motivate domestic sanctioning of in-group offenders".[2163] Based on the results of empirical experiments, Krebs argues that while 'legal truth' provides a framework through which to understand facts, legal discourse in inquiry reports is likely to trigger cognitive and emotional biases and belief polarization; reduce perceptions of the fairness of the report and be less effective than moral framing in influencing attitudes on accountability.[2164] She recommends greater recognition of the limitations of legal discourse in respect of the interpretation of facts and the nature of its influence on attitudes and beliefs.[2165] While the experiments may not have external validity,[2166] Krebs' study invites scrutiny of commonly held assumptions regarding 'legal truth' and juridified fact-finding.

4.3 Political accountability and accountability politics

Several commissions identified institutional and political reforms as necessary to comprehensively address violations and prevent their recurrence, especially in respect of conflict situations and authoritarian regimes. For instance, the North Korea Commission wrote, "[o]nce a process to carry out profound political and institutional reforms within the DPRK is underway, a parallel Korean-led transitional justice process becomes an urgent necessity."[2167] Commissions' recommendations for political and institutional reform were rather broad and generalized in comparison with their detailed consideration of modalities for legal accountability. Ratner writes that a legalistic focus ignores the fact that accountability is a "fundamentally political process"[2168] which must be achieved gradually with consensus. Ratner cautions that politics "does and should affect the interpretation of a commission's mandate, the tone of the report, and the recommendations",[2169] so fact-finding demands political as well as legal expertise. Other commentators are less enthusiastic about overt engagement with politics. Saxon writes that while commissions should not ignore the political context, they should distinguish documenting the political situation from seeking to achieve political objectives to avoid "colouring their results with political influences".[2170] Moreover,

[2161] Barrie Sander, 'The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law', *iCourts Working Paper Series No. 38*, January 2016, available at http://ssrn.com/abstract=2711236 (accessed 1 May 2018).
[2162] Shiri Krebs, 'The Legalization of Truth in International Fact-Finding', (2017) 18(1) Chi J Int'l L 83-163, at 83.
[2163] *Ibid*.
[2164] *Ibid*.
[2165] *Ibid*.
[2166] These findings may be limited to the US context as all respondents were US nationals and the experiments measured beliefs concerning reports of war crimes by US marines during a military operation in Afghanistan: *ibid*., at 91.
[2167] *North Korea Report*, *supra* note 32, para. 1203.
[2168] Ratner 2015, *supra* note 401, at 554.
[2169] *Ibid*.
[2170] Saxon, *supra* note 736, at 213.

commissions should not make recommendations aimed at "resolving or ameliorating the situations or events that they investigate."[2171]

It might be thought that by focusing on legal rather than political responses, commissions avoid the appearance of politicization. However, some scholars identify latent politics in legal processes and in particular the turn towards criminal law in human rights practice. Engle observes, "as advocates increasingly turn to [ICL] to respond to issues ranging from economic injustice to genocide, they reinforce an individualized and decontextualized understanding of the harms they aim to address, even while relying on the state and on forms of criminalization of which they have long been critical."[2172] Laurel Fletcher writes that international efforts to secure accountability mostly focus on individuals, and observes:[2173]

> One question that the neglect of international State accountability raises is whether international criminal accountability is a mere distraction or decoy drawing attention away from addressing the role of States in perpetrating atrocity crimes and in maintaining structures that may threaten peace, even after responsible leaders have been prosecuted in The Hague.

This view finds synergies with the critique that an emphasis on individual responsibility can distract from or mask responsibilities of collective actors.[2174] From this perspective, a legal focus does not reduce the influence of politics, but rather reflects a change in their manifestation.

It may be queried whether inquiry reports can transcend power politics.[2175] Stanley Cohen observes that responses to IHRL violations often do not arise from the violation *per se* but because the response aligns with geopolitical interests.[2176] Bassiouni observes that because the UN operates as a political process, the activity of upholding accountability and human rights is conditioned by political oversight.[2177] Bassiouni sees sophisticated *realpolitik* at work in all cases, including 'successes' such as the Security Council's referral of the situation in Darfur.[2178] Schwöbel-Patel argues that accountability-oriented commissions are utilised as part of an "intervention formula"[2179] by global powers and "implicated in international law's entwinement in a civilising mission"[2180] of liberal internationalism. Other commentators are more optimistic, viewing commissions as capable of influencing political actors and processes. For instance, Alston writes that the Darfur Commission's report promoted transparency and accountability in the Security Council, and that "[i]t is one thing for the Council to be confronted only with diffuse political pressures, some media exposés, and a

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[2171] *Ibid*., at 222 (citations omitted).
[2172] Engle, *supra* note 784, at 1071.
[2173] Laurel Fletcher, 'A Wolf in Sheep's Clothing: Transitional Justice and the Effacement of State Accountability for International Crimes', (2016) 39 Fordham Int'l LJ 447-531, at 517.
[2174] See Chapter Two, Section 6.1.
[2175] See Richard Burchill, 'From East Timor to Timor-Leste: A Demonstration of the Limits of International Law in the Pursuit of Justice', in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds), *The Legal Regime of the International Criminal Court* (Leiden: Martinus Nijhoff, 2009) 255-296.
[2176] Cohen, *supra* note 2153.
[2177] Bassiouni 2001, *supra* note 98, at 55.
[2178] Bassiouni 2016, *supra* note 773, at 373-374.
[2179] Schwöbel-Patel, *supra* note 103, at 166.
[2180] *Ibid*., at 165.

range of civil society perspectives when determining whether or not to take action in a human rights situation. It is quite another to have to respond to a carefully documented and powerfully argued analytical report."[2181] Although UN atrocity inquiries operate within a political context, they may in turn condition that context.

Conclusions

Commissions examined the responsibilities of a range of actors for violating international law, with analysis centring on states and, increasingly, individuals. This area of focus is perhaps not surprising considering the centrality of individual responsibility in commissions' mandates and the dominance of criminal responsibility in accountability discourse more generally. Such a focus is not value-free, but rather reflects choices to construct 'legal truth' rather than other narratives and to focus on individual accountability. While a legal focus may appear to be objective, from a critical perspective, it reflects and may even disguise political interests.

Commissions' recommendations represent considerations of feasibility and pragmatism as well as a commitment to legal principles. Their proposals for modalities of international criminal prosecutions, truth-seeking mechanisms and reparations reflect an appreciation of the situation 'on the ground' and the needs of affected communities. By linking states' legal obligations with political commitments such as R2P, commissions presented a multi-dimensional approach to accountability bolstered by legal and political doctrines. Their 'legacy planning' proposals for follow-up mechanisms revealed commissions' awareness of the need to continue applying pressure after their mandates had formally concluded.

Commissions have both instrumental and intrinsic roles to play in ensuring accountability for violations of international law. Their reports may encourage enforcement of legal responsibilities and also represent a form of moral sanction. These different functions arguably call for different levels of engagement with responsibility regimes. In respect of legal accountability, commissions' findings should be sufficiently robust to make the case for corrective action while not duplicating or contradicting the work of judicial bodies. Such an approach may not warrant in-depth analysis or firm conclusions of responsibility, especially ICL. By contrast, if seeking to denounce violators and impose reputational costs, more detailed analysis may be in order. Such a role may be more pronounced where legal accountability is unlikely for political or practical reasons.

Commissions also touched upon political and policy-based measures as part of a broad approach to accountability that included preventive dimensions. Commentators are divided as to the desirability of commissions' engagement with political aspects of situations. It may further be argued that commissions should concentrate on supporting particular accountability responses rather than acting as a 'jack of all trades'. Hellestveit argues that otherwise, a commission risks becoming purposeless, "weakening its potential impact, except for its symbolic value as an expression of concern by the international community."[2182] However, this symbolic or expressive function should not be entirely discounted. Commissions can

[2181] Alston 2005, *supra* note 96, at 606.
[2182] Hellestveit, *supra* note 20, at 369-370.

recognise victims' experiences, affirm rights and protections, denounce violations, and stigmatise perpetrators. From this perspective, they are not only a step along the road to accountability but may be accountability mechanisms "in their own right".[2183] Though borne out of political forces and ultimately returning to them, UN atrocity inquiries represent a moment in which the value of accountability is independently affirmed and are an important part of the UN's contemporary accountability architecture.

[2183] Butchard and Henderson, *supra* note 104, at 21 (emphasis omitted).

CONCLUSIONS

The recent proliferation of UN atrocity inquiries has given rise to new questions regarding their identity in the international legal order. This Conclusion summarises the main findings of each Chapter and offers some overarching reflections as to the contemporary and future place of UN atrocity inquiries in the international legal order.

Summary of Findings

The Introduction set the research agenda and delineated UN atrocity inquiries as the subjects of research. While inquiries into situations of atrocities have been established in different settings, the UN context is special for two reasons. First, the UN has established the majority of international atrocity inquiries, giving rise to a degree of institutional consistency amidst the *ad hoc*-ery generally associated with such bodies. Secondly, the UN represents a forum and conduit for collective action on the part of the international community.

Chapter One situated UN atrocity inquiries within larger institutional and historical contexts. It traversed the history of international atrocity inquiries established between states, by international and regional organisations, and in the field of IHL. This Chapter then identified different periods in UN history and linked the rise of UN atrocity inquiries with geopolitical seismic shifts and new conceptual and institutional linkages between the fields of development, security, and human rights.

Chapter Two demonstrated how the institutional characteristics and choices of UN mandating authorities shaped the roles and functions of UN atrocity inquiries. It described how the Security Council, Secretary-General, General Assembly, and HRC acted as inquiry architects, sketching commissions' broad scope and aesthetics. The varied powers and purposes of these mandating authorities produced different degrees of consent and cooperation by concerned states. The HRC has emerged as the most prolific mandating authority and also the most politically polarizing. Written mandates giving rise to apprehensions of bias or predetermination set commissions at a significant disadvantage, as they were perceived as an instrument of the mandating authority. The turn towards international law in inquiry can be traced to the terms of written mandates which requested commissions to characterise facts on the basis of international law. Juridified inquiry was further emphasized through the practice of appointing international legal experts as commissioners. Mandating authorities also shaped commissions' roles and functions through operational aspects such as resourcing and time limits, but most operational aspects of inquiry were entrusted to commissions. These practices give rise to several tensions for the roles and functions of inquiry. Mandating authorities, especially those with power to take binding enforcement action, expressed concern about accountability while retaining discretion to act. Inquiries built pressure against those violating international law while releasing pressure directed at mandating authorities to act. There is also some disparity on the part of mandating authorities in bestowing upon commissions a function of ensuring accountability when their powers and operational capacities do not allow them to carry out corrective follow-up action directly. This invites critiques that the decision

to establish an inquiry in the absence of further follow-up action reflects subtle *realpolitik* at work.

Chapter Three examined how commissions acted as engineers of their mandates by interpreting and implementing the mandating authority's broad plan with an eye to feasibility and practicality. It discussed how commissions interpreted their mandates in an effort to reinforce their impartiality and ensure that mandates were of appropriate scope. Commissions' design of their working methods reflected a desire to carry out impartial and credible investigations in light of constraints posed by time, resources, and security concerns. Information gathering and assessment practices were also guided by key principles, such as the centrality of victims and accountability. Where states refused to cooperate, commissions found innovative ways to gather information so as not to frustrate their mandates. They responded to concerns of methodological *ad hoc*-ery by adopting best practices. The emergence of common standards and procedures invites the idea that inquiries occupy a unique institutional space.

Chapter Four discussed how commissions' roles and functions shaped their identification of the applicable legal framework and the substantive applicability of fields of law to the situation and actors under examination. Where denunciation and stimulation of enforcement action lay at the heart of the mandate, there was a strong emphasis on assessing atrocities on the basis of international law. By contrast, where de-escalation of tensions was the underlying purpose, legal assessment was depicted as less important and even as unhelpful. Within the former approach, commissions interpreted the legal lenses of their mandates broadly to include other legal fields deemed as relevant. Commissions drew links between these fields, giving the impression of a mutually reinforcing normative framework. Their interpretations of the substantive applicability of legal fields reflected their roles and functions as well as wider principles such as even-handedness in investigations.

Chapter Five thematically assessed commissions' approaches to interpretation and application of international law in light of their roles and functions. Commissions promoted an expansive reach of human rights and fundamental freedoms but also demonstrated a concern to remain within the bounds of accepted law. Commissions' approaches to making findings of violations revealed that different emphases were placed on the value of certainty or rhetorical impact. *Prima facie* findings of patterns of serious violations made a case for action but were vulnerable to rebuttal. Conversely, more circumspect findings with a high degree of certainty might form an authoritative narrative, but arguably did not fully convey the gravity of atrocities. These choices reflect the idea that commissions straddle advocatory and adjudicative approaches to legal interpretation and application. Whether commissions' legal pronouncements have the capacity to play a jurisgenerative role, or whether they are simply discourse *about* international law, depends on one's conception of international law more generally.

Chapter Six took a closer look at commissions' roles and functions with respect to ensuring accountability for violations of international law. It found that while commissions examined responsibilities of different actors, there was an emphasis on those of states and individuals. Commissions engaged with the ICL framework in a selective and strategic way, to promote

and complement criminal proceedings. Commissions recommended a range of corrective measures to give effect to the rights to the truth, justice and remedies. They also identified intermediate steps to monitor and report upon implementation, so as to maintain pressure after their mandates had come to an end. The Chapter also discussed commissions' roles with respect to legal, moral and political dimensions of accountability. Commissions acted as precursors or catalysts for international judicial proceedings, and more rarely, as outsourced criminal investigations. Where prosecutions did take place, a commission could complement the narrow focus of a trial by providing a broader account of the history, causes and contributing factors in a situation of atrocities. Where legal accountability was unlikely, a commission's role as an arbiter of moral judgement was brought to the fore. Inquiry reports also had an expressive function in affirming the rule of law. A strong legal focus does not fully insulate commissions from global politics, since international law is itself shaped by political forces and commissions are established by and report to political actors. Nonetheless, when commissions affirm the rule of law and raise expectations for corrective action, they condition that political context.

Reflections on Roles and Functions of Contemporary Inquiry

The turn to international law in most UN atrocity inquiries has fundamentally shaped their functional and relational identities in the international legal order. Commissions seeking to promote accountability for violations and the rule of law are associated with functions of truth-seeking, giving a voice to victims, condemning violations, raising alert, inducing compliance and provoking corrective follow-up action. Such commissions perform triage accountability assessments, bring situations to the attention of the international community and justify the engagement of international criminal justice. Such commissions represent a "sequential model" [2184] of international criminal justice, commencing with non-judicial evidence collection and followed by criminal trials. In practice, uneven implementation has engendered critiques that inquiries often serve as placeholders rather than as precursors for accountability.

More pragmatically, commissions also act as 'safety valves', as originally proposed by Martens at the 1899 Peace Conference, to slow down and guide stakeholders' responses in situations of concern. Additionally, the example of the Palmer Commission shows that an atrocity inquiry may function to deescalate tensions and resolve diplomatic ruptures rather than to condemn violations and trigger legal enforcement. The Palmer Commission acted as a neutral third party rather than a moral authority and emphasised diplomatic channels and policy considerations. The institution of inquiry thus remains flexible and may be established in pursuit of lofty legal principles as well as more pragmatic goals.

Commissions' interpretations and operationalisations of their mandates also reflect principled and pragmatic considerations, as informed by their roles and functions. Where the impartiality of an inquiry has been compromised by the mandating authority, commissions adopt a highly principled approach to mandate interpretation in an effort to insulate their work from the

[2184] Caroline Fehl and Eliška Mocková, 'Chasing Justice for Syria: Roadblocks and detours on the path to accountability,' *PRIF Spotlight 5/2017*, September 2017, available at http://www.hsfk.de/fileadmin/HSFK/hsfk_publikationen/Spotlight0517.pdf (accessed 1 May 2018).

politicised circumstances of their establishment. Yet in carrying out fact-finding, commissions facing non-cooperation by concerned states often find pragmatic workarounds to fact-finding challenges to prevent the frustration of their mandates. Commissions seeking to give a voice to victims and raise alert often adopt a victim-oriented perspective, enter more expansive findings with a lower degree of certainty, and adopt a more flexible legal approach. By contrast, commissions aiming to support prosecutions have taken a more cautious and technical approach to findings of fact and law. A more conservative approach may also neutralise accusations that commissions reproduce bias in their mandating authorities.

Commissions' engagement with international law places them firmly on the map of international legal discourse and arguably renders them participants in the argumentative practice of international law. Yet to analogise inquiry with adjudication would overlook central political dimensions to their work. The decision to establish an inquiry reflects a commitment to legal principle as well as institutional pragmatism. When using the language of international law, commissions make a case for principled action, but also display selective engagement with legal frameworks in light of practical realities. In addition, the informality of inquiry means that commissions are not restricted by judicial traditions of legal reasoning, nor are there binding consequences for implicated actors. Commissions are in this sense well-placed to propose innovative interpretations of legal norms and to draw attention to violations that have not received much attention in judicial settings. In this sense, commissions have roles as norm entrepreneurs and as norm amplifiers.

Back to the Future

Looking to the future of UN atrocity inquiries, some current trends suggest that their roles and functions may circle back to the essential task of finding facts. As new communicative technologies gain in popularity, information concerning situations of atrocities is increasingly acquired and shared through informal networks and communities. Initiatives such as *Bellingcat* use information from open sources and social media networks to investigate a variety of subjects, including situations of atrocities.[2185] International criminal proceedings have already evolved in response to the availability of digital and technologically derived evidence and the challenges of veracity posed by these information sources.[2186] Future commissions are also likely to have access to a huge amount of digital information and be confronted by issues of the chain of custody, authentication and reliability of open-source information, compounded by challenges of technical expertise and resources.[2187] The risks faced by those collecting information, and the protection of safety and privacy of victims and witnesses who may be identified on the basis of that information, are further concerns.

[2185] Bellingcat, 'About', http://www.bellingcat.com/about (accessed 9 June 2018).

[2186] International Bar Association, *Evidence Matters in ICC Trials*, August 2016, available at http://www.ibanet.org/Document/Default.aspx?DocumentUid=864b7fc6-0e93-4b2b-a63c-d22fbab6f3d6 (accessed 10 June 2018) and Lindsay Freeman, 'Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials', (2018) 41(2) Fordham Int'l LJ 283-336.

[2187] Jay Aronson, 'Mobile Phones, Social Media and Big Data in Human Rights Fact-Finding', in Alston and Knuckey, *supra* note 94, at 441-461. For an example of verification techniques, see Syrian Archive, 'Methodology', available at http://syrianarchive.org/en/tools_methods/methodology (accessed 15 June 2018).

The democratization of fact-finding also raises new questions regarding our understanding of facts and the truth-seeking function of UN atrocity inquiries. In addition to acting as a tool for mobilizing and empowering communities, 'bottom-up' fact-finding strategies can disrupt traditional hierarchies of knowledge production.[2188] The recent attacks against 'fake news', which refers both to deliberate misinformation and a pretext for undermining genuine journalism, gives rise to new challenges for the credibility of public information. In this context, commissions' function of producing authoritative narratives of events may become more pronounced. However, the associated phenomenon of 'post-truth'[2189] politics has seen a shift in the role of information in shaping public opinion and governmental policies. Impartial inquiry could counter such political strategies, but conversely this trend might weaken the extent of commissions' influence, at least in certain political contexts beyond the UN.[2190]

We may also see a shift in emphasis away from the role of inquiry in facilitating criminal accountability. In recent years the UN has established non-judicial investigative mechanisms to facilitate criminal proceedings, such as the IIIM in respect of Syria and the Security Council's investigative team in Iraq.[2191] In March 2018, several states called for a mechanism similar to the IIIM to be established in respect of Myanmar.[2192] Though such entities remain rare, commentators identify a trend towards their establishment: the IIIM has been hailed as "the crystallization of a new approach to international criminal justice and an enhanced role of the General Assembly in the area of accountability".[2193] As the establishment of such mechanisms marks a concrete commitment to criminal accountability and involves significant resources, commissions may be established to conduct reconnaissance, with their findings of crimes informing the decision to establish a formal investigative mechanism.

While mandating authorities might prefer to establish a criminal investigative mechanism instead of an inquiry in certain situations, it is unlikely that commissions will be entirely displaced. Such mechanisms lack the flexibility, breadth and essential publicness of inquiry. Their chief aim is not to issue public findings but rather to feed into judicial processes. A large part of their work must remain confidential to facilitate investigations and protect the

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[2188] Molly Land, 'Democratizing Human Rights Fact-Finding', in Alston and Knuckey, *supra* note 94, at 399-424.

[2189] 'Post-truth' (adj.) is defined as "[r]elating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief": Oxford English Dictionary, 'Post-truth', available at http://en.oxforddictionaries.com/definition/post-truth (accessed 10 June 2018).

[2190] A pertinent example is the omission of any mention of the human rights situation in North Korea at a diplomatic summit between the United States and North Korea on 12 June 2018: Human Rights Watch, 'The Singapore Summit's Failure on North Korean Human Rights', 13 June 2018, available at http://www.hrw.org/news/2018/06/13/singapore-summits-failure-north-korean-human-rights (accessed 15 June 2018).

[2191] See Chapter Two, Section 4.2.2 and Chapter Two, Section 4.2.4.

[2192] Statement by H.E. Ambassador Veronika Bard, 'Interactive Dialogue on Myanmar – Sweden', 37th Session of the Human Rights Council, 11 March 2018, available at https://www.swedenabroad.se/en/embassies/un-geneva/current/news/interactive-dialogue-on-myanmar---sweden (accessed 10 June 2018) and Canada, *"Tell them we're human" What Canada and the world can do about the Rohingya crisis: Report of the Prime Minister's Special Envoy, the Honourable Bob Rae*, 2018, available at http://international.gc.ca/world-monde/assets/pdfs/rohingya_crisis_eng.pdf (accessed 10 June 2018).

[2193] Christian Wenaweser and James Cockayne, 'Justice for Syria? The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice', (2017) 15(2) JICJ 211-230, at 229.

integrity of the trial process. They are ill-equipped to inform policy, provide a contextual account of a situation of atrocities, raise alert or express condemnation of violations. As these functions remain important in the UN context, inquiry can complement the work of criminal investigative mechanisms.

UN atrocity inquiries are not likely to be rendered obsolete by the emergence of new information technologies or investigative mechanisms. However, their roles and functions may evolve in response to the changing fact-finding landscape. In this context, the original function of finding facts may be revitalized and complement the narrow focus of criminal mechanisms. In turn, the equilibrium to be struck between principle and pragmatism may also shift. Should commissions focus less on analysing international crimes and more on constructing contextual narratives of events and indicating the range and extent of atrocities, they might take a more pragmatic approach to information-gathering and assessment without undermining their authority. If space is retained for diplomatic and policy-based responses, we might also see an expansion in the types of situations under scrutiny, such as interstate conflicts or uses of force. However, as findings of atrocities imply the need for corrective action whether expressly classified as violations or not, they will continue to draw the attention of actors in the international justice space. Ultimately, the flexibility of UN atrocity inquiries and their positioning between the realms of law and politics means that they will continue to occupy a liminal place in the international legal order.

APPENDIX

UNITED NATIONS ATROCITY INQUIRIES 1945–2018

UN Atrocity Inquiry Name	Mandating Authority	Mandate	Final Report
UN Fact-Finding Mission to South Vietnam	General Assembly	A/PV.1239 11 Oct 1963	A/5630 7 Dec 1963
Commission of Inquiry on Reported Massacres in Mozambique	General Assembly	GA Res. 3114 (XXVIII) 12 Dec 1973	A/9621 22 Nov 1974
Commission of Experts concerning the former Yugoslavia	Security Council	SC Res. 780 (1992) 6 Oct 1992	S/1994/674 27 May 1994
Commission of Experts concerning Rwanda	Security Council	SC Res. 935 (1994) 1 July 1994	S/1994/1405 9 Dec 1994
International Commission of Inquiry concerning Burundi	Security Council	SC Res. 1012 (1995) 28 Aug 1995	S/1996/682 22 Aug 1996
Group of Experts for Cambodia	General Assembly	GA Res. 52/135 12 Dec 1998	A/53/850 16 Mar 1999
Commission of Inquiry on East Timor	UNCHR	CHR Res. S-4/1 27 Sept 1999	S/2000/59 31 Jan 2000
International Commission of Inquiry for Togo	Secretary-General	E/CN.4/Sub.2/2000/8 7 June 2000	E/CN.4/2001/134 22 Feb 2001
Human Rights Inquiry Commission on Palestine	UNCHR	CHR Res. S-5/1 19 Oct 2000	E/CN.4/2001/121 16 Mar 2001
Commission of Inquiry on the Events Connected with the March Planned for 25 March 2004 in Abidjan	Secretary-General	No reference 2 April 2004	S/2004/384 13 May 2004
International Commission of Inquiry on allegations of violations of human rights in Côte d'Ivoire	Security Council	S/PRST/2004/17 25 May 2004	Unofficial report Undated
International Commission of Inquiry for Darfur	Security Council	SC Res. 1564 (2004) 18 Sep 2004	S/2005/60 1 Feb 2005
UN Independent Special Commission of Inquiry for Timor-Leste	Secretary-General	S/2006/383 13 June 2006	S/2005/458 15 July 2005
International Commission of Inquiry on Lebanon	HRC	HRC Res. S-2/1 11 Aug 2006	A/HRC/3/2 23 Nov 2006
High-Level Fact-Finding Mission in Beit Hanoun	HRC	HRC Res. S-3/1 15 Nov 2006	A/HRC/9/26 1 Sep 2008
High-Level Mission on the situation of Human Rights in Darfur	HRC	HRC Dec. S-4/101 13 Dec 2006	A/HRC/4/80 7 Mar 2007
UN Fact Finding Mission on the Gaza Conflict	HRC	HRC Res. S-9/1 12 Jan 2009	A/HRC/12/48 25 Sep 2009
International Commission of Inquiry Mandated to Establish the Facts of Events of 28 September 2009 in Guinea	Secretary-General	S/2009/556 28 Oct 2009	S/2009/693 18 Dec 2009

International Fact-Finding Mission to Investigate Violations of International Law Resulting from Israeli Attacks on the Flotilla Carrying Humanitarian Assistance	HRC	HRC Res. 14/1 2 June 2010	A/HRC/15/21 27 Sep 2010
Secretary-General's Panel of Experts on Accountability in Sri Lanka	Secretary-General	SG/SM/12967 22 June 2010	Panel Report 31 Mar 2011
Panel of Inquiry on the 31 May 2010 Flotilla Incident	Secretary-General	S/2010/414 3 Aug 2010	Palmer Report Sep 2011
International Commission of Inquiry on the Libyan Arab Jamahiriya	HRC	HRC Res. S-15/1 25 Feb 2011	A/HRC/19/68 28 Jan 2014
International Independent Commission of Inquiry on the Situation of Human Rights in Côte d'Ivoire	HRC	HRC Res. 16/25 25 Mar 2011	A/HRC/17/48 1 July 2011
Independent International Commission of Inquiry on the Syrian Arab Republic	HRC	HRC Res. S-17/1 23 Aug 2011	A/HRC/39/65 9 Aug 2018
Independent International Fact-finding Mission to Investigate the Implications of the Israeli Settlements on the Human Rights of the Palestinian People Throughout the Occupied Palestinian Territory	HRC	HRC Res. 19/17 22 Mar 2012	A/HRC/22/63 7 Feb 2013
Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea	HRC	HRC Res. 22/13 21 Mar 2013	A/HRC/25/CRP.1 7 Feb 2014
International Commission of Inquiry on the Central African Republic	Security Council	SC Res. 2127 (2013) 5 Dec 2013	S/2014/928 22 Feb 2014
International Commission of Inquiry on Eritrea	HRC	HRC Res. 26/24 27 June 2014	A/HRC/32/CRP.1 8 June 2016
UN Independent Commission of Inquiry on the 2014 Gaza Conflict	HRC	HRC Res. S-21/1 23 July 2014	A/HRC/29/CRP.4 24 June 2015
Commission on Human Rights in South Sudan	HRC	HRC Res. 31/20 23 Mar 2016	A/HRC/37/CRP.2 23 Feb 2018
Commission of Inquiry on Human Rights in Burundi	HRC	HRC Res. 33/24 30 Sep 2016	A/HRC/39/63 8 Aug 2018
Independent International Fact-Finding Mission on Myanmar	HRC	HRC Res. 34/22 24 Mar 2017	A/HRC/39/64 24 Aug 2018
UN Commission of Inquiry on the 2018 protests in the Occupied Palestinian Territory	HRC	HRC Res. S-28/1 18 May 2018	n/a

SUMMARY

The United Nations plays an important role in preventing and responding to situations of mass atrocities. The UN system provides for many strategies to address such situations, including fact-finding. Fact-finding may take different forms, including international commissions of inquiry. These bodies are established on the international legal plane, conduct *ad hoc* fact-finding, are impartial and independent, and issue non-binding reports and recommendations. The UN has established at least thirty atrocity-related inquiries, which are frequently mandated to investigate suspected violations of international law, identify those responsible for violations, and make recommendations. Their reports inform their mandating authorities and can feed into broader processes of justice and accountability. UN atrocity inquiries resemble judicial processes in some respects, while remaining non-legal in others.

The proliferation of UN atrocity inquiries during the past twenty-five years, in concert with their mandates to examine violations of international law, gives rise to new questions as to their identity in the international legal order. The thesis explores two elements of identity: functional and relational. Functional identity (functions) refers to the ends to be attained by UN atrocity inquiries, while relational identity (roles) refers to commissions' place vis-à-vis other institutions. These concepts illuminate the unique institutional space in which commissions are situated. In determining the roles and functions, and thus the identity of UN atrocity inquiries, the thesis interrogates their turn to international law (juridification) and their navigation of considerations of principle (the legal) and pragmatism (the political).

To set the scene, Chapter One contextualises UN practice through a historical and institutional taxonomy of international inquiries into situations of atrocities. The earliest inquiries were established pursuant to *ad hoc* interstate agreements. States established international humanitarian law (IHL) inquiry procedures but did not use them much in practice. Regional organisations have established a few inquiries. By contrast, the UN has a rich practice of establishing atrocity inquiries, particularly from 1992 onwards, where the Yugoslavia Commission represented a 'watershed moment'. This period also marked greater recognition of the links between the realms of development, security and human rights, and the revitalisation of international criminal law. The features of these different inquiries were inexorably shaped by wider institutional and political dynamics.

The roles and functions of UN atrocity inquiries are informed by the institutional dynamics and choices of their mandating authorities, namely the Security Council, Secretary-General, General Assembly, and Human Rights Council. Chapter Two explores how UN mandating authorities act as 'architects' by sketching out the aesthetics and conceptual plan of inquiries through their mandates. The varied powers and purposes of mandating authorities produce differences in state consent and cooperation. The HRC is currently the most prolific mandating authority and also the most politically polarizing. Mandates giving rise to apprehensions of bias set commissions at a disadvantage, as they are perceived as politicised instruments of their mandating authorities. The juridification of inquiry is linked to mandates requesting commissions to establish the facts of atrocities on the basis of international law. Juridified inquiry is further emphasized by appointing international legal experts as

commissioners. Mandating authorities also shape operational aspects of inquiry such as resourcing and time limits. Mandating authorities' practices give rise to several tensions. They express concern about situations while retaining discretion, so that commissions build pressure against those violating international law while releasing pressure directed at mandating authorities to act. There is also some disparity in bestowing an accountability function upon bodies whose powers and operational capacities prevent them from carrying out corrective follow-up action.

If mandating authorities are the architects of inquiries, commissions are the 'engineers', executing the mandating authority's plan with an eye to practicality. Chapter Three describes how commissions' roles and functions inform the interpretation and implementation of their mandates. Commissions generally interpret their mandates in an effort to reinforce impartiality and ensure that mandates are of appropriate scope. Commissions' design of their working methods reflects a desire to carry out impartial and credible investigations in light of constraints posed by time, resources, and security concerns. Information gathering and assessment practices are also guided by key principles such as the centrality of victims and accountability. Where states refuse to cooperate, commissions find innovative ways to gather information to avoid frustrating their mandates. Such pragmatic approaches can lead to trade-offs with respect to the authoritativeness of findings.

Commissions are often instructed to examine violations of international law, which involves norm-to-fact application. A first step in this process is the identification of the applicable international legal framework. Chapter Four discusses how commissions' roles and functions shape the identification of the applicable law and the substantive applicability of legal fields to the situation and actors under examination. Where accountability is at the heart of the mandate, there is a strong emphasis on assessing atrocities on the basis of international law. Where the aim is to de-escalate tensions, legal assessment is less crucial. Within the former approach, commissions interpret the legal lenses of their mandates broadly to include other fields deemed relevant. They draw links between fields, giving the impression of a mutually reinforcing normative framework. Commissions' interpretations of the substantive applicability of legal fields reflect their roles and functions and principles such as even-handedness in investigations.

Chapter Five discusses how commissions' engagement with substantive international law is shaped by their roles and functions. A thematic comparative analysis is conducted of commissions' interpretations and applications of substantive legal issues, namely economic, social and cultural rights, IHL principles and the right to life, sexual and gender-based violence, genocide and crimes against humanity. Cross-cutting issues are then discussed. Commissions promote an expansive reach of human rights norms while seeking to remain within the bounds of accepted law. Their findings of violations reveal differing emphases on certainty or rhetorical impact, reflecting the idea that commissions straddle advocatory and adjudicative approaches. Whether commissions' legal pronouncements can play a law-making role or are simply discourse *about* international law depends on one's conception of international law more generally.

In light of the recurrent emphasis on 'accountability' for violations in inquiry mandates and reports, Chapter Six takes a closer look at commissions' roles and functions with respect to this concept. While commissions examine responsibilities of different actors, there is an emphasis on states and individuals. They engage with international criminal law in a selective and strategic way, and recommend a range of corrective measures to give effect to the rights to truth, justice and remedies. Commissions also identify intermediate steps to promote implementation of their recommendations. Different roles with respect to legal, moral and political dimensions of accountability are visible. Commissions can act as catalysts for international judicial proceedings, and more rarely, as outsourced criminal investigations. Commissions may also act as arbiters of moral judgement and have an expressive function in affirming the rule of law. While a strong legal focus does not fully insulate commissions from global politics, they can condition that political context.

In conclusion, UN atrocity inquiries continuously navigate between realms of law and politics, with the equilibrium shifting in different moments and contexts. The turn to international law has fundamentally shaped their identity in the international legal order. Commissions seeking to promote accountability and the rule of law are associated with functions of truth-seeking, giving a voice to victims, condemning violations, raising alert, inducing compliance and provoking corrective follow-up. In practice, uneven implementation has engendered critiques that inquiries are placeholders for action rather than force-multipliers for accountability. Commissions may also act as 'safety valves', deescalate tensions and resolve diplomatic ruptures. The informality of inquiry means that commissions are not restricted by judicial traditions, nor are there binding consequences for implicated actors. Commissions are well-placed to propose innovative legal interpretations and draw attention to violations that have not received much attention in judicial settings. The decision to establish an inquiry reflects a commitment to legal principle as well as institutional pragmatism.

Looking to the future of UN atrocity inquiries, some current trends suggest that they may circle back to the essential task of finding facts. Emerging communicative technologies and the increasingly digital nature of information give rise to new issues around the authentication and veracity of information and the need for technical expertise. The democratization of fact-finding and the rise of 'post-truth' politics raise further questions regarding our understanding of facts and the role of public information. We may also see a shift away from the role of inquiry to facilitate criminal accountability in light of the recent establishment of UN mechanisms specifically for this purpose. Inquiry can complement the work of such bodies by informing policy, providing a contextual account of a situation and condemning violations. In short, UN atrocity inquiries are not likely to be rendered obsolete. Their roles and functions may instead evolve in response to the changing fact-finding landscape, with the equilibrium between principle and pragmatism also shifting. The flexibility of UN atrocity inquiries, and their positioning between realms of law and politics, means that they will continue to occupy a liminal space in the international legal order.

SAMENVATTING (SUMMARY IN DUTCH)

NAVIGEREN TUSSEN PRINCIPE EN PRAGMATISME: DE ROLLEN EN FUNCTIES BINNEN DE INTERNATIONALE RECHTSORDE VAN VN-ONDERZOEKSCOMMISSIES DIE ONDERZOEK DOEN NAAR WREEDHEDEN

De Verenigde Naties (VN) spelen een belangrijke rol in het voorkomen van, en reageren op, situaties van massale wreedheden. Het VN-systeem voorziet in vele strategieën om dergelijke situaties aan te pakken, waaronder feitenonderzoek. Feitenonderzoek kan verschillende vormen aannemen, waaronder internationale onderzoekscommissies. Deze entiteiten opereren op internationaal juridisch vlak, doen op *ad hoc* basis feitenonderzoek, zijn onpartijdig en onafhankelijk, stellen niet-bindende rapporten op en doen niet-bindende aanbevelingen. De VN hebben ten minste dertig onderzoekscommissies ingesteld die onderzoek doen naar wreedheden en veelal de opdracht krijgen vermoedelijke schendingen van internationaal recht te onderzoeken, vast te stellen wie verantwoordelijk is of zijn voor de schendingen, en aanbevelingen te doen. Met de rapporten van deze commissies worden de mandaatgevers geïnformeerd en kunnen mede hierdoor rechtsbedeling en rekenschap in bredere zin hun beslag krijgen. VN-onderzoekscommissies naar wreedheden lijken in sommige opzichten op rechtsprocessen, maar blijven op andere punten juist niet-juridisch.

De grote toename in de afgelopen vijfentwintig jaar van het aantal VN-onderzoekscommissies naar wreedheden, in combinatie met het mandaat om schendingen van internationaal recht te onderzoeken, roept nieuwe vragen op over de identiteit van dergelijke onderzoekscommissies binnen de internationale rechtsorde. In dit proefschrift worden twee identiteitselementen onderzocht: functioneel en relationeel. Functionele identiteit (functies) verwijst naar de te realiseren doelstellingen van VN-onderzoekscommissies naar wreedheden, terwijl relationele identiteit (rollen) ingaat op de positie van commissies ten opzichte van andere instellingen. Deze concepten werpen een licht op de unieke institutionele ruimte waarin onderzoekscommissies zich bevinden. Teneinde de rollen en functies vast te stellen van VN-onderzoekscommissies naar wreedheden, en daarmee de identiteit daarvan, wordt in dit proefschrift uitgediept hoe deze aanhaken bij het internationale recht (verjuridisering) en daarbij wordt genavigeerd tussen principe (het juridische) en pragmatisme (het politieke).

Ter inleiding wordt in het eerste hoofdstuk de VN-praktijk ingekaderd aan de hand van een historische en institutionele taxonomie van internationale onderzoekscommissies naar situaties van wreedheden. De allereerste onderzoekscommissies zijn in het leven geroepen naar aanleiding van interstatelijke *ad hoc* overeenkomsten. Staten stelden onderzoeksprocedures in op het gebied van internationaal humanitair recht (IHR), waar in de praktijk echter maar weinig gebruik van werd gemaakt. Wel hebben regionale organisaties enkele onderzoekscommissies opgezet. De VN daarentegen kunnen terugkijken op een rijke geschiedenis van onderzoek naar wreedheden, met name sinds de in 1992 opgerichte Joegoslavië-commissie, wat een belangrijk keerpunt was. In deze periode kwam er ook meer erkenning voor de onderlinge verhoudingen tussen ontwikkeling, veiligheid en mensenrechten, en werd het internationaal strafrecht nieuw leven ingeblazen. Dat de

kenmerken van deze verschillende onderzoekscommissies werden vormgegeven door de bredere institutionele en politieke dynamiek was onvermijdelijk.

De rollen en functies van VN-onderzoekscommissies naar wreedheden zijn geënt op de institutionele dynamiek en de keuzes van de mandaatgevers, namelijk de Veiligheidsraad, de secretaris-generaal, de Algemene Vergadering en de Mensenrechtenraad. In het tweede hoofdstuk wordt gekeken naar de manier waarop mandaatgevers van de VN het door hen af te geven mandaat gebruiken om de esthetische kenmerken en het conceptuele plan van een onderzoek te schetsen, en daarmee in feite als 'architect' kunnen worden gezien. De diverse bevoegdheden en doelstellingen van mandaatgevers zorgen voor verschillen in toestemming en medewerking van staten. De actiefste en tevens de meest polariserende mandaatgever op dit moment is de Mensenrechtenraad. Door mandaten die aanleiding geven tot vermoedens van vooringenomenheid worden commissies op achterstand gezet: zij worden gezien als de gepolitiseerde werktuigen van de mandaatgevers. De verjuridisering van het onderzoek houdt verband met mandaten waarin een commissie wordt verzocht aan de hand van het internationale recht de feiten rond wreedheden in kaart te brengen. Deze verjuridisering wordt nog verder versterkt doordat deskundigen op het gebied van internationaal recht worden aangesteld als commissaris. Ook de operationele aspecten van het onderzoek, zoals de toewijzing van middelen en termijnen, worden door mandaatgevers vormgegeven. De handelswijze van mandaatgevers leiden tot verschillende spanningen. Mandaatgevers uiten hun bezorgdheid over situaties met de nodige discretie, waarbij commissies de druk opvoeren op schenders van internationaal recht en juist druk om actie te ondernemen wegnemen bij mandaatgevers. Dat entiteiten die vanwege hun bevoegdheden en operationele capaciteiten geen corrigerende vervolgstappen kunnen nemen, maar tegelijk wel worden geacht partijen ter verantwoording te roepen, zorgt eveneens voor enige frictie.

Als mandaatgevers de architecten van het onderzoek zijn, dan zijn commissies de 'ingenieurs' die bekijken of het plan van de mandaatgever haalbaar is en daar vervolgens uitvoering aan geven. In het derde hoofdstuk wordt beschreven op welke wijze de rollen en functies van onderzoekscommissies van invloed zijn op de uitleg en uitvoering van hun mandaat. Commissies geven over het algemeen zodanig invulling aan hun mandaat om hun onpartijdigheid te versterken en een passende omvang van het mandaat te waarborgen. De manier waarop commissies te werk gaan, getuigt van een verlangen om onpartijdig en geloofwaardig onderzoek te verrichten binnen de opgelegde beperkingen van tijd, middelen en veiligheidsoverwegingen. Informatieverzameling en beoordelingspraktijken worden tevens beïnvloed door belangrijke uitgangspunten als het centraal stellen van slachtoffers en aansprakelijkheid. Wanneer staten hun medewerking weigeren, vinden commissies innovatieve oplossingen om informatie te verzamelen en zo het mandaat alsnog zeker te stellen. Een dergelijke pragmatische benadering kan leiden tot concessies ten aanzien van het gezag van de bevindingen.

Commissies krijgen vaak de opdracht schendingen van het internationaal recht te onderzoeken, waarbij onder meer normen worden toegepast op de feiten. Een eerste stap in dit proces is vaststellen welk internationaal rechtskader van toepassing is. In het vierde hoofdstuk wordt ingegaan op de wijze waarop met de rollen en functies van onderzoekscommissies gestalte wordt gegeven aan de vaststelling van het toepasselijke recht en de inhoudelijke

toepasbaarheid van rechtsgebieden op de te onderzoeken situatie en betrokkenen. Wanneer aansprakelijkheid de kern van het mandaat vormt, wordt sterk de nadruk gelegd op internationaal recht als grondslag voor de beoordeling van wreedheden. Een juridische beoordeling is minder cruciaal wanneer de-escalatie van de spanningen het doel is. Bij de eerstgenoemde benadering geeft de commissie een brede uitleg aan de juridische lens van het mandaat en worden andere relevant geachte rechtsgebieden ook in ogenschouw genomen. Er worden daarbij verbanden gelegd tussen rechtsgebieden, waarmee de indruk wordt gewekt van een wederzijds versterkend normenkader. De uitleg van commissies van de inhoudelijke toepasbaarheid van rechtsgebieden geeft blijk van de rollen en functies en van uitgangspunten als onpartijdigheid in het onderzoek.

In het vijfde hoofdstuk wordt uiteengezet hoe de rollen en functies van onderzoekscommissies van invloed zijn op de manier waarop commissies zich wenden tot materieel internationaal recht. Er wordt een thematische vergelijkende analyse uitgevoerd van de inhoud en toepassing door commissies van zaken van materieel recht, namelijk economische, sociale en culturele rechten, IHR-beginselen en het recht op leven, seksueel en gender-gerelateerd geweld, genocide en misdaden tegen de menselijkheid. Vervolgens wordt er ingegaan op transversale thema's. Commissies pleiten voor een brede uitwerking van mensenrechtennormen, maar proberen daarbij ook binnen de grenzen van aanvaard recht te blijven. In hun bevindingen over schendingen wordt in meer of mindere mate de nadruk gelegd op zekerheid dan wel retorisch effect, wat het idee onderstreept dat commissies schipperen tussen een benadering als pleitbezorger en als rechtspreker. Of de juridische uitspraken van commissies een wetgevende rol kunnen spelen of slechts een verhandeling *over* internationaal recht betreffen, hangt af van ieders kijk op internationaal recht in het algemeen.

In het licht van de steeds terugkerende nadruk in onderzoeksmandaten en -rapporten op 'aansprakelijkheid' voor schendingen wordt in het zesde hoofdstuk dieper ingegaan op de rollen en functies van commissies ten aanzien van dit concept. Commissies onderzoeken weliswaar de verantwoordelijkheden van verschillende betrokkenen, maar de nadruk ligt op staten en personen. Zij wenden zich op selectieve en strategische wijze tot het internationaal strafrecht en geven aanbevelingen voor verschillende corrigerende maatregelen om gevolg te geven aan het recht op de waarheid, het recht op rechtspraak en het recht op rechtsmiddelen. Commissies stellen ook tussenmaatregelen vast om de implementatie van hun aanbevelingen te bevorderen. Er zijn verschillende rollen zichtbaar met betrekking tot de juridische, morele en politieke kaders van aansprakelijkheid. Commissieonderzoek kan als aanjager dienen van internationale gerechtelijke procedures, en in een enkel geval als uitbesteed strafrechtelijk onderzoek. Ook kunnen commissies de toon zetten in de morele oordeelsvorming en een expressieve functie vervullen in de bekrachtiging van de rechtsstaat. Hoewel commissies zich met een sterke juridische focus niet geheel kunnen afschermen van de mondiale politiek, kunnen zij die politieke context wel enigszins kneden.

In VN-onderzoekscommissies naar wreedheden wordt ten slotte continu genavigeerd tussen het juridische en het politieke spectrum, waarbij het evenwicht verschuift al naargelang het moment en de context. De toevlucht tot het internationaal recht is van wezenlijk belang geweest in de vorming van de identiteit van dergelijke onderzoekscommissies binnen de internationale rechtsorde. Commissies die rekenschap en de rechtsstaat willen bevorderen,

worden geassocieerd met functies van waarheidsvinding: zij geven slachtoffers een stem, veroordelen schendingen, slaan alarm, roepen op tot naleving en zetten aan tot corrigerende vervolgmaatregelen. In de praktijk heeft een onevenwichtige implementatie echter de voedingsbodem gevormd voor de kritiek dat onderzoek in de plaats is gekomen van actief optreden en niet wordt gezien als een krachtig middel waarmee partijen ter verantwoording worden geroepen. Commissies kunnen ook als 'veiligheidsklep' dienen, spanningen de-escaleren en diplomatieke breuken herstellen. Door de informele aard van het onderzoek zijn commissies niet aan gerechtelijke tradities gebonden en zijn er geen bindende gevolgen voor verantwoordelijken. Commissies zijn goed gepositioneerd om vernieuwende juridische interpretaties voor te stellen en de aandacht te vestigen op schendingen die in de juridische wereld niet veel aandacht hebben gekregen. Het besluit om een onderzoek in te stellen getuigt van loyaliteit aan zowel de beginselen van het recht als aan institutioneel pragmatisme.

Als we kijken naar de toekomst van VN-onderzoek naar wreedheden, dan lijken de huidige ontwikkelingen erop te wijzen dat wordt teruggekeerd naar de wezenlijke taak van feitenonderzoek. Opkomende communicatietechnologieën en de toenemende digitalisering van informatie leiden tot nieuwe problemen omtrent de authenticiteit en juistheid van informatie en de behoefte aan technische expertise. De democratisering van het vergaren van feiten en de opkomst van 'post-truth politics' roepen nadere vragen op over ons begrip van de feiten en de rol van algemeen beschikbare informatie. Mogelijk wordt ook de onderzoeksrol om strafrechtelijke aansprakelijkheid te faciliteren in enige mate losgelaten, gezien de recente invoering van VN-mechanismen voor dit specifieke doel. Onderzoek kan een aanvulling vormen op het werk van dergelijke entiteiten, doordat beleidsmakers worden geïnformeerd, een beeld wordt gegeven van de context van een situatie en schendingen worden veroordeeld. Kortom: VN-onderzoek naar wreedheden zal naar verwachting niet overbodig worden. De rollen en functies zullen mogelijk juist meebewegen met de veranderende wereld van feitenonderzoek, waarbij ook het evenwicht tussen principe en pragmatisme zal verschuiven. Gezien de flexibiliteit van VN-onderzoekscommissies naar wreedheden en de positionering daarvan tussen het juridische en het politieke spectrum zal het een grenspositie blijven innemen binnen de internationale rechtsorde.

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CURRICULUM VITAE

Catherine Elizabeth Mary Harwood (Hastings, New Zealand, 11 February 1985) attended Palmerston North Girls' High School, after which she took Bachelor of Laws (First Class Honours) and Bachelor of Arts (sociology) degrees at Victoria University of Wellington. Catherine took her LL.M. in Advanced Studies in Public International Law at Leiden University (*cum laude*). Catherine has been admitted to the Roll of Barristers and Solicitors of the High Court of New Zealand since 2009.

Since 2018, Catherine has been an associate legal officer in the Office of Legal Affairs, United Nations, at New York. From 2013 to 2018, Catherine was a Ph.D. candidate and lecturer at the Grotius Centre for International Legal Studies at Leiden Law School, Leiden University. In 2012, Catherine interned in Chambers at the International Criminal Court and at the International Bar Association's Programme on the ICC. From 2009 to 2011, Catherine clerked for Hon. Justice Terence Arnold at the New Zealand Court of Appeal.