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

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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?

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[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.