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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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## 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,<sup>105</sup> 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

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<sup>105</sup> E.g., Bassiouni, *supra* note 97, at 784 and Darcy, *supra* note 101.

Conference, and consisted of representatives of Allied powers.<sup>106</sup> 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.<sup>107</sup> 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<sup>108</sup> – one involving British, French and Russian delegates<sup>109</sup> – and the UK’s Casement inquiry into Belgian atrocities in the Congo Free State.<sup>110</sup> Moreover, in 1914, the UK established an inquiry into German violations of IHL<sup>111</sup> 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”.<sup>112</sup> 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.<sup>113</sup> Diplomatic exchanges reveal that Germany proposed a neutral inquiry to investigate responsibilities arising from WWI. After signing the armistice, Germany requested to negotiate peace<sup>114</sup> and wrote to the US, via Switzerland:<sup>115</sup>

[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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<sup>106</sup> 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.

<sup>107</sup> Minute No. 2, *supra*.

<sup>108</sup> 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.

<sup>109</sup> 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.

<sup>110</sup> *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>.

<sup>111</sup> *Report of the Committee on Alleged German Outrages* (1915), available at <http://archive.org/details/reportofcommitte01greu> (accessed 1 May 2018).

<sup>112</sup> *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*].

<sup>113</sup> See [Introduction, Section 2.2](#).

<sup>114</sup> 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](http://history.state.gov/historicaldocuments/frus1919Parisv02/pg_71) (accessed 1 May 2018).

<sup>115</sup> *Ibid.*, ‘Swiss Minister (Sulzer) to the Secretary of State’, 2 December 1918, 71-72.

demolishing the walls of hatred and misconception 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.<sup>116</sup> Allied states rejected the proposal, sharing the view that German responsibility was “incontestably proved”.<sup>117</sup> When Germany was notified of that position on 1 February,<sup>118</sup> 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.<sup>119</sup> 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.<sup>120</sup> Individuals appointed as commissioners were legal experts, many of whom held political positions, “showing the nexus between legal interpretations and political power.”<sup>121</sup>

Having examined documentary evidence of violations of the laws and customs of war, the 1919 Commission found thirty-two violations liable for prosecution.<sup>122</sup> Regarding its mandate to consider responsibilities, the Commission found that it was “not necessary to wait for proof attaching guilt to particular individuals”,<sup>123</sup> 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”<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup>

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<sup>116</sup> *Ibid.*, ‘Acting Secretary of State to the Commission to Negotiate Peace’, 6 January 1919, at 73.

<sup>117</sup> *Ibid.*, ‘Commission to Negotiate Peace to the Acting Secretary of State’, 10 January 1919, at 74.

<sup>118</sup> *Ibid.*, ‘Acting Secretary of State to the Swiss Minister (Sulzer), 1 February 1919, at 74.

<sup>119</sup> *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].

<sup>120</sup> *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].

<sup>121</sup> Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950* (Oxford: OUP, 2014) at 42.

<sup>122</sup> *1919 Report*, *supra* note 119, at 112-115.

<sup>123</sup> *Ibid.*, at 116.

<sup>124</sup> *Ibid.*, at 117.

<sup>125</sup> *Ibid.*, at 116.

<sup>126</sup> *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,<sup>127</sup> the Commission recommended that penal sanctions should be provided in the future.<sup>128</sup> 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.”<sup>129</sup> This language borrowed from the Martens Clause.<sup>130</sup> This proposal was innovative; as at 1919, most commentators located the basis for war crimes trials in domestic legal systems.<sup>131</sup>

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”.<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup> Of the 896 suspects identified, only twelve individuals were prosecuted, with six acquittals. The Leipzig trials are impugned as inadequate,<sup>135</sup> but “nonetheless serve as an important historical precedent for war crimes trials”.<sup>136</sup>

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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<sup>127</sup> *Ibid.*, at 98, 118, and 120.

<sup>128</sup> *Ibid.*, at 120.

<sup>129</sup> *Ibid.*, at 122.

<sup>130</sup> Convention (IV) respecting the Laws and Customs of War on Land 1907, with Annex of Regulations, TS 539, Preamble [*Hague Regulations*].

<sup>131</sup> René Provost, *International Human Rights and Humanitarian Law* (Cambridge: CUP, 2004) at 78.

<sup>132</sup> Treaty of Versailles 1919, 225 Consol. TS 188, Art 227.

<sup>133</sup> *Ibid.*, Arts. 228-229.

<sup>134</sup> Theodor Meron, ‘Reflections on the Prosecution of War Crimes by International Tribunals’, (2006) 100 AJIL 551-579, at 557.

<sup>135</sup> Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000) at 81.

<sup>136</sup> Bassiouni, *supra* note 97, at 786.

circumstances of its establishment and composition reflect a certain tolerance for ‘victor’s justice’.<sup>137</sup> 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”<sup>138</sup> 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.<sup>139</sup> 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.”<sup>140</sup> 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.<sup>141</sup> 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.”<sup>142</sup>

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”<sup>143</sup> 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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<sup>137</sup> 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.

<sup>138</sup> *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* (Berkeley: University of California Press, 2008) at 76.

<sup>139</sup> L. Stoyanovitch (Chair; former Serbian Prime Minister); A. Bonnassieux (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.

<sup>140</sup> *Occupied Serbia Report*, *supra* note 120, at 3.

<sup>141</sup> *Ibid.*, at 3.

<sup>142</sup> *Ibid.*, at 4.

<sup>143</sup> *1919 Report*, *supra* note 119, at 113.

German war crimes.<sup>144</sup> In a similar fashion, Balkan war crimes were to be prosecuted before domestic military tribunals.<sup>145</sup> 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.<sup>146</sup> 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.<sup>147</sup> Its report found Greece largely responsible for the violence, but did not overtly qualify incidents as legal violations.<sup>148</sup> The Commission found the presence of Greek forces as unnecessary and based on false information, and that its occupation had the appearance of annexation.<sup>149</sup> Council members accepted the findings but also criticised the Commission for exceeding its mandate.<sup>150</sup> 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.<sup>151</sup> The report was eventually published<sup>152</sup> after being suppressed.<sup>153</sup>

### 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.<sup>154</sup> 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,<sup>155</sup> 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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<sup>144</sup> Lewis, *supra* note 121, at 52.

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

<sup>146</sup> 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).

<sup>147</sup> 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*.

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

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

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

<sup>151</sup> *Ibid.*, at 85.

<sup>152</sup> 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).

<sup>153</sup> 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).

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

<sup>155</sup> *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”.<sup>156</sup> In its five years of operations, the Commission received files involving more than 36,000 individuals and units,<sup>157</sup> and listed over 24,000 accused persons.<sup>158</sup> 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”.<sup>159</sup>

The UNWCC also advised governments on legal questions relevant to war crimes trials.<sup>160</sup> 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.<sup>161</sup> 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.<sup>162</sup> Committee III proposed a definition of crimes against humanity which was incorporated in Article 6 of the Nuremberg Charter.<sup>163</sup> 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”.<sup>164</sup>

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.<sup>165</sup> 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.<sup>166</sup> 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.<sup>167</sup> 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.<sup>168</sup>

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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<sup>156</sup> 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.

<sup>157</sup> *History of the UNWCC*, *supra* note 112, at 508.

<sup>158</sup> *Ibid.*, at 484-485.

<sup>159</sup> Stahn, *supra* note 156, at 231.

<sup>160</sup> *History of the UNWCC*, *supra* note 112, at 3.

<sup>161</sup> *Ibid.*, at 98, 181, and 279.

<sup>162</sup> *Ibid.*, at 182.

<sup>163</sup> *Ibid.*, at 176.

<sup>164</sup> 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.

<sup>165</sup> *History of the UNWCC*, *supra* note 112, at 518.

<sup>166</sup> 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].

<sup>167</sup> Stahn, *supra* note 156, at 231, at 240, referring to *History of the UNWCC*, *supra* note 112, at 149.

<sup>168</sup> Bassiouni 1994, *supra* note 166, at 778.

mandate”<sup>169</sup> 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.<sup>170</sup> 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”.<sup>171</sup> This provision was initially seen as “a significant step forward”.<sup>172</sup> However, at the 1929 Diplomatic Conference, delegates expressed fears that findings of IHL violations by an inquiry might lead to sanctions.<sup>173</sup> The requirement for parties to agree on inquiry procedures would prove to be problematic.<sup>174</sup> An opportunity to put Article 30 into practice arose in 1936 during the Italo-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.<sup>175</sup> 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.<sup>176</sup> States did not support that proposal, finding some aspects too complicated.<sup>177</sup> 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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<sup>169</sup> Stahn, *supra* note 156, at 225.

<sup>170</sup> *Ibid.*, at 226.

<sup>171</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field 1929, 118 LNTS 303, Art. 30.

<sup>172</sup> *Updated Commentary on the First Geneva Convention 1949* (Cambridge: CUP, 2016), ‘Commentary to Article 52’, para. 8 [2016 *Commentary to Geneva Convention I*].

<sup>173</sup> Jean Pictet, *Commentary on the Geneva Conventions of August 12 1949. Vol. I* (Geneva: ICRC, 1952) at 375.

<sup>174</sup> 2016 *Commentary to Geneva Convention I*, *supra* note 172, para. 8.

<sup>175</sup> Rainer Baudendistel, *Between Bombs and Good Intentions: The International Committee of the Red Cross and the Italo-Ethiopian War 1935-1936* (New York and Oxford: Berghahn Books, 2006) at 280.

<sup>176</sup> *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.

<sup>177</sup> 2016 *Commentary to Geneva Convention I*, *supra* note 172, para. 3036.

procedure, they should jointly appoint an umpire to decide.<sup>178</sup> The requirement of *ad hoc* state consent remained. This mechanism also remains unused.<sup>179</sup> 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.<sup>180</sup>

Further efforts were made at the 1977 Diplomatic Conference<sup>181</sup> 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.<sup>182</sup> 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.<sup>183</sup> While the IHFFC's mandate indicates the relevance of legal questions,<sup>184</sup> the IHFFC states that its procedure "stops short of stating the law, which opens more possibilities for States to find mutually acceptable compromise solutions."<sup>185</sup> 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]."<sup>186</sup> The IHFFC does not aim to 'name and shame'; its reports are confidential unless parties agree to their publication.<sup>187</sup>

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.<sup>188</sup> The IHFFC may investigate "other situations"<sup>189</sup> at the request of a party with the consent of other parties concerned, which may include non-

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<sup>178</sup> 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 [Geneva Convention IV].

<sup>179</sup> ICRC, *Annual Report 1973* (Geneva, 1974) at 11, available at [http://library.icrc.org/library/docs/RA\\_CICR/RA\\_1973\\_ENG.pdf](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](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].

<sup>180</sup> *2016 Commentary to Geneva Convention I*, *supra* note 172, para. 3059.

<sup>181</sup> Plenary Meeting of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.

<sup>182</sup> Grace and Bruderlein, *supra* note 26, at 4.

<sup>183</sup> *Additional Protocol I*, *supra* note 33, Art. 90(5)(a).

<sup>184</sup> Boutruche 2015, *supra* note 179, para. 23.

<sup>185</sup> 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](http://www.ihffc.org/Files/en/pdf/ihffc_work_report_engl.pdf) (accessed 1 May 2018).

<sup>186</sup> '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\\_declarationofficial.pdf](http://www.ihffc.org/Files/en/pdf/ihffc_declarationofficial.pdf) (accessed 1 May 2018).

<sup>187</sup> *Additional Protocol I*, *supra* note 33, Art. 90(5)(c).

<sup>188</sup> *Ibid.*, Art. 90(2)(a).

<sup>189</sup> *Ibid.*, Art. 90(2)(d).

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

The IHFFC remained dormant from its entry into force in 1991 until 2017. Likening the IHFFC to a “sleeping beauty”,<sup>192</sup> 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”.<sup>193</sup> 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”.<sup>194</sup> 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]”,<sup>195</sup> 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.”<sup>196</sup> The IHFFC’s acceptance of jurisdiction by an organisation of states<sup>197</sup> 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<sup>198</sup> but do not have the same breadth of competence as states, which hold “the totality of international rights and duties recognized by international law”.<sup>199</sup> 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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<sup>190</sup> 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](http://www.ihffc.org/index.asp?Language=en&page=aboutus_general) (accessed 1 May 2018).

<sup>191</sup> 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.

<sup>192</sup> Frits Kalshoven, ‘The International Humanitarian Fact-Finding Commission: A Sleeping Beauty?’, (2002) 4 *Humanitäres Völkerrecht* 213-216.

<sup>193</sup> *Ibid.*, at 215. See 2016 *Commentary to Geneva Convention I*, *supra* note 172, para. 3059.

<sup>194</sup> Grace and Bruderlein, *supra* note 26, at 5, referring to Fritz Kalshoven and Torkel Opsahl.

<sup>195</sup> 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).

<sup>196</sup> *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).

<sup>197</sup> Ingo Peters, ‘Legitimacy and International Organizations—the Case of the OSCE’, in Dominik Zaum (ed.), *Legitimizing International Organizations* (Oxford: OUP, 2013) 196-220, at 203.

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

<sup>199</sup> *Ibid.*, at 180.

its constituent documents and developed in practice.”<sup>200</sup> 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.<sup>201</sup> 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”.<sup>202</sup> The League established seven inquiries, all of which concerned territorial disputes and invasions.<sup>203</sup> Some commissions were asked to offer settlement recommendations as well as to ascertain facts.<sup>204</sup>

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.<sup>205</sup> The Commission appealed to states’ interests,<sup>206</sup> finding that Japan’s actions could not be regarded as self-defence<sup>207</sup> but avoiding characterising the invasion as aggression.<sup>208</sup> 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.<sup>209</sup> 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.<sup>210</sup> 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”.<sup>211</sup>

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<sup>200</sup> *Ibid.*, at 180.

<sup>201</sup> Covenant of the League of Nations 1919, 34 LNTS, Preamble [*League Covenant*].

<sup>202</sup> *Ibid.*, Art. 12. See Arts. 11 and 15.

<sup>203</sup> 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).

<sup>204</sup> 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.

<sup>205</sup> 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.

<sup>206</sup> *Ibid.*, at 135.

<sup>207</sup> *Ibid.*, at 71.

<sup>208</sup> 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).

<sup>209</sup> *Report of the Commission of Enquiry into the Incidents on the Frontier between Bulgaria and Greece*, (February 1926) League of Nations Official Journal 196.

<sup>210</sup> *Ibid.*, at 203 and 207.

<sup>211</sup> 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 Italo-Ethiopian conflict, upon the request of the Emperor of Ethiopia.<sup>212</sup> 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".<sup>213</sup> The Committee requested information from the ICRC, which declined to do so to avoid compromising its neutrality.<sup>214</sup> 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.<sup>215</sup> 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.<sup>216</sup> The European Council has occasionally instructed fact-finding missions in respect of human rights situations.<sup>217</sup> The EU is active at the UN, sponsoring mandating resolutions of HRC-led atrocity inquiries.<sup>218</sup> The European Parliament has requested that EU member states pursue atrocity inquiries at the UN.<sup>219</sup> Human rights fact-finding has also been conducted by the Council of Europe.<sup>220</sup> From 1953 until its abolition in 1998,<sup>221</sup> the European Commission on Human Rights examined alleged violations of the European Convention on Human Rights.<sup>222</sup>

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<sup>212</sup> *History of the UNWCC*, *supra* note 112, at 189-190.

<sup>213</sup> 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).

<sup>214</sup> Rainer Baudendistel, 'Force Versus Law: The International Committee of the Red Cross and Chemical Warfare in the Italo-Ethiopian War 1935-1936', (1998) 322 *IRRC* 81-104.

<sup>215</sup> *Ibid.*

<sup>216</sup> EU Council Decision 2008/901/CFSP, Art 1.

<sup>217</sup> 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).

<sup>218</sup> 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](http://eeas.europa.eu/delegations/un-geneva/10865/outcomes-33rd-session-human-rights-council-european-unions-perspective_en) (accessed 1 May 2018).

<sup>219</sup> E.g., European Parliament Resolution P8\_TA-PROV(2017)0219, 18 May 2017, para. 1.

<sup>220</sup> Statute of the Council of Europe 1949, ETS No. 001.

<sup>221</sup> 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.

<sup>222</sup> 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.<sup>223</sup> The International Panel examined the failure of the international community to take action and the need for accountability in respect of violations.<sup>224</sup> 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”.<sup>225</sup> The report, which found extensive violations,<sup>226</sup> was published more than a year after completion, with deferral due to concerns that it would obstruct peace efforts.<sup>227</sup> 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.<sup>228</sup> The AU has also supported UN-led inquiries, such as the Security Council’s inquiry on the Central African Republic (the CAR).<sup>229</sup>

The League of Arab States has established inquiries concerning violations arising in the context of Israeli military operations in Gaza in 2009<sup>230</sup> 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.<sup>231</sup> Its report was oriented towards ascertaining responsibility and promoting accountability, including by recommending that the situation in Gaza be referred to the ICC.<sup>232</sup> 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.<sup>233</sup>

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<sup>223</sup> *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).

<sup>224</sup> *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).

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

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

<sup>227</sup> 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.

<sup>228</sup> 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](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, 35<sup>th</sup> Ordinary Session, 4 June 2004, available at [http://www.achpr.org/files/activity-reports/17/achpr34and35\\_actrep17\\_20032004\\_eng.pdf](http://www.achpr.org/files/activity-reports/17/achpr34and35_actrep17_20032004_eng.pdf) (accessed 1 May 2018).

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

<sup>230</sup> *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*].

<sup>231</sup> *Ibid.*, ‘Terms of Reference’, Annex I, at 217, paras. 2-3.

<sup>232</sup> *Ibid.*, para. 40(2).

<sup>233</sup> 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,<sup>234</sup> with an inquiry into violence in Haiti as an exception.<sup>235</sup> The OAS also established an inquiry jointly with the UN into allegations of extra-judicial executions in Togo.<sup>236</sup> The Inter-American Commission on Human Rights, an OAS organ, has also established inquiries.<sup>237</sup>

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.<sup>238</sup> 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.<sup>239</sup> These organs may undertake fact-finding to exercise their responsibilities in this field.<sup>240</sup> The HRC<sup>241</sup> and its predecessor, the UN Commission on Human Rights (UNCHR),<sup>242</sup> 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).

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

<sup>235</sup> *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](http://www.oas.org/OASpage/Haiti_situation/cpinf4702_02_eng.htm) (accessed 1 May 2018).

<sup>236</sup> 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.

<sup>237</sup> 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).

<sup>238</sup> UN Charter, Arts. 1(1) and 1(3).

<sup>239</sup> *Ibid.*, Arts. 10-11, 25, 34, and 99.

<sup>240</sup> *1991 Declaration*, *supra* note 25, Preamble.

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

<sup>242</sup> 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<sup>243</sup> and the 1968 Tehran Human Rights Conference explored proposals for reforms to the UN human rights system.<sup>244</sup> 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.<sup>245</sup> 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.<sup>246</sup> 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".<sup>247</sup> The Vietnam Commission interpreted its mandate as to investigate alleged violations of human rights,<sup>248</sup> consistent with the listing of the situation in the General Assembly's agenda as '[t]he violation of human rights in South Vietnam'.<sup>249</sup> The Commission acknowledged allegations of human rights violations but did not reach findings;<sup>250</sup> its mandate was terminated after a coup d'état and the General Assembly did not discuss its findings.<sup>251</sup>

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

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<sup>243</sup> 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].

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

<sup>245</sup> Franck and Cherkis, *supra* note 91, at 1511. See Weissbrodt and McCarthy, *supra* note 21 and D'Alessandra, *supra* note 100, at 61.

<sup>246</sup> E.g., *Greek Frontier Incidents Mandate*, *supra* note 83; *Seychelles Mandate*, *supra* note 84 and *Angola Mandate*, *supra* note 85.

<sup>247</sup> *Statement by the President of the General Assembly*, 1239<sup>th</sup> 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].

<sup>248</sup> *Vietnam Report*, *supra*, para. 7.

<sup>249</sup> General Assembly Agenda, 18<sup>th</sup> Session, 153<sup>rd</sup> meeting, 18 September 1963.

<sup>250</sup> *Vietnam Report*, *supra* note 247, para. 64.

<sup>251</sup> Franck and Cherkis, *supra* note 91, at 1505.

<sup>252</sup> GA Res. 3114 (XXVIII), 12 December 1973 [Mozambique Mandate].

<sup>253</sup> *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.<sup>254</sup> 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”.<sup>255</sup> It also recommended that Portugal provide compensation.<sup>256</sup> 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”.<sup>257</sup> 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”.<sup>258</sup>

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

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<sup>254</sup> *Ibid.*, paras. 142-144.

<sup>255</sup> *Ibid.*, para. 177(2).

<sup>256</sup> *Ibid.*, para. 177(3).

<sup>257</sup> Decision of the General Assembly, UN Doc. A/9631, 13 December 1974, at 117.

<sup>258</sup> 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.

<sup>259</sup> GA Res. 111 (II), 13 November 1947.

<sup>260</sup> *Ibid.*, para. 2(e).

<sup>261</sup> 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.

<sup>262</sup> Commission on the Racial Situation in the Union of South Africa, GA Res. 616A (VII), 5 December 1952.

<sup>263</sup> Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, GA Res. 2443 (XXIII), 19 December 1968.

<sup>264</sup> ECOSOC Res. 1235 (XLII), para. 3.

<sup>265</sup> 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.

<sup>266</sup> Group of Experts on South Africa, SC Res. 182 (1963).

<sup>267</sup> E.g., SC Res. 120 (1956); SC Res. 161 (1961); SC Res. 294 (1971); SC Res. 181 and 182 (1963).

<sup>268</sup> 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.<sup>269</sup> In 1989, "in the euphoria that followed the ending of the Cold War",<sup>270</sup> 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.<sup>271</sup> In 1998, the Secretary-General merged the Centre for Human Rights, which had been governed by an Assistant Secretary-General, with OHCHR.<sup>272</sup> 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.<sup>273</sup>

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."<sup>274</sup> In 1991 it condemned the "repression of the Iraqi civilian population... the consequences of which threaten international peace and

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

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

<sup>271</sup> GA Res. 48/141, 20 December 1993, para. 4.

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

<sup>273</sup> 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).

<sup>274</sup> 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](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”.<sup>275</sup> Some commentators point to this resolution as the Council’s first recognition that human rights violations could threaten international peace and security.<sup>276</sup>

There was also “progressive interaction”<sup>277</sup> 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.”<sup>278</sup> When referring the situation in Libya to the ICC, the Security Council welcomed the HRC’s decision to establish the Libya Commission.<sup>279</sup> Cecilie Hellesveit observes that this was “the first explicit recognition of the HRC fact-finding mechanisms as part of the Security Council’s investigative functions.”<sup>280</sup> The Council has discussed the situation of human rights in the Democratic People’s Republic of Korea (DPRK or North Korea) several times<sup>281</sup> since the report of the International Commission of Inquiry on North Korea (North Korea Commission) was submitted to it by the General Assembly.<sup>282</sup> Security Council members have called on Burundi to cooperate with the HRC’s Burundi Commission.<sup>283</sup> In 2017, the Security Council held its first thematic debate on human rights.<sup>284</sup> The Council thus engages with human rights norms and bodies more regularly.<sup>285</sup>

These developments reflect increasing recognition of links between security and human rights at the UN more generally.<sup>286</sup> In 2005, the General Assembly recognised that “development, peace and security and human rights are interlinked and mutually reinforcing.”<sup>287</sup> Similar

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<sup>275</sup> SC Res. 688 (1991), para. 1.

<sup>276</sup> 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.

<sup>277</sup> Elvira Domínguez-Redondo, ‘Making the Connection: Security and Human Rights’, in Bassiouni and Schabas, *supra* note 97, 267-290, at 279.

<sup>278</sup> UNCHR Res. S-2/1, 1 December 1992, para. 10.

<sup>279</sup> SC Res. 1970 (2011), Preamble.

<sup>280</sup> Hellesveit, *supra* note 20, at 383.

<sup>281</sup> 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].

<sup>282</sup> GA Res. 69/188, 18 December 2014, para. 8.

<sup>283</sup> 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).

<sup>284</sup> 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).

<sup>285</sup> 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](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_human_rights_january_2016.pdf) (accessed 1 May 2018).

<sup>286</sup> 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).

<sup>287</sup> *World Summit Outcome Document*, GA Res. 60/1, 24 October 2005, para. 9.

statements were issued by the Security Council and Secretary-General.<sup>288</sup> 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.<sup>289</sup> 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.<sup>290</sup> 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:<sup>291</sup>

[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,<sup>292</sup> the Commission wrote that creating such a tribunal would be consistent with its work.<sup>293</sup> The Council subsequently established the International Criminal Tribunal for the former Yugoslavia (ICTY),<sup>294</sup> linking international security with criminal justice.<sup>295</sup> 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.<sup>296</sup> That

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<sup>288</sup> *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.

<sup>289</sup> World Summit Outcome Document, *supra* note 287, paras. 139-140.

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

<sup>291</sup> 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.

<sup>292</sup> 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*].

<sup>293</sup> *Yugoslavia Interim Report*, *supra* note 292, para. 74.

<sup>294</sup> SC Res. 808 (1993).

<sup>295</sup> Statement by Mr. O’Brien (New Zealand), *Provisional Verbatim Record of the 3217<sup>th</sup> 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.”

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

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

The Security Council established several other inquiries into situations of atrocities, namely in Burundi in 1995,<sup>301</sup> Côte d'Ivoire<sup>302</sup> and Darfur<sup>303</sup> in 2004, and the CAR in 2013.<sup>304</sup> 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.<sup>305</sup> Then Secretary-General Kofi Annan described its report as "one of the most important documents in the recent history of the [UN]".<sup>306</sup> However, not all Security Council-led inquiries engendered international prosecutions.<sup>307</sup> 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.<sup>308</sup> Recently, it established an investigative team to assist Iraq in prosecuting international crimes by ISIS members.<sup>309</sup> 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,<sup>310</sup> Guinea<sup>311</sup> and Mali<sup>312</sup> were established with the

<sup>297</sup> *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*].

<sup>298</sup> *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*].

<sup>299</sup> SC Res. 955 (1994).

<sup>300</sup> 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].

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

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

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

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

<sup>305</sup> SC Res. 1757 (2007).

<sup>306</sup> 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.

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

<sup>308</sup> SC Res. 2235 (2015).

<sup>309</sup> 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).

<sup>310</sup> *Abidjan Report*, *supra* note 43, paras. 1-2.

<sup>311</sup> '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*].

<sup>312</sup> '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 inquiries to evaluate accountability measures in states which had experienced mass atrocities, namely Timor-Leste in 2005<sup>313</sup> and Sri Lanka in 2009.<sup>314</sup> 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.<sup>315</sup> 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.<sup>316</sup> The HRC also established an inquiry into this situation with a rather different investigative focus.<sup>317</sup>

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,<sup>318</sup> and was subsequently granted a general mandate to conduct such investigations.<sup>319</sup> In 2013, the Secretary-General established a fact-finding mission to “ascertain the facts related to the allegations of use of chemical weapons”<sup>320</sup> 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<sup>321</sup> and has created special investigations into situations concerning peacekeeping operations, headed by a single investigator.<sup>322</sup> 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*].

<sup>313</sup> *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.

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

<sup>315</sup> *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*].

<sup>316</sup> ‘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](http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf) (accessed 1 May 2018) [*Palmer Report*].

<sup>317</sup> 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*].

<sup>318</sup> *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.

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

<sup>320</sup> *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*].

<sup>321</sup> 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.

<sup>322</sup> 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.<sup>323</sup> 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.<sup>324</sup> Following the Cambodia Commission's recommendation of an *ad hoc* international tribunal,<sup>325</sup> a special chamber was established within Cambodia's domestic jurisdiction with UN assistance.<sup>326</sup> In an emergency session in 2006, the Assembly established an inquiry into Beit Hanoun.<sup>327</sup> This mission was not dispatched, as Israel did not confirm its cooperation.<sup>328</sup> The HRC also established an inquiry into this situation, despite Israel's opposition.<sup>329</sup>

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).<sup>330</sup> This body is headed by a single judge who is a UN staff member.<sup>331</sup> The IIIM has "a quasi-prosecutorial function"<sup>332</sup> beyond the scope of the HRC's International Commission of Inquiry on Syria (Syria Commission).<sup>333</sup> 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).

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

<sup>324</sup> *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*].

<sup>325</sup> *Cambodia Report*, *supra* note 324, para. 219(1).

<sup>326</sup> 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.

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

<sup>328</sup> *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.

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

<sup>330</sup> 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*].

<sup>331</sup> 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*].

<sup>332</sup> *IIIM First Implementation Report*, *supra* note 331, para. 32.

<sup>333</sup> *Syria Mandate*, *supra* note 47, para. 13.



analysing evidence and prepares files”<sup>334</sup> to assist prosecutions. The IIIM states that access to the Syria Commission’s “extensive documentary holdings... is a central requirement”<sup>335</sup> 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.<sup>336</sup> 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”.<sup>337</sup>

#### 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<sup>338</sup> and Gaza in 2000.<sup>339</sup> 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,<sup>340</sup> as well as Lebanon,<sup>341</sup> Darfur,<sup>342</sup> Libya,<sup>343</sup> Côte d’Ivoire,<sup>344</sup> Syria,<sup>345</sup> the DPRK,<sup>346</sup> Eritrea,<sup>347</sup> South Sudan,<sup>348</sup> Burundi<sup>349</sup> and Myanmar.<sup>350</sup> All HRC commissions examined human rights

<sup>334</sup> *IIIM First Implementation Report*, *supra* note 331, para. 30.

<sup>335</sup> *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*].

<sup>336</sup> *UNHRC Mandate*, *supra* note 87.

<sup>337</sup> 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.

<sup>338</sup> 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*].

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

<sup>340</sup> *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*].

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

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

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

<sup>344</sup> 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*].

<sup>345</sup> *Syria Mandate*, *supra* note 47.

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

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

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

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

<sup>350</sup> *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.<sup>351</sup>

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.<sup>352</sup> Perceived by some states as a softer measure than full inquiry, such arrangements have been seen as a compromise.<sup>353</sup> 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.<sup>354</sup> 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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<sup>351</sup> E.g., *Syria Mandate*, *supra* note 47, para. 13.

<sup>352</sup> 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*].

<sup>353</sup> 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).

<sup>354</sup> 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,<sup>355</sup> with all three bodies aiming “to investigate war crimes and prepare for the eventual prosecutions before international and national judicial bodies”.<sup>356</sup> The Yugoslavia Commission has been deemed a ‘watershed moment’ for UN atrocity inquiry and international criminal justice.<sup>357</sup> Michaela Frulli writes that the inquiries on Yugoslavia and Rwanda were “precursors to prosecution-oriented investigations led by UN fact-finding missions”.<sup>358</sup> Several scholars observe an ‘accountability turn’ in UN inquiry practice.<sup>359</sup>

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.

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<sup>355</sup> 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.

<sup>356</sup> Bassiouni 1994, *supra* note 166, at 784.

<sup>357</sup> 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.

<sup>358</sup> Frulli, *supra* note 102, at 336.

<sup>359</sup> See D’Alessandra, *supra* note 100 and Herik and Harwood, *supra* note 104.