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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 TWO

ESTABLISHING THE MANDATE: MANDATING AUTHORITIES AS ARCHITECTS OF ATROCITY INQUIRIES

Introduction

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

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

1. Dynamics of Establishment

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

1.1 Institutional framework relevant to UN atrocity inquiries

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

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

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

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

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

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

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

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

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

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

1.2 State consent and cooperation

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

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

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

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

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

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

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

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

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

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

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

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

[386] Harwood, *supra* note 99.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.3 Selection of situations

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

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

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

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

[411] GA Res. 60/251.

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

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

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

[415] *Ibid*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.4 New York/Geneva dynamics

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

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

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

> It may in fact also be that, occasionally, these Geneva-based commissions rather function as a correction mechanism to New York dynamics and in particular to a paralysed Security Council. In such a case, they would represent public opinion and have the *de facto* aim to express condemnation, to present a compelling conflict narrative so as to counter the Security Council inaction or to elicit alternative involvement by the [ICC]. This different emphasis in their role, function and audience may obviously impact the manner in which they fulfil their mandate, and more specifically it may influence their invocation of international law.

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

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

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

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

2. Legal Dimensions of Written Mandates

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

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451 SC Res. 1970 (2011), Preamble.

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

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

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

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

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

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

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

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

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

2.1 Investigative focus and recommendations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2 Legal lenses of analysis

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

2.2.1 International human rights law

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

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

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

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

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

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

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

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

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

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

[489] See Chapter Four, Section 2.4.

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

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

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

2.2.2 International humanitarian law

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

2.2.3 International criminal law

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

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

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

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

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

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

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

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

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

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

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

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

2.3 Challenges to legal lenses of HRC-led inquiries

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

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

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

2.3.1 Conferral of competence by the General Assembly

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.3.2 Competence implied from human rights function

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.3.3 Competence developed through organisational practice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Impartiality of Written Mandates

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

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

3.1 Geographic parameters

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

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

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

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

592 Collins English Dictionary, *supra* note 50.

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

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

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

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

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

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

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

3.2 Temporal scope

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

611 Arusha Peace and Reconciliation Agreement for Burundi 2000.

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

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

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

3.3 Actors under scrutiny

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

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

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

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

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

3.4 Prejudgment of findings

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Appointment and Composition of Commissions

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

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

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

4.1 Appointment processes

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

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

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

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

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

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

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

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

[652] *Ibid.*, at 18.

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

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

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

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

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

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

4.2 Commissioner independence and impartiality

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

4.2.1 Emphasis on independence and impartiality

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.2.2 The problem of prior statements

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

692 *Ibid.*, at 35.

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

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

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

4.2.3 Ensuring impartiality and independence in practice

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

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

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

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

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

4.3 Commissioner expertise

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

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

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

[706] *Ibid.*.

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

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

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

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

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

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

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

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

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

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

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

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

716 Composed of Ibrahim Boye (Permanent Representative of Senegal to the UN), Felix Ermacora (Austrian law professor), N. Jha (Permanent Mission of India to the UN), Waldo Waldron-Ramsey (Tanzanian Mission to the UN), Branimir Jankovic, Yugoslavian law professor and diplomat) and Luis Marchand-Stens (law professor serving in Peruvian embassy in Washington).

717 Miller, *supra* note 671, at 48.

718 Iain Guest, *Behind the Disappearances: Argentina's Dirty War against Human Rights and the United Nations* (Philadelphia: University of Pennsylvania Press, 1990) at 205.

719 Also composed of William Fenrick (Canadian military lawyer); Keba M'baye (Senegalese judge) and Torkel Opsahl (Norwegian human rights expert).

720 *SG Report on Rwanda*, *supra* note 676, para. 11. The Rwanda Commission was composed of Atsu-Koffi Amega (Chief Justice of Togo), Haby Dieng (Advocate-General of the Supreme Court of Guinea) and Salifou Fomba (Legal Counsel to the Ministry of Human Rights of Mali).

721 Composed of M. Cherif Bassiouni, Phillipe Kirsch (former ICC President) and Asma Khader, a senior human rights advocate.

722 Composed of Paulo Sergio Pinheiro (Brazil); Karen Koning AbuZayd (US); Carla Del Ponte (Switzerland). Previously Vitit Muntarbhorn (Thailand) and Yakın Ertürk (Turkey).

723 Composed of Michael Kirby (former Judge of High Court of Australia), Marzuki Darusman (Indonesia; Special Rapporteur on North Korea) and Sonja Biserko (Serbian human rights campaigner).

724 E.g., *SC Burundi Mandate*, *supra* note 301, para. 2; *Lebanon Mandate*, *supra* note 341, para. 7.

725 Composed of Philip Alston (Australia), Fatimata M'Baye (Mauritania) and Bernard Acho Muna (Cameroon).

726 *Mali TOR*, *supra* note 312, para. 4(a).

It should not be overlooked that other types of expertise remain relevant.[727] On occasion, mandating authorities provided for other types of expertise. In respect of the Mali Commission, individuals were appointed in light of criteria including knowledge of principles and processes of fact-finding or investigations, violence against persons, and the Malian and regional contexts.[728] The HRC resolved that relevant fields of expertise for the Myanmar Commission included forensics and sexual and gender-based violence.[729] Such expertise may be supplied via UN support staff,[730] experts contributed by states,[731] or Justice Rapid Response.[732]

Some commissions faced criticism that commissioners lacked relevant expertise. Lyal Sunga critiques the Rwanda Commission on the basis that its members "claimed no specialist expertise" in ICL, IHL or human rights, and that a "more international spectrum of experience and expertise could have lent greater credibility to this important fact-finding effort."[733] In a similar vein, Xiaodan Wu criticises the Israeli Settlements Commission as lacking expertise in IHL.[734] Critiques are particularly loud from IHL experts who warn against the appointment of human rights lawyers to assess IHL violations, due to the risks of inaccurate interpretation and application of IHL norms.[735] As commissions may collect information in anticipation of prosecutions, expertise relating to evidence collection is highly relevant. Dan Saxon writes that commissioners should have expertise in "international law and accountability"[736] rather than career diplomats or academics. Such critiques promote commissions' further juridification through the expertise of those implementing the mandates.

Commissioners' credentials and professional standing may "lend legitimacy to the mission"[737] and raise the profile of an inquiry. The public relations practices of some mandating authorities seem to link commissioners' credentials to the authority of inquiries on which they serve. The HRC routinely publishes biographies of commissioners on webpages dedicated to its commissions.[738] Although Security Council-led commissions do not have the same online

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727 Chinkin, *supra* note 97, at 489.

728 *Mali TOR*, *supra* note 312, para. 4(b), (c) and (d).

729 *Myanmar Mandate*, *supra* note 2, para. 13. See *HRC Burundi Mandate*, *supra* note 349, para. 25.

730 E.g., *Updated report of OHCHR on human rights and forensic science*, UN Doc. A/HRC/4/103, 27 February 2007, para. 22.

731 *Second interim report of the Commission of Experts established pursuant to Security Council resolution 780 (1992)*, UN Doc. S/26545, 6 October 1993, paras. 96-100.

732 Justice Rapid Response, *Annual Report 2014*, at 8, available at http://www.justicerapidresponse.org/wp-content/uploads/2015/03/Annual_Report_Final_Email.pdf (accessed 1 May 2018).

733 Lyal Sunga, 'How Can UN Human Rights Special Procedures Sharpen ICC Fact- Finding?', (2011) 15(2) *The International Journal of Human Rights* 187-205, at 195 [Sunga 2011].

734 Wu, *supra* note 702, at 202.

735 E.g., Theodor Meron, 'The Humanization of Humanitarian Law', (2000) 94 AJIL 239-278, at 247; Richemond-Barak, *supra* note 513; Boutruche, *supra* note 28, at 107; Charles Garraway, 'Armed Conflict and Law Enforcement: Is There a Legal Divide?' in Marielle Matthee, Brigit Toebes and Marcel Brus (eds), *Armed Conflict and International Law: In Search of the Human Face* (The Hague: TMC Asser Press, 2013) 259-284.

736 Dan Saxon, 'Purpose and Legitimacy in International Fact-Finding Bodies', in Bergsmo, *supra* note 94, 211-224, at 223.

737 Grace and Bruderlein, *supra* note 26, at 38.

738 E.g., OHCHR, 'Biographies of the members of the Fact-Finding Mission on Myanmar', available at http://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/Members.aspx (accessed 1 May 2018) and 'Biographies of the members of the Commission of Inquiry on Burundi', available at http://www.ohchr.org/EN/HRBodies/HRC/CoIBurundi/Pages/Commissioners.aspx (accessed 1 May 2018).

presence as those of the HRC, the Secretary-General has highlighted individuals' expertise when announcing commissioner appointments.[739] The Darfur Commission included commissioners' biographies in its report.[740] *OHCHR Guidance and Practice* cautions that while "having eminent personalities as members could be beneficial for mandates that require a high-profile approach", it should not be the sole criterion for appointment.[741]

The emphasis on legal expertise is consistent with the juridified investigative focus of modern UN atrocity inquiries. As noted by Boutruche, it seems "virtually impossible to conduct fact-finding without knowledge of the law because it is only through legal expertise that one can select the relevant facts from the huge quantity of information around a given incident."[742] Commissioners' legal expertise may also juridify the process of mandate implementation. Christine Schwöbel-Patel observes that as the "perspective from which the facts are considered not only depends on the mandate but also on the members appointed to the commission".[743] This change marks a turn away from diplomatic settlement towards a more juridified model. More fundamentally, participation of international legal experts may impart the gravitas and authority of international law to commissions, even though they remain formally non-judicial bodies.

5. Decisions on Operational Aspects

The roles and functions of UN atrocity inquiries are affected by decisions regarding their working methods and operations. This Section first discusses the extent to which such matters were left to commissions' discretion, including initiatives to standardize fact-finding methods (5.1). It then discusses how mandating authorities' decisions in respect of the allocation of resources and time limits for reporting have important operational consequences (5.2).

5.1 Scope of discretion accorded to commissions

Mandating authorities identified general tasks to be carried out such as to establish facts,[744] conduct investigations,[745] determine responsibilities[746] and make recommendations.[747] Instructions were often generalized, with operational decisions made by commissions. The conferral of broad discretion upon commissions to decide their own fact-finding approaches and working methods creates distance between commissions and mandating authorities, which in turn promotes a principled approach grounded in autonomy and impartiality.

Conferring broad discretion to commissions might also be explained by pragmatic factors such as the difficulty of reaching consensus regarding technical elements, or that mandating authorities are simply uninterested in such details. However, the example of the Palmer

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[739] E.g., United Nations, 'Secretary-General Announces Members of Central African Republic Commission of Inquiry to Investigate Events since 1 January 2013', UN Doc. SG/A/1451-AFR/2799, 22 January 2014, available at http://www.un.org/press/en/2014/sga1451.doc.htm (accessed 1 May 2018).

[740] *Darfur Report*, *supra* note 32, at 165.

[741] *OHCHR Guidance and Practice*, *supra* note 63, at 19.

[742] Boutruche, *supra* note 28, at 111.

[743] Schwöbel-Patel, *supra* note 103, at 148.

[744] E.g., *SC Burundi Mandate*, *supra* note 301.

[745] E.g., *Darfur Mandate*, *supra* note 303; *Lebanon Mandate*, *supra* note 341 and *Libya Mandate*, *supra* note 343.

[746] *Guinea Mandate*, *supra* note 311.

[747] E.g., *Libya Mandate*, *supra* note 343.

Commission indicates that where a commission is intended to improve diplomatic relations, mandating authorities prefer to retain more control over the fact-finding process. The Secretary-General set out the Palmer Commission's working methods in comprehensive terms of reference[748] and a separate document.[749] The Commission received information through 'Points of Contact' designated by Israel and Turkey, exclusively obtaining information "through diplomatic channels".[750] The Secretary-General's involvement in setting down its working methods reflects the fact that these aspects were negotiated by Israel and Turkey. Involving states in this way encouraged their cooperation. The close association between the Palmer Commission and its mandating authority was advantageous in this setting. The Commission's curtailed autonomy seemed to generate trust on the part of concerned states and reflected its more pragmatic function.

Requiring commissions to determine their own working methods promotes independence from mandating authorities but is also impugned as producing unreliable reports. Martin and Villarreal Sosa argue that the lack of a standardized methodological framework "often results in the utilization of flawed methodology, which in turn leads to incorrect conclusions, and compromised relationships with Member States."[751] Such observations have led to calls for greater standardisation of commissions' working methods.[752] Debates on the merits of standardising inquiry have oscillated between concerns of flexibility/arbitrariness and certainty/rigidity.[753] In 1968, noting that problems associated with *ad hoc* fact-finding, the International Conference on Human Rights recognised the "importance of well-defined rules of procedure for the orderly and efficient discharge of their functions by [UN] bodies concerned with the field of human rights"[754] and recommended the preparation of model rules of procedure. The resulting *Draft Model Rules 1970* were subsequently substantially revised and not adopted by ECOSOC.[755] The revised rules did not provide guidance on many important aspects such as witness testimony.[756] Franck and Fairley write, "[f]or those concerned with credibility and due process in fact-finding, the model rules are not the answer".[757] The *1991 Declaration* did not much advance this state of affairs, including just two provisions concerning the right of concerned states to express their views and use of "appropriate rules of procedure" to ensure fair hearings.[758]

In 2001, Bassiouni lamented that after fifty years of UN practice, "there is no standard operating procedure for fact-finding missions", resulting in "little consistency and predictability as to the methods and outcomes."[759] *OHCHR Guidance and Practice* represents

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[748] *Palmer TOR*, *supra* note 316, para. 2.
[749] 'Method of Work of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident,' in *Palmer Report*, *supra* note 316, at 13.
[750] *Palmer Report*, *supra* note 316, para. 6.
[751] Michelle Martin and Leticia Villarreal Sosa, 'An Empirical Analysis of United Nations Commissions of Inquiry: Toward the Development of a Standardized Methodology, in *Siracusa Guidelines*, *supra* note 34, 53-100, at 84.
[752] Cassese 2012, *supra* note 657.
[753] Kaufman, *supra* note 91 and Firmage, *supra* note 91.
[754] Final Act of the International Conference on Human Rights, Res. X, UN Doc. A/CONF.32/41, 12 May 1968.
[755] ECOSOC Res. 1870 (LVI), 17 May 1974.
[756] *Draft Model Rules 1970*, *supra* note 667, Rules 18-24, *contra UNCHR Model Rules*, *supra* note 674, Rule 18.
[757] Franck and Fairley, *supra* note 91, at 320.
[758] *1991 Declaration*, *supra* note 25, Arts. 26 and 27.
[759] Bassiouni 2001, *supra* note 98, at 40.

significant progress in this regard. It comprehensively examines fact-finding missions and commissions of inquiry, identifies best practices, and includes new model rules based on the *Model Rules 1970* and "modified on the basis of experience."[760] These rules do not exhaustively prescribe working methods, instead providing that inquiries "shall be conducted in conformity with relevant international standards and best practices on human rights fact-finding and investigations as developed by the [UN]."[761] This approach promotes consistency and development of institutional knowledge while retaining commissions' discretion to adopt methods of work appropriate for their mandates.

5.2 Provision of resources and time limits

Mandating authorities must ensure that commissions have sufficient resources to carry out their mandates and set appropriate time limits for the delivery of the report. OHCHR advises that deadlines and resources must be "commensurate with the mandate and consider the circumstances under which the commission/mission is required to operate."[762] The HRC commonly requests that commissions are provided with all resources necessary to fulfil their mandates.[763] However, information regarding the financing of inquiries is not easy to locate[764] and many inquiry reports do not specify the extent of resources or their allocation.[765]

Commissions have signalled that they operated with scarce resources and under tight time limits.[766] For instance, the Rwanda Commission only operated for four months, during which it was expected to examine massacre sites, interview witnesses, collect information and prepare its reports. Sunga observes, "[p]ractically speaking, it would have been very difficult for the three commission members to sift through the mass of documentary material, taped testimonies and other records it received in order to identify items of possible probative value to prosecutions."[767] Six months into its year-long mandate, the CAR Commission had only five investigators and lacked a chief of investigations and a legal advisor, which was a "source of anxiety"[768] regarding its ability to fulfil its mandate within the specified time. Marina Aksenova and Morten Bergsmo suggest that commissions' "widely defined, open-ended objectives"[769] contribute to this situation, and that mandates with more specific functions

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[760] *OHCHR Guidance and Practice*, *supra* note 63, at 69.
[761] *OHCHR Model Rules*, *supra* note 675, Rule 13.
[762] *OHCHR Guidance and Practice*, *supra* note 63, at 10.
[763] E.g., *Myanmar Mandate*, *supra* note 2, para. 13; *North Korea Mandate*, *supra* note 346, para. 9.
[764] E.g., OHCHR's 2016 financial statement provides that US$4,934,900 was spent by "mandated Commissions of Inquiry": *OHCHR Report 2016*, at 93, available at http://www2.ohchr.org/english/OHCHRreport2016/allegati/Downloads/1_The_whole_Report_2016.pdf (accessed 1 May 2018).
[765] Martin and Villarreal Sosa, *supra* note 751, at 92.
[766] E.g., *Goldstone Report*, *supra* note 633, para. 157; *Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1*, UN Doc. A/HRC/29/CRP.4, 22 June 2015, para. 13 [*Gaza Report*]. See Boutruche 2013, *supra* note 482, at 17.
[767] Sunga 2011, *supra* note 733, at 195.
[768] *Preliminary report of the International Commission of Inquiry on the Central African Republic*, UN Doc. S/2014/373, 26 June 2014, para. 23 [*CAR Preliminary Report*].
[769] Marina Aksenova and Morten Bergsmo, 'Non-Criminal Justice Fact-Work in the Age of Accountability', in Bergsmo, *supra* note 94, 1-23, at 18. See *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff*, UN Doc. A/HRC/24/42, 28 August 2013, para. 102.

might be more capable of being met. This proposal was not taken up by mandating authorities, which continue to award multi-faceted mandates.

A lack of resources might also be the result of political factors. Federica D'Alessandra writes that some mandating authorities ensured that commissions were understaffed and under-resourced to give the appearance of pursuing human rights "while at the same time not generating politically unwanted results".[770] In at least one case, commentators suggest that resource restrictions aimed to limit an inquiry's functions. Scharf, who participated in drafting the Yugoslavia Commission's mandate, writes that the UK and France preferred a more passive body which would analyse information received by it, while the US preferred a more active investigative mandate; and that the UK's agreement on that point was undermined "by insisting that the Commission be funded from existing UN resources rather than include in the resolution a specific budget for the Commission".[771] The General Assembly did not allocate resources for the Yugoslavia Commission, which required the Commission to seek independent funding and assistance.[772] The Yugoslavia Commission's temporal mandate concluded before it could complete its plan of work, and it had to cancel exhumations. The Commission sent its information to the ICTY Prosecutor before its final report was presented to the Security Council. Bassiouni writes that this lack of resources was due to the desire of some governments and those in the UN system "who wanted to advance the political agendas of those governments."[773]

6. Principle and Pragmatism in Mandating Authorities' Choices

The above discussion highlighted how mandating authorities determine key aspects of UN atrocity inquiries, including the investigative focus, composition, resources and in some cases, operational activities. This Section describes how choices by mandating authorities across these dimensions of inquiry practice reflect principled and pragmatic considerations and discusses consequences for commissions' roles and functions. These choices and consequences concern commissions' turn to international law (6.1), use of inquiry to condemn atrocities (6.2) and inquiry as a lever to build and release pressure (6.3).

6.1 Turn to international law

Mandating authorities frequently instructed UN atrocity inquiries to assess violations of international law. In addition to specifying legal lenses of analysis, many mandates linked the generation of recommendations with aims associated with the realm of law, such as ensuring accountability for violations. The appointment of commissioners with legal expertise reinforces commissions' legal orientation. International legal academics, judges, and practitioners are part of a professional community which Oscar Schachter famously termed the "invisible college of international lawyers",[774] where ideas are carried from one role to

[770] D'Alessandra, *supra* note 100, at 68.
[771] Scharf, *supra* note 291, at 273.
[772] Bassiouni 1994, *supra* note 166, at 801.
[773] Bassiouni 2001, *supra* note 98, at 47. See M. Cherif Bassiouni, 'Challenges to International Criminal Justice and International Criminal Law', in William Schabas (ed.), *Cambridge Companion to International Criminal Law* (Cambridge: CUP, 2016) 353-392, at 376 [Bassiouni 2016].
[774] Oscar Schachter, 'The Invisible College of International Lawyers', (1977) 72 (2) Nw U L Rev 217-226.

another. Commentators typify these inquiries as 'quasi-judicial',[775] 'justice-oriented',[776] and as new mechanisms for adjudication.[777] The Palmer Commission's mandate may be cited as a counterweight to the trend of juridification and shows that an emphasis on international law is a choice on the part of mandating authorities.[778]

The juridification of UN atrocity inquiries gives rise to certain consequences. Framing mandates by legal concepts focuses the scope of the inquiry. When a commission is mandated to inquire into violations, the fact-finding exercise naturally focuses on incidents which may be characterised in this way. Boutruche observes that where a fact-finding body is instructed to assess facts on the basis of law, "the facts covered through the inquiry are framed by the elements of the very rule allegedly violated. Otherwise, a legal conclusion cannot be reached."[779] A focus on legal violations also channels expected follow-up as a corollary of duties to investigate and prosecute serious violations.[780] As observed by Jean-Pierre Cot, "human rights do not leave much room for compromise."[781]

Several mandates emphasized criminal responsibility through instructions to investigate international crimes or to ensure 'full accountability' for violations. As noted by Saxon, a focus on individual accountability may be inevitable when a human rights lens is selected:[782]

> [A]ttempts to de-couple criminal accountability from human rights fact-finding creates a false dichotomy. Part of the relevance of fact-finding processes – whether by national or international bodies – includes the identification of persons responsible for international crimes.

The use of ICL language in mandates may also play a strategic role to draw attention to reported atrocities and signal the possibility of specific corrective action. Van den Herik argues that the North Korea Commission was instructed to use ICL language in order to "legally characterise given facts and thereby express a certain indignation and to evoke an external response rather than solely as a lens to select relevant facts."[783]

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[775] Franck and Fairley, *supra* note 91, at 308; Bertrand Ramcharan, 'Substantive Law Applicable', in Ramcharan, *supra* note 91, 26-40, at 26; Makane Moïse Mbengue and Brian McGarry, 'The International Commission of Inquiry on Darfur and the Application of International Humanitarian Norms', in Jinks *et al*, *supra* note 94, 479-504, at 481.

[776] Frulli, *supra* note 102.

[777] Dapo Akande and Hannah Tonkin, 'International Commissions of Inquiry: A New Form of Adjudication?', *EJIL:Talk*, 6 April 2012, available at http://www.ejiltalk.org/international-commissions-of-inquiry-a-new-form-of-adjudication (accessed 1 May 2018).

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

[779] Boutruche, *supra* note 28, at 111.

[780] E.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment 1984, 1465 UNTS 85, Art. 12 [CAT]; ECtHR, *McCann and others v. United Kingdom* [1995] ECHR 31 [*McCann Case*]; *Principles on the Right to a Remedy*, *supra* note 540, Principle 4; Geneva Convention I, *supra* note 178, Arts. 49-50; Geneva Convention II, *supra* note 178, Arts. 50-51; Geneva Convention III, *supra* note 178, Arts. 129-130; Geneva Convention IV, *supra* note 178, Arts. 146-147; *Additional Protocol I*, *supra* note 33, Art. 85; Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277, Art. 1 [Genocide Convention].

[781] Jean-Pierre Cot, *International Conciliation* (1972) at 263, cited in Van den Herik, *supra* note 74, at 30.

[782] Saxon, *supra* note 736, at 220.

[783] Van den Herik, *supra* note 74, at 29.

Commissions' written mandates emphasising individual responsibility for violations may be cited as examples of a wider turn to criminal law in human rights practice. Karen Engle writes that the human rights project has rather uncritically embraced criminal law "with little systematic deliberation about the aims of criminal law or about its pitfalls. In fact, forgotten are not only the debates about justice versus peace and truth but also broader critiques of penal systems that have long been voiced by human rights advocates."[784] She cautions:[785]

> … as criminal law has become the enforcement tool of choice, it has negatively affected the lens through which the human rights movement and the international law scholars who support it view human rights violations. In short, as advocates increasingly turn to [ICL] to respond to issues ranging from economic injustice to genocide, they reinforce an individualized and decontextualized understanding of the harms they aim to address, even while relying on the state and on forms of criminalization of which they have long been critical.

Other scholars also argue that an individualised focus may even mask responsibilities of collective actors such as states and organized armed groups, whose actions (and inaction) produce conditions for mass atrocities to occur.[786] André Nollkaemper writes that criminal law "provides a distorted and fragmentized picture of reality in which the blame rests on a few individuals who, understandably, resent their being sacrificed as scapegoats."[787] Claire Nielsen similarly writes that ICL "fails to account for the structural causes of violence" and that its focus on actions of individuals is "obscuring and avoiding discussion of the global inequality in which powerful states are profoundly implicated."[788]

A mandate to investigate legal violations of can also produce quite different dynamics between commissions and states. There is less room for negotiation; rather than seeking collaboration with concerned states, commissions may be perceived as antagonistic and accusatory. For instance, Michael Kirby writes that the North Korea Commission could not ignore its mandate to examine culpability for violations even if "addressing this question might alienate the leadership or authorities of DPRK or make peaceful dialogue with them more difficult."[789] It may also mean that any perceived deviations in the mandate from full impartiality are more strictly critiqued and utilised to attack a commission's credibility.

6.2 Inquiry to condemn atrocities

Many mandating resolutions at once condemn violations and call for their investigation. While condemning atrocities may justify states' collective involvement in a crisis situation, it appears to prejudge the result of a supposedly impartial inquiry. UN atrocity inquiries are not usually established in circumstances where the facts are truly unknown or disputed. Rather,

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[784] Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights', (2015) 100 Cornell L Rev 1069-1128, at 1071.
[785] *Ibid*.
[786] Claire Nielsen, 'From Nuremburg to The Hague: The Civilizing Mission of International Criminal Law', (2008) 14 Auckland U L Rev 81-114, at 99.
[787] André Nollkaemper, 'Systemic Effects of International Responsibility for International Crimes', (2010) 8(1) Santa Clara J Int'l L 313-352, at 352.
[788] Nielsen, *supra* note 786, at 99.
[789] Kirby, *supra* note 97, at 25.

credible reports of violations build momentum for their establishment. As observed by Van den Herik:[790]

> Whereas the traditional [Hague] commissions of inquiry were principally meant to pacify and defuse a conflict, contemporary human rights commissions rather aim to stir, to evoke action, to opine and to condemn. Their inquiry is to a certain extent predisposed. The mere fact that a commission is created by the [HRC] signals a perception that there are credible allegations that human rights have been violated.

The HRC's responsibility to respond to human rights emergencies may be triggered upon reports of serious violations, so it is not inconsistent for a mandating resolution to acknowledge reported violations. However, the notion of 'impartial' inquiry must take on a different hue, as commissions mandated to investigate human rights violations and ensure accountability are "inherently biased to contribute to the normative agenda that underlies human rights."[791]

The desire to condemn violations may also influence commissioner selection. Commissions established to examine alleged violations of international law should include recognised legal experts who are demonstrably independent. Credibility and impartiality issues that have arisen from commissioners' prior statements illustrates that potential appointees' previous activities should be carefully considered. However, as observed by Mégret, "the politicized nature of designation processes means that judges/experts are in fact sometimes chosen not despite their previous declarations, but on the very basis of having made them."[792] In addition, appointment processes remain opaque and a matter of discretion for the mandating authority, despite initiatives to formalise this process. If mandating authorities wished to further demonstrate their commitment to impartiality, they might consider appointing commissioners from a public list of vetted candidates.

Challenges to impartiality are compounded where the mandating resolution is unbalanced, such as by identifying violations by only one party to a conflict or containing geographic or temporal limitations which exclude relevant actors, events, or contexts. As such imbalance is often seized upon by states as reason to deny cooperation, they may endanger a commission's ability to discharge its mandate. There is room for improvement in the drafting of mandates to avoid limiting commissions' impact before they have commenced their work. Devereux suggests that it may be beneficial to develop model precedents for mandates to "outline the desirable categories of information as well as provide draft language".[793] She writes that while states are likely to want to retain control over the formulation of mandates, identifying best practices might encourage greater uniformity and consistency, and thus greater clarity in written mandates.[794] However, it is unclear whether model precedents would discourage the sorts of mandates which appear to have been fully intended. In addition, the text is subject to debate and may reflect significant compromise in light of wider goals and interests.

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[790] Van den Herik, *supra* note 74, at 30.
[791] *Ibid*., at 30.
[792] Mégret 2011, *supra* note 51, at 32.
[793] Devereux, *supra* note 409, at 109.
[794] Devereux, *supra* note 409, at 109.

6.3 Inquiry as building and releasing pressure

Establishing an inquiry signals that allegations of violations are being taken seriously and that international community's attention is turned to the situation. As inquiry is one of several measures available at the UN, it represents an escalation in response. For instance, Human Rights Watch called on the UN to establish an inquiry on North Korea, stating "North Korea's defiance of the [HRC's] mandates and mechanisms should not be allowed to stand. It's time for the UN to take the next step, and ratchet up the pressure by [setting up an inquiry]."[795] When voting to establish the Syria Commission, Thailand's representative stated that Thailand supported the resolution because of "the need to turn back the tide of violence in Syria… and to send a firm message to the government of Syria".[796] Where a mandating authority has power to take binding action, inquiry might pave the way for enforcement measures. Bassiouni claims that the Security Council had already decided to establish the ICTR prior to establishing the Rwanda Commission, so the latter's function "was essentially window dressing."[797]

The prospect of inquiry may be used to induce states to comply with their obligations. For instance, the High Commissioner for Human Rights warned that unless the DRC cooperated with a hybrid investigation into violations, he would "insist on the creation of an international investigative mechanism".[798] Recent HRC practice shows that the label 'commission of inquiry' also has power. The Myanmar Commission is described in its written mandate as an "independent international fact-finding mission".[799] This term was evidently the subject of negotiation; in explaining its position on the resolution, the Philippines stated, "[t]he balanced efforts of the [EU] were appreciated, steering away from a Commission of Inquiry".[800] However, the official title of the Myanmar Commission is nearly identical to that of the Goldstone Commission.[801] Although the Myanmar Commission is substantively a commission of inquiry, the 'inquiry' label appears to have the ability to communicate denunciation.

At the same time as establishing an inquiry can build pressure for actors to comply with obligations, it may relieve other sources of pressure. While the subject-matter and composition of UN atrocity inquiries have moved closer to the realm of international law, they have not been endowed with judicial powers. Enforcet still depends on the will of external actors. Mandating authorities might establish an inquiry to appease feverish political

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[795] Human Rights Watch, 'North Korea: UN Should Investigate Crimes Against Humanity', 23 January 2012, available at http://www.hrw.org/news/2012/01/23/north-korea-un-should-investigate-crimes-against-humanity (accessed 1 May 2018).

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

[797] Bassiouni 2001, *supra* note 98, at 43.

[798] OHCHR, 'Denial of access and lack of cooperation with UN bodies will not diminish scrutiny of a State's human rights record', 6 June 2017, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21687&LangID=E (accessed 1 May 2018).

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

[800] OHCHR, 'Human Rights Council decides to dispatch a fact-finding mission to Myanmar to establish facts on violations, especially in Rakhine State', 24 March 2017, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21443&LangID=E (accessed 1 May 2018).

[801] *Goldstone Mandate*, *supra* note 340, para. 14.

situations and mollify calls for immediate action. Such a perspective was originally advanced in 1899 by Martens in relation to commissions established to resolve international disputes:[802]

> One can compare the commission of inquiry to a safety valve given to the governments. They are allowed to say to the very excited and ill-informed public opinion, 'Wait— we will organize a commission which will go to the spot, which shall furnish all the new information— in a word, it shall shed light.' In that way time is gained, and in international life a day gained may save the future of a nation. The object of commissions of inquiry is therefore clear. They are the instruments of pacification.

A similar function has been observed of atrocity inquiries. For instance, as well as bolstering the case for an *ad hoc* tribunal, Bassiouni suggests that the Rwanda Commission served as a delay tactic: "[i]t was necessary to gain time before the Security Council established the ICTR in order to work out the logistics of the prospective tribunal."[803] Saxon writes that commissions may be subservient to wider diplomatic objectives, including "attempts to create a 'safety-valve' through which the international community may criticize a particular regime; to facilitate the resolution of a conflict or temper its severity; or, more cynically, to act as a 'placeholder' for an international community that cannot achieve consensus on a strategy for addressing a crisis."[804] Such observations have synergies with wider critiques of the Security Council's inaction in the face of ongoing atrocities[805] and its practice of establishing accountability mechanisms rather than taking measures of prevention or intervention.[806] Criminalized mandates are also critiqued for having the opposite effect. Schwöbel-Patel sees these commissions as part of an 'intervention formula' carried out in the name of the international community but in reality, at the service of powerful Western states.[807]

Some commentators perceive mandating authorities' lack of guidance and support of commissions' operations as in service of wider political goals. According to Bassiouni, the general state of '*ad hoc*-ery' can be explained by the fact that "the human rights component of the UN system reflects the values of justice, while systemically it functions as a political process, thus conditioning the upholding of these values to political oversight".[808] In any case, UN atrocity inquiries are "caught in a certain tension rising from international law's ambition of peace on the one hand and justice on the other."[809] Thus, the establishment of an inquiry can represent a mandating authority's commitment to principles of justice and the rule of law, as well as pragmatic considerations such as retaining discretion to take action and advancing wider political goals and interests.

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[802] Third Commission, Sixth Meeting, 19 July 1899, in James Brown Scott (ed.), *The Proceedings of the Hague Peace Conferences: The Conference of 1899* (New York: OUP, 1920) at 641.

[803] Bassiouni 2001, *supra* note 98, at 43.

[804] Saxon, *supra* note 736, at 212 (footnotes omitted).

[805] E.g., the Syria Commission wrote that inaction by the permanent members of the Security Council "provided the space for the proliferation of actors in [Syria], each pursuing its own agenda and contributing to the radicalization and escalation of violence. The Security Council bears this responsibility": *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/25/65, 12 February 2014, para. 155 [*Syria Seventh Report*].

[806] Engle, *supra* note 784, at 1076.

[807] Schwöbel-Patel, *supra* note 103, at 167.

[808] Bassiouni 2001, *supra* note 98, at 38.

[809] Hellestveit, *supra* note 20, at 394.

Conclusions

This Chapter illustrated how the characteristics and decisions of UN mandating authorities shaped the manifestation of UN atrocity inquiries in practice. Their institutional characteristics and spheres of responsibility attracted differing levels of consent and cooperation on the part of concerned states. Several HRC-led inquiries faced strong opposition from concerned states because of the HRC's constellation of features, including its political decision-making, practice of condemning violations and recommendatory powers. Inquiries by the Security Council and the Secretary-General did not face such impediments for different reasons; states generally obeyed Security Council decisions, while the Secretary-General sought their consent. State cooperation was thus influenced by the circumstances of commissions' establishment.

Mandating authorities fundamentally shaped commissions' roles and functions through the formulation of their written mandates. These mandates were often juridified, with a focus on legal violations and responsibilities, and were associated with the aim of ensuring accountability. Regarding commission composition, mandating authorities have moved away from the traditional practice of appointing state representatives. Recently, most commissioners were respected international legal experts serving in their personal capacity. These actions signal a commitment to encourage actors to comply with obligations and promote the rule of law. At the same time, mandating authorities have resisted initiatives to sharpen the institution of inquiry, so it remains institutionally 'soft' and deployed at their discretion.

Like an architect's conceptual plan, written mandates identify broad tasks and objectives, but leave much detail to be worked out by those charged with their implementation. While mandating authorities' institutional characteristics and decisions crucially inform the roles of UN atrocity inquiries, commissions also make their own choices. The next Chapter explores how commissions' interpretations and implementations of their mandates further illuminate their roles and functions.