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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 THREE

MANDATE INTERPRETATION AND IMPLEMENTATION: COMMISSIONS AS ENGINEERS OF THEIR ROLES AND FUNCTIONS

Introduction

If mandating authorities are the architects of UN atrocity inquiries, sketching out the broad aesthetics and conceptual plan, commissions are the engineers. Commissions must work within the limits of their mandates to execute the mandating authority's vision, determining what is feasible and resolving practical issues. In addition to interpreting the scope of their mandates, commissions must decide *how* to carry out their work. Chapter Two explained that most often, mandating authorities left operational decisions in the hands of commissions.

This Chapter analyses how commissions interpreted and implemented their mandates in light of their roles and functions. The analysis chiefly draws from commissions' *reported* mandate interpretations and working methods. This qualification is important for two reasons. First, to evaluate how commissions carried out their mandates in practice, it would have been necessary to observe operations first-hand, which was not possible within the scope of this research. Secondly, commissions did not report on all aspects of their work and the level of detail provided is uneven.⁸¹⁰ As such, this Chapter aims to identify patterns and trends in commissions' approaches, to determine how their roles and functions informed their mandate interpretation and implementation.

Chapter Three is organised as follows. Section 1 examines how commissions interpreted their mandates in order to uphold, and in some cases to restore, impartiality. It does not address commissions' interpretations of the legal framework or recommendations, as these are discussed in Chapters Four and Six, respectively. Section 2 examines key principles guiding mandate implementation. Section 3 discusses practical challenges faced by commissions when operationalising their mandates and their efforts to overcome them. Section 4 discusses commissions' initiatives with respect to working methods in order to promote credible and reliable findings. The Conclusions section discusses how commissions' roles and functions shaped their approaches to mandate interpretation and implementation.

1. Interpretation of the Mandate

Chapter Two identified how mandating authorities set down written mandates and how some elements of these documents posed challenges to commissions' impartiality. Commissions routinely interpret their mandates in order to flesh out the focus of the inquiry and ensure that it is of appropriate scope. The *Advanced Practitioner's Handbook on Commissions of Inquiry* by the Harvard Program on Humanitarian Policy and Conflict Research (*HPCR Handbook*) recommends that commissions' interpretations be guided by principles of professional

⁸¹⁰ E.g., *Report of the International Commission of Inquiry on Côte d'Ivoire*, UN Doc. A/HRC/17/48, 1 July 2011, paras. 5-8 [*HRC Côte d'Ivoire Report*], as compared with *North Korea Report*, *supra* note 32, paras. 28-62. See Martin and Villarreal Sosa, *supra* note 751, at 69-70.

practice,⁸¹¹ which include impartiality. This Section discusses how commissions interpreted their mandates so as to preserve or reinstate impartiality and distance themselves from the politicised circumstances of their establishment. It examines commissions' interpretations of geographic parameters (1.1), temporal scope (1.2), actors under scrutiny (1.3) and issues of prejudgment (1.4).

1.1 *Geographic parameters*

Commissions' written mandates generally specified the territory of concern. Where alleged violations were confined to a particular territory, the literal wording tended to be adopted. For instance, the Darfur Commission interpreted its geographic mandate as "only the situation in the Darfur region of the Sudan",⁸¹² on the basis of the text of its mandating resolution.

Some commissions interpreted geographic parameters broadly to include actions or actors beyond concerned states. For instance, the HRC requested the North Korea Commission to investigate violations in the DPRK, including "abductions of nationals of other States".⁸¹³ The Commission interpreted its mandate broadly to include violations "by the DPRK against its nationals both within and outside the DPRK as well as those violations that involve extraterritorial action originating from the DPRK".⁸¹⁴ It explained that such violations fell within its mandate as they "facilitate subsequent human rights violations in the DPRK, or are the immediate consequence of human rights violations that take place in the DPRK."⁸¹⁵ This approach led the Commission to make findings in respect of China's *refoulement* practice.⁸¹⁶ In a similar vein, the HRC mandated the Burundi Commission to investigate violations "in Burundi".⁸¹⁷ The Commission interpreted its mandate to include "abuses committed in Burundi by nonstate entities, or their members, *based abroad*."⁸¹⁸ The mandating resolution also recognised the situation of Burundian refugees in neighbouring countries and invited the Commission to engage with them.⁸¹⁹ Reading these provisions together, the Burundi Commission determined that its mandate included an "examination of the human rights situation relating to refugees".⁸²⁰

By contrast, the Eritrea Commission adopted the literal meaning of its mandate to investigate violations "in Eritrea".⁸²¹ It interpreted the geographic scope as "the territory of Eritrea, without any exclusion of a specific area of the country and including the border zones and Eritrean maritime territory."⁸²² This interpretation excluded potential violations against members of the Eritrean diaspora. Van den Herik and Mirjam van Reisen write that the

⁸¹¹ *HPCR Handbook*, *supra* note 95, at 9.

⁸¹² *Darfur Report*, *supra* note 32, para. 11.

⁸¹³ *North Korea Mandate*, *supra* note 346, para. 5.

⁸¹⁴ *North Korea Report*, *supra* note 32, para. 19.

⁸¹⁵ *Ibid.*, para. 20.

⁸¹⁶ *Ibid.*, paras. 452, 458, 1197 and 1221(a).

⁸¹⁷ *HRC Burundi Mandate*, *supra* note 349, paras. 23(a) and (b).

⁸¹⁸ *HRC Burundi TOR*, *supra* note 495, at II(iii) (emphasis added).

⁸¹⁹ *HRC Burundi Mandate*, *supra* note 349, paras. 23(d).

⁸²⁰ *HRC Burundi TOR*, *supra* note 495, at II(iii).

⁸²¹ *Eritrea Mandate*, *supra* note 347, para. 8.

⁸²² *Eritrea First Report*, *supra* note 567, para. 10.

diaspora was not perceived “as an object of protection in its own right”,⁸²³ although it was engaged as an information source and dissemination channel. The HRC seems to have approved of the Eritrea Commission’s interpretation, as the geographic scope was not widened when its mandate was extended include an investigation of crimes against humanity.⁸²⁴ The Eritrea Commission’s approach diverges from that of the North Korea Commission, even though both examined authoritarian regimes which are often perceived as alike.⁸²⁵ However, neither inquiry closely examined more diffuse contributions emanating beyond concerned states that enabled situations of violations to continue, such as foreign revenue streams.⁸²⁶

As observed in Chapter Two, where an inquiry is established into a situation of armed conflict, the mandate must include relevant all geographic zones. This aspect proved to be problematic for several HRC-led inquiries into conflicts involving Israel, whose written mandates focussed on violations occurring on the territory of the other party to the conflict and often explicitly referred to violations by Israel. As the effect of these formulations was to focus on one party to the conflict, they are discussed together in Section 1.3 below.

1.2 Temporal scope

Just as mandating authorities qualified the temporal scope in various ways, so too have commissions taken different approaches to their interpretation. Some commissions interpreted the temporal scope narrowly but also had regard to earlier events as relevant context. For instance, the Sri Lanka Panel was instructed to advise on accountability measures in relation to Sri Lanka’s commitment to address IHL and IHRL violations “with respect to the final stages of the war”.⁸²⁷ Taking guidance from that phrase, the Panel focussed on the most “intense and violent phase”,⁸²⁸ namely September 2008 until May 2009, when the Sri Lankan Army carried out its final offensive and the Liberation Tigers of Tamil Eelam (LTTE) were defeated. It examined events prior to this point “in order to provide context.”⁸²⁹ The CAR Commission reported that although its temporal focus was limited to events on or after 1 January 2013, it “takes note of earlier events where appropriate to an understanding of the situation during the period under review.”⁸³⁰ The Gaza Commission was asked to investigate violations “in the context of the military operations conducted since 13 June 2014, whether before, during or after”.⁸³¹ Understanding that its mandate was bookended by the murder of three Israeli teenagers on 12 June 2014 and the conclusion of Operation Protective Edge, the

⁸²³ Larissa van den Herik and Mirjam van Reisen, ‘A Diasporic Perspective on the Commission of Inquiry for Eritrea: A Missed Opportunity to Maximize Impact?’, forthcoming, at 2.

⁸²⁴ *Eritrea Mandate Extension*, *supra* note 503.

⁸²⁵ E.g., Nathaniel Myersjune, ‘Africa’s North Korea’, *Foreign Policy*, 15 June 2010, available at <http://foreignpolicy.com/2010/06/15/africas-north-korea> (accessed 1 May 2018).

⁸²⁶ Allegations of DPRK nationals being sent abroad to perform forced labour emerged after the North Korea Commission’s report was published, and were examined by the Special Rapporteur: *Report of the Special Rapporteur on the situation of human rights in the Democratic People’s Republic of Korea*, Marzuki Darusman, UN Doc. A/HRC/28/71, 18 March 2015, para. 19.

⁸²⁷ ‘Terms of Reference’, in *Sri Lanka Report*, *supra* note 29, para. 5.

⁸²⁸ *Sri Lanka Report*, *supra* note 29, para. 12.

⁸²⁹ *Ibid.*, para. 13.

⁸³⁰ E.g., *CAR Report*, *supra* note 32, para. 6.

⁸³¹ *Gaza Mandate*, *supra* note 340, para. 13.

Gaza Commission interpreted its temporal mandate as “between 13 June and 26 August 2014”.⁸³²

Other mandates were silent as to the temporal scope. Where an inquiry concerned a situation of increased violence or conflict, some commissions identified the beginning of the crisis period as the starting point. For instance, the Libya Commission focussed on events from 2011, as commissioners “perceived these incidents to constitute the mandate’s implicit focus.”⁸³³ The Darfur Commission examined violations from 2003, when “reports of violations” began to emerge.⁸³⁴

In situations of long-standing concern, commissions defined temporal scope differently. In light of practical limitations of time and resources, the North Korea Commission focused on violations “reflective of the human rights situation as it persists at present” and, where resources permitted, patterns of past violations of continued relevance.⁸³⁵ Historical events were considered where crucial to understanding the situation in North Korea and underlying causes of violations.⁸³⁶ The Eritrea Commission focussed on events from 1991, “when Eritrean entities took effective control of Eritrean territory.”⁸³⁷ The Eritrean Government objected to the breadth of the written mandate “which theoretically can span any time period in Eritrean history”⁸³⁸ but also criticised the Commission’s determination of temporal limits as exceeding its authority.⁸³⁹ This type of criticism indicates how a very broad written mandate could be used as a basis to undermine the work of an inquiry.

1.3 Actors under scrutiny

Most mandates did not identify particular actors as the focus of inquiry. Rob Grace observes that in such cases commissions should be “guided by the professional norm of evenhandedness to probe allegations of violations committed by all relevant parties.”⁸⁴⁰ In situations not involving active hostilities, commissions chiefly focussed on concerned states. For instance, the Eritrea Commission interpreted its mandate as limited to “violations that are imputable on Eritrean authorities.”⁸⁴¹ The North Korea Commission took a slightly broader view, examining alleged violations “by the DPRK against its nationals” and “the extent to which other states carry relevant responsibility”⁸⁴² for violations in North Korea. In support of its broad interpretation, the Commission cited other UN atrocity inquiries which examined actions of actors other than concerned states.⁸⁴³

⁸³² *Gaza Report*, *supra* note 766, paras. 6 and 58.

⁸³³ *HPCR Handbook*, *supra* note 95, at 11.

⁸³⁴ *Darfur Report*, *supra* note 32, para. 11.

⁸³⁵ *North Korea Report*, *supra* note 32, para. 18.

⁸³⁶ *Ibid.*, para. 18.

⁸³⁷ *Eritrea First Report*, *supra* note 567, para. 10; *Eritrea Second Report*, *supra* note 569, para. 1.

⁸³⁸ Eritrea Ministry of Foreign Affairs, ‘Commission of Inquiry Report: Devoid of Credibility and Substance’, 19 June 2015, para. 4, available at <http://www.shabait.com/news/local-news/20031-commission-of-inquiry-report-devoid-of-credibility-and-substance> (accessed 1 May 2018).

⁸³⁹ *Ibid.*

⁸⁴⁰ Grace 2015, *supra* note 59, at 46.

⁸⁴¹ *Eritrea First Report*, *supra* note 567, para. 10.

⁸⁴² *North Korea Report*, *supra* note 32, para. 20.

⁸⁴³ *Ibid.*, footnote 8.

Some commissions examined contributions to situations of human rights concern by actors other than states. The Burundi Commission interpreted its mandate to examine human rights ‘violations’ as referring to state agents or entities, and ‘abuses’ to refer to “actions committed by non-state entities or their members.”⁸⁴⁴ The Israeli Settlements Commission, instructed to investigate human rights implications of Israeli settlements in Palestine,⁸⁴⁵ interpreted the term ‘Israeli settlements’ to mean “all physical and non-physical structures and processes that... support the establishment, expansion and maintenance of Israeli residential communities beyond the Green Line of 1949”.⁸⁴⁶ This interpretation permitted the Commission to examine actors beyond the Israeli Government which contributed to the situation of the settlements, notably private companies.⁸⁴⁷ The Eritrea Commission also examined contributions to the human rights situation by foreign enterprises, and directed recommendations to these actors.⁸⁴⁸

A few commissions were instructed to focus on specific actors. The Cambodia Commission was asked to examine crimes by “Khmer Rouge leaders”.⁸⁴⁹ The Cambodia Commission observed that its mandate excluded potential violations by other actors, but “endorse[d] this limitation as focusing on the extraordinary nature of the Khmer Rouge’s crimes.”⁸⁵⁰ It may be queried whether a formally even-handed inquiry would have created an inappropriate sense of equivalence. More recently, the Myanmar Commission was asked to investigate “alleged recent human rights violations by military and security forces, and abuses, in Myanmar”.⁸⁵¹ The term ‘abuses’ might be interpreted broadly to refer to non-state actors in line with other commissions’ interpretations.⁸⁵² However, its mandate focusses principally on state institutions.

Commissions which examined situations of conflict generally interpreted their mandates to include all parties. For instance, the Libya Commission examined the military actions of the Gadhafi regime, opposition forces and NATO.⁸⁵³ As discussed in Chapter Two, the HRC instructed several inquiries involving Israel to investigate violations by that State and limited the geographic scope to the territory of the other party. In addition to raising concerns of bias, such mandates are problematic because “rules on the conduct of hostilities necessitate establishing facts with regard to the behaviour of the other party.”⁸⁵⁴ The Lebanon Commission wrote, “any independent, impartial and objective investigation into a particular conduct during the course of hostilities must of necessity be with reference to all the belligerents involved.”⁸⁵⁵

⁸⁴⁴ *HRC Burundi TOR*, *supra* note 495, at II(i).

⁸⁴⁵ *Israeli Settlements Mandate*, *supra* note 340.

⁸⁴⁶ *Israeli Settlements Report*, *supra* note 572, para. 4.

⁸⁴⁷ *Ibid.*, para. 96.

⁸⁴⁸ *Eritrea First Report*, *supra* note 567, paras. 211-212, 1408-1412, and 1537.

⁸⁴⁹ *Cambodia Report*, *supra* note 324, para. 9.

⁸⁵⁰ *Ibid.*, para. 10.

⁸⁵¹ *Myanmar Mandate*, *supra* note 2, para. 11.

⁸⁵² *HRC Burundi TOR*, *supra* note 495, at II(i).

⁸⁵³ *Report of the International Commission of Inquiry on Libya*, UN Doc. A/HRC/19/68, 2 March 2012, para. 11 [*Libya Second Report*].

⁸⁵⁴ Boutruche, *supra* note 28, at 125.

⁸⁵⁵ *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1*, UN Doc. A/HRC/3/2, 23 November 2006, para. 14 [*Lebanon Report*]. See Stewart, *supra* note 96, at 1041.

Commissions took different approaches when trying to resolve one-sidedness mandates. The most conservative approach was taken by the Lebanon Commission, the first inquiry to be established by the HRC. It was asked to investigate “systematic targeting and killings of civilians by Israel in Lebanon”.⁸⁵⁶ The Commission considered that it could not construe its mandate as “equally authorizing the investigation of the actions by Hezbollah in Israel”, as this would exceed its “interpretative function and would be to usurp the [HRC’s] powers.”⁸⁵⁷ Israel refused to cooperate with this inquiry.⁸⁵⁸ Also in 2006, the HRC established the Beit Hanoun Commission to, *inter alia*, “make recommendations on ways and means to protect Palestinian civilians against any further Israeli assaults”.⁸⁵⁹ The mandate focussed on Israeli violations and did not include victims in Israel. The Commission interpreted its mandate broadly to review the situation “within a broader context of events in Gaza”⁸⁶⁰ and examined obligations of other parties to the conflict.⁸⁶¹ Chinkin writes that the instruction to make recommendations for the protection of Palestinian civilians “opened the way for inclusion of consideration of the firing of rockets from Gaza.”⁸⁶² Israel refused to cooperate, so the Commission had to enter Beit Hanoun via Egypt.⁸⁶³ The Commission stated that Israel’s view that the mandate was biased “is a matter for the Council”, and that the Commission had “gone to great lengths to execute its mandate in as balanced a way as possible.”⁸⁶⁴

A two-step approach to mandate reformulation was taken by the UN Fact Finding Mission on the Gaza Conflict (known as the Goldstone Commission after its chair, Richard Goldstone). Its original mandate was to investigate violations “by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip”.⁸⁶⁵ Israel rejected the resolution as biased⁸⁶⁶ and several potential commissioners declined appointment due to the mandate. The mandate was reformulated by the HRC President as a condition of Goldstone’s appointment⁸⁶⁷ as the investigation of violations “in the context of the military operations that were conducted in Gaza”.⁸⁶⁸ The Commission interpreted its mandate to require consideration of the actions of all parties and to “review related actions in the entire Occupied Palestinian Territory and Israel”.⁸⁶⁹ Despite the amended mandate and Goldstone’s assurance of even-handed investigations,⁸⁷⁰ Israel

⁸⁵⁶ *Lebanon Mandate*, *supra* note 341.

⁸⁵⁷ *Lebanon Report*, *supra* note 855, para. 15.

⁸⁵⁸ *Lebanon Report*, *supra* note 855, para. 19.

⁸⁵⁹ *Beit Hanoun Mandate*, *supra* note 317, para. 7.

⁸⁶⁰ *Beit Hanoun Report*, *supra* note 620, para. 6.

⁸⁶¹ *Ibid.*, para. 14.

⁸⁶² Chinkin, *supra* note 97, at 491-492.

⁸⁶³ *Beit Hanoun Report*, *supra* note 620, paras. 3 and 7.

⁸⁶⁴ *Ibid.*, para. 73.

⁸⁶⁵ *Goldstone Mandate*, *supra* note 340.

⁸⁶⁶ *Israel MFA Press Release*, *supra* note 416.

⁸⁶⁷ Richard Goldstone, ‘Quality Control in International Fact-Finding Outside Criminal Justice for Core International Crimes’, in Bergsmo, *supra* note 94, 35-53, at 47.

⁸⁶⁸ *Ibid.*

⁸⁶⁹ *Goldstone Report*, *supra* note 633, para. 152.

⁸⁷⁰ *Letter from Richard Goldstone to the Permanent Representative of Israel to the United Nations at Geneva*, 3 April 2009, in *Goldstone Report*, *supra* note 633, at 434.

considered that the mandate could only be changed by the HRC, so the original mandate persisted.⁸⁷¹

The 2014 Gaza Commission's mandate also raised concerns of partiality; it was instructed to investigate violations "in the [OPT], including East Jerusalem, particularly in the occupied Gaza Strip, in the context of the military operations conducted since 13 June 2014, whether before, during or after".⁸⁷² While this phrase did not mention Israel, the surrounding context emphasised Israeli violations.⁸⁷³ The resolution did not mention Hamas, instead generally condemning "all violence against civilians wherever it occurs, including the killing of two Israeli civilians as a result of rocket fire", and urging "all parties" to respect IHL.⁸⁷⁴ There was pushback from several states who considered the resolution biased.⁸⁷⁵ The Gaza Commission interpreted its mandate as requiring it to also examine alleged violations in Israel.⁸⁷⁶

Commissions' approaches reflected different understandings of their interpretive powers. The Lebanon Commission took a narrow view of its interpretive competence, in contrast with more recent inquiries which interpreted mandates liberally. Its narrow interpretation may have been intended to discourage the HRC from issuing similar mandates in the future; if so, it was not successful. Chinkin writes that the HRC's practice to the contrary suggests that it lacks "political sensibility",⁸⁷⁷ as such mandates predictably lead to non-cooperation. Fact-finding guidelines endorse commissions' ability to interpret their mandates to give effect to the mandating authority's intent while ensuring impartiality. Commissions' interpretations of their mandates to remove one-sided elements has not always produced state cooperation, so that such one-sided mandates may pose intractable difficulties for commissions.

1.4 Prejudgment of findings

Concerns of bias arose from several HRC mandates which presumed the existence of violations. Commissions tried to ameliorate these aspects by reformulating mandates in more neutral terms. For instance, the Gaza Flotilla Commission was instructed to investigate violations "resulting from the Israeli attacks" on the flotilla.⁸⁷⁸ The Commission acknowledged that this wording indicate prejudgment⁸⁷⁹ and reformulated the mandate as "ascertaining the facts surrounding the Israeli interception of the Gaza-bound flotilla to determine whether any violations... took place."⁸⁸⁰ It also cautioned, "[i]t is important in the drafting of matters of the sort that the impression is not given of the appearance of any prejudgment."⁸⁸¹ Perhaps as a testament to the Commission's efforts, Israel's initial objection

⁸⁷¹ *Israel letter to Goldstone Commission*, *supra* note 633, at 436. See Israel Ministry of Foreign Affairs, 'Initial Response to Report of the Fact-Finding Mission on Gaza', 24 September 2009, para. 15, available at <http://mfa.gov.il/mfa/foreignpolicy/terrorism/pages/initial-response-goldstone-report-24-sep-2009.aspx> (accessed 1 May 2018) [*Israel Response to Goldstone Report*].

⁸⁷² *Gaza Mandate*, *supra* note 340, para. 13.

⁸⁷³ *Gaza Mandate*, *supra* note 340, para. 2.

⁸⁷⁴ *Ibid.*, para. 3.

⁸⁷⁵ E.g., *Gaza Press Release*, *supra* note 420 and *EU Press Release*, *supra* note 421.

⁸⁷⁶ *Gaza Report*, *supra* note 766, para. 6.

⁸⁷⁷ Chinkin *supra* note 97, at 488.

⁸⁷⁸ *Gaza Flotilla Mandate*, *supra* note 317, para. 8.

⁸⁷⁹ *Gaza Flotilla Report*, *supra* note 681, para. 5.

⁸⁸⁰ 'Terms of Reference', in *Gaza Flotilla Report*, *supra* note 681, Annex I, para. 4 [*Gaza Flotilla TOR*].

⁸⁸¹ *Gaza Flotilla Report*, *supra* note 681, para. 272.

on grounds of bias⁸⁸² was not reiterated after the Commission's interpretation. Rather, Israel argued that the report should be postponed until inquiries by national authorities and the Secretary-General were completed.⁸⁸³ Ultimately, Israel did not cooperate with the HRC-led inquiry.

Some written mandates gave the impression of prejudgment through instructions to investigate 'all violations' or to make recommendations to protect civilians from 'further assaults'.⁸⁸⁴ This language contrasts with mandates to investigate 'alleged'⁸⁸⁵ or 'reported' violations.⁸⁸⁶ Several commissions included the word 'alleged' when interpreting their mandates. For instance, the Gaza Commission wrote that its mandate was to investigate "all alleged violations" and to "examine whether" crimes were perpetrated.⁸⁸⁷ Such language communicates that violations are yet to be proven and that the commission is committed to carrying out an impartial inquiry.

It should also be noted that such language does not *necessarily* give rise to prejudgment. Where inquiries are established after credible reports of violations have emerged, mandating authorities may recognise those findings as grounds to establish an inquiry. The example of the North Korea Commission is illuminating. When establishing that inquiry, the HRC condemned "ongoing grave, widespread and systematic human rights violations"⁸⁸⁸ and instructed the Commission to investigate violations "as outlined in paragraph 31 of the report of the Special Rapporteur".⁸⁸⁹ In its report, the Commission recalled the raft of preceding human rights reports and explained that it aimed to further investigate and document those violations.⁸⁹⁰ In this case, there was already evidence of violations, and recognition of that fact should not amount to prejudgment. In more immediate situations, commissions interpreted their mandates more cautiously to remove any pre-existing indications of prejudgment.

2. Principles Guiding Mandate Implementation

Commissions identified broad principles which guided the conduct of their work. Several commissions stated that they were guided by principles of independence, impartiality, objectivity, transparency, confidentiality, integrity and the principle of 'do no harm' in relation to victims and witnesses.⁸⁹¹ This Section zooms in on three key principles that have frequently informed mandate implementation: impartiality (2.1), centrality of victims (2.2) and accountability (2.3).

⁸⁸² Letter dated 18 August 2010, from Mr. Aaron Leshno Yaar addressed to Ambassador Sihasak Phuangketkeow, President, Human Rights Council, in *Gaza Flotilla Report*, *supra* note 681, at 60.

⁸⁸³ Letter dated 13 September 2010, from His Excellency Mr. Aaron Leshno Yaar to Mr. Karl T. Hudson-Phillips, in *Gaza Flotilla Report*, *supra* note 681, at 63.

⁸⁸⁴ E.g., *Gaza Mandate*, *supra* note 340, para. 13; *Beit Hanoun Mandate*, *supra* note 317, para. 7.

⁸⁸⁵ E.g., *Syria Mandate*, *supra* note 47.

⁸⁸⁶ E.g., *Darfur Mandate*, *supra* note 303.

⁸⁸⁷ *Gaza Report*, *supra* note 766, para. 22.

⁸⁸⁸ *North Korea Mandate*, *supra* note 346, para. 1.

⁸⁸⁹ *Ibid.*, para. 5.

⁸⁹⁰ *North Korea Report*, *supra* note 32, para. 15(a).

⁸⁹¹ *Israeli Settlements Report*, *supra* note 572, para. 5; *North Korea Report*, *supra* note 32, para. 29; *Eritrea First Report*, *supra* note 567, para. 25.

2.1 *Impartiality*

In addition to interpreting their mandates so as to ensure impartiality, commissions sought to establish the facts in a demonstrably impartial way. For instance, the UNCHR's Gaza Inquiry was "deeply mindful of its responsibility to exercise every care to be objective and impartial in gathering information and evaluating the evidence upon which it would base its conclusions and recommendations..."⁸⁹² The Goldstone Commission "based its work on an independent and impartial analysis of compliance by the parties with their obligations."⁸⁹³ Members of the Security Council's Burundi Inquiry formally declared that they would act impartially,⁸⁹⁴ a practice endorsed by fact-finding guidelines.⁸⁹⁵

Some commissions sought to take a 'balanced' approach by treating all parties equally. For instance, the Yugoslavia Commission wrote that although it had to adopt a selective approach to investigations due to resource constraints, "[i]n its choice and method of conducting research projects or investigations, the Commission endeavoured, at all times, to be both impartial and balanced."⁸⁹⁶ The Commission explained that "as a matter of balance",⁸⁹⁷ it simultaneously negotiated access to excavate mass graves believed to contain Serb victims and those believed to contain victims of Serb forces. The Rwanda Commission wrote that it applied the same standards of impartiality and independence when considering allegations of atrocities by RPF authorities and allegations of atrocities by other actors.⁸⁹⁸ Impartiality was also demonstrated through broad information-gathering and outreach activities. Commissions routinely issued public calls for submissions, welcomed information from all interested actors, and made efforts to hear from relevant stakeholders. These efforts were not always successful, as discussed in Sections 3.3 and 3.4 below.

2.2 *Centrality of victims*

Evident in many commissions' reports is a concern that their work be victim-centred. Commissions recognised harms as experienced by victims and provided a platform for their voices to be heard. For instance, the Gaza Commission wrote that "the victims and their human rights were at the core of its mandate. Its activities were thus informed by the wish to ensure that the voices of all victims are heard".⁸⁹⁹ The Goldstone Commission wrote that the purpose of its public hearings, which were broadcast live, was "to enable victims, witnesses and experts from all sides to the conflict to speak directly to as many people as possible in the region as well as in the international community", and priority was given to "participation of victims and people from the affected communities."⁹⁰⁰ Kirby writes that the North Korea

⁸⁹² *UNCHR Gaza Report*, *supra* note 536, para. 104.

⁸⁹³ *Goldstone Report*, *supra* note 633, para. 17.

⁸⁹⁴ *SC Burundi Report*, *supra* note 307, Annex I, Rules of Procedure, Rule 1.

⁸⁹⁵ *1991 Declaration*, *supra* note 25, Art. 25; *Siracusa Guidelines*, *supra* note 34, Guideline 4.4 and *OHCHR Model Rules*, *supra* note 675, Rule 3.

⁸⁹⁶ *Yugoslavia Final Report*, *supra* note 39, para. 30.

⁸⁹⁷ *Ibid.*, paras. 268-269.

⁸⁹⁸ *Rwanda Final Report*, *supra* note 297, para. 97.

⁸⁹⁹ *Gaza Report*, *supra* note 766, para. 6.

⁹⁰⁰ *Goldstone Report*, *supra* note 633, para. 22.

Commission resolved that collecting testimony at public hearings would be its “centrepiece” as it would “play a function in raising public consciousness of the suffering of the victims”.⁹⁰¹

Many commissions emphasised the importance of visiting affected communities. For instance, the Beit Hanoun Commission emphasized the importance of travelling to Beit Hanoun “to witness first-hand the situation of victims and survivors of the shelling, in particular to comprehend the deep distress of the victims of the shelling and of the population generated by the ongoing blockade.”⁹⁰² The Goldstone Commission similarly wrote that its field visits were “particularly important to form an understanding of the situation, the context, impact and consequences of the conflict on people, and to assess violations of international law.”⁹⁰³ Several commissions were unable to enter relevant territories owing to a lack of cooperation by concerned states. Their efforts to overcome such obstacles are detailed in Section 3 below.

A victim-centred approach manifests in information-gathering techniques responsive to challenges in reporting violations, particularly in relation to sexual and gender-based violence (SGBV). Commissions observed that victims of SGBV faced difficulties in reporting violations due to fears of being disbelieved and stigmatized.⁹⁰⁴ Almost a century ago, the Greek Delegate to the Smyrna Commission objected to its findings of rape on the basis that complaints were made by women of “dubious morality”.⁹⁰⁵ In 2014, the North Korea Commission wrote, “[v]iolence against women, in particular sexual violence, proved to be difficult to document owing to the stigma and shame that still attaches to the victims.”⁹⁰⁶ The Eritrea Commission received reports that some victims of sexual violence committed suicide “as a result of the extreme shame, stigma and related consequences from which they traditionally suffer.”⁹⁰⁷

Some commissions designed their working methods in light of the challenges experienced by victims of SGBV. Of note is the work of the Yugoslavia Commission, which gave specific attention to sexual violence⁹⁰⁸ and conducted interviews with victims by teams of female lawyers with the support of mental health specialists.⁹⁰⁹ The Commission observed that it was the first time that an women-led rape investigation was conducted in wartime.⁹¹⁰ It also conducted a ‘pilot study’ on rape to review information and “develop a methodology for interviewing witnesses and victims in order to determine how relevant evidence could be obtained for use before a tribunal.”⁹¹¹ However, methodological attention to SGBV has not been uniform. An analysis of UN inquiry reports between 2005 and 2012 by Emily Kenny

⁹⁰¹ Kirby, *supra* note 97, at 5.

⁹⁰² *Beit Hanoun Report*, *supra* note 620, para. 8.

⁹⁰³ *Goldstone Report*, *supra* note 633, para. 163.

⁹⁰⁴ See *Occupied Serbia Report*, *supra* note 120, at 13, noting the difficulties victims in reporting rape.

⁹⁰⁵ Smyrna Commission, *Document 5: Appendix II. Comments made by Colonel Alexander Mazarakis on the account of the Inter-Allied Commission of Inquiry*, point 5. See Smyrna Commission, *Document 5: Appendix II. Comments made by Colonel Alexander Mazarakis on the account of the Inter-Allied Commission of Inquiry*, point 5.

⁹⁰⁶ *North Korea Report*, *supra* note 32, para. 17. See *Eritrea First Report*, *supra* note 567, para. 50.

⁹⁰⁷ *Eritrea First Report*, *supra* note 567, para. 51.

⁹⁰⁸ *Yugoslavia Final Report*, *supra* note 39, paras. 232-253.

⁹⁰⁹ *Ibid.*, at 82, footnote 65.

⁹¹⁰ *Ibid.*

⁹¹¹ *Ibid.*, para. 238.

found “astonishing disparities in their reporting of gender issues”⁹¹² and recommended strengthening gender dimensions of methodologies. In 2013, the HRC resolved that commissions should “devote specific attention to violence against women and girls in their reports and recommendations”.⁹¹³ OHCHR’s *Guidance and Practice* advises the integration of a gender perspective into commissions’ work.⁹¹⁴

Recent UN atrocity inquiries examined gendered dimensions of their work in more detail.⁹¹⁵ The Eritrea Commission engaged a specialist to provide gender-sensitive training and guidance.⁹¹⁶ The Commission recognised that women faced particular difficulties in giving information and “developed innovative ways to overcome these challenges”,⁹¹⁷ including by engaging with women’s networks and female intermediaries, conducting interviews at various locations, including women’s homes; and observing strict confidentiality.⁹¹⁸ It tried to find interpreters “with experience in interpreting for survivors of [SGBV] and/or victims of trauma”.⁹¹⁹ Examining SGBV remains difficult sensitive work which continues to pose challenges for commissions.

2.3 Accountability

Many commissions identified the principle of accountability as central to their work. Commissions conceived of this concept differently;⁹²⁰ these themes are explored further in Chapter 6. The principle of accountability was embraced by commissions whose written mandates mentioned this term as well as some whose mandates did not.⁹²¹ Some commissions linked their work to accountability in a rather generalized way. For instance, the Eritrea Commission considered that an objective of its report was “to provide a comprehensive account of violations which could serve as a historical record for future accountability”.⁹²² Other commissions identified more concrete contributions to criminal investigations and prosecutions. The Yugoslavia Commission wrote that its purpose was not only to establish “the existence of certain patterns of criminality but also to obtain specific evidence such as an investigative body would need for prosecution purposes”.⁹²³ The Burundi Commission similarly decided to “amass evidence that could be of use for any later judicial action”.⁹²⁴

Commissions’ concern to facilitate criminal proceedings influenced their methods of gathering, assessing and storing information. The South Sudan Commission sought to

⁹¹² Emily Kenny, ‘Developing a Gender Methodology for U.N. Commissions of Inquiry’, (2014) 46(2) NYU J Int’l L & Pol 589-634, at 595.

⁹¹³ HRC Res. 23/25, 14 June 2013, para. 17. The HRC has since instructed other inquiries to examine SGBV, e.g., *Myanmar Mandate*, *supra* note 2, para. 11 and *South Sudan Mandate Extension*, *supra* note 506, para. 16(b).

⁹¹⁴ *OHCHR Guidance and Practice*, *supra* note 63, at 63.

⁹¹⁵ E.g., *North Korea Report*, *supra* note 32, para. 17.

⁹¹⁶ *Eritrea First Report*, *supra* note 567, paras. 44.

⁹¹⁷ *Ibid.*, paras. 46- 47.

⁹¹⁸ *Ibid.*, paras. 47-52.

⁹¹⁹ *Eritrea Second Report*, *supra* note 569, para. 23.

⁹²⁰ E.g., *Goldstone Report*, *supra* note 633, para. 286; *Gaza Report*, *supra* note 766, para. 665; *Sri Lanka Report*, *supra* note 29, at iv.

⁹²¹ E.g., *Lebanon Report*, *supra* note 855, para. 29.

⁹²² *Eritrea Q&A*, *supra* note 89, at 1.

⁹²³ *Yugoslavia Interim Report*, *supra* note 292, para. 31.

⁹²⁴ *SC Burundi Report*, *supra* note 307, para. 6.

preserve the chain of custody of evidence, ensure high-quality witness statements and organize information in a database which could be utilised in criminal investigations.⁹²⁵ The Syria Commission informed the HRC that it was “recording and safeguarding all evidence it obtains... bearing in mind its possible use by a future justice mechanism.”⁹²⁶ After the General Assembly established the IIIM to collect and preserve evidence of crimes,⁹²⁷ the Commission aligned its work with this body.⁹²⁸ The Darfur Commission represents the high water mark of this ‘ICL approach’. It oriented its work towards criminal proceedings and collected “all material necessary” to classify facts according to ICL.⁹²⁹ It made accounts of witnesses’ testimony, collected official records and verified crime scenes, which “allow[ed] it to take a first step in the direction of ensuring accountability for the crimes committed in Darfur”.⁹³⁰

Some commissions also designed their working methods in an effort to avoid impairing future trials. For instance, the Guinea Commission wrote that in order to preserve evidence, it did not visit locations that had been identified as mass graves, for fear of their destruction.⁹³¹ The Darfur Commission did not take signed witness statements, instead making accounts of witnesses’ testimony.⁹³² This avoided the issue of generating multiple, and possibly conflicting, witness statements should a witness be called to testify in future criminal proceedings.

The question of whether UN atrocity inquiries *ought* to design their working methods in the aim of facilitating criminal proceedings is a subject of continued debate.⁹³³ Commentators have examined to what extent UN atrocity inquiries contribute to criminal proceedings in practice.⁹³⁴ There are some positive indications; Bassiouni writes that the ICTY Prosecutor would not have been able to start work so quickly had it not been for the work of the Yugoslavia Commission⁹³⁵ and the Darfur Commission is credited with facilitating the ICC’s plan of investigation.⁹³⁶ At the same time, myriad issues arise from non-judicial investigations of international crimes, including contamination of evidence and witnesses,⁹³⁷ problems associated with multiple witness interviews⁹³⁸ and difficulties in transferring information

⁹²⁵ *South Sudan Second Report*, *supra* note 31, para. 12.

⁹²⁶ *Ibid.*

⁹²⁷ *IIIM Mandate*, *supra* note 330.

⁹²⁸ *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/34/64, 2 February 2017, para. 109(b) [*Syria Thirteenth Report*].

⁹²⁹ *Darfur Report*, *supra* note 32, para. 14.

⁹³⁰ *Ibid.*, para. 538.

⁹³¹ *Guinea Report*, *supra* note 39, para. 13.

⁹³² *Darfur Report*, *supra* note 32, para. 538.

⁹³³ E.g., Ratner 2015, *supra* note 401, at 553, contrasted with Sunga, *ibid.*

⁹³⁴ E.g., Stahn and Jacobs, *supra* note 99, 255-280.

⁹³⁵ Bassiouni 2001, *supra* note 98, at 47.

⁹³⁶ Luis Moreno Ocampo, ‘The International Criminal Court in Motion’, in Carsten Stahn and Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff, 2009) 13-20, at 15.

⁹³⁷ Rob Grace and Jill Coster van Voorhout, ‘From Isolation to Interoperability: The Interaction of Monitoring, Reporting, and Fact-finding Missions and International Criminal Courts and Tribunals’, *THIGJ Working Paper 4*, December 2014, available at <http://hhi.harvard.edu/publications/isolation-interoperability-interaction-monitoring-reporting-and-fact-finding-missions> (accessed 1 May 2018).

⁹³⁸ Stahn and Jacobs, *supra* note 99, at 260; Grace and Coster van Voorhout, *supra* note 937, at 20-21.

across institutions.⁹³⁹ In practice, accountability remains an important guiding principle for most commissions when implementing their mandates.

3 Practical Challenges Informing Mandate Implementation

Commissions implemented their mandates in light of practical challenges and limitations. These challenges include limitations in resources and time (3.1), security concerns (3.2), lack of territorial access (3.3) and states' refusals to provide information (3.4). This Section discusses these challenges and commissions' efforts to overcome them.

3.1 Resource and time limitations

Commissions' information-gathering and assessment practices were profoundly shaped by limitations in resources and tight reporting deadlines. Many commissions were instructed to examine 'all' violations in concerned states.⁹⁴⁰ Such broad mandates were not usually matched with plentiful resources or lengthy time periods for reporting.

Working within these constraints, commissions often decided to focus on certain types or patterns of atrocities. For instance, the Goldstone Commission wrote, "[i]n view of the time frame within which it had to complete its work, the Mission necessarily had to be selective in the choice of issues and incidents for investigation."⁹⁴¹ Some commissions used terms such as 'representative', 'illustrative', or the 'most serious' to explain their selections.⁹⁴² Some commissions linked their focus on violations amounting to international crimes,⁹⁴³ seeking to facilitate accountability efforts. For instance, the CAR Commission chose to focus on "more serious violations, and especially those for which it is reasonable to expect that accountability might be exacted in the future".⁹⁴⁴ Commissions also referred to practical considerations. For instance, the Darfur Commission selected incidents deemed "most representative" of patterns of violations with "greater possibilities of effective fact-finding".⁹⁴⁵ It highlighted site access, witness protection and evidence-gathering potential as particularly relevant to the selection process.⁹⁴⁶ Not all commissions explained how incidents were selected.⁹⁴⁷ Rob Grace suggests that "articulating the rationales for the mission's decisions in detailed terms would enhance the transparency regarding the mission's methodological choices".⁹⁴⁸ There is no legal definition of 'serious' violations, but the Geneva Academy of International Humanitarian Law and Human Rights identifies certain indicators, including the nature of obligations, the scale

⁹³⁹ Lyal Sunga, 'What Should be the UN Human Rights Council's Role in Investigating Genocide, War Crimes and Crimes Against Humanity?' in Bassiouni and Schabas, *supra* note 97, 319-349, at 344.

⁹⁴⁰ *Darfur Mandate*, *supra* note 303.

⁹⁴¹ *Goldstone Report*, *supra* note 633, para. 157.

⁹⁴² E.g., *Darfur Report*, *supra* note 32, para. 223; *Goldstone Report*, *supra* note 633, para. 157; *Syria Third Report*, *supra* note 564, para. 37; *Lebanon Report*, *supra* note 855, para. 20.

⁹⁴³ *HRC Burundi TOR*, *supra* note 495, para. II(i).

⁹⁴⁴ *CAR Report*, *supra* note 32, at 9.

⁹⁴⁵ *Darfur Report*, *supra* note 32, para. 223.

⁹⁴⁶ *Ibid.*, para. 223.

⁹⁴⁷ E.g., *Syria Third Report*, *supra* note 564, para. 37.

⁹⁴⁸ Grace 2015, *supra* note 59, at 37.

and impact of violations, and the status of victims.⁹⁴⁹ Such parameters were adopted by some OHCHR-led mapping exercises⁹⁵⁰ and might be useful for UN atrocity inquiries.⁹⁵¹

Limited resources and time also meant that commissions could not always carry out all desired information-gathering activities.⁹⁵² For instance, the Gaza Commission decided that it was not feasible to hold public hearings in light of the timeframe for its work.⁹⁵³ As it could not gain territorial access, it made a public call for submissions and held individual interviews in other locations.

Resource limitations pose particular difficulties for information-gathering regarding SGBV, as demonstrated in the example of the CAR Commission. That Commission reported that it could not fully investigate SGBV in refugee camps due to practical constraints:⁹⁵⁴

Although it visited six camps and met with one hundred and ninety-eight victims in four days, it was unable to investigate [SGBV] due to time constraints which impeded its ability to establish the necessary rapport with the victims and to create a conducive working environment in which to conduct interviews.

The CAR Commission advised that this task should be undertaken by investigators with sufficient time and resources.⁹⁵⁵ In effect, the Commission could not investigate SGBV in relation to this group of victims due to lack of time.

3.2 Security concerns

Security concerns also shaped commissions' working methods. The Syria Commission reported that concerns around witness protection "lie at the heart of the methodology of human rights investigations."⁹⁵⁶ Several commissions faced challenges where victims and witnesses feared reprisals.⁹⁵⁷ The North Korea Commission explained at length its consideration of risks posed to victims and witnesses by interacting with the Commission, including reprisals against those individuals or their family members inside the DPRK.⁹⁵⁸ It did not take up offers to have mobile telephone contact with witnesses inside the DPRK out of concerns that such contact could put them at risk⁹⁵⁹ and only heard publicly from people who had no close family in the DPRK or were judged not to be at risk in China.⁹⁶⁰ Other commissions similarly took practical steps to minimise risks such as not interviewing

⁹⁴⁹ Geneva Academy of International Humanitarian Law and Human Rights, 'What amounts to 'a serious violation of international human rights law'?', *Geneva Academy Briefing No. 6*, August 2014, at 5 and 11, available at <http://www.sipri.org/node/2872> (accessed 1 May 2018).

⁹⁵⁰ E.g., *Nepal Conflict Report*, *supra* note 56, Annex II, at 230; *DRC Mapping Report*, *supra* note 56, para. 6.

⁹⁵¹ *Grace 2015*, *supra* note 59, at 39.

⁹⁵² E.g., *Libya Second Report*, *supra* note 853, para. 7.

⁹⁵³ *Gaza Report*, *supra* note 766, para. 10.

⁹⁵⁴ *CAR Report*, *supra* note 32, para. 474.

⁹⁵⁵ *Ibid.*, para. 474.

⁹⁵⁶ *Syria Third Report*, *supra* note 564, para. 8.

⁹⁵⁷ *Eritrea First Report*, *supra* note 567, para. 27, *North Korea Report*, *supra* note 32, para. 24.

⁹⁵⁸ *North Korea Report*, *supra* note 32, paras. 51-53.

⁹⁵⁹ *Ibid.*, para. 52.

⁹⁶⁰ *Ibid.*, para. 53.

witnesses at locations where they could be seen to be cooperating,⁹⁶¹ conducting interviews confidentially, and redacting identifying information.⁹⁶²

Recently, commissions have recognised that they could not guarantee comprehensive witness protection.⁹⁶³ For instance, the Eritrea Commission wrote that its ability to “physically protect concerned persons is limited” and that it depended on states to “respect their primary responsibility to protect all individuals present on their territories, whatever their status may be”.⁹⁶⁴ Such practice is consistent with OHCHR’s recommendation that participants be informed of commissions’ limited capacity to ensure their safety and that primary responsibility for ensuring their protection lies with states.⁹⁶⁵

In some situations, commissioners and support staff also faced security risks, which limited their ability to gather information. For instance, the CAR Commission could not visit some areas due to general instability in the CAR.⁹⁶⁶ In addition, some support staff of the CAR Commission were targeted and held hostage.⁹⁶⁷ The Libya Commission similarly reported that it faced significant security considerations and was unable to visit sites where active hostilities continued.⁹⁶⁸

3.3 Lack of territorial access

Where concerned states refused to cooperate, commissions were barred from entering their territories. HRC-led commissions have largely borne the brunt of this lack of cooperation; inquiries into North Korea, Eritrea, Syria, Myanmar, and different phases of the Israel/Palestine conflict were all denied territorial access and information.⁹⁶⁹ It may be recalled from Chapter Two that while states usually consented to inquiries by the Secretary-General and Security Council, this did not always translate to full cooperation in practice.⁹⁷⁰ Saxon writes that lack of state cooperation is not a “fatal impediment” where fact-finders are persistent and creative.⁹⁷¹ In practice, UN atrocity inquiries frequently resorted to gathering information from outside uncooperative states.

Some commissions held hearings and conducted interviews with victims and witnesses in third states. For instance, the North Korea Commission conducted public hearings in Seoul, Tokyo, London and Washington DC.⁹⁷² The Goldstone Commission held public hearings in Gaza and in Geneva.⁹⁷³ The Syria Commission collected first-hand accounts from people who

⁹⁶¹ E.g., *Guinea Report*, *supra* note 39, para. 13.

⁹⁶² E.g., *Eritrea First Report*, *supra* note 567, para. 31.

⁹⁶³ *South Sudan First Report*, *supra* note 30, para. 12 and *Gaza Report*, *supra* note 766, para. 9.

⁹⁶⁴ *Eritrea Q&A*, *supra* note 89, at 1.

⁹⁶⁵ *OHCHR Guidance and Practice*, *supra* note 63, at 56 and 75.

⁹⁶⁶ *CAR Report*, *supra* note 32, para. 7.

⁹⁶⁷ *Ibid.*, para. 21.

⁹⁶⁸ *Report of the International Commission of Inquiry on Libya*, UN Doc. A/HRC/17/44, 12 January 2012, para. 11 [*Libya First Report*].

⁹⁶⁹ ‘Myanmar refuses visas to UN team investigating abuse of Rohingya Muslims’, *The Guardian*, 30 June 2017, available at <http://www.theguardian.com/world/2017/jun/30/myanmar-refuses-visas-un-abuse-rohingya-muslims> (accessed 1 May 2018).

⁹⁷⁰ See [Chapter Two, Section 1.2](#) and Yihdego, *supra* note 96, at 46.

⁹⁷¹ Saxon, *supra* note 736, at 221.

⁹⁷² *North Korea Report*, *supra* note 32, paras. 15(b) and 31.

⁹⁷³ *Goldstone Report*, *supra* note 633, para. 166.

had left the country and interviewed people inside Syria by Skype and telephone.⁹⁷⁴ The Eritrea Commission similarly collected accounts from people located outside Eritrea, including refugees, asylum-seekers and migrants.⁹⁷⁵

Commissions also utilised documentary sources of information. Several commissions utilised satellite imagery; this enabled the Eritrea Commission to locate many detention facilities⁹⁷⁶ and the North Korea Commission to confirm the existence of prison camps.⁹⁷⁷ Some commissions obtained satellite imagery from the UN Institute for Training and Research's Operational Satellite Applications Programme,⁹⁷⁸ while the North Korea Commission had to rely on commercially available information.⁹⁷⁹ That Commission chided, "[a]lmost certainly, higher resolution satellite imagery produced by more technologically advanced states would have provided further information",⁹⁸⁰ but that its requests were not granted, apparently due to security restrictions.⁹⁸¹

Commissions also examined information available in the public domain, including by those implicated in violations. The Syria Commission examined public communications by CENTCOM⁹⁸² and videos and photographs published by extremist groups.⁹⁸³ Some commissions also obtained clandestinely-recorded videos and photographs.⁹⁸⁴ For instance, the Syria Commission examined a cache of thousands of photographs allegedly taken inside in Government-run detention facilities.⁹⁸⁵ As it can be difficult to verify the authenticity of documentary sources, such information was usually used to corroborate first-hand accounts.⁹⁸⁶⁹⁸⁷ In some cases, commissions were not able to use photographic and video materials as they could not be authenticated.⁹⁸⁸

Some states criticised commissions' information-gathering methods after refusing to cooperate. For instance, Eritrea complained that most claims of violations were from "550 anonymous individuals who are comprised of refugees", which was "not representative of the vast majority of Eritreans abroad and inside the country."⁹⁸⁹ Yet, Eritrea had denied access to the Eritrea Commission, which, in combination with that state's control of information and

⁹⁷⁴ *Syria Third Report*, *supra* note 564, para. 9.

⁹⁷⁵ *Eritrea First Report*, *supra* note 567, para. 34.

⁹⁷⁶ *Ibid.*, para. 35.

⁹⁷⁷ *North Korea Report*, *supra* note 32, para. 60.

⁹⁷⁸ *Eritrea First Report*, *supra* note 567, para. 35; *Goldstone Report*, *supra* note 633, para. 53; *Gaza Report*, *supra* note 766, para. 260.

⁹⁷⁹ *North Korea Report*, *supra* note 32, para. 60.

⁹⁸⁰ *Ibid.*, para. 60.

⁹⁸¹ *Ibid.*, footnote 1063.

⁹⁸² E.g., *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/36/55, 8 August 2017, footnotes 10 and 11 [*Syria Fourteenth Report*].

⁹⁸³ E.g., *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/27/60, 13 August 2014, paras. 37 and 40 [*Syria Eighth Report*].

⁹⁸⁴ *North Korea Report*, *supra* note 32, para. 61.

⁹⁸⁵ *Syria Eighth Report*, *supra* note 983, para. 26.

⁹⁸⁶ Eg, *North Korea Report*, *supra* note 32, paras. 71-72 and 734; *Syria Fourteenth Report*, *supra* note 982, Annex II, para. 8 and *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/37/72, 1 February 2018, Annex V, para. 24 [*Syria Fifteenth Report*].

⁹⁸⁷ Eg, *North Korea Report*, *supra* note 32, paras. 71-72 and 734; *Syria Fourteenth Report*, *supra* note 982, Annex II, para. 8 and *Syria Fifteenth Report*, *supra* note 986, Annex V, para. 24.

⁹⁸⁸ E.g., *Syria Third Report*, *supra* note 564, Annex VI, para. 22.

⁹⁸⁹ Eritrea Ministry of Foreign Affairs, *supra* note 838, para. 6.

fears of reprisals, precluded the Commission from contacting those within the country. In response to the Government's assertion that testimonies of prison camps were false, the North Korea Commission stated that the best way for the DPRK to respond would be to allow access to sites allegedly containing such camps.⁹⁹⁰ Commissions also adopted other strategies to respond to states' non-cooperation, discussed next.

3.4 *States' refusals to provide information*

Fact-finding instruments affirm that concerned states must have an opportunity to be heard.⁹⁹¹ Palmer writes that if such an opportunity is not reasonably afforded, an inquiry risks "delegitimization".⁹⁹² In practice, uncooperative states did not exercise this opportunity and refused to engage with commissions. In such cases, commissions reported that they had repeatedly invited the views of concerned states, without success.⁹⁹³ Commissions also sought to identify states' views from their public statements. For instance, several commissions examined statements published on government websites expressing Israel's versions of events concerning its military operations.⁹⁹⁴ The Sri Lanka Panel similarly examined governmental military strategies from publicly available sources, including the Defence Ministry website.⁹⁹⁵ The Eritrea Commission wrote that in the face of Eritrea's non-cooperation, "the Commission has relied wherever possible on statements by the Government of Eritrea as reported on its official website or in the public domain."⁹⁹⁶ Some commissions also afforded an opportunity for states to reply to their findings before their reports were finalised. For instance, the North Korea Commission shared its draft findings with the DPRK and invited its "comments and factual corrections."⁹⁹⁷ That invitation was not accepted.

States' refusals to cooperate gave rise to particular difficulties where they exclusively held material information. Where cooperation was sought to no avail, some commissions decided to draw adverse inferences from their silence. This practice is known in arbitration⁹⁹⁸ and the ECHR has ruled that where events in issue lie within the exclusive knowledge of the state and the facts give rise to a strong presumption of violations, "the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation."⁹⁹⁹ In a draft general comment on the right to life, the Human Rights Committee identifies an obligation to

⁹⁹⁰ OHCHR, 'UN-mandated human rights inquiry on DPR Korea 'not biased', chair stresses', 29 October 2013, available at <http://www.un.org/apps/news/story.asp?NewsID=46369> (accessed 1 May 2018).

⁹⁹¹ 1991 Declaration, *supra* note 25, Art. 26. See *Principles Against Impunity*, *supra* note 54, Principle 9, concerning suspected perpetrators.

⁹⁹² Palmer, *supra* note 480, at 610.

⁹⁹³ North Korea Report, *supra* note 32, para. 24 and Beit Hanoun Report, *supra* note 620, para. 3.

⁹⁹⁴ Beit Hanoun Report, *supra* note 620, para. 7; Goldstone Report, *supra* note 633, para. 173; Gaza Report, *supra* note 766, para. 14.

⁹⁹⁵ Sri Lanka Report, *supra* note 29, para. 54.

⁹⁹⁶ Eritrea Second Report, *supra* note 569, para. 16.

⁹⁹⁷ North Korea Report, *supra* note 32, para. 27. The Libya Commission extended a similar opportunity to NATO, which was more cooperative: Letter from Peter Olson, NATO Legal Adviser to Judge Kirsch, OLA(2012)0014, 15 February 2012, in Libya Second Report, *supra* note 853, Annex II, at 212 [NATO letter 15 February 2012].

⁹⁹⁸ Jeremy Sharpe, 'Drawing Adverse Inferences from the Non-production of Evidence', (2006) 22(4) *Arbitration International* 549-572.

⁹⁹⁹ ECtHR, *Khashiev and Akayeva v. Russia*, No. 57942/00 and 57945/00, Judgment, 24 February 2005. See ECtHR, *Isayeva and others v. Russia* (2005) 41 EHRR 39, para. 175 and ECtHR, *Salman v. Turkey*, No. 21986/93, Merits and Just Satisfaction, Grand Chamber [2000] ECHR 357, para. 100.

disclose information where an attack results in loss of life, subject to ‘compelling’ security concerns.¹⁰⁰⁰

States parties should, subject to compelling security considerations, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether non-lethal alternatives for attaining the same military objective were considered. They must also investigate allegations of violations of article 6 in situations of armed conflict in accordance with the relevant international standards.

In the inquiry context, the North Korea Commission reported that it was comfortable in drawing inferences, as it had provided many opportunities for DPRK authorities to address the Commission and provide its views, of which it had not availed itself.¹⁰⁰¹ The example of the Goldstone Commission demonstrates how adverse inferences may not always promote effective implementation of the mandate. That Commission responded to Israel’s refusal to provide information about its military operations by making findings on the basis of “the information available”¹⁰⁰² or “in the absence of any information refuting the allegations”.¹⁰⁰³ Such findings included that Israel had a policy of intentionally attacking civilians.¹⁰⁰⁴ Israel criticised the findings as made “in the absence of the sensitive intelligence information which Israel did not feel able to provide”.¹⁰⁰⁵ Goldstone defended the Commission’s findings: “Our mission obviously could only consider and report on what it saw, heard and read. If the government of Israel failed to bring facts and analyses to our attention, we cannot fairly be blamed for the consequences.”¹⁰⁰⁶ While its report was heralded in some quarters as adhering to the highest standards of legality given the lack of cooperation and challenges posed by the fog of war,¹⁰⁰⁷ it was also criticised in others for making findings on the basis of information supplied by one party to the conflict.¹⁰⁰⁸ Later, Goldstone personally renounced some findings, explaining that information later published by Israel indicated that civilians were not targeted as a matter of policy, but that the Commission “had no evidence on which to draw

¹⁰⁰⁰ CCPR, *General Comment No. 36 on article 6 of the ICCPR, Revised draft prepared by the Rapporteur*, para. 67, available at http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf (accessed 1 May 2018) [Draft GC 36]. See *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Ben Emmerson, UN Doc. A/HRC/29/51, 16 June 2015, para. 58.

¹⁰⁰¹ *North Korea Report*, *supra* note 32, para. 76.

¹⁰⁰² *Goldstone Report*, *supra* note 633, paras. 32, 75, 389, 437, 494, 629, 652, 701, 1102, 1167.

¹⁰⁰³ *Ibid.*, paras. 595, 838, 1167.

¹⁰⁰⁴ *Ibid.*, para. 1191.

¹⁰⁰⁵ Israel Ministry of Foreign Affairs, ‘Israel’s Analysis and Comments on the Gaza Fact-Finding Mission Report’, 15 September 2009, available at http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Pages/Israel_analysis_comments_Goldstone_Mission_15-Sep-2009.aspx (accessed 1 May 2018).

¹⁰⁰⁶ Richard Goldstone, ‘Israel’s Missed Opportunity’, *The Guardian*, 21 October 2009, available at <http://www.theguardian.com/commentisfree/cifamerica/2009/oct/21/goldstone-report-israel-gaza-war-crimes-un> (accessed 1 May 2018).

¹⁰⁰⁷ Richard Falk, ‘The Goldstone Report and the Goldstone Retreat: Truths Told by Law and Reviled by Geopolitics’, in Chantal Meloni and Gianni Tognoni (eds), *Is there a Court for Gaza?* (The Hague: TMC Asser Press, 2012) 83-103, at 97.

¹⁰⁰⁸ E.g., Trevor Norwitz, ‘Letter to Justice Goldstone’, in Gerald Steinberg and Anne Herzberg (eds), *The Goldstone Report “Reconsidered”: A Critical Analysis* (Israel: NGO Monitor, 2011) 153-180, at 153.

any other reasonable conclusion”.¹⁰⁰⁹ This episode stands as a cautionary tale of the real difficulties that arise when concerned states refuse to provide information.

Commentators are divided as to the use of adverse inferences in the inquiry context. Liesbeth Zegveld points out that inquiry reports are not sufficient to convict, but rather provide grounds for opening investigations.¹⁰¹⁰ By contrast, Mégret writes that as states may argue that fact-finding reports are biased whether they cooperate or not, it is important to create incentives for cooperation and to tread carefully in reaching findings when access to information is denied. Mégret cautions that “adverse factual findings cannot be a way of ‘punishing’ a non-cooperative state and must evidently result from the best possible interpretation of the evidence in the circumstances.”¹⁰¹¹ Drawing adverse inferences walks a tightrope between preventing non-cooperation from obstructing an inquiry and rendering findings vulnerable to criticism that they are incorrect or even a *de facto* penalty for refusing to cooperate. In both scenarios, the credibility of findings may be damaged, and prospects for stimulating corrective action may be reduced.

4. Fostering Quality in Methods of Work

While commissions enjoy a large degree of freedom in determining their working methods, this flexibility has engendered criticisms of arbitrariness and unreliability. Some states pointed to commissions’ non-judicial nature as grounds to reject their findings. For instance, Eritrea wrote that the Eritrea Commission “admits that it is not a judicial body. In other words, its accusations do not meet fundamental standards of accuracy, objectivity, neutrality and legality”.¹⁰¹² Commissions have taken various initiatives to reduce misgivings of *ad hoc*-ery and strengthen the credibility of their findings, as well as ensuring that working methods are appropriate to the context of inquiry. This Section discusses initiatives taken by commissions in pursuit of these aims, namely adopting judicial procedures (4.1), rules of procedure and terms of reference (4.2), standards of proof (4.3) and best practices (4.4).

4.1 Judicial procedures

A few UN atrocity inquiries borrowed procedures from the judicial context. For instance, the Burundi Commission decided to “conform as far as possible to judicial standards” in order to “give its eventual conclusions a solid base”.¹⁰¹³ It permitted any person appearing before it to be assisted by a lawyer, and all witnesses had to swear to “speak the truth, the whole truth,

¹⁰⁰⁹ Richard Goldstone, ‘Reconsidering the Goldstone Report on Israel and war crimes’, *Washington Post*, 1 April 2011, available at http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html (accessed 1 May 2018). This statement was opposed by the other commissioners: Hina Jilani, Christine Chinkin and Desmond Travers, ‘Goldstone report: Statement issued by members of UN mission on Gaza war’, *The Guardian*, 14 April 2011, available at <http://www.theguardian.com/commentisfree/2011/apr/14/goldstone-report-statement-un-gaza> (accessed 1 May 2018).

¹⁰¹⁰ Liesbeth Zegveld, ‘The Importance of Fact-Finding Missions Under International Humanitarian Law’, in Chantal Meloni and Gianni Tognoni (eds), *Is there a Court for Gaza?* (The Hague: TMC Asser Press, 2012) 161-167, at 165 [Zegveld 2012].

¹⁰¹¹ Mégret 2016, *supra* note 460, at 40.

¹⁰¹² Eritrea Ministry of Information, ‘Press Statement by H.E. Mr. Yemane Gebreab, Presidential Adviser’, 8 June 2016, available at <http://www.shabait.com/news/local-news/21964-press-statement-by-he-mr-yemane-gebreab> (accessed 1 May 2018) [Eritrea Press Release].

¹⁰¹³ *SC Burundi Report*, *supra* note 307, para. 6.

and nothing but the truth”.¹⁰¹⁴ The Mozambique Commission also required witnesses to swear an oath, adopting the ICJ’s formulation.¹⁰¹⁵ The Darfur Commission adopted “an approach proper to a judicial body”¹⁰¹⁶ when examining international crimes. These references to judicial standards and approaches appear to convey analytical rigour. At the same time, most commissions did not identify specific judicial regimes, so their invocations were generalised.

Commissions invoked ‘judicial’ procedures infrequently and distinguished their work from that of courts and judicial procedures.¹⁰¹⁷ For instance, the Libya Commission emphasised that “it is not a court of law and that its investigations were not undertaken with the time, resources, and judicial tools (such as subpoena powers) that normally characterize criminal investigations.”¹⁰¹⁸ The Eritrea Commission stated, “it has no law enforcement powers and is not a judicial body. It has nevertheless adopted a rigorous approach to the analysis of the information it has collected.”¹⁰¹⁹ Although the Darfur Commission adopted a ‘judicial approach’, it explained that it was not “vested with prosecutorial or investigative functions proper”, so focussed on collecting reliable information about suspected perpetrators.¹⁰²⁰ This distinction clarifies that commissions are not seeking to replicate the judicial process, so their investigations should not be judged against such standards. At the same time, such approaches could imbue the fact-finding process with gravitas akin to judicial proceedings, while maintaining differentiation.

4.2 Rules of procedure and terms of reference

Some commissions adopted rules of procedure to govern the conduct of their work. Such rules tended to govern formal aspects such as decision-making, confidentiality policies and methods of information-gathering and assessment. Although many rules were similar in content, these documents also contained some differences, and the practice of adopting them was *ad hoc*. Rules of procedure were especially popular during the 1990s and were also adopted by historic UN atrocity inquiries.¹⁰²¹ Several commissions in the 1990s adopted rules of procedure, including inquiries on the former Yugoslavia, Rwanda, Burundi, and Timor-Leste.¹⁰²²

The practice of adopting rules of procedure fell away in the 2000s, but support for their use has recently re-emerged. *OHCHR Guidance and Practice* recommends that commissions adopt rules of procedure defining their methods of work and responsibilities, and drew up model standard rules.¹⁰²³ OHCHR also recommends that commissions adopt terms of reference at the outset of their operations specifying the scope of the investigative mandate,

¹⁰¹⁴ *Ibid.*, Annex, Rules of Procedure, Rule 12.

¹⁰¹⁵ *Mozambique Report*, *supra* note 253, para. 18. See *Vietnam Report*, *supra* note 273, Annex II, Rules of Procedure and Plan of Work of the Mission, Rule 13 [*Vietnam Rules of Procedure*].

¹⁰¹⁶ *Darfur Report*, *supra* note 32, para. 14.

¹⁰¹⁷ E.g., *ibid.*, para. 14; *Timor-Leste Report*, *supra* note 376, paras. 11-12; *Goldstone Report*, *supra* note 633, para. 25 and *Libya First Report*, *supra* note 968, para. 227.

¹⁰¹⁸ *Libya Second Report*, *supra* note 853, para. 8.

¹⁰¹⁹ *Eritrea Second Report*, *supra* note 569, para. 31.

¹⁰²⁰ *Darfur Report*, *supra* note 32, para. 538.

¹⁰²¹ *Vietnam Rules of Procedure*, *supra* note 1015, Rule 13.

¹⁰²² *Yugoslavia Interim Report*, *supra* note 292, Appendix; *Rwanda Final Report*, *supra* note 297, Annex II; *SC Burundi Report*, *supra* note 307, Annex I and *East Timor Report*, *supra* note 338, Annex I.

¹⁰²³ *OHCHR Guidance and Practice*, *supra* note 63, Annex II.

legal framework and methods of work.¹⁰²⁴ The *Siracusa Guidelines* recommend that commissions adopt an ‘operational plan’ setting out their budget, internal protocols, functions, activities and methods of work, and an ‘investigation plan’ outlining investigative priorities, methodology and internal protocols.¹⁰²⁵ In practice, only two recent commissions reported that they adopted rules of procedure, and did not include them in their reports.¹⁰²⁶ Commissions have been more receptive to drawing up terms of reference, but practice remains mixed. Some commissions appended terms of reference to their reports¹⁰²⁷ or published them as separate documents.¹⁰²⁸ Other commissions discussed their terms of reference in their main reports.¹⁰²⁹ The CAR Commission reportedly adopted an ‘investigation plan’.¹⁰³⁰ Other recent commissions did not refer to rules of procedure or terms of reference.¹⁰³¹

4.3 Standards of proof

In comparison with commissions’ rather practices of adhering to judicial procedures or adopting rules of procedure, there is rich practice of utilising standards of proof, also termed ‘evidentiary standards’ or ‘evidentiary thresholds’, to communicate the strength of findings. In the adjudicative context, evidence must meet or surpass a standard of proof for findings to be made out.¹⁰³² For instance, the standard of ‘beyond a reasonable doubt’ is generally required for criminal convictions.¹⁰³³ Proponents of standards of proof in the inquiry context argue that they may encourage commissions to scrutinise the strength of findings, convey the strength of conclusions and demonstrate procedural integrity, while also accepting they are not a panacea for credibility.¹⁰³⁴ The use of common standards of proof by UN fact-finding bodies was advocated as long ago as 1982.¹⁰³⁵ However, it has taken some time for standards of proof to become a regular part of commissions’ working methods.

In the 1990s, commissions did not utilise standards of proof, instead expressing findings with differing degrees of certitude. For instance, the Yugoslavia Commission concluded with “a reasonable degree of certainty” that the civilian population was deliberately targeted during

¹⁰²⁴ *Ibid.*, at 67. See *OHCHR Model Rules*, *supra* note 675, Rule 2.

¹⁰²⁵ *Siracusa Guidelines*, *supra* note 34, Guidelines 5 and 7.

¹⁰²⁶ *Eritrea First Report*, *supra* note 567, para. 24; *CAR Preliminary Report*, *supra* note 768, para. 8.

¹⁰²⁷ *Lebanon Report*, *supra* note 855, Annex II; *Report of the High-Level Mission on the situation of human rights in Darfur pursuant to Human Rights Council decision S-4/101*, UN Doc. A/HRC/4/80, 9 March 2007, Annex II [*Darfur High-Level Report*]; *Syria First Report*, *supra* note 32, Annex I; *Gaza Flotilla Report*, *supra* note 681, Annex I.

¹⁰²⁸ ‘Terms of Reference of the Independent International Fact-finding Mission on the Israeli Settlements in the Occupied Palestinian Territory including East Jerusalem’, para. 11, available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/FFM/FFMSettlementTOR.pdf> (accessed 1 May 2018) [*Israeli Settlements TOR*] and *HRC Burundi TOR*, *supra* note 495.

¹⁰²⁹ E.g., *Goldstone Report*, *supra* note 633, para. 15 and *Darfur Report*, *supra* note 32, para. 2.

¹⁰³⁰ *CAR Preliminary Report*, *supra* note 768, para. 8.

¹⁰³¹ E.g., *Gaza Report*, *supra* note 766. The North Korea Commission applied ‘best practices’ but it is unclear whether it adopted specific rules of procedure: *North Korea Report*, *supra* note 32, para. 29.

¹⁰³² Katherine Del Mar, ‘The International Court of Justice and Standards of Proof’, in Karine Bannelier, Theodore Christakis and Sarah Heathcote (eds), *The ICJ and the Development of International Law: the Lasting Impact of the Corfu Channel Case* (Oxon: Routledge, 2011) 98-123.

¹⁰³³ E.g., Rome Statute of the International Criminal Court 1998, UN Doc. A/CONF.183/9, 2187 UNTS 90, Art. 66 [Rome Statute]. See Dov Jacobs, ‘The Burden and Standard of Proof’, in Goran Sluiter *et al* (eds), *International Criminal Procedure, Principles and Rules* (Oxford: OUP, 2013) 1128-1150.

¹⁰³⁴ Wilkinson 2014, *supra* note 25, at 12 and Franck and Fairley, *supra* note 91, at 310.

¹⁰³⁵ Ramcharan, ‘Evidence’, in Ramcharan, *supra* note 91, 64-82, at 78.

the battle of Sarajevo;¹⁰³⁶ the Rwanda Commission found “abundant evidence” of genocide,¹⁰³⁷ and the East Timor Commission concluded that evidence “clearly demonstrates” a pattern of serious violations.¹⁰³⁸ In 2005, the Darfur Commission applied a standard of proof when identifying suspected perpetrators. The standard adopted was “a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.”¹⁰³⁹ Since then, most commissions have articulated standards of proof,¹⁰⁴⁰ which have been expressed differently. For instance, the Sri Lanka Panel considered an allegation of violations as credible “if there was a reasonable basis to believe that the underlying act or event occurred”.¹⁰⁴¹ The Libya Commission adopted a ‘balance of probabilities’ standard.¹⁰⁴² Other formulations were similar to that of the Darfur Commission.¹⁰⁴³ A review of these standards by Wilkinson in 2012 concluded that expressions of certitude were “being applied, though not uniformly and only to some extent”.¹⁰⁴⁴

Recent practice suggests that commissions are commonly adopting a standard of ‘reasonable grounds to believe’, defined by the North Korea Commission as “a reliable body of information, consistent with other material, based on which a reasonable and ordinarily prudent person has reason to believe that such incident or pattern of conduct has occurred.”¹⁰⁴⁵ Many commissions have applied this standard,¹⁰⁴⁶ with some indicating that their adoption of this standard was consistent with the practice of other commissions¹⁰⁴⁷ and UN fact-finding bodies.¹⁰⁴⁸ Such self-referential practice contributes to the development of best practices, discussed below.

Commissions contrasted their standards of proof with those used in criminal proceedings and generally agreed that the ‘beyond reasonable doubt’ standard was inappropriate for the inquiry context, as their findings were not binding and they lacked coercive information-gathering powers.¹⁰⁴⁹ The Darfur Commission observed that its standard of proof was lower than the *prima facie* standard used to confirm indictments before *ad hoc* tribunals.¹⁰⁵⁰ Commissions have explained that the ‘reasonable grounds to believe’ standard is sufficiently high to call for

¹⁰³⁶ *Yugoslavia Final Report*, *supra* note 39, para. 209.

¹⁰³⁷ *Rwanda Final Report*, *supra* note 297, para. 184.

¹⁰³⁸ *East Timor Report*, *supra* note 338, para. 142.

¹⁰³⁹ *Darfur Report* *supra* note 32, para. 15.

¹⁰⁴⁰ An exception is the Palmer Commission, which wrote that that findings were established to its ‘satisfaction’: *Palmer Report*, *supra* note 316, para. 125. Wilkinson criticises this formulation as lacking transparency: Wilkinson 2014, *supra* note 25, at 13.

¹⁰⁴¹ *Sri Lanka Report*, *supra* note 29, at i.

¹⁰⁴² *Libya Second Report*, *supra* note 853, para. 6.

¹⁰⁴³ *Timor-Leste Report*, *supra* note 376, para. 12; *Guinea Report*, *supra* note 39, para. 22.

¹⁰⁴⁴ Wilkinson, *supra* note 98, at 61.

¹⁰⁴⁵ *North Korea Report*, *supra* note 32, para. 68.

¹⁰⁴⁶ *CAR Preliminary Report*, *supra* note 768, para. 17; *Eritrea First Report*, *supra* note 567, para. 31; *Gaza Report*, *supra* note 766, para. 19; *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/23/58, 4 June 2013, para. 6 [*Syria Fifth Report*].

¹⁰⁴⁷ *Gaza Report*, *supra* note 766, para. 19, citing *North Korea Report* and *Eritrea Second Report*, *supra* note 569, para. 32.

¹⁰⁴⁸ *CAR Preliminary Report*, *supra* note 768, para. 17; *Eritrea First Report*, *supra* note 567, para. 31; *HRC Burundi TOR*, *supra* note 495, at IV.

¹⁰⁴⁹ *Timor-Leste Report*, *supra* note 376, paras. 12 and 110; *Darfur Report*, *supra* note 32, para. 15; *Goldstone Report*, *supra* note 633, para. 25.

¹⁰⁵⁰ *Darfur Report*, *supra* note 32, para. 15, citing practice of the ICTR and ICTY.

further investigations, which might lead to prosecutions.¹⁰⁵¹ The Eritrea Commission further observed that this standard was “used by the ICC to review evidence prior to the issuance of an arrest warrant.”¹⁰⁵² The Commission was referring to the rule that the ICC Pre-Trial Chamber must be satisfied that there are “reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court” to issue an arrest warrant.¹⁰⁵³ Commissions’ preferred standard of proof may be compared to that applied by the ICC Pre-Trial Chamber when assessing a request by the Prosecutor to initiate *proprio motu* investigations. The Chamber must decide whether there is a “reasonable basis to proceed”,¹⁰⁵⁴ which entails “a reasonable basis to believe that a crime within the jurisdiction of the Court has or is being committed”.¹⁰⁵⁵ These linkages with judicial standards reflect the function of promoting accountability for violations and their role as catalysts or precursors for criminal investigations.

4.4 Best practices

An emerging trend is the invocation of ‘best practices’ or ‘international standards’ of fact-finding or of international commissions of inquiry. Several commissions asserted that their working methods complied with standard UN practices. The Goldstone Commission stated that it based its work on “international investigative standards developed by the [UN].”¹⁰⁵⁶ Similar statements were made by commissions on Timor-Leste, Guinea, the CAR and Eritrea.¹⁰⁵⁷ The Syria Commission wrote that its methodology was based on “best practices of commissions of inquiry and fact-finding missions.”¹⁰⁵⁸ The North Korea Commission reported that it applied ‘best practices’ regarding integrating gender into the exercise of its mandate,¹⁰⁵⁹ witness protection, outreach, rules of procedure, report writing, international investigation standards, and archiving.¹⁰⁶⁰

Commissions often did not identify specific sources of these standards, rather asserting that they adhered to them. For instance, the above-cited statement by the Goldstone Commission was not accompanied by references, and it did not explain what ‘international investigative standards’ meant in practice. The Eritrea Commission referred to OHCHR’s “standard policies”¹⁰⁶¹ of protecting victims and witnesses but did not identify their source or content. Some recent commissions cited a manual on sexual violence investigations¹⁰⁶² and OHCHR

¹⁰⁵¹ *Eritrea First Report*, supra note 567, para. 32; *CAR Preliminary Report*, supra note 768, para. 32; *North Korea Report*, supra note 32, para. 68.

¹⁰⁵² *Eritrea Second Report*, supra note 569, para. 32.

¹⁰⁵³ Rome Statute, supra note 1033, Art. 58(1).

¹⁰⁵⁴ *Ibid.*, Arts. 15(3) and 15(4).

¹⁰⁵⁵ *Ibid.*, Art. 53(1)(a).

¹⁰⁵⁶ *Goldstone Report*, supra note 633, para. 17. See paras. 158 and 161.

¹⁰⁵⁷ *Timor-Leste Report*, supra note 376, para. 14; *Guinea Report*, supra note 39, para. 22; *CAR Report*, supra note 32, para. 16; *Eritrea First Report*, supra note 567, para. 26.

¹⁰⁵⁸ *Syria Thirteenth Report*, supra note 928, para. 3.

¹⁰⁵⁹ *North Korea Report*, supra note 32, para. 17.

¹⁰⁶⁰ *Ibid.*, para. 29.

¹⁰⁶¹ *Eritrea Second Report*, supra note 569, para. 10.

¹⁰⁶² *CAR Report*, supra note 32, footnote 215, citing ICTR Prosecutor, *Best Practices Manual on the Investigation and Prosecution of Sexual Violence Crimes in Post Conflict Regions*, 30 January 2014, available at http://w.unictr.org/sites/unictr.org/files/legal-library/140130_prosecution_of_sexual_violence.pdf (accessed 1 May 2018).

*Guidance and Practice*¹⁰⁶³ as sources of best practices. Adhering to best practices may go some way towards defusing objections that commissions' working methods are unfair or insufficiently rigorous.¹⁰⁶⁴ They give the impression of the development of coherent and consistent inquiry practice, which may bolster perceptions of the credibility and reliability of commissions' findings.

Conclusions

This Chapter examined how UN atrocity inquiries acted as engineers of their mandates, determining the technical requirements to implement the mandating authority's vision in light of practical constraints and in view of their roles and functions. Understanding impartiality as a crucial condition for formulating credible findings, commissions interpreted their mandates to include relevant actors and territories, while excising suggestions of prejudgment and bias. Commissions' independence was especially asserted when their interpretations departed significantly from the language of mandating resolutions. These efforts went some way to insulate commissions from elements of politicisation at the level of the mandating authority.

Commissions' approaches to mandate implementation were guided by principles of impartiality, a victim-centred outlook, and in many cases, accountability. The limited allocation of resources and time pressure for reporting necessitated selective information-gathering and consideration of feasibility in designing working methods. Security risks added further complexity. By focussing on serious violations, especially those amounting to international crimes, commissions prioritised scarce resources towards incidents that would trigger states' duties to investigate and prosecute and which would command the attention of the international community. Their efforts to collect and preserve information for use in criminal proceedings further concretised their roles as precursors of investigations of international crimes. Commissions provided a platform for victims' voices by holding public hearings and designing working methods that facilitated victim participation while protecting their safety to the extent possible. Interesting in this regard is commissions' burgeoning recognition of their limited abilities to protect witnesses and investigate SGBV. Such disclosures reflect a commitment to transparency and signal to mandating authorities that such tasks should not be expected to be undertaken by bodies with temporary mandates and scarce resources.

While commissions encouraged states to participate in their work, they found ways to gather and assess information in the absence of state cooperation, to recognise harms as experienced by victims and avoid frustrating their mandates. By according states highly visible opportunities to provide information, reporting on the extent of their non-cooperation and seeking states' views from alternative sources, commissions insulated themselves to some extent from critiques that they had discharged their mandates unfairly. Kirby recalls that in respect of the North Korea Commission, "transparency was the antidote to our exclusion

¹⁰⁶³ *Gaza Report*, *supra* note 766, footnote 3; *North Korea Report*, *supra* note 32, footnote 11; *Eritrea First Report*, *supra* note 567, para. 16.

¹⁰⁶⁴ E.g., 'Response of the Government of Eritrea to the report of the Commission of Inquiry', in *Note verbale dated 19 June 2015 from the Permanent Mission of Eritrea to the United Nations Office at Geneva addressed to the Office of the President of the Human Rights Council*, UN Doc. A/HRC/29/G/6, 24 June 2015, Annex II, para. 5 [*Eritrea Note Verbale*].

from, and non-cooperation by, the country subject to our inquiry.”¹⁰⁶⁵ The drawing of adverse inferences was another strategy, especially where material information was exclusively held by states. While this practice allows commissions to reach findings of violations and thereby denounce states’ conduct, it also gives rise to some concerns. Where states refuse to cooperate due to perceptions of bias, use of adverse inferences may be interpreted as further unfair targeting. The example of the Goldstone Commission shows how this practice might undermine an inquiry’s work.¹⁰⁶⁶ This practice remains vulnerable to criticism that findings reflect political ends rather than the results of impartial fact-finding.

Commissions’ design of their working methods was also informed by their roles and functions. Some commissions emphasised links with judicial procedure, not only to align their work with judicial bodies but to borrow from the hallmarks of judicial pedigree. Commissions’ adoption of rules of procedure added a sense of formality to their work and, where rules were similar, promoted consistency across commissions. The adoption of standards of proof and best practices acted as means of quality-control. The development of a common standard of proof and best practices more generally reinforced consistency in inquiry practice while distinguishing commissions’ work from that of judicial bodies. These initiatives convey that commissions are not simply arbitrary exercises or ‘lite’ judicial proceedings, but rather are principled endeavours occupying a distinct institutional space.

In short, commissions interpreted and implemented their mandates in an effort to create conditions for the production of authoritative findings. Such findings could challenge denials by concerned states, command the attention of the international community and galvanise accountability efforts.¹⁰⁶⁷ These functions also informed commissions’ interpretations of legal dimensions of their mandates and the substantive applicability of fields of international law. These aspects are explored in next, in Chapter Four.

¹⁰⁶⁵ Michael Kirby, ‘Foreword’, in Henderson, *supra* note 94, vi-xiv, at xi.

¹⁰⁶⁶ Yihdego writes that Goldstone’s retraction “arguably damaged UN fact-finding in general and the Mission in particular”: Yihdego, *supra* note 96, at 21.

¹⁰⁶⁷ E.g., *UNCHR Gaza Report*, *supra* note 536, para. 104.