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 FOUR

IDENTIFICATION OF THE APPLICABLE LEGAL FRAMEWORK

Introduction

Previous chapters identified how roles and functions of UN atrocity inquiries were fashioned by mandating authorities and finessed by commissions when interpreting and operationalizing their mandates. It was also observed that commissions' mandates often had legal dimensions, such as through instructions to establish the facts of violations, determine responsibilities and propose accountability recommendations with regard to the nature and scope of violations.[1068] Some mandates mentioned specific legal fields, notably IHRL, IHL and ICL, as legal lenses [1069] of analysis. Building on these observations, Chapter Four zooms in on commissions' engagement with legal dimensions of their mandates. Commissions often termed relevant legal fields as the 'applicable' law.[1070] In the UN inquiry context, such 'applications' do not have direct legal effect; however, for ease of reference, similar language is used here. The Chapter examines how commissions' roles and functions informed their approaches toward identifying the legal framework law applicable to the situations under scrutiny.

Chapter Four is organised in the following way. Section 1 discusses how commissions identified legal dimensions of their mandates, including common rationales for interpreting mandates to include legal lenses beyond those specified by mandating authorities. The Chapter then moves to examine commissions' approaches towards the selection of law applicable to the situations and actors under scrutiny. Section 2 examines commissions' approaches in respect of IHRL, Section 3 examines the same in respect of IHL, and Section 4 discusses commissions' view of the applicability of ICL. The Conclusions section offers cross-cutting observations as to how commissions' roles and functions informed their approaches to the identification of the applicable legal framework.

1. Identification of Legal Dimensions of the Mandate

This Section discusses how commissions identified legal dimensions of their mandates. As these identifications were made independently of mandating authorities, they offer insights into commissions' own perceptions of their functions. Commissions' reasoning was expressed in their reports and was sometimes also articulated in other documents prepared by them, such as terms of reference and communications with states. This Section also examines commissioners' views as expressed in their academic writings and published interviews with journalists and scholars, as these resources offer further comprehension of their approaches.

[1068] See Chapter Two, Section 2.
[1069] Boutruche 2013, *supra* note 482.
[1070] E.g., *Yugoslavia Interim Report*, *supra* note 292, para. 36; *Goldstone Report*, *supra* note 633, para. 268; *Syria First Report*, *supra* note 32, para. 84; *Libya First Report*, *supra* note 968, para. 57 and *CAR Report*, *supra* note 32, para. 41.

Section 1.1 discusses how commissions interpreted mandates expressed in factual terms to include legal dimensions. Section 1.2 discusses the extent to which commissions interpreted their mandates conservatively, by confining the applicable law to fields specified in the written mandate. Section 1.3 discusses the more common practice of interpreting the mandate to include other legal fields and examines commissions' rationales for those interpretations. Section 1.4 brings these strands together to discuss how commissions' interpretations of legal dimensions of their mandates were shaped by their roles and functions.

1.1 Inclusion of legal dimensions in factual mandates

A few written mandates of UN atrocity inquiries did not explicitly mention international law. All these commissions interpreted their mandates to include legal dimensions. The approaches of two commissions are examined in more detail: the HRC-led Beit Hanoun Commission and the Palmer Commission. These commissions viewed the framework of international law as of significantly different relevance to their mandates.

The HRC instructed the Beit Hanoun Commission to "[a]ssess the situation of victims; address needs of survivors; and make recommendations on ways to protect Palestinian civilians against further Israeli assaults".[1071] The Commission saw the framework of international law as central, stating that "[i]n construing its mandate and the facts presented to it, the mission applied an international law framework, in particular [IHRL] and [IHL]".[1072] When interpreting its mandate, the Beit Hanoun Commission took into account the "context provided by the [mandating] resolution as a whole, with particular reference to collective punishment; the killing of civilians as a gross violation of human rights law and [IHL]; [IHL] applicable to medical personnel";[1073] and the "rights-based definition of 'victim'."[1074] The Commission treated its mandating authority's condemnation of violations as indications that an important part of its mandate was to evaluate atrocities on the basis of international law.

The Secretary-General instructed the Palmer Commission to identify the "facts, circumstances and context"[1075] of the Gaza flotilla incident and recommend ways of avoiding similar incidents in the future. The Commission depicted its mandate as concerned with matters beyond the scope of domestic inquiries by Israel and Turkey, which had reached opposite conclusions as to its legality.[1076] Its view of the utility of international law as a framework for the inquiry is apparent from its statement:[1077]

> The [Commission] will not add value for the [UN] by attempting to determine contested facts or by arguing endlessly about the applicable law. Too much legal analysis threatens to produce political paralysis. Whether what occurred here was legally

[1071] *Beit Hanoun Mandate*, *supra* note 317.
[1072] *Beit Hanoun Report*, *supra* note 620, para. 10.
[1073] *Ibid.*, para. 5(a).
[1074] *Ibid.*, para. 5(c).
[1075] *Palmer TOR*, *supra* note 316.
[1076] *Palmer Mandate*, *supra* note 315. See *Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010*, February 2011, available at http://www.mfa.gov.tr/data/Turkish%20Report%20Final%20-%20UN%20Copy.pdf (accessed 1 May 2018) [*Turkish Report*] and *Report of the Public Commission to Examine the Maritime Incident of 31 May 2010*, January 2011, available at http://www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf (accessed 1 May 2018) [*Turkel Report*].
[1077] *Palmer Report*, *supra* note 316, para. 15.

> defensible is important but in diplomatic terms it is not dispositive of what has become an important irritant not only in the relationship between two important nations but also in the Middle East generally.

The Palmer Commission also downplayed the authority of its legal views:[1078]

> We observe that the legal views of Israel and Turkey are no more authoritative or definitive than our own. A Commission of Inquiry is not a court any more than the Panel is. The findings of a Commission of Inquiry bind no one, unlike those of a court. So the legal issues at large in this matter have not been authoritatively determined by the two States involved and neither can they be by the Panel.

These statements indicate that the Palmer Commission was not seeking to impose its views on states, instead aiming to provide an account of events which both states could accept in order to move past their diplomatic rupture. Blank observes that in respect of the Gaza flotilla situation, different legal positions reinforced disagreements about wider narratives of the conflict,[1079] and that the law may be used "as a tool for further disputes".[1080] This observation may explain why the Commission did not dwell on legal dimensions of the conflict. The bulk of its report focussed on factual issues, but it also concluded that Israel's naval blockade was lawful[1081] and its actions when intercepting the vessels were "excessive and unreasonable".[1082] Other legal principles were discussed in an annex and not applied to the facts. Moreover, they were the limited to the views of the Chair and Vice-Chair, excluding representatives of Turkey and Israel.[1083] Recommendations were generally of a practical nature; the Commission considered the existence of practical alternatives and whether steps could be taken to remove the need for a blockade as "issues of importance to the wider international community."[1084]

1.2 Conservative interpretations of legal lenses

In a few cases, commissions only applied the legal fields specified in their written mandates. For instance, the UNCHR's Gaza Inquiry was instructed to investigate IHL and IHRL.[1085] That commission characterised incidents as violations of these fields, and only engaged with ICL in a general statement that targeted shootings would attract "international criminal responsibility".[1086] The Eritrea Commission narrowly interpreted the legal dimensions of its mandate. The HRC had requested the Commission to "investigate all alleged violations of human rights in Eritrea, as outlined in the reports of the Special Rapporteur".[1087] The Eritrea Commission compared its mandate with other HRC mandates which had requested commissions to investigate human rights violations and 'related crimes',[1088] concluding that its mandate did not include the investigation of international crimes.[1089] It recommended that

[1078] *Palmer Report*, *supra* note 316, para. 14.
[1079] Blank, *supra* note 481, at 102.
[1080] *Ibid.*, at 102.
[1081] *Palmer Report*, *supra* note 316, para. 81.
[1082] *Ibid.*, para. 117.
[1083] *Ibid.*, Appendix I, at 86.
[1084] *Ibid.*, para. 16.
[1085] *UNCHR Gaza Mandate*, *supra* note 339, para. 6 and *Israeli Settlements Mandate*, *supra* note 340, para. 9.
[1086] *UNCHR Gaza Report*, *supra* note 536, para. 119.
[1087] *Eritrea Mandate*, *supra* note 347, para. 8.
[1088] *Eritrea First Report*, *supra* note 567, para. 11.
[1089] *Ibid.*, para. 11. See *Eritrea Q&A*, *supra* note 89.

the HRC mandate an investigation "of the extent to which the abuses identified by the Commission constitute crimes against humanity".[1090] Nor did it apply IHL, finding that the Government's policy of 'no war, no peace' had no legal significance, and that Eritrea was not currently engaged in an armed conflict as defined in international law.[1091] After receiving its report, the HRC extended its mandate to investigate violations with a view to ensuring accountability, including where they "may amount to crimes against humanity".[1092] The Commission qualified violations as international crimes in its second report.[1093] The Eritrea Commission's interpretive approach suggests that it did not consider that it could – or should – stray beyond its written mandate. It may also have conveyed to the HRC that legal lenses should be specified in written mandates, to avoid potential claims that commissions had exceeded their jurisdiction.

1.3 Broad interpretations of legal lenses

Most commissions interpreted their mandates expansively, including legal fields in the applicable law beyond those stated in written mandates, particularly IHL and ICL. Commissions presented different – sometimes multiple – explanations for their interpretations, namely reference to resolutions of the mandating authority or other UN bodies (1.3.1); engagement with concerned states' views (1.3.2); objective applicability of legal fields to the situation on the ground (1.3.3); the interrelationship of fields of law (1.3.4) and the purpose of ensuring accountability (1.3.5).

1.3.1 Reliance on UN resolutions

Some commissions identified legal lenses by pointing to other aspects of their mandating resolutions. The Beit Hanoun Commission identified IHRL and IHL as relevant legal lenses, citing the HRC's reference to those fields in its mandating resolution.[1094] The Burundi Commission interpreted the instruction to identify "authors" of violations as including ICL within its applicable law.[1095] Another pertinent example is the Syria Commission, whose original mandate mentioned IHRL and crimes against humanity.[1096] Syria objected to the Commission's investigation of IHL violations as invoking "incorrect legal pretexts which fall beyond the scope of its mandate".[1097] In response, the Commission cited HRC Resolution 21/26 which affirmed the need to hold to account "those responsible for crimes against humanity and war crimes", pointing out, "[w]ar crimes are serious violations of IHL."[1098] OHCHR cites this resolution as expanding the Commission's mandate to include war

[1090] *Eritrea First Report*, *supra* note 567, para. 1542(c).
[1091] *Ibid.*, para. 190.
[1092] *Eritrea Mandate Extension*, *supra* note 503, para. 10.
[1093] *Eritrea Second Report*, *supra* note 569, para. 178 *et seq*.
[1094] *Beit Hanoun Report*, *supra* note 620, para. 10, citing *Beit Hanoun Mandate*, *supra* note 317, paras. 4-5.
[1095] *Burundi Detailed Report*, *supra* note 405, para. 703.
[1096] *Syria Mandate*, *supra* note 47.
[1097] *Letter from the Permanent Mission of the Syrian Arab Republic*, 7 January 2013, in *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/22/59, 5 February 2013, Annex I, at 31 [*Syria Fourth Report*].
[1098] *Letter from the International Commission of Inquiry on the Syrian Arab Republic*, 15 January 2013, in *Syria Fourth Report*, *supra* note 1097, Annex I, at 34.

crimes.[1099] While the resolution extended the Commission's temporal mandate, the reference to war crimes is more oblique. By contrast, the HRC instructed the Commission to continue updating its "mapping exercise" [1100] of human rights violations and to investigate massacres.[1101] The HRC has since expressly instructed the Commission to investigate war crimes.[1102]

The Yugoslavia Commission referred to other UN resolutions when construing its mandate.[1103] The Commission observed in its interim report that the Third Committee of the General Assembly adopted a draft resolution affirming that those committing crimes against humanity and grave breaches of the Geneva Conventions were individually responsible; the international community would seek to bring them to justice and relevant information should be provided to the Commission.[1104] The Commission concluded that its mandate "empowered it to engage in consultations on the refinement of the principle of personal responsibility".[1105]

1.3.2 Engagement with concerned states' views

In at least one case, critiques by a concerned state regarding the legal lenses selected by a commission may have informed its mandate interpretation. This example is the Syria Commission, which was instructed by the HRC to investigate violations of human rights and crimes against humanity.[1106] The Syrian Government argued that the Commission should examine terrorist acts, as well as foreign states' support of terrorist organisations. As the latter issue gives rise to questions of state responsibility, it is examined in Chapter Six. This Section explores whether the first prong of the state's critique encouraged the Syria Commission to examine acts of terrorism. In order to do so, it is necessary to closely read the Commission's reports and its correspondence with the Syrian Government.

At first, the Syria Commission did not engage with the concept of terrorism except as a pretext for the Syrian Government's use of force. In its first report in late 2011, the Commission made findings of human rights violations by the Government and crimes against humanity by its agents.[1107] It was critical of the Government's use of force against mostly peaceful protestors, depicting its justification of responding to 'terrorists' as largely pretext.[1108] In response, the Government accused the Commission of exceeding its mandate by "holding the Syrian Government fully accountable for what is going on in Syria, while you have given a blind eye to the violations of human rights committed by the terrorist

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[1099] OHCHR, 'Mandate', available at http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/CoIMandate.aspx (accessed 1 May 2018).
[1100] HRC Res. 21/26, para. 18.
[1101] *Ibid.*, para. 19.
[1102] HRC Res. 32/25, 1 July 2016, para. 22.
[1103] *Yugoslavia Mandate*, *supra* note 290, in conjunction with SC Res. 771 (1992).
[1104] *Yugoslavia Interim Report*, *supra* note 292, para. 7. See *Yugoslavia Final Report*, *supra* note 39, para. 4, citing GA Res. 47/147, 18 December 1992.
[1105] *Yugoslavia Interim Report*, *supra* note 292, para. 19.
[1106] *Syria Mandate*, *supra* note 47.
[1107] *Syria First Report*, *supra* note 32, paras. 109-111.
[1108] *Ibid.*, paras. 30, 45 and 104.

groups".[1109] The Commission replied that it was "firmly committed to reflecting violations and abuses on all sides".[1110]

In the Commission's second report of February 2012, it found that opposition forces had become more organised[1111] and that "instances of gross abuses" were committed by them.[1112] By contrast, "widespread and systematic"[1113] patterns of violations were found to be committed by State forces. The Commission did not qualify opposition attacks as 'terrorist acts', but did find that Government snipers and *de facto* agents known as *Shabbiha* had "terrorized the population".[1114] In April 2012, the Commission wrote again seeking cooperation, reminding the Government that the Commission was "the first body to investigate and report on human rights violations by armed opposition groups"[1115] and assuring that it would investigate all violations, including those committed against Syrian military and security forces. In August 2012, the Commission qualified the situation in Syria for the first time as a NIAC.[1116] It confirmed earlier findings of responsibility in respect of the Syrian Government and found that opposition groups had violated IHRL and IHL,[1117] but did not qualify incidents as terrorist acts.

In January 2013, the Syrian Government wrote again, stating that "[i]t remains unknown why the CoI continues to refuse to apply international law on combating terrorism – including relevant [Security Council] Resolutions, despite the fact that these are binding resolutions that are to be applied to what is happening in Syria."[1118] The Commission's reply did not wholly answer those concerns. On one hand, the Commission seemed to take Syria's views into account, stating that it would "welcome an exchange on the Government's concern as to the application of international law on combating terrorism, including relevant UN Security Council Resolutions".[1119] On the other hand, the Commission suggested that it had already engaged with this issue:[1120]

> Although the mandate of the CoI does not include 'terrorism', previous CoI reports have condemned bombings that did not appear directed toward military targets (See Periodic

[1109] *Note verbale dated 21 December 2011 from the Permanent Representative of the Syrian Arab Republic addressed to the commission* [*Syria note verbale 21 December 2011*], in *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/19/69, 22 February 2012, Annex II, at 27 [*Syria Second Report*]. See *Note verbale dated 23 January 2012 from the Permanent Representative of the Syrian Arab Republic addressed to the Commission*, paras. 6-9, in *Syria Second Report*, Annex XI, at 63-64.

[1110] *Note verbale dated 2 February 2012 from the Commission addressed to the Permanent Representative of the Syrian Arab Republic*, in *Syria Second Report*, *supra* note 1109, Annex XII, at 68.

[1111] *Syria Second Report*, *supra* note 1109, para. 17.

[1112] *Ibid*., para. 83.

[1113] *Ibid*.

[1114] *Syria Second Report*, *supra* note 1109, para. 39.

[1115] *Letter dated 22 June 2012 from the Chair of the Commission to the Minister of Foreign and Expatriates Affairs of the Syrian Arab Republic*, in *Syria Third Report*, *supra* note 564, Annex I, at 43.

[1116] *Syria Third Report*, *supra* note 564, para. 12.

[1117] *Ibid*., paras. 132-134.

[1118] *Note verbale dated 9 January 2013 from the Permanent Representative of the Syrian Arab Republic addressed to the Commission*, in *Syria Fourth Report*, *supra* note 1097, Annex I, at 32 [*Syria note verbale 9 January 2013*].

[1119] *Note verbale dated 15 January 2013 from the Commission addressed to the Permanent Representative of the Syrian Arab Republic*, in *Syria Fourth Report*, *supra* note 1097, at 36 [*Syria note verbale 15 January 2013*].

[1120] *Ibid*.

> Update 24 May, p. 5 repeated in HRC/20/CRP.1) (See also HRC/21/50, p. 78) and which appeared to have as 'a primary purpose spreading terror among the civilian population' which are prohibited under IHL. The CoI's subsequent report will contain additional findings in this area.

The documents cited above identified several explosions which killed "scores of civilians",[1121] but the Commission did not find that they were intentionally aimed at civilians, let alone qualifying as terrorist acts. On the contrary, the Commission reached the limited conclusion that while the explosions "may be linked to the [NIAC] and thus assessed under the applicable IHL rubric, lack of access to the crime scenes combined with an absence of information on the perpetrators hampered the Commission's ability to render such an assessment".[1122] The Commission's indication that its next report would make 'additional findings' in the area of terrorism may have sought to mollify the concerned state if it was of the view that the Commission had not yet considered those issues.

A change in approach is discernible in the Commission's fourth report, issued in February 2013. It recognised that some anti-Government groups as well as Government forces and "other perpetrators"[1123] had spread terror in violation of IHL. Shortly after the Commission's fourth report, UN bodies began to pay more attention to the involvement of terror groups in Syria. In March 2013, the HRC condemned "all violence, especially against civilians… including terrorist acts".[1124] In its fifth report, the Commission identified Jabhat Al-Nusra (Al-Nusra Front) and the Islamic State of Iraq and the Levant (Daesh or ISIS) as parties to the conflict, but did not make findings of terrorist acts by these actors.[1125] In its sixth report, the Commission acknowledged terrorism in a broader way, stating in its methodology section:[1126]

> The commission investigated a number of incidents that may be labelled as 'terrorist attacks' or 'terrorism'. Once the threshold of non-international armed conflict has been met, and the suspected perpetrators are parties to the conflict, the commission renders its assessment of an attack's legality under the rubric of [IHL] and [IHRL]. Any attack the sole purpose of which is to spread terror among the civilian population is prohibited.

The Commission qualified various attacks as acts of terror in violation of IHL.[1127] From 2014, the Commission's reports gave significant attention to terrorist acts by ISIS and the Al-Nusra Front,[1128] noting that the Security Council had deemed these actors as 'terrorist entities'.[1129]

[1121] *Syria Third Report*, *supra* note 564, Annex V, para. 55; *Oral Update of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. HRC/20/CRP.1, 26 June 2012, para. 102 [*Syria Oral Update*]; *Periodic Update of the Independent International Commission of Inquiry on the Syrian Arab Republic*, 24 May 2012, para. 24, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/PeriodicUpdate24May2012.pdf (accessed 1 May 2018).

[1122] *Syria Third Report*, *supra* note 564, para. 56. See *Syria Oral Update*, *supra* note 1121, para. 103.

[1123] *Syria Fourth Report*, *supra* note 1097, paras. 127 and 133-135.

[1124] HRC Res. 22/24, 22 March 2013, para. 3.

[1125] *Syria Fifth Report*, *supra* note 1046, para. 29.

[1126] *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/24/46, 16 August 2013, para. 11 [*Syria Sixth Report*].

[1127] *Syria Sixth Report*, *supra* note 1126, paras. 74, 134, and 148.

[1128] Syria Commission, *Rule of Terror: Living under ISIS in Syria*, 14 November 2014, para. 1. See *Syria Eighth Report*, *supra* note 983, para. 108 and findings at paras. 37 (ISIS), 107 (Al-Nusra Front) and 102 (Syrian Government).

The focus on terrorism in the Commission's later reports arguably reflects the deteriorating situation on the ground.[1130] However, the Commission's fourth report of February 2013 represents an interesting intermediate phase, as it made findings of terrorist acts prior to wider recognition of this dimension of the conflict. This focus might have represented an effort to assure the Syrian Government of its even-handedness while pointing out that the scale of violations was not equivalent between the parties. Perhaps the Commission hoped to encourage Syria's cooperation by examining acts of terrorism. If that was the case, it still did not fully accept the Government's approach, as it examined terrorism through the frameworks of IHL and IHRL rather than as discrete violations, as might have been suggested by the Government's invocation of Security Council resolutions. By requiring 'terrorist acts' to violate IHL, the Commission distinguished participation in hostilities against the Government from targeting of civilians. In this way, it avoided labelling all opposition forces as 'terror' groups. The Syria Commission is the sole instance to date of a commission adjusting its investigative focus in response to critiques by a concerned state. Its long-running mandate has also allowed more opportunities for engagement with the concerned state.

1.3.3 Applicability to the situation on the ground

Some commissions explained that fields of law came within their mandates as a result of their applicability to the situation on the ground, and that it was necessary to include them to conduct a comprehensive examination. For instance, the HRC-led Gaza Flotilla Commission had regard to *jus in bello* and *jus ad bellum* norms relevant to naval warfare, reasoning that these legal fields were of relevance to "issues raised by the mandate".[1131] The Israeli Settlements Commission found that because there was an ongoing situation of occupation in Palestine, that IHL was applicable.[1132] The North Korea Commission incorporated IHL into its applicable law to the extent relevant to the DPRK's residual obligations after the Korean War.[1133] After the HRC widened the Eritrea Commission's mandate to include crimes against humanity, the Commission examined whether Eritrea was engaged in an armed conflict as defined under international law, in order to determine whether IHL was applicable.[1134]

This rationale was notably adopted by commissions when expanding the applicable law to include IHL when their mandates had been formulated before violence escalated into armed conflict. For instance, in 2011 the HRC instructed the Syria Commission to investigate human rights violations.[1135] In March 2012, the Syria Commission reported that the situation amounted to a NIAC, so that IHL also applied.[1136] The Libya Commission took a similar

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[1129] SC Res. 2170 (2014) and SC Res. 2161 (2014).
[1130] E.g., US Department of State, 'The Global Coalition to Defeat ISIS', 10 September 2014, available at http://www.state.gov/s/seci (accessed 1 May 2018) and White House Office of the Press Secretary, 'Statement by the President on ISIL', 10 September 2014, available at http://obamawhitehouse.archives.gov/the-press-office/2014/09/10/statement-president-isil-1 (accessed 1 May 2018).
[1131] *Gaza Flotilla Report*, *supra* note 681, para. 48.
[1132] *Israeli Settlements Report*, *supra* note 572, para. 13.
[1133] *North Korea Report*, *supra* note 32, para. 64.
[1134] *Eritrea Second Report*, *supra* note 569, para. 190.
[1135] *Syria Mandate*, *supra* note 47.
[1136] *Syria Third Report*, *supra* note 564, para. 12 and Annex II, at 45, para. 3, *contra Syria Second Report*, *supra* note 1109, para. 13.

approach. Its mandate was drafted in February 2011 as the situation in Libya was rapidly deteriorating.[1137] The Commission included IHL in its applicable law after finding that armed conflicts had arisen in Libya.[1138] Philippe Kirsch, who chaired the Commission, explained that the application of IHL "could not have been anticipated by the [HRC] because there was no armed conflict when the commission was set up".[1139] From his perspective, had the Commission excluded IHL, "there is no question we would have been criticized for avoiding so many violations."[1140] The Burundi Commission prospectively recognized the potential applicability of IHL in its terms of reference. Noting that its written mandate referred to IHRL and ICL, the Commission also observed, "Burundi is party to the Geneva Conventions and their additional protocols. If the Commission were to reach the conclusion that aspects of the situation in Burundi fell under these conventions, they would also become part of the body of applicable law."[1141]

Some commissions identified the ICC's active jurisdiction as a reason to include ICL within the applicable law. The Libya Commission interpreted its mandate to consider "crimes perpetrated" as follows: "[g]iven the Security Council's referral of events in Libya to the [ICC], the Commission has also considered events in light of [ICL]."[1142] This perspective was reiterated by Kirsch writing academically: "[ICL] also applies to the [Libyan] situation, by virtue of the referral of the Security Council to the [ICC]…"[1143] The CAR Commission reported that ICL was a "central frame of reference" as the CAR had ratified the Rome Statute of the ICC (Rome Statute) in 2001.[1144]

Commissions utilized this rationale selectively. While IHL and ICL were commonly incorporated on this basis, other potentially relevant legal fields remained outside the mandate. For instance, the Gaza Commission examined the report of a Headquarters Board of Inquiry into damage to UN facilities[1145] for the purpose of assessing IHL violations,[1146] but did not examine whether the Convention on the Privileges and Immunities of the United Nations 1946 was violated, considering this body of law as beyond its mandate.[1147] Several commissions did not examine potential violations of *jus ad bellum*. For instance, the Syria Commission did not address *jus ad bellum* dimensions of military operations by third states conducted without Syria's consent, and the Libya Commission did not discuss whether NATO's operations complied with the scope of the Security Council's authorization of the use of force.[1148] Marko Milanovic observes in relation to regional human rights courts, "because *jus ad bellum* issues can be both politically and legally complex and controversial,

[1137] *Libya Mandate*, *supra* note 343.
[1138] *Libya First Report*, *supra* note 968, paras. 4, 52 and 56.
[1139] Interview conducted by Rob Grace on 22 March 2013 with Philippe Kirsch, quoted in Grace 2015, *supra* note 59, at 41 [*Kirsch interview*].
[1140] Grace 2015, *supra* note 59, at 41.
[1141] *HRC Burundi TOR*, *supra* note 495, at III(i).
[1142] *Libya First Report*, *supra* note 968, para. 4.
[1143] Kirsch, *supra* note 97, at 304.
[1144] *CAR Report*, *supra* note 32, para. 4.
[1145] *Summary by the Secretary-General of the report of the United Nations Headquarters Board of Inquiry into certain incidents that occurred in the Gaza Strip between 8 July 2014 and 26 August 2014*, UN Doc. S/2015/286, 27 April 2015.
[1146] *Gaza Report*, *supra* note 766, paras. 421 and 475.
[1147] *Ibid.*, para. 449.
[1148] *Libya Second Report*, *supra* note 853, paras. 603 and 613.

insulating human rights from the *jus ad bellum* can help preserve the integrity of human rights and the institutional competence of human rights bodies."[1149] Similar concerns might arise for inquiry bodies. Commissions might consider *jus ad bellum* as insufficiently connected to human rights, or perhaps as a matter reserved for other bodies, particularly the Security Council.

1.3.4 Links between fields of international law

Some commissions considered IHRL and IHL as sufficiently interconnected so as to fall within their mandates. Several commissions depicted IHL and IHRL as mutually reinforcing.[1150] Offering an additional basis for the Libya Commission's application of IHL, Philippe Kirsch states that the Commission concluded that "the broad human rights legal framework encompassed human rights and IHL as *lex specialis* applicable in times of armed conflicts."[1151]

This perspective of the interrelationship between IHL and IHRL is shared by scholars such as Thilo Marauhn, who writes that although the HRC was not originally established to address IHL violations, it may do so as a result of the overlap in these fields. Marauhn argues that the Syria Commission "can draw legitimacy for addressing [IHL] from the interface between the two bodies of law."[1152] Other scholars do not consider that a human rights mandate implicitly includes IHL.[1153]

1.3.5 Purpose of ensuring accountability

Some commissions depicted ICL as a means of ensuring individual accountability for serious violations of IHL and IHRL.[1154] This justification also has synergies with the above-mentioned rationale based on links between legal fields, as it posits that ICL comprises rules of individual responsibility for violations of IHL and IHRL. It also reflects the goal of promoting human rights protection and compliance.[1155] Some commissions whose written mandates did not mention ICL applied this legal field to promote accountability. For instance, the CAR Commission observed that although the Security Council did not mention ICL in its mandate, ICL was "an essential complement to both [IHRL] and [IHL], in that it establishes individual criminal liability for serious violations of those other two bodies of law."[1156] The Goldstone Commission explained its inclusion of ICL in the following way:[1157]

[1149] Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict', in Nehal Bhuta (ed.), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (Oxford: OUP, 2016) 55-88, at 86.

[1150] *Darfur Report*, *supra* note 32, para. 143; *Lebanon Report*, *supra* note 855, para. 64; *Syria Third Report*, *supra* note 564, Annex II, para. 5.

[1151] *Kirsch interview*, *supra* note 1139, at 40-41.

[1152] Marauhn, *supra* note 96, at 439.

[1153] See Chapter Two, Section 2.3.2.

[1154] E.g., *Libya Second Report*, *supra* note 853, para. 23; *CAR Report*, *supra* note 32, para. 111.

[1155] Ratner 2015, *supra* note 401, at 556; OHCHR, *Outcome of the Expert Consultation on the Issue of Protecting the Human Rights of Civilians in Armed Conflict*, UN Doc. A/HRC/11/31, 4 June 2009, para. 7.

[1156] *CAR Report*, *supra* note 32, para. 111.

[1157] *Goldstone Report*, *supra* note 633, para. 286.

> [ICL] has become a necessary instrument for the enforcement of IHL and IHRL. Criminal proceedings and sanctions have a deterrent function and offer a measure of justice for the victims of violations. The international community increasingly looks to criminal justice as an effective mechanism of accountability and justice in the face of abuse and impunity. The Mission regards the rules and definitions of [ICL] as crucial to the fulfilment of its mandate to look at all violations of IHL and IHRL by all parties to the conflict.

The Rwanda Commission was instructed to investigate 'grave violations' of IHL and genocide.[1158] Its mandating resolution recognised individual responsibility for serious violations of IHL and affirmed that individuals "should be brought to justice".[1159] The Commission wrote:[1160]

> The principle that the individual shall be held responsible for serious violations of human rights - firmly enforced by the Nuremberg Tribunal and today universally recognized by the international community - is the same principle that guides the operation of the [ICTY] and of the [Rwanda Commission] acting in conformity with [SC Res. 935 (1994)].

The Rwanda Commission's explanation evokes the statement at Nuremburg that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[1161]

Commissions have not expressly included IHL on the basis that it is necessary to ensure accountability, but this argument has been made in commentary. Some scholars argue that because IHL lacks enforcement mechanisms, it is important for commissions to assess IHL violations.[1162] Theodor Meron writes that because few expert bodies are mandated to apply IHL, human rights bodies "fill an institutional gap".[1163] Marauhn writes that if the Syria Commission did not investigate IHL violations, they would remain unaddressed, so "the Commission and the HRC deserve credit for taking up the issues".[1164]

1.4 Discussion

All UN atrocity inquiries examined legal dimensions of situations of concern. The contrasting examples of the Beit Hanoun Commission and the Palmer Commission illustrate how both commissions interpreted their mandates to include some legal content. They also show that commissions saw rather different roles for international law in light of the wider purposes of their mandates. The Beit Hanoun Commission took a human rights-based approach and sought to convey the suffering of victims. By contrast, the Palmer Commission was not

[1158] *Rwanda Mandate*, *supra* note 296, para. 1.
[1159] *Ibid.*, Preamble.
[1160] *Rwanda Interim Report*, *supra* note 298, para. 128.
[1161] *The Trial of Major War Criminals before the International Military Tribunal*, cited in Nollkaemper, *supra* note 787, at 313.
[1162] See in relation to special procedures mandates, Alston *et al*, *supra* note 533, at 184-185.
[1163] Meron, *supra* note 735, at 247.
[1164] Marauhn, *supra* note 96, at 455.

primarily concerned about determining legal responsibilities, and rather findings as a platform for practical suggestions to move Turkey and Israel beyond their diplomatic stalemate.

UN atrocity inquiries usually interpreted their mandates broadly to include relevant fields of international law. The Eritrea Commission stands rather alone in its conservative approach. The weight of commissions' practice indicates that they asserted their competence to interpret legal parameters of their mandates.[1165] This competence is not unlimited; commissions did identify certain legal areas as outside their mandates. However, commissions were generally comfortable in expanding their mandates to include IHL and ICL.

Different views have been expressed as to how mandates should be interpreted. The *Siracusa Principles* advocate a flexible approach, namely that a fact-finding body should be able to adapt to unexpected changes in circumstances, such as changes in the applicable law.[1166] The *HPCR Handbook* recommends that mandates be interpreted in light of the text, investigative purposes, principles of professional practice and practical considerations.[1167] It advises that commissioners examine the mandating authority's intent and "shifts in conditions on the ground that might require a different approach to fulfil the mandating authority's expectations".[1168] By contrast, the Special Rapporteur on Torture takes a stricter approach, advocating that mandates should be clearly drafted and only amended "in exceptional circumstances", so long as new elements are necessary and the decision is explained transparently.[1169]

In practice, not all commissions gave reasons for their interpretations of the applicable law. Further explanation as to how and why legal fields were selected might ward off critiques of overstepping the mandate and demonstrate commissions' commitment to transparency. This issue might be avoided if written mandates identified all (potentially) relevant legal fields. Conversely, ambiguity in the mandate permits flexibility, and might also foster political consensus. Grace sees benefits in fleshing out the mandate through terms of reference formulated by OHCHR so that interpretations are based on technical rather than political considerations, and their scope can be adapted more easily.[1170]

Commissions generally included IHL where it applied to the situation of concern, demonstrating an interest in raising alert of violations of humanitarian norms as well as human rights. Commissions tended to depict ICL as a vehicle for ensuring accountability for violations of IHRL and IHL. There are indeed normative links among IHRL, IHL and ICL. Crimes against humanity are sometimes depicted in scholarship as individualized prohibitions of IHRL violations,[1171] and the ICTY depicts human dignity as the common underpinning of

[1165] Alexander Orakhelashvili, 'Commissions of Inquiry and Traditional Mechanisms of Dispute Settlement', in Henderson, *supra* note 94, 119-143, at 134.
[1166] *Siracusa Guidelines*, *supra* note 34, Guideline 3.5.
[1167] *HPCR Handbook*, *supra* note 95, at 9.
[1168] *Ibid.*, at 11.
[1169] *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, UN Doc. A/HRC/19/61, 18 January 2012, para. 64.
[1170] Grace 2015, *supra* note 59, at 33-34.
[1171] E.g., Andrew Clapham, 'Human Rights and International Criminal Law', in William Schabas (ed.), *Cambridge Companion to International Criminal Law* (Cambridge: CUP, 2016) 11-33, at 16, and Thomas

IHRL and IHL.[1172] There are also significant structural and substantive differences. Schabas argues that IHL and IHRL rest on fundamentally different predicates with respect to aggressive war.[1173] Duty-bearers also differ across legal fields,[1174] and norms are overlapping, but not identical. For instance, Paola Gaeta observes that while both states and individuals may commit genocide, those responsibilities are triggered by "infringement of two different primary rules, each one shaped upon the particular nature of their addressees and the consequences of the illegal conduct attributed to them."[1175] Links between these legal fields do not necessarily explain why bodies mandated to examine violations in one field should examine others. As observed in Chapter Two, such an approach was not usually adopted by adjudicative human rights bodies.[1176] However, commissions' interpretations find synergies with special procedures mandate-holders, which sometimes included IHL and ICL in their applicable law.[1177] Reviewing the mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Alston observes:[1178]

> In general terms, the Commission and the [HRC] have chosen to create special procedures in response to particular violations which have generated pressure on the international community to take action to address specific problems. Thus the initial formulation of a mandate will often be narrow. But in relation to almost all mandates it quickly becomes apparent that a particular type of violation cannot be addressed in isolation, that the definition of the problem has been unduly restrictive, and that a systematic and potentially effective response to the goals set by the sponsors of the original resolution will require a more expansive approach.

As commissions are not linked to a particular treaty regime, they might take a broader approach in a similar manner as special procedures, in pursuit of the goals of the mandating authority.

2. Applicability of International Human Rights Law

Commissions considered several issues pertaining to the substantive applicability of IHRL, namely the general applicability of human rights treaties and the operation of derogation regimes (2.1), extraterritorial applicability (2.2), applicability in armed conflict (2.3) and to organised armed groups (2.4). Some concluding observations are then offered (2.5).

Margueritte, 'International Criminal Law and Human Rights', in William Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Oxon: Routledge, 2011) 435-452, at 446.

[1172] *Prosecutor v. Furundija*, 1T-95-17/1-T, Judgment, 10 December 1998, para. 183: "The general principle of respect for human dignity is... the very raison d'être of [IHL] and human rights law…"

[1173] William Schabas, 'Lex Specialis: Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum', (2007) 40(2) Isr L Rev 592-613, at 593 [Schabas 2007].

[1174] Frédéric Mégret, 'Nature of Obligations', in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford: OUP, 2010) 124-149.

[1175] Paola Gaeta, 'On What Conditions Can a State Be Held Responsible for Genocide?', (2007) 18(4) EJIL 631-648, at 637.

[1176] See Chapter Two, Section 2.3.2.

[1177] E.g., *Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights*, UN Doc. E/CN.4/1993/50, 10 February 1993 [*Yugoslavia SR Report*]; *DRC Joint Mission Report*, *supra* note 537 and *Somalia SR Report*, *supra* note 537.

[1178] *Extrajudicial Executions SR Report*, *supra* note 562, para. 52.

2.1 Applicability of human rights treaties

Commissions primarily identified as applicable those treaties that had been ratified by concerned states.[1179] Occasionally, commissions included treaties which states had signed but not ratified, pursuant to the customary rule that a state must refrain from acts defeating the purpose of a treaty it has signed until it makes its intention clear not to become a party.[1180] For instance, the Darfur Commission wrote that as Sudan was a signatory to the *Optional Protocol to the Convention on the Rights of the Child Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* (CRC-OP), it had to refrain from acts defeating its object and purpose.[1181]

When identifying the scope of applicability of human rights treaties, commissions examined the operation of derogation regimes. They did not accept other justifications for derogations; for instance, the Eritrea Commission rejected the Eritrean authorities' argument based on the so-called 'no war, no peace' situation in Eritrea, observing that "derogations and restrictions to human rights in exceptional situations are strictly regulated by the human rights treaties themselves."[1182]

Under the ICCPR, states may derogate from certain obligations to the extent strictly required "in times of public emergency threatening the life of nation".[1183] Commissions emphasized that certain rights could never be derogated from, such as the right to life, the prohibition of torture, and freedom of thought.[1184] In addition to expressly non-derogable rights,[1185] commissions found that other ICCPR rights impliedly had this character, such as the prohibitions of hostage-taking and forcible transfer of population,[1186] and the right to a remedy for serious violations.[1187]

When considering the ICCPR's applicability, commissions examined whether derogation conditions were satisfied.[1188] A state party wishing to derogate must inform the Secretary-General of the provisions from which it derogated and the reasons therefor.[1189] Commissions examined whether states had communicated derogations. For instance, the Darfur Commission observed that Sudan had declared a state of emergency but not that it would

[1179] Relevant treaties include the ICCPR, *supra* note 243; ICESCR, *supra* note 243; CAT, *supra* note 780; International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660 UNTS 195 [CERD]; Convention on the Elimination of All Forms of Discrimination against Women 1979, 1249 UNTS 13 and Convention on the Rights of the Child 1989, 1577 UNTS 3 [CRC].

[1180] Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, Art. 18 [VCLT]. E.g., *Darfur High-Level Report*, *supra* note 1027, para. 20.

[1181] *Darfur Report*, *supra* note 32, para. 154.

[1182] *Eritrea First Report*, *supra* note 567, para. 55.

[1183] ICCPR, *supra* note 243, Art. 4(1).

[1184] See, e.g., *Darfur Report*, *supra* note 32, para. 150; *Gaza Flotilla Report*, *supra* note 681, paras. 162 and 180, and *North Korea Report*, *supra* note 32, para. 165.

[1185] ICCPR, *supra* note 243.

[1186] *Darfur Report*, *supra* note 32, para. 151; *Lebanon Report*, *supra* note 855, para. 71; *Gaza Flotilla Report*, *supra* note 681, para. 72; *Libya Second Report*, *supra* note 853, footnote 1049.

[1187] *Darfur Report*, *supra* note 32, footnote 54.

[1188] See, e.g., *Guinea Report*, para. 170; *Goldstone Report*, *supra* note 633, para. 299; *Libya Second Report*, *supra* note 853, para. 16; *Syria First Report*, *supra* note 32, para. 25; *CAR Preliminary Report*, *supra* note 768, para. 57.

[1189] ICCPR, *supra* note 243, Art. 4(3).

derogate from the ICCPR.[1190] The Syria Commission observed that Syria had not declared a state of emergency nor sought to derogate, so the ICCPR similarly remained in full effect,[1191] including in periods of intense conflict such as the battle of Aleppo.[1192]

Where states had entered derogations, commissions examined whether they were lawfully invoked. The Lebanon Commission observed that Israel had declared a state of emergency since 1948 and had declared in 1991 that it was necessary to derogate from its obligations regarding the right to liberty.[1193] The Commission noted that the Human Rights Committee considered Israel's reservation as overly broad, and did not take the derogation into account when assessing violations concerning detained persons.[1194] The Sri Lanka Panel of Experts reported that although Sri Lanka had notified the Secretary-General of its derogations, their extent and duration were "a matter of concern".[1195] Doubting their validity, the Panel did not take Sri Lanka's derogations into account when assessing its compliance with the ICCPR.[1196] The approach taken by these commissions is similar to the strict approach to derogations taken by the Human Rights Committee in monitoring the implementation of the ICCPR.[1197]

The International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) does not have a formal derogations regime. Some commissions observed this fact.[1198] The ICESCR does however permit rights to be limited "in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."[1199] Gilles Giacca argues that this limitation clause could correspond to the ICCPR's general derogation clause.[1200] According to the ESCR Committee (CESCR), states parties have "a minimum core obligation" to ensure "minimum essential levels",[1201] and if a state blames failure to meet its obligations on a lack of resources, it must show that "every effort has been made to use all resources that are at its disposition".[1202] Commissions have affirmed the CESCR's view. For instance, the Syria Commission observed minimum core obligations to the rights to health[1203] and food.[1204] The Lebanon Commission recognised that "in times of armed conflict where resources are constrained" Economic, social and cultural rights could be limited, but restrictions had to be proportionate, pursuant to a legitimate aim and strictly necessary.[1205] The North Korea Commission observed that a state "cannot plead resource constraints to justify its failure to ensure minimum essential levels of socio-economic well-

[1190] *Darfur Report*, *supra* note 32, para. 153.
[1191] *Syria Third Report*, *supra* note 564, Annex II, para. 8.
[1192] *Syria Thirteenth Report*, *supra* note 928, Annex II, para. 3.
[1193] *Lebanon Report*, *supra* note 855, para. 73, noting Israel's derogation from ICCPR, *supra* note 243, Art. 9.
[1194] *Ibid.*, para. 197 and fn. 173.
[1195] *Sri Lanka Report*, *supra* note 29, para. 187.
[1196] *Ibid.*, para. 187.
[1197] CCPR, 'Chapter 1. Jurisdiction and Activities', para. 31, in *Report of the Human Rights Committee (Vol. 1)*, UN Doc. A/60/40, 3 October 2005.
[1198] *Goldstone Report*, *supra* note 633, para. 299.
[1199] ICESCR, *supra* note 243, Art. 4.
[1200] Gilles Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* (Oxford: OUP, 2014) at 72.
[1201] ICESCR Committee (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations*, UN Doc. E/1991/23, 14 December 1990, para. 10 [ESCR GC 3].
[1202] ESCR GC 3, *supra* note 1201, para. 10.
[1203] *Syria Seventh Report*, *supra* note 805, Annex VII, para. 2.
[1204] *Ibid.*, para. 132.
[1205] *Lebanon Report*, *supra* note 855, para. 72.

being... unless it can demonstrate that it has used all the resources at its disposal".[1206] Commissions generally interpreted ICESCR limitations narrowly, to maximize protection.

2.2 Territorial scope of applicability

Where states examined situations where states acted beyond their borders, they examined the extraterritorial applicability of IHRL obligations. Some commissions examined this issue in relation to IHRL generally. For instance, the CAR Commission wrote that "international forces in CAR are obliged to respect human rights in their activities and especially in relation to any individuals who are under their power or effective control, even when these forces are operating outside their national borders",[1207] citing in support a general comment of the Human Rights Committee.[1208]

Other commissions examined the question of territorial applicability by reference to human rights treaties, particularly the ICCPR and ICESCR. The ICCPR provides that a state party must ensure rights in respect of all individuals "within its territory and subject to its jurisdiction".[1209] Commissions which investigated Israel's actions in Palestine, Lebanon and on ships in the high seas found that Israel's ICCPR obligations applied wherever it exercised effective control, affirming the views of the International Court of Justice[1210] and the Human Rights Committee.[1211] While most states accept this view,[1212] the US, Israel and Turkey consider that the ICCPR only applies within their sovereign territories.[1213] In 2015, the Gaza Commission acknowledged[1214] but rejected Israel's view, pointing out that Israel had accepted to exercise its powers "with due regard to internationally-accepted norms and principles of human rights and the rule of law",[1215] and that the weight of authority favoured extra-territorial applicability.[1216] The North Korea Commission interpreted its mandate to include "violations that involve extraterritorial action originating from the DPRK".[1217]

[1206] *North Korea Report*, *supra* note 32, para. 638.
[1207] *CAR Report*, *supra* note 32, para. 567.
[1208] CCPR, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 10 [*CCPR GC 31*], cited in *CAR Report*, *supra* note 32, footnote 274.
[1209] ICCPR, *supra* note 243, Art. 2.
[1210] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Reports 136, para. 111 [*Wall Opinion*], cited in *Lebanon Report*, *supra* note 855, para. 74; *Goldstone Report*, *supra* note 633, para. 298; *Gaza Flotilla Report*, *supra* note 681, para. 73; *Israeli Settlements Report*, *supra* note 572, footnote 4 and *Gaza Report*, *supra* note 766, para. 41.
[1211] *CCPR GC 31*, *supra* note 1208, para. 10, cited in *Goldstone Report*, *supra* note 633, footnote 175; *Gaza Flotilla Report*, *supra* note 681, para. 73.
[1212] E.g., CCPR, *Concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, UN Doc. CCPR/C/GBR/CO/6, 30 July 2008, para. 14; Australia: *Replies to the List of Issues (CCPR/C/AUS/Q/5) to be Taken Up in Connection with the Consideration of the Fifth Periodic Report of the Government of Australia*, UN Doc. CCPR/C/AUS/Q/5/Add.1, 5 February 2009, para. 17.
[1213] US, *Fourth Periodic Report of the United States of America to the UN Committee on Human Rights*, 30 December 2011, para. 505, available at http://www.state.gov/j/drl/rls/179781.htm#i (accessed 1 May 2018) [*CCPR US Report*]; CCPR, *Concluding observations on the fourth periodic report of Israel*, UN Doc. CCPR/C/ISR/CO/4, 21 November 2014, para. 5 [*CCPR Israel Conclusions*]; CCPR, *Concluding observations on the initial report of Turkey adopted by the Committee at its 106th session*, UN Doc. CCPR/C/TUR/CO/1, 13 November 2012, para. 5.
[1214] *Gaza Report*, *supra* note 766, para. 39.
[1215] Agreement on the Gaza Strip and the Jericho Area 1994, Art. XIV.
[1216] *Gaza Report*, *supra* note 766, para. 41.
[1217] *North Korea Report*, *supra* note 32, para. 19.

Unlike the ICCPR, the ICESCR does not have a jurisdiction clause. Commissions' approaches reflected developments in authoritative interpretations of this treaty. As at the year 2000, there was little guidance as to the ICESCR's extraterritorial scope. The UNCHR's Gaza Inquiry found that Israel violated economic, social and cultural rights in Palestine while expressing doubt as to whether that treaty applied extra-territorially.[1218] In 2003, the CESCR affirmed that Israel's ICESCR obligations "apply to all territories and populations under its effective control."[1219] In 2004, the ICJ found that ICESCR obligations apply where states exercise "territorial jurisdiction."[1220] Subsequent commissions affirmed the extraterritorial applicability of the ICESCR with more confidence. The Goldstone Commission cited the CESCR when finding that Israel's obligations extended to the population in Palestine.[1221] The Israeli Settlements Commission found that Israel was bound to protect the rights of "all persons within its jurisdiction" because it was a party to several human rights treaties including the ICESCR.[1222] The Gaza Commission observed that in line with the position of the ICJ and treaty bodies, Israel's human rights obligations in Palestine endured "to the extent that it continues to exercise jurisdiction in those territories",[1223] and was obliged to not impede the exercise of those rights where competence had been transferred to Palestinian authorities. Commissions thus affirmed the ICESCR's extra-territorial applicability as legal authorities developed.

2.3 Applicability in situations of armed conflict

Commissions examined the applicability of IHRL in situations of armed conflict. Traditionally, IHL was considered as exclusively governing situations of armed conflict, with IHRL applying in peacetime.[1224] The contemporary view of the ICJ[1225] and treaty bodies[1226] is that IHL and IHRL are co-applicable. While most states accept this position, the US and Israel were opposed,[1227] though the US has since changed its view.[1228] Commissions' approaches reflect wider developments on this issue. The Yugoslavia Commission did not apply human rights treaties directly, instead having regard to human rights norms under the rubric of crimes against humanity.[1229] The Rwanda Commission took a similar approach, citing the Genocide

[1218] *UNCHR Gaza Report*, *supra* note 536, para. 93 and at 34, footnote 2.
[1219] CESCR, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Israel*, UN Doc. E/C.12/1/Add.90, 26 June 2003, para. 31 [*ESCR Israel Conclusions*].
[1220] *Wall Opinion*, *supra* note 1210, para. 112.
[1221] *Goldstone Report*, *supra* note 633, para. 298, citing *ESCR Israel Conclusions*, *supra* note 1219.
[1222] E.g., *Israeli Settlements Report*, *supra* note 572, para. 11.
[1223] *Gaza Report*, *supra* note 766, para. 41, citing *Wall Opinion*, *supra* note 1210, paras. 111-113.
[1224] Dan Kawali, ''Humanitarian Rights': how to ensure respect for human rights and humanitarian law in armed conflicts', in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham: Edward Elgar, 2013) 343-370, at 348.
[1225] *Nuclear Weapons Opinion*, *supra* note 557, para. 25; *Wall Opinion*, *supra* note 1210, para. 101; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment [2005] ICJ Reports 168, para. 216 [*Armed Activities Case*].
[1226] CCPR, *General Comment 29: Article 4: Derogations during a State of Emergency*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 3 [*CCPR GC 29*]; *CCPR GC 31*, *supra* note 1208, para. 11.
[1227] CAT Committee, *Conclusions and recommendations of the Committee against Torture: United States of America*, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para. 14; US, *Follow-Up Response to the Human Rights Committee by State Party*, UN Doc. CCPR/C/USA/CO/3/Rev.1/Add.1, 12 February 2008, at 3; *CCPR Israel Conclusions*, *supra* note 1213, para. 5.
[1228] *CCPR US Report*, *supra* note 1213, paras. 506-507; *US Law of War Manual*, *supra* note 575, at 22.
[1229] *Yugoslavia Interim Report*, *supra* note 292, para. 49.

Convention and the Apartheid Convention as recognising crimes against humanity.[1230] Differences in approach do not seem to reflect doctrinal divergence but rather differences in commissions' mandates which centred on IHL (and genocide, in the Rwandan case), and on species of violations attracting individual criminal responsibility.[1231]

In 1996, the ICJ issued its landmark *Nuclear Weapons* advisory opinion which found that the ICCPR did not cease to apply in wartime, save for the possible operation of the derogations regime.[1232] The Commission on East Timor in its 2000 report did not identify human rights treaties directly, instead describing human rights norms without identifying legal sources.[1233] This also may have been due to its mandate, which was to investigate "possible violations of human rights acts which might constitute breaches of [IHL]".[1234] In 2001, the UNCHR's Gaza Inquiry cited the ICCPR and ICESCR as sources of human rights applicable in situations of occupation.[1235] While the Commission did not directly cite the *Nuclear Weapons* opinion, its approach is substantively similar.

In 2001, the Human Rights Committee stated that the ICCPR continued to apply in situations of armed conflict,[1236] and reiterated that view in 2004.[1237] Also in 2004, the ICJ issued its seminal *Wall Opinion* which reaffirmed its finding in *Nuclear Weapons*.[1238] Subsequent commissions consistently affirmed the applicability of IHRL in armed conflict. For instance, the Gaza Commission rejected Israel's view that that it did not have human rights obligations in Palestine because IHL exclusively applied in armed conflict,[1239] instead adopting "the widely accepted interpretation" [1240] that states' human rights obligations continued in situations of armed conflict and occupation.

Some commissions also explained the interrelationship of these legal fields. Several commissions depicted IHRL and IHL as complementary and mutually reinforcing.[1241] Commissions generally cited the principle of *lex specialis derogat legi generali* (*lex specialis*) that was articulated by the ICJ in its *Nuclear Weapons* opinion to resolve normative conflict between these fields.[1242] For instance, the Goldstone Commission explained that IHRL would apply "as long as it is not modified or set aside by IHL", and would continue to "inform the application and interpretation" of IHL.[1243] The Syria Commission made similar observations, clarifying that it "deferred to the application of IHL under the principle of *lex specialis*."[1244] Commissions' interpretations of IHL and IHRL norms are explored further in Chapter Five.

[1230] *Rwanda Final Report*, *supra* note 297, paras. 133-134.
[1231] E.g., *Rwanda Final Report*, *supra* note 297, para. 102.
[1232] *Nuclear Weapons Opinion*, *supra* note 557, para. 25.
[1233] *East Timor Report*, *supra* note 338, paras. 20 and 142.
[1234] *East Timor Mandate*, *supra* note 338.
[1235] *UNCHR Gaza Report*, *supra* note 536, paras. 61 and 94.
[1236] *CCPR GC 29*, *supra* note 1226, para. 3.
[1237] *CCPR GC 31*, *supra* note 1208, para. 11.
[1238] *Wall Opinion*, *supra* note 1210, para. 106.
[1239] *Gaza Report*, *supra* note 766, para. 39.
[1240] *Ibid.*, para. 40.
[1241] *Darfur Report*, *supra* note 32, paras. 143-144; *Syria Thirteenth Report*, *supra* note 928, Annex I, para. 2; *CAR Report*, *supra* note 32, para. 106.
[1242] *Nuclear Weapons Opinion*, *supra* note 557, para. 25. See *Wall Opinion*, *supra* note 1210, para. 106.
[1243] *Goldstone Report*, *supra* note 633, para. 296.
[1244] *Syria Thirteenth Report*, *supra* note 928, Annex I, para. 2.

2.4 Applicability to organised armed groups

Several commissions examined whether human rights obligations applied to collective actors beyond the state, particularly organised armed groups (also termed 'armed non-state actors').[1245] Some commissions interpreted their mandates to include assessment of IHRL violations by non-state actors. For instance, the Burundi Commission interpreted the instruction to investigate 'human rights violations' as meaning violations by states, while the direction to investigate 'abuses' was interpreted as "actions committed by non-state entities or their members."[1246] Some commissions identified that all actors must abide by human rights recognised as peremptory norms.[1247] For instance, the Syria Commission wrote, "at a minimum, human rights obligations constituting peremptory international law (*ius cogens*) bind States, individuals and non-State collective entities, including armed groups."[1248] The Commission reached that view before it had classified the situation in Syria as an armed conflict, which raises questions of whether and how armed groups bear such obligations outside armed conflict.

Commissions examined whether armed groups bear treaty-based human rights obligations. The mainstream view in scholarship and practice is that these instruments create binding duties for states parties.[1249] The Darfur Commission saw armed groups' obligations as limited to IHL.[1250] However, several commissions examined whether the CRC-OP gave rise to binding obligations for these actors in the territories of states which had ratified this instrument. Article 4(1) of the CRC-OP provides that armed groups "should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years."[1251] Some commissions observed that because non-state actors could not be parties, they were not bound. The Libya Commission wrote that Libya's ratification obliged it to take feasible measures to prevent armed groups from using child soldiers, but did not identify a distinct duty for armed groups,[1252] reasoning that in comparison with the Rome Statute which "regulates the conduct of all parties to the conflict", the CRC-OP only imposed obligations on states parties.[1253] The Syria Commission at first shared this view,[1254] but later found that the

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[1245] E.g., Geneva Academy of International Humanitarian Law and Human Rights, 'Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council', *Geneva Academy Briefing No. 7*, December 2016, at 3, available at http://www.geneva-academy.ch/joomlatools-files/docman-files/InBrief7_web.pdf (accessed 1 May 2018) depicts armed non-state actors as "bound by the law of armed conflict".

[1246] *HRC Burundi TOR*, *supra* note 495, at II(i).

[1247] *South Sudan Second Report*, *supra* note 31, para. 122, citing UNMISS, *Conflict in South Sudan: A Human Rights Report*, 8 May 2014, para. 18, available at http://unmiss.unmissions.org/sites/default/files/unmiss_conflict_in_south_sudan_-_a_human_rights_report.pdf (accessed 1 May 2018).

[1248] *Syria Second Report*, *supra* note 1109, para. 106.

[1249] E.g., ICRC, *International Humanitarian Law and the challenges of contemporary armed conflicts*, 31st International Conference of the Red Cross and Red Crescent Movement, Geneva, 28 November to 1 December 2011, at 14, available at http://www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm (accessed 1 May 2018); Cedric Ryngaert, 'Human Rights Obligations of Armed Groups', (2008) 41 Rev BDI 355-381, at 365 and Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge: CUP, 2002) at 53 [Zegveld 2002].

[1250] *Darfur Report*, *supra* note 32, para. 174.

[1251] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000, 2173 UNTS 222, Art. 4(1) [CRC-OP].

[1252] *Libya Second Report*, *supra* note 853, para. 710.

[1253] *Ibid.*, para. 699.

CRC-OP "by its terms applies to non-State actors".[1255] This interpretation carried over into later reports where the Commission found that armed groups used children in hostilities "contrary to" the CRC-OP.[1256] That interpretation was lauded as 'progressive' in commentary.[1257] However, commentators have expressed doubt that the CRC-OP establishes a legal duty for armed groups,[1258] and the general theoretical basis for imposing human rights treaty obligations on armed groups is also contested.[1259] Commissions have not expounded on larger questions of the international legal capacity of armed groups, and analysis remains confined to the CRC-OP. As such, there is limited recognition in the inquiry context of armed groups' treaty-based human rights obligations.

By contrast, commissions have consistently supported the idea that armed groups have customary human rights obligations. Some commissions considered that armed groups had to respect human rights recognised as peremptory norms.[1260] Others found that armed groups owed customary human rights obligations as parties to a conflict.[1261] The dominant approach was to connect armed groups' human rights obligations with their fulfilment of certain conditions, namely exercise of territorial control[1262] and government-like functions.[1263] This approach linked groups' obligations with their capacity. For instance, the Libya Commission pointed to the exercise of territorial control "akin to that of a Government authority",[1264] and the Gaza Commission articulated the conditions as exercising "government-like functions and control over a territory".[1265] Commissions expressed these interpretations with varying degrees of confidence. The Goldstone Commission depicted recognition of armed groups' human rights obligations as "rapidly evolving"[1266] and the Sri Lanka Panel wrote that this principle was "increasingly accepted",[1267] while observing that differences in view remained. The Libya Commission acknowledged that this issue "remains contested as a matter of international law" but was "increasingly accepted".[1268] The CAR Commission found that

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[1254] *Syria Third Report*, *supra* note 564, Annex X, para. 35.
[1255] *Syria Fourth Report*, *supra* note 1097, Annex X, para. 44.
[1256] *Syria Seventh Report*, *supra* note 805, para. 84. See *Syria Eighth Report*, *supra* note 983, para. 92.
[1257] Tilman Rodenhäuser, 'Progressive Development of International Human Rights Law: The Reports of the Independent International Commission of Inquiry on the Syrian Arab Republic', *EJIL:Talk*, 13 April 2013, available at http://www.ejiltalk.org/progressive-development-of-international-human-rights-law-the-reports-of-the-independent-international-commission-of-inquiry-on-the-syrian-arab-republic (accessed 1 May 2018).
[1258] UNICEF, 'Guide to the Optional Protocol on the Involvement of Children in Armed Conflict', (2003), available at http://www.unicef.org/protection/option_protocol_conflict.pdf (accessed 1 May 2018); ICRC, 'Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000', available at http://ihl-databases.icrc.org/ihl/INTRO/595?OpenDocument (accessed 1 May 2018) and Daniel Helle, 'Optional Protocol on the involvement of children in armed conflict to the Convention on the Rights of the Child', (2000) 82 IRRC 797-823, at 806.
[1259] Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups', (2014) 20(1) J Conflict Security Law 101-131, *contra* Giacca, *supra* note 1200, at 234-235.
[1260] *Yugoslavia Interim Report*, *supra* note 292, para. 46; *Syria Second Report*, *supra* note 1109, para. 106.
[1261] *Lebanon Report*, *supra* note 855, para. 67; *Darfur High-Level Report*, *supra* note 1027, para. 76; *Goldstone Report*, *supra* note 633, para. 310.
[1262] *Sri Lanka Report*, *supra* note 29, para. 188; *Libya Second Report*, *supra* note 853, para. 181; *Syria Third Report*, *supra* note 564, Annex II, para. 10; *CAR Report*, *supra* note 32, para. 107.
[1263] *Goldstone Report*, *supra* note 633, para. 305.
[1264] *Libya First Report*, *supra* note 968, para. 62.
[1265] *Gaza Report*, *supra* note 766, para. 45.
[1266] *Goldstone Report*, *supra* note 633, para. 305.
[1267] *Sri Lanka Report*, *supra* note 29, para. 188.
[1268] *Libya First Report*, *supra* note 968, para. 62.

earlier debates had been "replaced by a general understanding" that armed groups exercising territorial control must respect human rights.[1269]

Commissions' use of authorities in support of their interpretations offers interesting insights. They cited diverse authorities, including a seminal text by Clapham,[1270] special rapporteur reports[1271] and a Security Council resolution condemning human rights 'abuses' by rebel groups.[1272] Commissions also cited previous inquiry reports as authorities. The Sri Lanka Panel's report was cited by several commissions.[1273] The Panel itself did not cite any supporting authorities. This practice is rare; it is one of the only issues in respect of which commissions cited other commissions' reports as authorities.

While many commissions affirmed the general applicability of customary human rights obligations to armed groups in control of territory, they did not much identify particular norms that were applicable.[1274] The Goldstone Commission wrote that most provisions of the Universal Declaration of Human Rights (UDHR) were customary but did not identify which ones.[1275] In some cases commissions' views can be inferred through their findings of violations. For instance, the Syria Commission found that opposition forces had committed human rights violations of murder, extrajudicial execution and torture.[1276] By contrast, the Sri Lanka Panel only categorised violations by the Liberation Tigers of Tamil Eelam under IHL, and did not consider their human rights abuses outside the conflict zone "because of the uncertainty surrounding whether non-state actors have obligations beyond the territories they control."[1277] Thus, commissions generally supported the broad idea that organised armed groups must respect customary human rights, but have not analysed the content of those obligations in detail.

2.5 Discussion

Commissions' interpretations of the applicability of IHRL reveal a general commitment to a human-rights based approach. Commissions found that states must protect human rights wherever they have effective control over territory or persons, including in armed conflicts. Commissions interpreted the operation of the ICCPR derogation regime strictly and affirmed the existence of non-derogable rights in the ICCPR and minimum core obligations in the ICESCR.

[1269] *CAR Report*, *supra* note 32, para. 107.

[1270] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: OUP, 2006), cited in *Libya First Report*, *supra* note 968, footnote 50; *Syria Third Report*, *supra* note 564, Annex II, footnote 8; *Goldstone Report*, *supra* note 633, footnote 700, *Lebanon Report*, *supra* note 855, footnote 41; *CAR Report*, *supra* note 32, footnote 51.

[1271] *Combined report of Special Rapporteurs*, UN Doc. A/HRC/10/22, 29 May 2009, cited in *Goldstone Report*, *supra* note 633, footnotes 186 and 700, and *Gaza Report*, *supra* note 766, footnote 50; *Combined report of Special Rapporteurs*, UN Doc. A/HRC/2/7, 2 October 2006, cited in *Gaza Report*, *supra* note 766, footnote 50.

[1272] *CAR Mandate*, *supra* note 304, para. 17, cited in *CAR Report*, *supra* note 32, footnote 53.

[1273] *CAR Report*, *supra* note 32, para. 107, footnote 52; *Libya First Report*, *supra* note 968, para. 62; *Syria Third Report*, *supra* note 564, Annex II, para. 10 and Annex I, footnote 6.

[1274] E.g., *Libya Second Report*, *supra* note 853, paras. 17-18.

[1275] *Goldstone Report*, *supra* note 633, para. 1576.

[1276] *Syria Third Report*, *supra* note 564, para. 134.

[1277] *Sri Lanka Report*, *supra* note 29, para. 243.

When examining these issues, commissions frequently cited the ICJ and treaty bodies.[1278] Commissions consistently affirmed treaty bodies' general comments as authoritative. The ICJ has also given weight to treaty bodies' views to promote clear and consistent international law.[1279] Commentators have described general comments as normatively authoritative but also point to methodological weaknesses which might reduce their persuasiveness. [1280] Nevertheless, commissions' reliance upon them promotes "doctrinal convergence"[1281] and a coherent outlook across institutional contexts. It may also help to further marginalize the positions of states disagreeing with those interpretations. In general, commissions endorsed a broad reach of human rights treaties, while seeking to remain in-step with other legal authorities.

Commissions' findings that armed groups can hold customary human rights obligations in certain circumstances reflects a broad view of human rights protection, and a willingness to identify responsibility despite an absence of tangible enforcement mechanisms. Some commentators see these interpretations as commendable[1282] while others argue that they stray into *lex ferenda*.[1283] Clapham writes that recognition of such obligations has generally emerged from a desire to address activities of non-state actors that cannot be framed under IHL and that UN commissions identified human rights obligations on the part of organised armed groups to achieve "balanced reporting".[1284] Commissions' practice of citing other inquiry reports on this issue might indicates the paucity of guidance by traditional sources of authority. While many commissions recognised that the matter of human rights obligations of organised armed groups is a developing area of law, they adopted interpretations which sought to enhance the protective scope of human rights.[1285]

3. Applicability of International Humanitarian Law

IHL governs situations of armed conflict, so its applicability "hinges on the status of the conflict".[1286] In order for IHL treaties and customary international law to be applicable to a situation, it must amount to either an international armed conflict (IAC), non-international armed conflict (NIAC), or situation of occupation. Where not classified as such, a situation is

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[1278] *Lebanon Report*, *supra* note 855, footnote 47; *Gaza Flotilla Report*, *supra* note 681, para. 73 and *Gaza Flotilla Report*, *supra* note 681, para. 68, citing *CCPR GC 29*, *supra* note 1226.

[1279] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment [2010] ICJ Reports 639, para. 66 [*Diallo Case*].

[1280] Christine Chinkin, 'Sources', in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford: OUP, 2010), 103-123, at 119 and Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights', (2009) 92 Vand J Transnat'l L 905-947, at 924.

[1281] Beth van Schaack, 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change', (2014) 90 *International Legal Studies* 20-65, at 22.

[1282] Jean-Marie Henckaerts and Cornelius Wiesener, 'Human Rights Obligations of Non-State Armed Groups: A Possible Contribution from Customary International Law?', in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights And Humanitarian Law* (Cheltenham: Edward Elgar, 2013) 146-169; Tilman Rodenhäuser, 'Human Rights Obligations of Non-State Armed Groups in Other Situations of Violence: The Syria Example', (2012) 3 *International Humanitarian Legal Studies* 263-290, at 280.

[1283] James Devaney, 'Killing Two Birds with One Stone: Can Increased use of Article 34(2) of the ICJ Statute Improve the Legitimacy of UN Commissions of Inquiry & the Court's Fact-finding Procedure?', *Sant'Anna Legal Studies STALS Research Paper No. 2/2013*, at 13, available at http://www.stals.sssup.it/files/Devaney%20STALS%202%202013.pdf (accessed 1 May 2018).

[1284] Clapham forthcoming, *supra* note 513, at 3.

[1285] *Goldstone Report*, *supra* note 633, para. 305.

[1286] *Rwanda Final Report*, *supra* note 297, para. 105.

governed by the 'peacetime' legal paradigm of IHRL. The lion's share of IHL, including the four Geneva Conventions and Additional Protocol I, applies in IAC,[1287] which occurs "whenever there is a resort to armed force between States".[1288] A NIAC is 'internationalized' when a third state exercises "overall control" over an organised armed group.[1289] IHL applicable in IAC also applies to situations of occupation.[1290] According to the Hague Regulations, territory is occupied when "actually placed under the authority of the hostile army", and "extends only to the territory where such authority has been established and can be exercised."[1291] The ICTY in *Naletilić* identified some non-exhaustive indicia to determine when territory is occupied, including that the occupying power can substitute its own authority; enemy forces have withdrawn; the occupying power has "the capacity to send troops within a reasonable time to make the authority of the occupying power felt",[1292] and establishment of a temporary administration. *Naletilić* also held that the application of the law of occupation "as it effects 'individuals' as civilians protected under [Geneva Convention IV] *does not require that the occupying power have actual authority*. For the purposes of those individuals' rights, a state of occupation exists upon their falling into 'the hands of the occupying power'."[1293] *Naletilić* thus distinguishes situations of occupation governed by the Hague Regulations from the broader applicability of Geneva Convention IV.

IHL also applies in situations of NIAC. This concept was not defined in IHL treaties. The ICTY in *Tadić* defined NIAC as "protracted armed violence between governmental authorities and organised armed groups or between such groups".[1294] This definition has been accepted as authoritative and was cited by several commissions.[1295] Fewer treaty rules govern NIAC. Common Article 3 to the Geneva Conventions (CA 3) sets down protections applicable in all NIACs, and Additional Protocol II 1977 provides more detailed rules for specific types of NIAC.[1296] Rules applicable in IAC may also apply in NIAC when the parties to the conflict

[1287] Common Article 1 to the Geneva Conventions, *supra* note 178 [CA 1] and *Additional Protocol I*, *supra* note 33, Art. 1. The latter also applies to wars of national liberation, which would otherwise be non-international in nature. See Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge: CUP, 2004) at 90.

[1288] *Commentary on the Geneva Conventions*, *supra* note 173, at 32.

[1289] *Prosecutor v. Tadić*, IT-94-1-A, Appeals Judgement, 15 July 1999, paras. 156-157 [*Tadić Appeal Judgment*]. The 'overall control' threshold is generally accepted for conflict classification purposes: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment [2007] ICJ Reports 43, para. 404 [*Bosnia Genocide Case*]; *Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment pursuant to Article 74 of the Statute', ICC-01/04-01/06-2842, TC I, 14 March 2012, para. 541 [*Lubanga Judgment*].

[1290] CA 1, *supra* note 1287.

[1291] *Hague Regulations*, *supra* note 130, Art. 42.

[1292] *Prosecutor v. Naletilić and Martinović*, IT-98-34, Trial Judgement, 31 March 2003, para. 217 [*Naletilić Judgment*].

[1293] *Naletilić Judgment*, *supra* note 1292, para. 221 (emphasis added).

[1294] *Prosecutor v. Tadić*, IT-94-1-A, 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction', 2 October 1995, para. 70 [*Tadić Interlocutory Appeal*].

[1295] ICRC, 'How is the term "armed conflict" defined in international humanitarian law?' available at http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf (accessed 1 May 2018). See, e.g., *Darfur Report*, *supra* note 32, para. 74; *Libya First Report*, *supra* note 968, para. 53 and *Sri Lanka Report*, *supra* note 29, para. 181.

[1296] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts 1977, 1125 UNTS 609, Art. 1 [*Additional Protocol II*].

agree.[1297] Many rules found in IHL treaties apply in both IAC and NIAC as customary law.[1298]

This Section examines how commissions approached the applicability of IHL to situations of concern. When determining whether IHL treaties and custom applied, commissions considered whether the situation amounted to an armed conflict (3.1). Some commissions also examined the applicability of IHL to non-state armed groups (3.2) and multinational peace-enforcement operations (3.3). Some general observations are then offered (3.4).

3.1 Legal classifications of armed conflict

This Section discusses commissions' different approaches to classifying situations as armed conflict for the purpose of identifying the IHL substantively applicable. It distinguishes broad (3.1.1), narrow (3.1.2) and ambivalent (3.1.3) approaches to conflict classification.

3.1.1 Broad approaches to conflict classification

Some commissions interpreted the elements of conflict classification broadly, which had the effect of expanding the applicable IHL. The Yugoslavia Commission, qualifying the conflict prior to the ICTY's seminal *Tadić* decision, found that "the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian issues that the parties have concluded among themselves, justify an approach whereby it applies the law applicable in [IAC] to the entirety of the armed conflicts".[1299] In its final report, the Commission wrote, "when these conflicts are internal and when they are international is a difficult task because the legally relevant facts are not yet generally agreed upon", and stated that this was a task for the ICTY.[1300] The ICTY classified the conflict in Bosnia as IAC, not due to its complexity but the degree of control exercised by the Yugoslav Army over Bosnian Serb forces.[1301]

Some commissions adopted a two-step approach, first considering whether there was an 'armed conflict' and then examining whether the conflict was IAC or NIAC. For instance, the Rwanda Commission considered whether there was an "armed conflict" between government forces and the Rwandan Patriotic Front (RPF), and then whether it was IAC or NIAC.[1302] It concluded that there was an armed conflict due to the "means and methods employed" and the "scale of atrocities",[1303] which was non-international as hostilities remained within Rwanda's borders and did not involve active participation of third states.[1304] The Commission found that the conflict was governed by Additional Protocol II because individuals under responsible

[1297] Common Article 3(2) to the Geneva Conventions, *supra* note 178 [CA 3].
[1298] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: CUP, 2005) Vol. I [*ICRC Customary IHL Study*].
[1299] *Yugoslavia Interim Report*, *supra* note 292, para. 45; *Yugoslavia Final Report*, *supra* note 39, para. 44.
[1300] *Yugoslavia Final Report*, *supra* note 39, para. 43.
[1301] *Tadić Appeal Judgment*, *supra* note 1289, paras. 156-157.
[1302] *Rwanda Interim Report*, *supra* note 298, para. 89. See *Rwanda Final Report*, *supra* note 297, para. 106.
[1303] *Ibid.*, para. 89.
[1304] *Ibid.*, para. 91.

command conducted military operations "involving strategic planning and tactical sophistication".[1305]

The Lebanon Commission adopted a two-step analysis, identifying the existence of 'armed conflict' before classifying it as IAC or NIAC. Citing *Tadić*, the Commission assessed the intensity of violence and found an 'armed conflict'.[1306] It identified *sui generis* features[1307] justifying its classification as IAC, even though active hostilities occurred between Israel and Hezbollah.[1308] The Commission identified many factors deemed relevant to its decision, including that Hezbollah "participates in the constitutional organs of the State";[1309] acted as a resistance movement against Israel's occupation of Lebanese territory;[1310] the Lebanese President approved of its activities[1311] and Israel had attacked Lebanon's assets and civilian population.[1312] The Commission's analysis does not reflect the established test for the 'internationalization' of NIAC.[1313] Its view that the conflict was *sui generis* implies that it was not appropriate to classify it pursuant to traditional IAC/NIAC distinctions. The Commission's broad classification of the conflict as IAC expanded the substantive IHL applicable to the four Geneva Conventions.

The Palmer Commission also departed from the orthodox approach when assessing the Israeli-Palestinian conflict. It considered that the situation had "all the trappings of an international armed conflict".[1314] The Commission observed that classifying the conflict as IAC was "disputed", but reasoned that circumstances of Gaza were "unique" and that "the law does not operate in a political vacuum, and it is implausible to deny that the nature of the armed violence between Israel and Hamas goes beyond purely domestic matters".[1315] The Commission treated the conflict as international "for the purposes of the law of blockade" and wrote that its analysis "goes no further than is necessary for the Panel to carry out its mandate".[1316] These statements demonstrate the Commission's pragmatic desire to avoid engaging with wider implications of conflict classification in this context.

Several commissions interpreted the applicability of occupation law expansively, citing the ICTY's broad interpretation in *Naletilić* of the protective reach of provisions in Geneva Convention IV.[1317] Following Israel's military withdrawal from the Gaza Strip in 2005, it argued that it no longer occupied Gaza.[1318] However, several commissions found that Israel

[1305] *Ibid.*, para. 94.
[1306] *Lebanon Report*, *supra* note 855, para. 51.
[1307] *Ibid.*, para. 55.
[1308] *Ibid.*, paras. 8-9.
[1309] *Ibid.*, para. 56.
[1310] Geneva Convention III, *supra* note 178, Art. 4(2(b).
[1311] *Lebanon Report*, *supra* note 855, para. 57.
[1312] *Ibid.*, para. 58.
[1313] *Tadić Appeal Judgment*, *supra* note 1289, para. 137. See Stewart, *supra* note 96, at 1042.
[1314] *Palmer Report*, *supra* note 316, para. 73.
[1315] *Ibid*.
[1316] *Ibid*.
[1317] *Naletilić Judgment*, *supra* note 1292, para. 221.
[1318] Israel Ministry of Foreign Affairs, 'The Background to the 2014 Gaza Conflict', para. 45, available at http://mfa.gov.il/ProtectiveEdge/Documents/HamasBackground.pdf (accessed 1 May 2018).

continued to be an 'occupying power', citing *Naletilić*. In 2009, the Goldstone Commission recognized the broad applicability of Geneva Convention IV:[1319]

> While the drafters of the Hague Regulations were as much concerned with protecting the rights of the State whose territory is occupied as with protecting the inhabitants of that territory, the drafters of [Geneva Convention IV] sought to guarantee the protection of civilians… in times of war regardless of the status of the occupied territories. That [Geneva Convention IV] contains requirements in many respects more flexible than the Hague Regulations and thus offering greater protections was recognized… in the *Naletilić* case, where the Trial Chamber applied the test contained in article 6 of [Geneva Convention IV]: the protections provided for in Geneva Convention IV become operative as soon as the protected persons fall 'in the hands' of a hostile army or an occupying Power, this being understood not in its physical sense but in the broader sense of being 'in the power' of a hostile army.

The Goldstone Commission also found that Israel continued to exercise effective control over the Gaza Strip,[1320] pointing to the latter's geopolitical configuration, Israel's control of borders and conditions of life, military incursions and regulation of taxes and the local monetary market as indicating that "ultimate authority… still lies with Israel."[1321] While recognizing a *de facto* local administration, the Commission found that this was just one factor and concluded that "essential elements of occupation are present in the Gaza Strip".[1322]

In 2015, the Gaza Commission adopted a similar analytical approach as the Goldstone Commission. It wrote that exercise of effective control was central to determining occupation, but that "continuous presence of soldiers on the ground is only one criterion to be used in determining effective control."[1323] The Commission observed that occupation law also applies where a state has the "capacity to send troops within a reasonable time to make its power felt",[1324] citing *Naletilić*. In addition to Israel's fulfilment of this criterion, the Commission found that Israel "continues to exercise effective control of the Gaza Strip through other means",[1325] pointing to similar facts as the Goldstone Commission, so that the Hague Regulations also applied. Commissions' broad approaches to classifying the situation in Gaza as an occupation meant that civilian protections in Geneva Convention IV were applicable.

3.1.2 Narrow approaches to conflict classification

Some commissions were cautious when classifying conflicts, identifying a sequence of classifications, a patchwork of co-existing conflicts, or emphasizing the applicability of certain regimes within IHL. In 2017, the Burundi Commission found that the situation of violence did not amount to armed conflict, because it was sporadic.[1326] In 2000, the UNCHR's

[1319] *Goldstone Report*, *supra* note 633, para. 275, citations omitted, citing *Naletilić Judgment*, *supra* note 1292, para. 221.
[1320] *Ibid.*, para. 276.
[1321] *Ibid.*, para. 279.
[1322] *Ibid.*, para. 280.
[1323] *Gaza Report*, *supra* note 766, para. 26.
[1324] *Naletilić Judgment*, *supra* note 1292, para. 217.
[1325] *Gaza Report*, *supra* note 766, para. 29.
[1326] *Report of the Commission of Inquiry on Burundi*, UN Doc. A/HRC/36/54, 11 August 2017, para. 11 [*HRC Burundi Report*]. See *HRC Burundi Detailed Report*, *supra* note 405, paras. 35-36.

Gaza Inquiry observed that while Israel treated the situation in Gaza as a NIAC, the Palestinian side characterised it as a largely unorganized civilian uprising. The Commission agreed with the latter, finding a lack of organisation on the part of Palestinian participants.[1327] Nor was the situation an IAC, as Palestine "still falls short of the accepted criteria of statehood."[1328] The Commission did find a situation of occupation, so that Geneva Convention IV applied. But even if the situation were categorized as armed conflict, "entitling the IDF to greater latitude in the exercise of its powers", it was still required to abide by IHL and IHRL,[1329] and "there is general agreement that [human rights] norms are to be applied in the case of prolonged occupation."[1330] By de-coupling occupation from armed conflict, the Commission gave primacy to IHRL and greater limitations on lethal force, even though IHL applicable in IAC technically applied as a consequence of the occupation.

The Libya Commission found co-existing separate armed conflicts. The Commission found that hostilities between the Libyan Government and *thuwar* rebels amounted to a NIAC. In its first report, the Commission acknowledged that it had more information regarding the intensity of violence and the exercise of territorial control by opposition forces, rather than their organisation. Nonetheless, it reached the "preliminary view" that a NIAC had come into existence which was governed by both CA 3 and Additional Protocol II.[1331] The Commission also found that airstrikes conducted by a coalition of states pursuant to Security Council resolution 1973 (2011) gave rise to a separate IAC with Libyan forces. The Commission reasoned that as the coalition's objective was to enforce the SC resolution and did not exercise 'overall control' over the parties, the conflict remained legally separate.[1332] It observed that Libya and "most states" in the coalition had ratified Additional Protocol I, "bringing its provisions into effect."[1333] It could have further clarified that Additional Protocol I only applied vis-à-vis state parties, excluding Turkey and the US.

The Syria Commission reported in February 2012 that while violence appeared to have requisite intensity, it could not verify that opposition groups were sufficiently organised, so IHL was not applicable.[1334] In August 2012, the Commission reported that opposition forces had increased their organisational capabilities, so that the situation amounted to a NIAC.[1335] In support of its finding, the Commission cited the ICRC and President Assad, who described Syria as in a state of war.[1336] Since 2012, the conflict in Syria has grown in complexity with the participation of new armed actors and third states. The Commission observed that these developments rendered the conflict a "multisided proxy war steered from abroad by an intricate network of alliances",[1337] but did not assess whether those developments altered the

[1327] *UNCHR Gaza Report*, *supra* note 536, para. 40.
[1328] *Ibid.*, para. 39.
[1329] *UNCHR Gaza Report*, *supra* note 536, para. 43.
[1330] *Ibid.*, para. 43.
[1331] *Libya First Report*, *supra* note 968, para. 55.
[1332] *Ibid.*, para. 56.
[1333] *Libya Second Report*, *supra* note 853, para. 21.
[1334] *Syria Second Report*, *supra* note 1109, para. 13.
[1335] *Syria Third Report*, *supra* note 564, para. 3.
[1336] *Ibid.*, footnote 3.
[1337] *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/31/68, 11 February 2016, para. 17 [*Syria Eleventh Report*].

conflict classification. For instance, in 2017, the Commission did not address whether the US attack on a Syrian airbase generated a co-existing IAC.[1338]

The CAR Commission also took a cautious approach, identifying several phases to the conflict. Adopting factors identified at the ICTY,[1339] the Commission found several NIACs: one between the Seleka rebel group and governmental forces from January to March 2013;[1340] an intervening period of relative peace in which IHL did not apply; and resumption of hostilities from December 2013 between the Seleka and other armed groups.[1341] The Commission identified a separate NIAC between armed groups and French forces in the CAR.[1342] The Commission noted that while the ICTY had cautioned against making many changes in conflict classification,[1343] it considered that it was important to classify conflicts correctly to avoid thwarting prosecutions as a result of incorrect conflict classifications, citing *Haradinaj*.[1344] Balancing these concerns, the CAR Commission considered it better to "avoid blunt classifications that may provide a greater degree of legal certainty and facilitate the continuing and uninterrupted application of [IHL] but that do not accurately reflect the nature of the events on the ground."[1345]

Finally, the Cote d'Ivoire Commission took a geographically narrow approach, finding that "the conflict was not waged throughout the full expanse of the country, so that [IHL] applies solely to the area where an armed conflict not of an international character actually took place."[1346] This interpretation conflicts with the position of the ICTY and the ICRC that in situations of NIAC, IHL applies to the entire territory of the concerned state.[1347]

3.1.3 Ambivalence towards conflict classification

Some commissions were ambivalent in their approaches to classifying conflicts, on the basis that IHL rules are converging across conflicts. The Goldstone Commission noted that hostilities between the IDF and groups "loosely affiliated with the Fatah movement in control of the Palestine Authority"[1348] had been classified by the Israeli Supreme Court as IAC due to its cross-border nature and the situation of occupation.[1349] It also noted that armed conflicts involving resistance movements against occupation are deemed as international in nature

[1338] *Syria Fourteenth Report*, *supra* note 982, footnote 2. See Stephanie Nebehay, 'Exclusive: Situation in Syria constitutes international armed conflict - Red Cross', *Reuters*, 8 April 2017, available at http://www.reuters.com/article/us-mideast-crisis-syria-redcross/exclusive-situation-in-syria-constitutes-international-armed-conflict-red-cross-idUSKBN17924T (accessed 1 May 2018).
[1339] *CAR Report*, *supra* note 32, para. 86, and citations therein.
[1340] *Ibid.*, para. 39.
[1341] *Ibid.*, para. 95.
[1342] *Ibid.*, para. 98
[1343] *Ibid.*, para. 99.
[1344] *Prosecutor v. Haradinaj and others*, IT-04-84bis-T, Trial Judgement, 29 November 2012, para. 410.
[1345] *CAR Report*, *supra* note 32, para. 101.
[1346] *HRC Côte d'Ivoire Report*, *supra* note 810, para. 89.
[1347] ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, 32nd International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 8-10 December 2015, at 13, available at http://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts (accessed 1 May 2018) and *Tadić Interlocutory Appeal*, *supra* note 1294, paras. 69–70.
[1348] *Goldstone Report*, *supra* note 633, para. 282.
[1349] *Ibid.*, para. 282, citing *Public Committee against Torture in Israel v. Government of Israel* (*Targeted Killings case*), HCJ 769/02, 13 December 2006.

pursuant to Additional Protocol I.[1350] However, the Commission wrote that the question of conflict classification "may not be too important", as "concern for the protection of civilians and those *hors de combat* in all kinds of conflicts has led to an increasing convergence in the principles and rules applicable to [IAC] and [NIAC]".[1351] The Commission cited the ICJ's finding that "many similar norms and principles govern both types of conflicts"[1352] and the ICTY's view that "what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife."[1353] The Commission found that this related to civilian protection as well as means and methods of warfare,[1354] and did not provide a firm conclusion as to the classification of the conflict.

As mentioned above, the Gaza Commission found a situation of occupation in the West Bank and the Gaza strip.[1355] It also observed that the 'State of Palestine' had ratified several IHL treaties,[1356] which invites the question of whether the conflict should be classified as IAC in recognition of Palestinian statehood. The Commission did not answer this question, instead observing that "there are very little substantive differences"[1357] in customary IHL rules applicable in IAC and NIAC[1358] and analysing the conduct of hostilities on the basis of customary law. The Commission did acknowledge that conflict classification was relevant for other contexts, such as the war crimes provisions in the Rome Statute.[1359] This represents an alternative approach the 'sui generis conflict' reasoning of earlier commissions, which seems to have been generated in order to assess the sophisticated Israel-Palestine conflict beyond the very basic provisions of Common Article 3.

3.2 Applicability to organised armed groups

IHL obligations are held by the parties to armed conflicts.[1360] Commissions readily accepted that in situations of NIAC, organised armed groups had obligations under IHL. While the theoretical basis for armed groups' treaty-based obligations remains "misty",[1361] it is accepted in practice.[1362] Most commissions did not expressly consider the theoretical basis of organised armed groups' IHL obligations. The Goldstone Commission stated that the issue of whether organized armed groups were bound by IHL did not arise, "the question being settled some time ago".[1363] That Commission and the Syria Commission cited the SCSL's view that "it is well settled that all parties to an armed conflict, whether States or non-State actors, are

[1350] *Ibid*., para. 308, citing *Additional Protocol I*, *supra* note 33, Art. 1(4).
[1351] *Ibid*., para. 283.
[1352] *Ibid*., at 14, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment [1986] ICJ Reports 64 [*Nicaragua Case*].
[1353] *Tadić Interlocutory Appeal*, *supra* note 1294, para. 119.
[1354] *Goldstone Report*, *supra* note 633, para. 283.
[1355] *Gaza Report*, *supra* note 766, para. 25.
[1356] *Ibid*., para. 32.
[1357] *Ibid*., para. 34.
[1358] *Ibid*., para. 37.
[1359] *Ibid*., para. 50 and citations therein.
[1360] CA 3, *supra* note 1297.
[1361] Andrew Clapham, 'Human rights obligations of non-state actors in conflict situations', (2006) 88(863) IRRC 491-523, at 499. See Ryngaert, *supra* note 1249, at 357.
[1362] Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC/Nijhoff, 1987), para. 4444 [*Commentary to Additional Protocols*].
[1363] *Goldstone Report*, *supra* note 633, para. 304.

bound"[1364] by IHL. The Darfur Commission considered that armed groups had international legal personality when they "reached a certain threshold of organization, stability and effective control of territory", so that such actors were "bound by the relevant rules of customary international law on internal armed conflicts".[1365] The Darfur Commission also recognised that organised armed groups could enter into international agreements under customary international law, and that armed groups in Darfur had entered into such agreements with the Sudanese Government in which they agreed to comply with IHL.[1366]

3.3 Applicability to peace-enforcement missions

A handful of UN atrocity inquiries considered the applicability of IHL to multinational peace-enforcement missions involved in situations of conflict. The recent CAR Commission found that "[i]t is uncontested that the [UN] is bound by at least the customary rules of IHL when engaged in hostilities."[1367] It also found that the Security Council required peacekeeping forces in the CAR to carry out their mandates in compliance with IHL, pursuant to the mandating resolution.[1368]

The Libya Commission discussed the applicability of IHL to NATO, flowing from its finding that an IAC existed between Qadhafi's forces and states participating in the military operation authorised by SC Resolution 1973.[1369] The Commission examined NATO's control over operations, finding that by 24 March 2011, NATO controlled operations within the no-fly zone, but that NATO member states controlled airstrikes by their own forces. This changed on 31 March 2011, when NATO assumed command of all offensive operations.[1370] The Commission explained that NATO had to abide by IHL:[1371]

> The legal regime applicable to NATO's actions in Libya based upon principles of [IHL] set out elsewhere in this report… Principles of distinction, proportionality, precautions, humanity and military necessity can be found in multiple legal sources, including the Hague and Geneva Conventions. They form part of customary international law.

This statement suggests that the Commission considered NATO as bound by customary IHL, but not treaty law. It contrasts with the Commission's earlier statement that the "full provisions of the four Geneva Conventions" and customary IHL applied in the IAC "that ensued once the international forces engaged the Qadhafi forces".[1372]

3.4 Discussion

Commissions' approaches to conflict classification indicate an interplay of different aims and objectives. Some commissions found that conflicts not of an international nature should be

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[1364] SCSL, *Prosecutor v. Sam Hinga Norman*, 'Decision on preliminary motion based on lack of jurisdiction (child recruitment)', SCSL-2004-14-AR72(E), 31 May 2004, para. 22, cited in *Goldstone Report*, *supra* note 633, para. 304 and *Syria Thirteenth Report*, *supra* note 928, Annex I, footnote 7.
[1365] *Darfur Report*, *supra* note 32, para. 172.
[1366] *Darfur Report*, *supra* note 32, para. 174.
[1367] *CAR Report*, *supra* note 32, para. 568.
[1368] *Ibid.*, para. 569, citing *CAR Mandate*, *supra* note 304.
[1369] *Libya First Report*, *supra* note 968, para. 56.
[1370] *Libya Second Report*, *supra* note 853, para. 603.
[1371] *Ibid.*, para. 613.
[1372] *Ibid.*, para. 21.

treated as international nature due to their complexity to their *sui generis* characteristics. Others interpreted situations of occupation broadly, finding protections in occupation law applicable in situations beyond those governed by the Hague Regulations. Affirming the applicability of the more detailed IAC regime might be thought to better regulate hostilities and enhance civilian protection. However, it might erode the IAC/NIAC distinction, which is fundamental to IHL. Other commissions were more cautious when analysing whether a situation amounted to NIAC, by identifying different phases or co-existing separate conflicts and arguing that that in prolonged occupation, IHRL should govern the use of force. These narrower approaches indicate an awareness of IHL's greater permissiveness of lethal force and concern not to hinder prosecutions with incorrect classifications.

While a narrower approach may be more precise, it may also result in what Meron terms "a crazy quilt of norms".[1373] Some commissions sought to overcome this difficulty by taking a third way, expressing ambivalence towards conflict classification in light of the convergence of customary IHL across conflicts. This approach did not blur legal categories while avoiding the 'patchwork approach' to conflict classification. This approach also has certain drawbacks. The ICTY's observation about the convergence of IHL was made in relation to war crimes, rather than IHL as a whole. Some rules such as combatant privilege remain wedded to IAC, and the extent to which customary rules are applicable in NIAC may be questioned. Such an approach may be suitable if commissions focus their efforts on violations attracting individual criminal responsibility; yet the war crimes regime in the Rome Statute preserves the distinction between IAC and NIAC.[1374] An approach which presents an 'essentialised' IHL may over-simplify the law and de-emphasise rules whose violation does not attract individual sanction.

Perhaps because it is uncontroversial that IHL applies to the parties to a conflict, commissions have not examined in much detail the theoretical basis for the attachment of IHL obligations to organised armed groups. More difficult questions arise in respect of the scope of IHL applicable to peace-enforcement missions and troop-contributing states. Commissions have not yet examined these issues often, nor in depth.

4. Applicability of International Criminal Law

The substantive applicability of ICL has been less discussed in commissions' reports. Recent commissions readily accepted that individuals are responsible under ICL. For instance, the Syria Commission wrote, "[t]he principle of individual criminal responsibility for international crimes is well established in customary international law."[1375] The proposition that individuals can be found internationally responsible for violations was discussed by UN inquiries in the 1990s, prior to the proliferation of international criminal courts and tribunals. The Yugoslavia Commission did not mention ICL in its final report, instead identifying an array of norms giving rise to criminal responsibility. A year later, the Rwanda Commission examined the general basis for individual responsibility under international law. The Commission wrote, "attribution of responsibility to the individual *in propria personam* is not

[1373] Theodor Meron, 'Classification of Armed Conflict in Former Yugoslavia: Nicaragua's Fallout', (1998) 92 AJIL 236-242, at 238.
[1374] Rome Statute, *supra* note 1033, Art. 8.
[1375] *Syria Third Report*, *supra* note 564, Annex II, para. 27.

entirely new", pointing to trials from the Middle Ages and early recognition of international crimes of slave trading and piracy.[1376] While acknowledging that "international responsibility is predominately, even almost exclusively, centred around States rather than other entities", the Rwanda Commission found that the Nuremberg trials established that individuals could be "held responsible in international law for war crimes, crimes against peace or crimes against humanity."[1377]

Commissions did consider the applicability of sources of ICL norms to situations of concern. Some commissions reasoned that the Rome Statute was applicable on the basis of the concerned state's ratification (in the case of the CAR)[1378] or a Security Council referral (in the case of Libya).[1379] The Burundi Commission observed that Burundi's notification of intention to withdraw from the Rome Statute did not affect its applicability, as withdrawal did not release Burundi from its obligations while it was party, and would not come into effect for until one year after its notification. The Burundi Commission concluded that it could "base its work on the Rome Statute which will remain in force throughout its mandate".[1380] The commissions on Syria and Darfur also applied the Rome Statute, noting that these states had signed but not ratified this treaty.[1381] The Darfur Commission also observed that Sudan's signature meant that it had to "refrain from "acts which would defeat the object and purpose" of the Statute."[1382] Commissions which were established before the ICC came into existence identified customary ICL as applicable.[1383] Some recent commissions also found that customary ICL applied due to the non-ratification of the Rome Statute by concerned states, but also had regard to provisions of the Rome Statute considered to reflect custom.[1384] On occasion, commissions considered the *rationae personae* applicability of ICL.[1385]

Conclusions

UN atrocity inquiries' interpretations of the legal dimensions of their mandates were informed by their roles and functions. The examples of the Beit Hanoun Commission and the Palmer Commission illustrate how commissions' roles and functions informed their emphasis on qualifying facts as violations of international law. Commissions' broad interpretations of the applicable law link with functions of raising alert and ensuring accountability. The inclusion of IHL reflects a concern to authoritatively report on the types and extent of violations, and to raise alert regarding the need for corrective action. Commissions' depictions of ICL as a necessary tool to ensure responsibility for violations at the level of the individual and their incorporation of this legal lens into the applicable law reflect an accountability function.

Commissions' understandings of IHRL as applicable across borders and in armed conflicts aligned with the position of treaty bodies and the ICJ, promoting consistent interpretations

[1376] *Rwanda Final Report*, *supra* note 297, para. 169.
[1377] *Ibid.*, para. 171. See *Rwanda Interim Report*, *supra* note 298, para. 127.
[1378] *CAR Report*, *supra* note 32, para. 4.
[1379] *Libya First Report*, *supra* note 968, para. 4.
[1380] *HRC Burundi TOR*, *supra* note 495, at III(i).
[1381] *Syria First Report*, *supra* note 32, para. 111.
[1382] *Darfur Report*, *supra* note 32, para. 145.
[1383] *Yugoslavia Interim Report*, *supra* note 292, para. 54 and *Rwanda Final Report*, *supra* note 297, para. 134.
[1384] *North Korea Report*, *supra* note 32, para. 65 and *Eritrea Final Report*, para. 179.
[1385] *Syria First Report*, *supra* note 32, para. 111, citing Rome Statute, *supra* note 1033, Art. 27.

across institutional contexts. Several commissions also found that customary human rights obligations applied to organised armed groups in some circumstances. The examination of human rights violations of armed groups conveyed an even-handed approach. This approach was further emphasised in situations not amounting to armed conflict. As a matter of law, it is unclear whether armed groups have international legal personality outside of armed conflict. In any event, this approach promoted a broad protective reach of IHRL beyond the state.

Commissions' roles and functions also informed their classifications of armed conflicts. Several commissions avoided wading into political debates surrounding the Israel/Palestine conflict by classifying this conflict as international due to its *sui generis* nature, or by avoiding the classification issue by pointing to the general convergence of customary IHL across conflicts. Other commissions interpreted the applicability of IHL narrowly in order to limit use of lethal force yet broadly in situations of occupation in order to promote expansive protection of the civilian population. Thus, apparently divergent approaches can reflect the same purpose: to promote the expansive reach of human rights and humanitarian protections. Some commissions also demonstrated a concern to conduct rigorous conflict classification so as not to undermine possible future judicial proceedings. This concern evokes the role of a pre-investigative body that facilitates criminal investigations and prosecutions.

Commissions' interpretations of the applicable law thus sought to promote the broad protective reach of fundamental rights and freedoms, a commitment to impartiality, and operational realities, reflecting principled and pragmatic considerations. The next Chapter continues the study of legal dimensions of inquiry mandates by examining how commissions' applications of international legal norms were informed by their roles and functions.