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 FIVE

LAW-APPLICATION IN THE INQUIRY CONTEXT

Introduction

When assessing atrocities in light of international law, UN atrocity inquiries conduct 'norm-to-fact application'.[1386] This activity involves legal interpretation, as "the question of the determination of the content of international legal rules arises each time one is called upon to apply a rule."[1387] As noted by Henderson, commissions "often go beyond 'merely' identifying violations… to making in fact quite detailed determinations on points of international law, a function traditionally associated with more formal and permanent legal adjudicative bodies."[1388] Yet their findings remain non-legal in fundamental ways. Chapter Five examines how commissions interpreted and applied international law (collectively 'legal analysis') in light of their roles and functions.

Commissions' approaches to legal analysis are first illuminated through a thematic analysis. Pertinent topics in the fields of IHRL, IHL and ICL are selected to focus the discussion, namely violations of economic, social and cultural rights (Section 1), violations arising from lethal attacks in armed conflict, focusing on IHL principles and their interaction with the right to life (Section 2), sexual and gender-based violence (Section 3), genocide (Section 4) and crimes against humanity (Section 5). These topics display the range of legal approaches taken by commissions and key challenges faced when legally appraising facts. Drawing on discussions from earlier chapters, it is critically assessed whether commissions are well-suited to assess those violations, considering their institutional architecture. Next, Section 6 conducts a cross-cutting analysis of three characteristics of commissions' approaches, namely their focus on discrete incidents; the degree of certainty of findings of violations; and the rigour of their legal analysis. It discusses how these characteristics reflect commissions' roles and functions. The Chapter concludes by reflecting on the idea that commissions analyse international law from outlooks of advocacy and adjudication, in a liminal normative space which speaks to both law and politics.

1. Violations of Economic, Social and Cultural Rights

Fact-finding guidelines emphasize that violations of economic, social, and cultural rights (ESCR) must not be overlooked.[1389] OHCHR cautions that such violations "can have consequences as serious as many violations of civil and political rights".[1390] Commissions have recognised the applicability of human rights treaties protecting ESCR as well as civil and political rights.[1391] Rights of particular relevance include health, work, education, adequate

[1386] Mechlem, *supra* note 1280, at 913.
[1387] Jean d'Aspremont, *Formalism and the Sources of International Law* (Oxford: OUP, 2011) at 157.
[1388] Henderson 2014, *supra* note 100, at 293.
[1389] *OHCHR Guidance and Practice*, *supra* note 63, at 63.
[1390] OHCHR, *Training Manual on Human Rights Monitoring - Chapter XVII: Monitoring Economic, Social and Cultural Rights* (2001), para. 13, available at http://hrlibrary.umn.edu/monitoring/chapter17.html#C (accessed 1 May 2018).
[1391] E.g., *Darfur Report*, *supra* note 32, para. 147.

housing, water and freedom from hunger. States' obligations to respect, protect and ensure ESCR are framed differently from civil and political rights. The ICESCR provides that states parties must take steps "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant".[1392] ESCR may only be limited "solely for the purpose of promoting the general welfare in a democratic society."[1393] States parties have a "minimum core obligation" to ensure "minimum essential levels"[1394] of rights. If a state blames its failure on a lack of resources, it must show that "every effort has been made to use all resources that are at its disposition".[1395]

Commissions sometimes presented socio-economic factors as part of the broader social and political context or background, rather than assessing them as violations of ESCR.[1396] This is particularly the case for inquiries into armed conflicts. For instance, the Syria Commission wrote that while it "focused on most serious violations of human rights, it wishes to note the overall deteriorating human rights situation", and that "[t]he Syrian population is generally deprived of basic [ESCR]."[1397] The CAR Commission acknowledged that armed conflicts are generally examined under the frameworks of ICL and IHL, and that "[w]hen a human rights lens is applied, it generally focuses only on civil and political rights".[1398] The Commission recognised that warfare severely impedes ESCR, which may be deliberately violated.[1399] Though not trying to analyse the "full range of such violations",[1400] in a section of its report dedicated to ESCR, the Commission only found one such violation, namely the right to housing.[1401] While recognizing that rights to food, water and access to health services were jeopardized, the Commission stopped short of finding that parties had violated those rights. Its analysis of ESCR violations remained somewhat limited.

UN atrocity inquiries generally found violations of ESCR in three broad scenarios. First, commissions found ESCR violations in respect of incidents which also violated civil and political rights, IHL, or ICL. Several commissions found that rape violated the prohibition on torture and the right to health.[1402] The Darfur Commission found that the destruction of homes violated the right to housing[1403] and that forced displacement of civilians was incompatible with the ICESCR.[1404] The CAR Commission found that attacks against humanitarian personnel and medical objects violated the right to health[1405] and the Syria Commission found that starvation of the civilian population as a method of warfare violated "core obligations under the right to adequate food and the right to the highest attainable standard of health."[1406]

[1392] ICESCR, *supra* note 243, Art. 2(1).
[1393] *Ibid*., Art. 4.
[1394] ESCR GC 3, *supra* note 1201, para. 10.
[1395] *Ibid*., para. 10.
[1396] E.g., *Syria Third Report*, *supra* note 564, paras. 32-36.
[1397] *Syria Third Report*, *supra* note 564, para. 37. See *Syria Fourth Report*, *supra* note 1097, para. 30.
[1398] *CAR Report*, *supra* note 32, para. 507.
[1399] *Ibid*., paras. 508-509.
[1400] *Ibid*., para. 510.
[1401] *Ibid*., para. 517.
[1402] *Darfur Report*, *supra* note 32, para. 356; *Syria Third Report*, *supra* note 564, para. 59; *Libya Second Report*, *supra* note 853, para. 500; *Eritrea Second Report*, *supra* note 569, para. 123.
[1403] *Darfur Report*, *supra* note 32, para. 318.
[1404] *Ibid*., paras. 330-331.
[1405] *CAR Report*, *supra* note 32, paras. 596-602.
[1406] *Syria Seventh Report*, *supra* note 805, para. 132.

Secondly, commissions identified violations of ESCR which were discrete and measurable. For instance, the Syria Commission found that the Government's occupation of schools and hospitals violated the rights to education and health.[1407] Thirdly, commissions found pervasive violations of ESCR where states failed to meet minimum core obligations.[1408] Perhaps the best example is the North Korea Commission's finding that the DPRK failed to fulfill its obligation to use all the resources at its disposal to satisfy freedom from hunger.[1409]

This survey of practice shows that commissions assessed violations of ESCR to some extent, and that their reports indicate certain concentrations of focus. Commentators observe that fact-finders tend to focus on civil and political rights rather than ESCR, which are often relegated to the background[1410] or mentioned "in passing, by paying lip-service to the mantra of universality… of all human rights, and then apologetically highlighting that the nature of ESC-rights allegedly differs fundamentally from [civil and political] rights."[1411] In conflict situations, commissions tended to assess ESCR violations arising from physically violent incidents which were also expressed as prohibitions under IHL and ICL. Other findings of ESCR violations were usually discrete, rather than systemic or chronic. Commissions generally focused on the 'tip of the iceberg' of the obligation to progressively realize ESCR by focusing on states' failures to fulfill minimum core obligations.

This selective focus links to commissions' institutional features. In order to identify violations arising from policies or patterns of discrimination, it may be necessary to analyse complex statistical and quantitative data. OHCHR observes that monitoring ESCR "tends to be confused with assessing general trends about basic needs"[1412] and that assessments of violations may require "statistics and quantitative information to prove that the State has not complied with its obligations, despite having the resources."[1413] Where concerned states refuse to cooperate, it may be very difficult to obtain such information. For instance, the Eritrea Commission could not determine whether Eritrea complied with its ICESCR obligations, due to a lack of information. The Commission reported, "[i]n the absence of public financial information and statistics, it is difficult for the Commission to assess any progress in the areas of economic and social rights reported by the Government."[1414] Its findings of IHRL violations were almost entirely civil and political in nature.[1415] By contrast, although Israel refused to cooperate with the Goldstone Commission, the latter evaluated Israel's compliance with ESCR on the basis of reports by international agencies. Even where commissions enjoyed cooperation, they faced difficulties in analyzing complex data in the

[1407] *Syria Third Report*, *supra* note 564, para. 124.
[1408] E.g., *Beit Hanoun Report*, *supra* note 620, para. 58 and *Goldstone Report*, *supra* note 633, para. 1312.
[1409] *North Korea Report*, *supra* note 32, para. 1124.
[1410] Evelyne Schmid and Aoife Nolan, ''Do No Harm'? Exploring the Scope of Economic and Social Rights in Transitional Justice', (2014) 8 *International Journal of Transitional Justice* 362-382, at 376.
[1411] Eibe Riedel, 'Economic, Social, and Cultural Rights in Armed Conflict', in Andrew Clapham and Paola Gaeta (eds), *Oxford Handbook of International Law in Armed Conflict* (Oxford: OUP, 2014) 441-469, at 443.
[1412] OHCHR, *Manual on Human Rights Monitoring: Chapter 20: Monitoring Economic, Social and Cultural Rights* UN Doc. HR/P/PT/7/Rev.1 (2011) at 11, available at http://www.ohchr.org/Documents/Publications/Chapter20-48pp.pdf (accessed 1 May 2018) [*Manual on Human Rights Monitoring*].
[1413] *Ibid*., at 25. See Audrey Chapman, 'A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights', (1996) 18 HRQ 23-66, at 31.
[1414] *Eritrea Second Report*, *supra* note 569, para. 155.
[1415] *Ibid*., para. 343.

short timeframe required to produce reports. Thus, there are many practical obstacles to the assessment of ESCR violations in the inquiry context.

2. Violations Arising from Lethal Attacks in Armed Conflict

Situations of armed conflict are governed by IHL as well as IHRL. This Section discusses how commissions interpreted and applied these fields of law when assessing attacks in armed conflict which resulted in loss of life.[1416] In IHL, attacks are defined as "acts of violence against the adversary, whether in offence or in defence".[1417] This Section discusses how commissions interpreted the right to life and its interaction with IHL norms (2.1). Next, it examines how commissions assessed the legality of lethal attacks in light of cardinal IHL principles (2.2). Finally, this Section discusses challenges faced by commissions in applying IHL and strategies adopted in response (2.3).

2.1 Right to life in armed conflict

Commissions consistently affirmed that IHRL continues to apply in armed conflict alongside IHL.[1418] Beyond this basic premise, questions arise as to how human rights are to be interpreted, particularly where they diverge from IHL. The ICCPR provides, "[n]o one shall be arbitrarily deprived of his life."[1419] In peacetime, lethal force may only be used to protect life; it must be reasonable and proportionate to the threat and must be a method of last resort.[1420] IHL is by contrast more permissive. While attacks must not be directed against protected civilians, IHL accepts that some use of force is inherent in the waging of war and that an adversary may be lethally targeted.[1421] This Section discusses how commissions articulated the general relationship between IHRL and IHL (2.1.1) and interpreted the scope of the right to life in armed conflict (2.1.2).

2.1.1 Interrelationship of IHRL and IHL

In general, commissions depicted IHL and IHRL as complementary and mutually applicable. For instance, the Syria Commission wrote, "[t]he onset of IHL applicability does not replace existing obligations under IHRL; both regimes remain in force and are generally considered as complementary and mutually reinforcing. Where both IHL and IHRL apply, and can be applied consistently, parties to a conflict are obliged to do so."[1422] This view has synergies

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[1416] IHL also applies in situations of occupation. While it may be queried whether states have more extensive IHRL obligations in occupation absent active hostilities, this is outside the scope of this Section, which focuses on attacks in the theater of combat.

[1417] *Additional Protocol I*, *supra* note 33, Art. 49(1). This concept excludes non-violent military operations, but is not limited to attacks against enemy forces: Michael Schmitt, ''Attack' as a Term of Art in International Law: The Cyber Operations Context', in Christian Czosseck, Rain Ottis, Katharina Ziolkowski (eds), *Proceedings of the 4th International Conference on Cyber Conflict* (NATO, 2012) 283-293, at 290.

[1418] See Chapter Four, Section 2.3.

[1419] ICCPR, *supra* note 243, Art. 6(1).

[1420] CCPR, *Suarez de Guerrero v. Colombia*, UN Doc. CCPR/C/15/D/45/1979, 31 March 1982, paras. 13.1-13.3; *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston*, A/HRC/14/24/Add.6, 28 May 2010, paras. 32-33 and *McCann Case*, *supra* note 780.

[1421] ICRC, *Expert Meeting: The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms* (2013), available at http://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf (accessed 1 May 2018).

[1422] *Syria Third Report*, *supra* note 564, Annex II, para. 5. See *Israeli Settlements Report*, *supra* note 572, para. 12 and *UNCHR Gaza Report*, *supra* note 536, para. 43.

with the Human Rights Committee's position that "more specific" IHL rules may be relevant for the purposes of interpreting the ICCPR, but that "both spheres of law are complementary".[1423] Seeing IHRL as 'filling the gaps' in humanitarian protections reflects a desire to "humanize"[1424] IHL. Several commissions found that some atrocities in armed conflict violated both IHL and IHRL, such as torture[1425] and targeting of civilian homes.[1426] The Sri Lanka Panel framed its findings of violations under IHL[1427] but acknowledged that many incidents would also violate IHRL.[1428] Commissions applied IHL and IHRL in a complementary way where situations were protected by both fields, in particular detention.[1429] The Eritrea Commission also interpreted IHRL by reference to more detailed IHL rules: when assessing whether Eritrea violated the prohibition of forced labour, the Commission examined the types of non-military work permitted for prisoners of war under Geneva Convention III.[1430]

Where IHRL and IHL norms were co-applicable but could not be applied consistently, commissions utilised the *lex specialis* principle.[1431] Commissions invoked different meanings of *lex specialis*, reflecting wider academic debates.[1432] Usually, commissions accorded general priority to IHL as the *lex specialis* of armed conflict. For instance, the CAR Commission wrote, "[i]n times of armed conflict, [IHL] is generally assumed to be the *lex specialis*."[1433] The Goldstone Commission explained that IHRL applied "as long as it is not modified or set aside by IHL".[1434] The Palmer Commission and Darfur Commission adopted similar views.[1435] On occasion, commissions invoked a narrower form of *lex specialis* to accord priority to the norm more specifically regulating a given situation. For instance, the Syria Commission explained that parties "must abide by the legal regime which has a more specific provision on point. The analysis is fact specific and therefore each regime may apply, exclusive of the other, in specific circumstances".[1436] Several scholars advocate this approach, reasoning that otherwise IHRL could be 'read out' of the armed conflict paradigm altogether.[1437]

[1423] *CCPR GC 31*, *supra* note 1208, para. 11.
[1424] Meron, *supra* note 735.
[1425] *Libya First Report*, *supra* note 968, para. 119.
[1426] *Lebanon Report*, *supra* note 855, para. 319.
[1427] *Sri Lanka Report*, *supra* note 29, paras. 185 and 243.
[1428] *Ibid.*, para. 18.
[1429] E.g., *Darfur Report*, *supra* note 32, para. 403; *Palmer Report*, *supra* note 316, Appendix 1, para. 63; *Goldstone Report*, *supra* note 633, para. 284; *Syria Third Report*, *supra* note 564, Annex II, para. 43. See ICRC, 'Internment in Armed Conflict: Basic Rules and Challenges', November 2014, available at http://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges (accessed 1 May 2018).
[1430] *Eritrea First Report*, *supra* note 567, paras. 1399-1401 and footnote 1912.
[1431] *Syria Third Report*, *supra* note 564, Annex II, para. 5.
[1432] E.g., Marko Milanovic, 'The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law', in Jens David Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge: CUP 2016) 78-117 and Schabas 2007, *supra* note 1173.
[1433] *CAR Report*, *supra* note 32, para. 231.
[1434] *Goldstone Report*, *supra* note 633, para. 296.
[1435] *Palmer Report*, *supra* note 316, Appendix I, para. 63; *Darfur Report*, *supra* note 32, para. 143.
[1436] *Syria Third Report*, *supra* note 564, Annex II, footnote 4; *Syria Thirteenth Report*, *supra* note 928, footnote 2.
[1437] E.g., Marko Milanovic, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law', in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford: OUP, 2011) 95-128 and Marco Sassòli and Laura Loson, 'The legal relationship between

2.1.2 Interpretation of the scope of the right to life

Commissions uniformly recognised that in the 'peacetime' or 'law enforcement' paradigm of IHRL, states' use of lethal force was governed by strict parameters of reasonableness, proportionality, and necessity.[1438] Several commissions found that in armed conflict, the right to life was to be interpreted by reference to IHL targeting rules as *lex specialis*.[1439] For instance, the Syria Commission wrote:[1440]

> … IHRL standards differ to a degree from those applicable to fighters/combatants during an armed conflict under IHL. For example, one would not expect soldiers to warn their enemies before an attack. So long as all applicable IHL, [customary international law] and IHRL requirements are met, killing an enemy fighter during an armed conflict is not illegal. The converse is also true: fighters/combatants causing another person's death, even that of the enemy, during armed conflict can be unlawful when the applicable law is breached…

The Gaza Commission noted that civilian deaths did not necessarily violate IHL because parties may "carry out proportionate attacks against military objectives, even when it is known that some civilian deaths or injuries will occur."[1441]

The Libya Commission took a different approach. While accepting that IHL operates as *lex specialis*[1442] and deeming fighters as "legitimate targets",[1443] the Commission stated that IHRL could limit the use of lethal force in armed conflict in some circumstances:[1444]

> This is particularly the case where the circumstances on the ground are more akin to policing than combat. For example, in encountering a member of the opposing forces in an area far removed from combat, or in situations where that enemy can be arrested easily and without risk to one's own forces, it may well be that the [IHL] regime is not determinative. In such situations, combatants/fighters should ensure their use of lethal force conforms to the parameters of [IHRL].

The Libya Commission's interpretation is more akin to the 'mutually applicable and complementary' approach rather than *lex specialis*. However, it does not seem to have applied its interpretation to the facts; its findings of arbitrary deprivations of life were all made in relation to civilians or those rendered *hors de combat*.[1445] At first glance, the Commission's approach might be thought to have synergies with the ICRC's view that a party should avoid using lethal force against a civilian directly participating in hostilities when it is possible to "neutralize the military threat posed by that civilian through… non-lethal means without

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international humanitarian law and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflict', (2008) 780 IRRC 599-627.

[1438] E.g., *Syria Third Report*, *supra* note 564, Annex II, paras. 30-31; *Libya Second Report*, *supra* note 853, para. 144.

[1439] *Gaza Flotilla Report*, *supra* note 681, para. 69; *Palmer Report*, *supra* note 316, Appendix I, paras. 62-63; *UNCHR Gaza Report*, *supra* note 536, para. 62.

[1440] *Syria Third Report*, *supra* note 564, Annex II, para. 32.

[1441] *Gaza Report*, *supra* note 766, para. 22.

[1442] *Libya First Report*, *supra* note 968, para. 61 and *Libya Second Report*, *supra* note *supra* note 853, footnote 24.

[1443] *Libya Second Report*, *supra* note 853, footnote 173.

[1444] *Ibid.*, para. 145 (footnotes omitted).

[1445] *Ibid.*, paras. 36 and 251-254.

additional risk to the operating forces or the surrounding civilian population".[1446] The ICRC based its reasoning on IHL concepts of military necessity and humanity, writing that while these principles were unlikely to restrict use of force against military targets in active combat zones, they "may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing."[1447] The ICRC's analysis reaches a similar end point, but arrives there via IHL. The idea of a use-of-force continuum even within IHL is criticized by W. Hays Parks as beyond settled law.[1448] Nor does is the Human Rights Committee in favour of the Libya Commission's approach, stating in a recent draft general comment that uses of lethal force compliant with IHL are "in principle, not arbitrary"[1449] deprivations of life.

Commentators caution that the humanizing trend within IHL, epitomised by the Libya Commission, may have deleterious consequences. Shany cautions the tendency of human rights bodies to engage in "normative overreaching"[1450] by viewing armed conflict through a human rights lens, which risks uncoupling law-application from conditions of warfare. Richemond-Barak similarly cautions that such approaches may not only weaken IHL norms but also reduce compliance, as "states may regard these standards as out of sync with the reality of the battlefield and be less inclined to comply with them."[1451] An interpretive approach which disturbs the equilibrium struck in IHL between humanity and military necessity might erode parties' willingness to comply with the law and decrease the protection felt on the ground.

2.2 Assessment of lethal attacks under IHL

This Section discusses how commissions interpreted and applied cardinal IHL principles of distinction (2.2.1), proportionality (2.2.2) and precautions (2.2.3) when assessing lethal attacks carried out in armed conflict.

2.2.1 Distinction

The principle of distinction requires that parties distinguish protected civilians from military objectives.[1452] Deliberate attacks on civilians and persons *hors de combat* are forbidden, and attacks not directed at a specific military objective or whose effects cannot be so limited are prohibited.[1453] Most armed conflicts under examination have been non-international in nature, where combatant status is not formally recognised. IHL applicable in NIAC provides that civilian protection is lost for such time as an individual directly participates in hostilities

[1446] Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: ICRC, 2009) at 80 [*ICRC Interpretive Guidance*].
[1447] *ICRC Interpretive Guidance*, *supra* note 1446, at 80.
[1448] W. Hays Parks, 'Part IX of the ICTC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise, and Legally Incorrect', (2010) NYU J Int'l L & Pol 769-830.
[1449] *Draft GC 36*, *supra* note 1000, para. 67.
[1450] Shany, *supra* note 1513, at 29.
[1451] Richemond-Barak, *supra* note 513, at 18.
[1452] *Additional Protocol I*, *supra* note 33, Arts. 48, 51(2) and 52(2); *ICRC Customary IHL Study*, *supra* note 1298, Rule 1.
[1453] CA 3, *supra* note 1297; *Additional Protocol I*, *supra* note 33, Arts. 51, 52 and 57; *Additional Protocol II*, *supra* note 1296, Art. 13; *ICRC Customary IHL Study*, *supra* note 1298, Rules 1, 6 and 12.

(DPH);[1454] this concept is activity-based and narrow.[1455] Rules pertaining to status-based loss of protection in NIAC are less defined. The ICRC's *Commentary on Additional Protocols* advises that persons belonging to armed forces or armed groups "may be attacked at any time".[1456] Some states treat all members of armed groups as without protection, regardless of their role.[1457] By contrast, the ICRC's concept of 'continuous combat function' provides that only members of armed groups holding a continuous function involving DPH may be lawfully targeted.[1458] This Section discusses how commissions interpreted and assessed the scope of protection from direct attack, and complexities arising in situations of asymmetric warfare.

Commissions articulated status-based targeting in NIAC in different ways. Some commissions considered membership in an armed group as sufficient to lose protection from direct attack,[1459] defining the parameters of membership carefully. For instance, the Goldstone Commission distinguished membership in Hamas, which comprises political, military and social welfare components,[1460] from membership in its armed wing.[1461] The Gaza Commission cited the concept of the 'continuous combat function', observing that this concept had been criticized both for broadening the definition of DPH and overly restricting targeting rules.[1462] It disagreed with Israel's position that all Hamas members lacked civilian protection.[1463] It also rejected the term 'enemy civilian' as not recognised in international law, and reiterated that "a civilian is a civilian regardless of nationality, race or the place where he or she lives."[1464] Other commissions appear to have implicitly identified combat function as the touchstone for continuous loss of protection by using the term 'fighter'.[1465] The Lebanon Commission wrote that attacks against houses of "family, friends, *members* or relatives – *but not fighters* – of Hezbollah"[1466] violated international law. The CAR Commission also used the term 'fighter' but it is unclear whether it endorsed status-based targeting. It found that targeting civilians not DPH was a war crime, and that this also applied to "unarmed fighters, not taking part in the hostilities", so that killings of "unarmed recruits"[1467] would be a war

[1454] *Additional Protocol II*, *supra* note 1296, Art. 13(3).
[1455] *Commentary to Additional Protocols*, *supra* note 1362, paras. 1944-1945 and 4787-4789.
[1456] *Ibid.*, para. 4789.
[1457] E.g., *US Law of War Manual*, *supra* note 575, paras. 5.8.1 and 5.8.3; *Gherebi v. Obama*, 609 F. Supp. 2d 43, 68 (D.D.C. 2009); Israel Ministry of Foreign Affairs, 'The 2014 Gaza Conflict: Factual and Legal Aspects', (2015), para. 264, available at http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf (accessed 1 May 2018).
[1458] *ICRC Interpretive Guidance*, *supra* note 1446, at 33. There is limited state practice in support of this concept, e.g., Germany Federal Ministry of Defence, *Humanitäres Völkerrecht in bewaffneten Konflikten*, ZDv15/2, DSK AV230100262 (Berlin, 2013), para. 1308.
[1459] E.g., *Sri Lanka Report*, *supra* note 29, at 194; *Goldstone Report*, *supra* note 633, para. 431; *Darfur Report*, *supra* note 32, paras. 264 and 292.
[1460] *Goldstone Report*, *supra* note 633, para. 382.
[1461] *Ibid.*, para. 428.
[1462] *Gaza Report*, *supra* note 766, para. 220 and footnote 30. See Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC 'Direct Participation in Hostilities' Interpretive Guidance', (2010) 42 NYU J Int'l L & Pol 641-695.
[1463] *Gaza Report*, *supra* note 766, para. 220.
[1464] *Ibid.*, para. 395, reflecting *Tadić Appeal Judgment*, *supra* note 1289, para. 168.
[1465] *Syria Third Report*, *supra* note 564, Annex II, para. 32; *Syria Fourth Report*, *supra* note 1097, para. 42; *Libya Second Report*, *supra* note 853, para. 138; *Gaza Report*, *supra* note 766, footnote 30.
[1466] *Lebanon Report*, *supra* note 855, para. 318 (emphasis added).
[1467] *CAR Report*, *supra* note 32, para. 352.

crime. The Commission did not specify whether this was because the recruits did not yet hold a continuous combat function, or because it rejected status-based targeting more generally.

Commissions also considered whether civilians who were not members of armed groups had lost protection by DPH.[1468] Commissions did not offer a general definition of this concept but were cautious as to what would trigger loss of protection in concrete situations. For instance, the Darfur Commission found that since most tribes in Darfur possessed weapons to defend their land and cattle, the fact that attacked civilians had weapons was not necessarily evidence of DPH.[1469] The UNCHR's Gaza Inquiry cautioned that it was prohibited to kill civilians "on the basis of suspicion or even on the basis of evidence of their supposedly menacing activities or possible future undertakings".[1470] It found that political assassinations violated IHRL and were grave breaches of Geneva Convention IV.[1471] The question of DPH was pertinent for Gaza flotilla incident, where several passengers onboard the *Mavi Marmara* were killed and many more were injured. Israel considered passengers who engaged in violence as DPH, reasoning that they had lost protection as they directed violence against Israel as a party to the conflict and were trying to transport cement, deemed as having a military purpose in breach of the blockade and in support of Hamas.[1472] The Gaza Flotilla Commission found that there was a situation of occupation in Gaza to which IHL applied, but that passengers were protected civilians.[1473] It did not elaborate much on its reasoning, but found that the deaths of passengers who were injured or "not participating in activities that represented a threat to any Israeli soldier"[1474] were violations of IHRL and grave breaches of Geneva Convention IV. The Palmer Commission found that Israeli soldiers faced organized violent resistance which justified use of force in self-defence[1475] but that the extent of loss of life and injury was "unacceptable".[1476] Further legal discussion was relegated to an appendix, and the Commission did not assess violations, reflecting an emphasis on policy analysis.[1477]

The Syria Commission was instructed to investigate "massacres",[1478] and defined this term by reference to international law:[1479]

> [I]ntentional mass killing of civilians not directly participating in hostilities, or *hors de combat* fighters, by organized armed forces or groups in a single incident, in violation of international human rights or humanitarian law.

Thilo Marauhn writes that this definition refers to IHL and IHRL "indifferently"[1480] and cautions that the Commission may have "blurred the lines"[1481] by applying these legal fields

[1468] E.g., *Syria Third Report*, *supra* note 564, Annex V, para. 17.
[1469] *Darfur Report*, *supra* note 32, para. 292.
[1470] *UNCHR Gaza Report*, *supra* note 536, para. 63.
[1471] *Ibid.*, para. 61.
[1472] *Turkel Report*, *supra* note 1076, at 233-242 and 278.
[1473] *Gaza Flotilla Report*, *supra* note 681, paras. 62-66.
[1474] *Ibid.*, para. 170.
[1475] *Palmer Report*, *supra* note 316, para. 133.
[1476] *Ibid.*, para. 134.
[1477] See Palmer, *supra* note 480, at 605.
[1478] HRC Res. 21/26, para. 19.
[1479] *Syria Fourth Report*, *supra* note 1097, para. 42.
[1480] Marauhn, *supra* note 96, at 443.
[1481] *Ibid.*, at 443.

alongside one another. In its analysis, the Syria Commission appeared to be sensitive to IHL concepts, distinguishing protected from unprotected persons. Some incidents qualified as 'massacres' appeared to neatly fit its definition, such as mass summary executions.[1482] Other 'massacres' involved several phases which might have included active combat and in respect of which the Commission lacked material information. For instance, when reporting on a 'massacre' at Temseh, the Commission stated that it could not determine whether some of those killed were "civilians or fighters";[1483] whether some civilians directly participated in hostilities; [1484] and whether civilians were "inadequately protected, or deliberately targeted".[1485] The latter scenario would be a serious violation of IHL, while in the former scenario, analysis of proportionality and precautions might be required. The Commission broadly qualified some complex events as massacres in violation of IHL and IHRL while also facing challenges in substantiating key facts.

IHL requires that, where feasible, parties avoid locating military objectives in or near densely populated areas.[1486] Where a party to the conflict does not or cannot do so, issues arise as to how to assess attacks by the other party causing significant civilian casualties. [1487] Commissions which investigated hostilities in densely populated Gaza faced such complexities. The Gaza Commission wrote, "Gaza's small size and its population density makes it particularly difficult for armed groups always to comply with these requirements."[1488] The Goldstone Commission found that Israel deliberately attacked civilians and civilian objects, and that while Hamas operated in a densely populated area, it did not intend to shield its operations with the civilian population.[1489] Those findings are critiqued by scholars who see Hamas' failure to distinguish itself from the civilian population as to blame for high rates of civilian casualties.[1490] Richard Rosen writes that the Goldstone Commission effectively "placed the onus of avoiding civilian casualties entirely on Israel."[1491] As noted by Blank, "context does not excuse overt violations of the law nor does it alter the fundamental legal framework,"[1492] but it might influence evaluations of compliance with IHL. Difficulties at the level of legal analysis were compounded by the fact that neither commission enjoyed Israel's cooperation and lacked access to sensitive information which might have informed operational targeting decisions.[1493] Strategies adopted by commissions in response to these challenges are discussed in Section 2.3.

[1482] E.g., Events at Jedaydet Artouz, 1 August 2012: *Syria Fourth Report*, *supra* note 1097, Annex IV, at 47.
[1483] *Syria Fourth Report*, *supra* note 1097, Annex IV, Part 1A, para. 5.
[1484] *Ibid*., para. 8.
[1485] *Ibid*., para. 12.
[1486] *Additional Protocol I*, *supra* note 33, Art. 58(b); *ICRC Customary IHL Study*, *supra* note 1298, Rule 23.
[1487] See Robin Geiß, 'Asymmetric conflict structures', (2006) 88(864) IRRC 757-777.
[1488] *Gaza Report*, *supra* note 766, para. 473.
[1489] E.g., *Goldstone Report*, *supra* note 633, paras. 389, 483-488, and 1026.
[1490] Laurie Blank, 'The Application of IHL in the Goldstone Report: A Critical Commentary', in Gerald Steinberg and Anne Herzberg (eds), *The Goldstone Report 'Reconsidered': A Critical Analysis* (Jerusalem: NGO Monitor, 2011) 203-264, at 216 and Richard Rosen, 'Goldstone Reconsidered', (2012) 21 J Transnat'l L & Pol'y 35-103, at 91.
[1491] Rosen, *supra* note 1490, at 91.
[1492] Blank, *supra* note 1490, at 216.
[1493] *Goldstone Report*, *supra* note 633, para. 162.

2.2.2 Proportionality

Under IHL, it is prohibited to launch an attack expected to cause incidental civilian harm that is excessive in relation to the concrete and direct military advantage anticipated.[1494] The proportionality test is prospective; judicial assessments generally adopt the *ex-ante* perspective of the 'reasonable military commander'.[1495] The proportionality principle is notoriously difficult to apply in practice;[1496] this is borne out in commissions' reports.

While some commissions' articulations of the proportionality principle mirror its codification in Additional Protocol I,[1497] others omitted its forward-looking nature.[1498] For instance, the Darfur Commission described proportionality as "a largely subjective standard, based on a balancing between the expectation and anticipation of military gain and the *actual loss* of civilian life or destruction of civilian objects."[1499] The balancing of actual civilian loss implies an *ex-post* rather than *ex-ante* assessment, more akin to IHRL.[1500] When applying the proportionality test, the Darfur Commission found that assuming that some rebels were hiding in villages, the destruction of those villages was disproportionate because "the military force used was manifestly disproportionate to any threat posed by the rebels".[1501] The Commission did not weigh anticipated military advantage against expected civilian harm, as required in Additional Protocol I, but rather against the military threat itself.

Some commissions found disproportionate attacks without identifying a specific military advantage.[1502] For instance, the Syria Commission found that attacks by Government forces against anti-Government armed groups often did not distinguish between civilian and military targets, and that Government shelling was indiscriminate. The Commission went on to find:[1503]

> [T]he attacks, especially shelling, caused incidental loss of civilian life and injury to civilians, as well as damage to civilian objects. There are reasonable grounds to believe that the damage was excessive when compared to the anticipated military advantage.

The Syria Commission did not identify the military advantage, nor articulated that its analysis of civilian harm was *ex-ante*. It seems to have 'piggybacked' its finding of disproportionate attack onto its finding of indiscriminate attack. If attacks are indiscriminate, the question of proportionality is moot.

[1494] *ICRC Customary IHL Study*, *supra* note 1298, Rule 14. See Michael Newton and Larry May, *Proportionality in International Law* (Oxford: OUP, 2014).
[1495] E.g., *Gaza Report*, *supra* note 766, para. 296; *ICRC Customary IHL Study*, *supra* note 1298, Rule 14; *Prosecutor v. Galić*, IT-98-29-T, Trial Judgement, 5 December 2003, para. 58.
[1496] Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: CUP, 2004) at 22.
[1497] E.g., *Gaza Report*, *supra* note 766, para. 37.
[1498] *Syria Third Report*, *supra* note 564, para. 29; *Palmer Report*, *supra* note 316, para. 78. Elsewhere, the Syria Commission articulated the principle correctly: *Syria Third Report*, *supra* note 564, para. 37.
[1499] *Darfur Report*, *supra* note 32, para. 260 (emphasis added).
[1500] E.g., Dominik Steiger, 'Enforcing International Humanitarian Law through Human Rights Bodies', in Heike Krieger (ed.), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (Cambridge: CUP, 2015) 263-299, at 290.
[1501] *Darfur Report*, *supra* note 32, para. 267.
[1502] E.g., *Syria Third Report*, *supra* note 564, Annex VI, para. 25 and *Libya Second Report*, *supra* note 853, para. 600, *contra Gaza Report*, *supra* note 766, paras. 368-370 and 393-394.
[1503] *Syria Third Report*, *supra* note 564, para. 95.

Commissions' varied understandings of elements of the proportionality test have led to varied outcomes. For instance, the Palmer Commission and the HRC's Gaza Flotilla Commission viewed the scope of 'attack' differently, generating opposite legal conclusions. The Palmer Commission assessed the effects of Israel's naval blockade separately to its land closure policy, finding that the naval blockade did not have a "significant humanitarian impact",[1504] so was proportionate. By contrast, the Gaza Flotilla Commission considered that the blockade was "implemented in support of the overall closure regime"[1505] so formed part of a wider attack, including land closures. It concluded that Israel's "policy of blockade or closure"[1506] was disproportionate. Commissions have also valued the weight of risks to one's own side differently. Andreas Zimmermann argues that when finding that Israeli shelling of a Hezbollah-controlled town was disproportionate, the Lebanon Commission did not consider whether conquering the town using ground forces would significantly increase troop risks.[1507] The Gaza Commission recognised that "the issue of force protection of the attacking force as an element in assessing proportionality is still unresolved",[1508] but should not be an overriding concern. It found that although force protection might be taken into account, the IDF's means and methods would likely result in excessive civilian casualties.[1509] By reducing the weight of force protection, a lower level of civilian harm is tolerated. In this sense, such an approach is 'humanizing', as it moves the balance further in the direction of protected persons.

2.2.3 Precautions

Parties to a conflict must take all feasible precautions to avoid or minimize incidental civilian harm.[1510] Precautions include verifying the military nature of targets and giving effective advance warning to civilians, where circumstances permit.[1511] Commissions have not always examined the question of precautions, as such analysis is only required if attacks *prima facie* comply with the principle of distinction. Many incidents examined by commissions fell at this first hurdle. In situations involving sophisticated military forces, commissions have examined compliance with this principle in more detail.

Several commissions examined the 'effectiveness' of warnings. The Lebanon Commission identified that to be 'effective', a warning should give clear time slots for evacuation and link to guaranteed safe humanitarian exit corridors.[1512] The Goldstone Commission was criticized for taking applying an unduly high standard for measuring the effectiveness of warnings; judging effectiveness based on whether warning were heeded, rather than successfully communicated; and wrongly applying a proportionality analysis when determining whether warnings were effective.[1513] The Goldstone Commission also linked the principle of

[1504] *Palmer Report*, *supra* note 316, para. 79.
[1505] *Gaza Flotilla Report*, *supra* note 681, para. 59.
[1506] *Ibid.*, para. 59.
[1507] Andreas Zimmermann, 'The Second Lebanon War: *Jus ad Bellum*, *Jus in Bello* and the Issue of Proportionality', (2007) 11 *Max Planck Yearbook of United Nations Law* 99-141, at 140.
[1508] *Gaza Report*, *supra* note 766, para. 296.
[1509] *Ibid.*, para. 296.
[1510] *ICRC Customary IHL Study*, *supra* note 1298, Rule 15.
[1511] *Additional Protocol I*, *supra* note 33, Art. 57.
[1512] *Lebanon Report*, *supra* note 855, para. 157.
[1513] Blank, *supra* note 1490, at 247, citing *Goldstone Report*, *supra* note 633, para. 529. See Yuval Shany, 'Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror', in Orna Ben-

precautions to the right to life, finding that Israel's failure to take precautions violated the ICCPR's 'due diligence' requirement to prevent arbitrary deprivation of life.[1514] Yuval Shany argues that this approach "leads to a reversal of the *lex specialis* rule"[1515] by replacing IHL's greater tolerance for operational mistakes with the higher standard of care in IHRL.

Recent commentary discussing the Syria Commission's finding that the United States violated the principle of precautions illustrates how such findings are subject to critique. The Commission found that a US airstrike in the village of Al-Jinah, intended to target an Al Qaeda meeting, instead killed 38 civilians at a religious gathering.[1516] The Commission found that the targeted building was part of a mosque complex and used for religious purposes.[1517] While it could have been subject to attack if an Al Qaeda meeting was taking place, US intelligence to that effect was three days old and additional verification of target activities should have been carried out as the building was a protected object.[1518] In commentary, two senior members of the US military, Lt. Col. Shane Reeves and Lt. Col. Ward Narramore, write that the Syria Commission tried to "impose an absolute requirement" to minimize incidental civilian loss, which reflected "a common conflation perpetrated by those who attempt to usurp [IHL] by injecting some version of human rights laws."[1519] In response, Adil Haque points out that the Commission's articulation of the principle of precautions is consistent with the ICRC and the US Department of Defence; and US forces admitted that the targeting team was erroneously not informed that the building was a religious complex, which would have required additional steps to verify its use for military purposes.[1520]

In addition to arguing that the Syria Commission applied the wrong legal test, Reeves and Narramore argue that it did not have enough information make such a finding, which "erodes its authority in this and future investigations."[1521] The authors point to the Commission's witness interviews as insufficiently corroborated and irrelevant, because "what matters is what the commander reasonably knew at the time the decision was made to attack the building."[1522] This argument warrants further consideration. While villagers' accounts can indicate the extent of civilian harm which occurred, they cannot necessarily show that a reasonable commander ought to have known that the building was a mosque. However, the Commission also cited a transcript of a media briefing by US Central Command in which the above-mentioned errors were admitted.[1523] This example shows how a commission's authority may

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Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford: OUP, 2011) 13-33, at 30.

[1514] *Goldstone Report*, *supra* note 633, para. 862.

[1515] Shany, *supra* note 1513, at 31.

[1516] *Syria Fourteenth Report*, *supra* note 982, para. 52.

[1517] *Ibid.*, para. 60.

[1518] *Ibid.*, para. 61.

[1519] Shane Reeves and Ward Narramore, 'The UNHRC Commission of Inquiry on Syria Misapplies the Law of Armed Conflict,' *Lawfare*, 15 September 2017, available at http://www.lawfareblog.com/unhrc-commission-inquiry-syria-misapplies-law-armed-conflict (accessed 1 May 2018).

[1520] Adil Haque, 'A Careless Attack on the UN's Commission of Inquiry on Syria', *Just Security*, 21 September 2017, available at http://www.justsecurity.org/45213/syria-commission-inquiry (accessed 1 May 2018).

[1521] Reeves and Narramore, *supra* note 1519.

[1522] *Ibid*.

[1523] *Syria Fourteenth Report*, *supra* note 982, footnote 11. The unofficial transcript is available at 'Transcript of Pentagon's Al Jinah Investigation media briefing', *Airwars*, 27 June 2017, http://airwars.org/news/transcript-of-al-jinah-investigation-briefing (accessed 1 May 2018).

be challenged both on the basis of its legal analysis and its approach to fact-finding. Particular challenges faced when establishing the facts of attacks in armed conflict are discussed next.

2.3 Fact-finding challenges and strategies

Fact-finding in armed conflict gives rise to specific challenges, including "access to the battlefield; the need for forensic, ballistic, and other technical evaluations; issues of security, credibility, and partiality of witnesses; and the obtainment of sensitive internal information that is relevant to weighing the lawfulness of attacks".[1524] The type and extent of detail required to assess attacks in armed conflict is illustrated by the Gaza Commission's report:[1525]

> Israel was asked to explain the specific contribution of each building to the military actions of the Palestinian armed groups and how its destruction represented a military advantage for the IDF; what were the ranks and combat functions of members of armed groups if they were the target of the attack; what precautionary measures, including warnings and the choice of weapons, were employed; what was the number of fatalities resulting from each of the incidents; and whether any investigations had been initiated in relation to these strikes.

Commissions' information-gathering efforts were impeded for various reasons, including lack of territorial access,[1526] less than full cooperation from parties to the conflict[1527] and security concerns.[1528] Commissions adopted three broad strategies when faced with information-gathering barriers: entering strong findings of violations on a limited basis; making broad findings of violations on a qualified basis; or stating that findings could not be reached. The first and third strategies result in more robust but truncated findings, while the second has led to critiques that findings were unreliable. Each strategy is discussed in turn.

Some commissions entered convincing findings of IHL violations on a limited basis. Boutruche observes that fact-finding bodies tend to focus on "manifest and clear-cut incidents or patterns"[1529] of disproportionate attacks, in light of the difficulties in assessing such violations. For instance, the Darfur Commission found that civilian harm would be "*patently* excessive"[1530] in relation to the expected military advantage. The Lebanon Commission wrote that if there were Hezbollah members among civilians who left villages in convoys, attacks against those convoys would be "utterly disproportionate and beyond any concept of military necessity or the principle of distinction."[1531] The advantage of this 'low-hanging fruit' approach is that findings are less susceptible to reproach on the basis that commissions failed to consider material but unavailable information. However, it also means that more complex or sophisticated attacks are less likely to be scrutinized and recognised as in violation of IHL.

[1524] PoKempner, *supra* note 96, at 149.
[1525] E.g., *Gaza Report*, *supra* note 766, para. 114.
[1526] *Gaza Report*, *supra* note 766, para. 18.
[1527] E.g., *Goldstone Report*, *supra* note 633, paras. 438-429 and 1339 regarding 'Gaza authorities'; *Darfur Report*, *supra* note 32, para. 38 regarding rebel groups and *Letter to Judge Kirsch dated 23 January 2012 from Peter Olson, NATO Legal Adviser*, at 8, in *Libya Second Report*, *supra* note 853, Annex II [*NATO letter 23 January 2012*] regarding NATO's refusal to provide some video footage which was classified. See Chapter Three, Section 3.
[1528] E.g., *CAR Report*, *supra* note 32, paras. 7 and 20-21 and *Libya First Report*, *supra* note 968, para. 145.
[1529] Boutruche 2013, *supra* note 482, at 33.
[1530] *Darfur Report*, *supra* note 32, para. 266 (emphasis added).
[1531] *Lebanon Report*, *supra* note 855, para. 153.

More often, particularly where concerned states refused to cooperate, commissions made broad but tentative findings of IHL violations. For instance, the Syria Commission made findings of massacres while acknowledging that could not verify that all those killed were protected persons.[1532] The Goldstone Commission found some IHL violations with the caveat that they were reached on the basis of "available information"[1533] or "in the absence of any information refuting the allegations".[1534] Some scholars criticized the Goldstone Commission for finding disproportionate attacks in the absence of full information.[1535] Others, including Cassese, praised its report as systematically analyzing facts in light of the applicable law[1536] and adhering to standards of legality in 'the fog of war' and in the face of Israeli non-cooperation. [1537] The Gaza Commission made similar caveats in its findings of disproportionate attack.[1538]

As discussed in Chapter 3,[1539] some commissions made qualified findings of violations by drawing adverse inferences or reversing the evidentiary burden where attacks were *prima facie* directed against civilians and civilian objects. The Gaza Commission wrote, "[t]he onus is on Israel to make available information about those objectives and explain how attacking them contributed to military action",[1540] as only then could legality be assessed. While accepting that there may be limits to disclosure, the Commission required "a minimum level of transparency"[1541] to assist victims' rights to the truth and a remedy. Benjamin Wittes and Yishai Schwartz are critical of the Gaza Commission's approach: "[h]aving put the burden on Israel to prove every attack legitimate and having no access to Israeli decision-making, it is no wonder that the commission regularly finds that many of the strikes it examines may have been war crimes."[1542] Israel argues that IHL does not require disclosure of sensitive information, and it "cannot publicize detailed reasoning behind every attack without endangering intelligence sources and methods".[1543] The Commission rejected Israel's view, as "accepting that logic would undermine any efforts to ensure accountability".[1544] The strategies of the Gaza Commission and Goldstone Commission reflect a more human rights-oriented approach by reaching *prima facie* findings in the absence of information from the concerned state, in order to promote accountability and the rights to truth and a remedy.

[1532] See Chapter Five, Section 2.2.1.
[1533] *Goldstone Report*, *supra* note 633, paras. 32, 75, 389, 437, 494, 629, 652, 701, 1102, 1167.
[1534] *Ibid.*, paras. 595, 838, 1167.
[1535] E.g., Abraham Bell, 'A Critique of the Goldstone Report and its Treatment of International Humanitarian Law', (2010) 104 Am Soc'y Int'l L Proc 79-86 and Blank, *supra* note 1490.
[1536] Antonio Cassese, 'We Must Stand behind the UN Report on Gaza', *Financial Times*, 14 October 2009, cited in Yihdego, *supra* note 96, at 47.
[1537] Falk, *supra* note 1007, at 97.
[1538] *Gaza Report*, *supra* note 766, para. 221.
[1539] See Chapter Three, Section 3.4.
[1540] *Gaza Report*, *supra* note 766, para. 228.
[1541] *Ibid.*, para. 217.
[1542] Benjamin Wittes and Yishai Schwartz, 'What to Make of the UN's Special Commission Report on Gaza?', *Lawfare*, 24 June 2015, available at http://www.lawfareblog.com/what-make-uns-special-commission-report-gaza (accessed 1 May 2018).
[1543] Israel Ministry of Foreign Affairs, 'Israel's Investigation of Alleged Violations of the Law of Armed Conflict', at 27, cited in *Gaza Report*, *supra* note 766, para. 215. Note: this quote does not appear in the document available at http://mfa.gov.il/ProtectiveEdge/Documents/IsraelInvestigations.pdf (accessed 1 May 2018).
[1544] *Gaza Report*, *supra* note 766, para. 215.

In other cases, commissions acknowledged limits to their abilities to assess compliance with IHL due to a lack of information.[1545] For instance, the Libya Commission wrote that while it established that many civilians were harmed, it could not "determine the full circumstances of the attacks in order to be able to evaluate whether the attacks were intentional, indiscriminate and/or disproportionate."[1546] It was rather conservative in its analysis of NATO strikes, finding a few incidents where "NATO's response to the Commission has not allowed it to draw conclusions on the rationale for, or the circumstances of the attacks", so that it could not assess whether all feasible precautions were taken.[1547] The Goldstone Commission refrained from making findings in respect of some incidents involving complicated assessments. In a letter quoted by Israeli authorities, Goldstone wrote that the Commission avoided calling a witness who could testify as to conditions of warfare in Gaza:[1548]

> [M]ainly because in our Report we did not deal with the issues he raised regarding the problems of conducting military operations in civilian areas and second-guessing decisions made by soldiers and their commanding officers 'in the fog of war'. We avoided having to do so in the incidents we decided to investigate.

For Israel, this response showed that the Goldstone Commission "*deliberately selected* incidents so as to evade the complex dilemmas of confronting threats in civilian areas."[1549] Nigel Rodley surmises, "[t]he Israeli response seems to imply that concentrating on incidents where facts are relatively clear, rather than on those where they may not be, is somehow reprehensible."[1550] While in politically volatile situations, pragmatic selection of incidents might be interpreted by the parties as evidence of bias, such objections may also resemble the *tu quoque* fallacy when parties refuse to provide information.[1551]

Commissions experienced significant difficulties in gathering and assessing information in ongoing conflicts. This was especially the case in respect of the principles of proportionality and precautions, which involve a difficult balancing of military necessity and humanity. Without cooperation from the parties, it could be very difficult to understand the conditions of the theater of combat and the intelligence relied upon when making targeting decisions. Commissions generally faced less criticism of findings of deliberate attacks against civilians, perhaps due to the absolute nature of this prohibition. An exception may be seen in respect of hostilities in densely populated areas, where it may be more difficult to determine whether civilians were directly targeted or incidentally harmed.

[1545] E.g., *Gaza Report*, *supra* note 766, para. 223.
[1546] *Libya First Report*, *supra* note 968, para. 156.
[1547] *Libya Second Report*, *supra* note 853, para. 89.
[1548] *Letter from Richard Goldstone dated 21 September 2009*, cited in *Israel Response to Goldstone Report*, *supra* note 871, para. 18.
[1549] *Israel Response to Goldstone Report*, *supra* note 871, para. 18 (emphasis in original).
[1550] Nigel Rodley, 'Assessing the Goldstone Report', (2010) 16 *Global Governance* 191-202, at 197.
[1551] M. Cherif Bassiouni, *Introduction to International Criminal Law* (Leiden: Brill, 2012) at 465 and Sienho Yee, 'The tu quoque argument as a defence to international crimes, prosecution or punishment', (2004) 3(1) Chinese J Int'l L 87-134.

3. Violations involving Sexual and Gender-Based Violence

Violence committed against an individual on the basis of his or her sex or gender is a common occurrence in situations of conflict and has been used as a 'weapon of war'.[1552] The meaning and interrelationship of 'sex' and 'gender' are discussed at length in scholarship.[1553] UN policy documents often bundle these terms as 'sexual and gender-based violence' (SGBV). For instance, the UN High Commissioner for Refugees defines SGBV as:[1554]

> [A]ny act that is perpetrated against a person's will and is based on gender norms and unequal power relationships. It encompasses threats of violence and coercion. It can be physical, emotional, psychological, or sexual in nature, and can take the form of a denial of resources or access to services.

Other UN and judicial definitions contain similar elements. Some definitions are made in the context of violence against women and girls,[1555] but SGBV may also be committed against men and boys.[1556] SGBV encompasses sexual and non-sexual physical and mental violence based on a person's gender. Some definitions of SGBV also include broader types of harm such as economic harm and denial of resources.[1557] This Chapter uses this expansive definition to discuss how commissions engaged with different gendered dimensions of violations. This Section examines how commissions recognised SGBV as violations of international law and the victims of such atrocities (3.1) and assessed these types of violations (3.2).

3.1 Recognition of violations and victims

Some scholars criticize IHL treaties and early war crimes trials for not sufficiently acknowledging SGBV as violations of international law.[1558] Early international atrocity inquiries recognised that sexual violence violated international law in a cursory way. The

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[1552] GA Res. 48/143, 20 December 1993, Preamble; SC Res. 1820 (2008).

[1553] E.g., Gloria Gaggioli, 'Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law', (2014) 96(894) IRRC 503-538 and Charlotte Lindsey-Curtet, Florence Holst-Roness and Letitia Anderson, *Addressing the Needs of Women Affected by Armed Conflict: An ICRC Guidance Document* (Geneva: ICRC, 2004) at 7, available at http://www.icrc.org/eng/assets/files/other/icrc_002_0840_women_guidance.pdf (accessed 1 May 2018).

[1554] UNHCR, 'Sexual and Gender-Based Violence', available at http://www.unhcr.org/sexual-and-gender-based-violence.html (accessed 1 May 2018).

[1555] *UN Declaration on the Elimination of Violence Against Women*, GA Res. 48/104, 20 December 1993, Art. 1; CEDAW Committee, *General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, UN Doc. CEDAW/C/GC/35, 26 July 2017, para. 14 [*CEDAW GR 35*] and *General Recommendation No. 19, Violence against Women*, UN Doc. HRI/GEN/1/Rev.6, 12 May 2003, para. 6 [*CEDAW GR 19*].

[1556] E.g., *Prosecutor v. Češic*, IT-95-10/1-S, Sentencing Judgement, 11 March 2007, paras. 13-14 and ICC Prosecutor, 'Policy Paper on Sexual and Gender-Based Crimes', (2014), para. 16, available at http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf (accessed 1 May 2018).

[1557] E.g., UNHCR, *supra* note 1554 and *CEDAW GR 35*, *supra* note 1555, para. 14: gender-based violence includes "acts or omissions intended or likely to cause or result in death or physical, sexual, psychological or economic harm or suffering to women, threats of such acts, harassment, coercion and arbitrary deprivation of liberty."

[1558] Judith Gardam, 'Women, Human Rights and International Humanitarian Law', (1998) 324 IRRC 421-432, *contra* Gaggioli, *supra* note 1553, at 511 and Fionnuala Ní Aoláin, 'The Gender Politics of Fact-Finding in the Context of the Women, Peace and Security Agenda', in Alston and Knuckey, *supra* note 94, 89-105, at 93.

1919 Commission identified rape and forced prostitution as violations of IHL attracting criminal sanction.[1559] The Inter-Allied Commission of Inquiry on occupied Serbia devoted a section of its report to rape.[1560] The Smyrna Commission made findings of rape but did not qualify them as legal violations.[1561] In the UN context, the Mozambique Commission made brief findings that women were raped and that some pregnant women were disemboweled,[1562] but its recognition of these acts as legal violations was quite generalized. It found that "massacres and other atrocities described in this report"[1563] violated the right to life, liberty, and security of the person under the UDHR and the prohibition of mutilation, cruel treatment, and torture under Geneva Convention IV.[1564]

From the 1990s, UN atrocity inquiries examined legal prohibitions of sexual violence in detail. The Yugoslavia Commission observed that most domestic legal systems considered rape as "a crime of violence of a sexual nature against the person" and that the "characteristic of violence of a sexual nature also applies to other forms of sexual assault against women, men and children, when these activities are performed under coercion or threat of force".[1565] The inquiries on Yugoslavia and Rwanda both found that rape and sexual assault were prohibited as war crimes and underlying acts of crimes against humanity and genocide.[1566] Commissions now routinely recognise rape and sexual violence as underlying acts of international crimes, reflecting developments from the *ad hoc* tribunals and the ICC.[1567] Some commissions also recognised that sexual violence violates other legal norms such as the prohibition against torture[1568] and the right to health.[1569]

Inquiry reports indicated increasing appreciation of gender-based violence, but uneven recognition of their legal prohibition. Neither the Rwanda or Yugoslavia commissions mentioned the term 'gender'. While the Darfur Commission mentioned 'gender violence', it defined this as non-penetrative sexual violence.[1570] By contrast, the Beit Hanoun Commission recognised that in conflict situations, gender-related violence might be given less attention:[1571]

> The particular position of women and gender-specific harm may be invisible where a whole society is facing gross violations of human rights and of [IHL], as there is a sense of unity that prevents identification of and focus on women's situations.

The Beit Hanoun Commission and the Lebanon Commission recognised gender-specific harms suffered from the breakdown of communities, such as domestic violence and sexual

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[1559] *1919 Report*, *supra* note 119, at 114.
[1560] *Occupied Serbia Report*, *supra* note 120, at 13.
[1561] Smyrna Commission, *'Document 3: Account of Events that took place following the Occupation, which were established during the Inquiry between 12 August and 6 October 1919'*, point 15.
[1562] *Mozambique Report*, *supra* note 253, paras. 69 and 86.
[1563] *Ibid.*, para. 140.
[1564] *Ibid.*, paras. 149 and 155.
[1565] *Yugoslavia Final Report*, *supra* note 39, para. 103 (footnotes omitted).
[1566] *Yugoslavia Final Report*, *supra* note 39, para. 107; *Rwanda Final Report*, *supra* note 297, paras. 140-145.
[1567] E.g., *Darfur Report*, *supra* note 32, paras. 177-178 and 358; *Libya First Report*, *supra* note 968, para. 203.
[1568] E.g., *Syria Third Report*, *supra* note 564, Annex II, para. 61.
[1569] *Guinea Report*, *supra* note 39, para. 175; *Syria Third Report*, *supra* note 564, para. 59, citing ICESCR, *supra* note 243, Art. 12.
[1570] *Darfur Report*, *supra* note 32, para. 359.
[1571] *Beit Hanoun Report*, *supra* note 620, para. 63.

abuse.[1572] The Lebanon Commission acknowledged that legal and financial issues related to property and social benefits could be particularly severe for women, "who may be marginalized or isolated from social support networks."[1573] Neither commission expressly linked such harms to legal prohibitions, however. The CAR Commission defined gender-based violence as "any harmful act directed against individuals or groups of individuals on the basis of their gender", including "sexual violence, domestic violence, trafficking, forced/early marriage and harmful traditional practices".[1574] However, it only discussed prohibitions of sexual violence.[1575] By contrast, the North Korea Commission discussed gender-based persecution as a crime against humanity[1576] and found that in addition to its expression in the Rome Statute, this prohibition was "crystalizing into customary international law."[1577]

3.2 Assessment of violations

Commissions consistently remarked that it was very difficult to evaluate SGBV, especially in conflict situations, but also due to social, cultural, and religious beliefs.[1578] The Yugoslavia Commission wrote:[1579]

> Owing to the social stigma attached - even in times of peace - rape is among the least reported crimes. For this reason, it is very difficult to make any general assessment of actual numbers of rape victims… The overall reluctance to report rape is aggravated by war, especially if the perpetrators are soldiers and also where there is a general condition of chaos and a breakdown in law and order. The victims may have little confidence in finding justice. The strong fear of reprisal during wartime adds to the silencing of victims. The perpetrators have a strong belief that they can get away with their crimes.

The Eritrea Commission observed that in addition to the general trauma and shame felt by victims, the patriarchal nature of Eritrean society contributed to under-reporting and under-acknowledgement of gender-based violence.[1580]

Despite these difficulties, some commissions devoted considerable effort to assessing SGBV. The Yugoslavia Commission conducted a study of rape and sexual assault[1581] and reported that it had identified almost 800 victims by name or number and 600 alleged perpetrators by name.[1582] In 2016, the Eritrea Commission "decided to devote specific attention to [SGBV], including violence against women and girls, and to assess the gender dimension and impact of other violations."[1583] In 2018, the Syria Commission issued a thematic report centring on

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[1572] *Beit Hanoun Report*, *supra* note 620, para. 66; *Lebanon Report*, *supra* note 855, para. 280.
[1573] *Lebanon Report*, *supra* note 855, para. 277.
[1574] *CAR Report*, *supra* note 32, para. 483.
[1575] *Ibid.*, paras. 483-488. The CAR Commission recognised the norm of gender-based persecution but only discussed persecution on religious, political or racial grounds: para. 431.
[1576] *North Korea Report*, *supra* note 32, para. 1059.
[1577] *Ibid.*, footnote 1576.
[1578] E.g., *Darfur Report*, *supra* note 32, para. 336; *Syria Third Report*, *supra* note 564, para. 97; *Libya First Report*, *supra* note 968, para. 202 and *Libya Second Report*, *supra* note 853, para. 70.
[1579] *Yugoslavia Final Report*, *supra* note 39, para. 234.
[1580] *Eritrea Second Report*, *supra* note 569, paras. 20-29.
[1581] *Yugoslavia Final Report, Annex II, Rape and sexual assault: a legal study*, UN Doc. S/1994/674/Add.2, 28 December 1994.
[1582] *Yugoslavia Final Report*, *supra* note 39, para. 236.
[1583] *Eritrea Second Report*, *supra* note 569, para. 18.

SGBV.[1584] Some commissions found that sexual violence was perpetrated against men and boys as well as women and girls.[1585]

In other cases, commissions only made brief findings of SGBV. The Rwanda Commission's findings of SGBV amounted to one sentence, namely that "disturbing reports"[1586] of rape had been filed. Its lack of attention to sexual violence stands in contrast to findings of the prevalence of sexual violence in the Rwandan genocide[1587] and the strong focus on such violations at the ICTR[1588] following significant witness testimony in the *Akayesu* case.[1589] Linda Bianchi observes that ICTR investigators needed cultural training to elicit accurate information and understand what they were being told as Rwandan victims tended to refer to rape indirectly.[1590] It is not clear from the Rwanda Commission's report whether it interviewed victims of SGBV or examined allegations in depth. If it had, it may well have faced similar obstacles.

Occasionally, commissions identified gendered dimensions to sexual violence, recognizing that victims were targeted because of their gender. For instance, the Guinea Commission found that acts of sexual violence violated CEDAW "since they were clearly directed against women as such."[1591] The North Korea Commission found that forced abortions violated women's physical integrity and sexual and reproductive rights, and constituted gender-based persecution.[1592] The Eritrea Commission identified gender-based violence such as forced marriage of underage girls[1593] and gender-specific torture of women in detention, such as preventing mothers from breastfeeding, beating women to induce abortions and refusing to provide sanitary pads.[1594]

Gender-based violations distinct from sexual violations were generally recognised to a lesser extent. For instance, the Cambodia Commission did not examine SGBV, even though forced marriage was a feature of the Khmer Rouge regime and such allegations were investigated by

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[1584] Syria Commission, *"I lost my dignity": Sexual and gender-based violence in the Syrian Arab Republic*, UN Doc. A/HRC/37/CRP.3, 8 March 2018.

[1585] *Ibid*., paras. 43-50; *Yugoslavia Final Report*, *supra* note 39, paras. 230(o) and 235; *Syria Third Report*, *supra* note 564, para. 100 and *Eritrea Second Report*, *supra* note 569, para. 127.

[1586] *Rwanda Final Report*, *supra* note 297, para. 136. The remainder of its discussion on this topic focussed on issues of law.

[1587] E.g., *Report on the Situation of Human Rights in Rwanda submitted by Mr René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994*, UN Doc. E/CN.4/1996/68, 29 January 1996, paras. 16-24.

[1588] Of 87 indictees, 40 were charged with rape and sexual violence crimes: Linda Bianchi, 'The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR', in Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Cambridge: Intersentia, 2013) 123-149, at 128.

[1589] ICTR, 'Amicus Brief Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and Other Sexual Violence Within the Competence of the Tribunal', May 1997, available at http://www.iccwomen.org/publications/briefs/docs/Prosecutor_v_Akayesu_ICTR.pdf (accessed 1 May 2018) and UN Women, 'Sexual Violence and Armed Conflict: United Nations Response', (1998), available at http://www.un.org/womenwatch/daw/public/cover.pdf (accessed 1 May 2018).

[1590] Bianchi, *supra* note 1588, at 132.

[1591] *Guinea Report*, *supra* note 39, para. 178, citing *CEDAW GR 19*, *supra* note 1555.

[1592] *North Korea Report*, *supra* note 32, para. 434.

[1593] *Eritrea Second Report*, *supra* note 569, para. 126.

[1594] *Ibid*., para. 267.

the Extraordinary Chambers in the Courts of Cambodia.[1595] The CAR Commission used the term SGBV[1596] but only made findings of rape.[1597] Inquiries into authoritarian regimes gave some attention to non-sexual gender-based violations, such as the Eritrea Commission's finding that women's forced domestic servitude in military training camps was gendered enslavement.[1598] Some commissions identified gendered dimensions of other violations. The Beit Hanoun Commission wrote that in a society where women had limited freedom of movement, soldiers' intrusions into homes violated women's privacy and dignity.[1599] The North Korea Commission recognised that men and women suffered differently from enforced disappearances during and after wartime. Wartime abductions of POWs affected women whose families were left without breadwinners, while post-war, women were abducted because of their gender.[1600]

Recently, commissions have identified the intersectionality[1601] of SGBV with other violence. For instance, the Syria Commission examined ISIS's treatment of Yazidi women and girls, finding that their practice of sexual enslavement constituted serious bodily and mental harm under the Genocide Convention.[1602] The Commission emphasized:[1603]

> Yazidi women and girls are not, however, simply vessels through which ISIS seeks to achieve the destruction of the Yazidi religious group. Rape and sexual violence, when committed against women and girls as part of a genocide, is a crime against a wider protected group, but it is equally a crime committed against a female, as an individual, on the basis of her sex.

This statement recognises that women and girls were subject to sexual violence on the basis of gender as well as ethnicity. The North Korea Commission found that discrimination arising out of North Korea's *songbun* class system "intersects with gender based discrimination, which is equally pervasive".[1604] Persecution on political grounds also intersected with gender-based persecution; for instance, women were forced to have abortions to prevent the reproduction of "class enemies".[1605] The Eritrea Commission found that discrimination against women interacted with other violations, such as being forced into marriage to avoid the possibility of sexual abuse during military training.[1606] Heightened sensitivity to gender issues has also manifested in recognition of limitations in assessing SGBV, with some recent

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[1595] Extraordinary Chambers in the Courts of Cambodia, 'Case 002 Closing Order', para. 843, available at http://www.eccc.gov.kh/en/articles/public-version-case-002-closing-order (accessed 1 May 2018) and Transcultural Psychosocial Organization Cambodia, *A Study about Victims' Participation at the Extraordinary Chambers in the Courts of Cambodia and Gender-Based Violence under the Khmer Rouge Regime*, September 2015, available at http://tpocambodia.org/wp-content/uploads/2014/06/TPO_GBV-under-the-Khmer-Rouge_Report_20151.pdf (accessed 1 May 2018).
[1596] *CAR Report*, *supra* note 32, para. 462.
[1597] *Ibid*., paras. 464-482.
[1598] *Eritrea Second Report*, *supra* note 569, para. 224.
[1599] *Beit Hanoun Report*, *supra* note 620, para. 64.
[1600] *North Korea Report*, *supra* note 32, paras. 1004-1014.
[1601] Atrey, *supra* note 103.
[1602] Syria Commission, "*They came to destroy": ISIS Crimes Against the Yazidis*, UN Doc. A/HRC/32/CRP.2, 15 June 2016, para. 122 [*They Came to Destroy*].
[1603] *They Came to Destroy*, *supra* note 1602, para. 124.
[1604] *North Korea Report*, *supra* note 32, para. 346.
[1605] *Ibid*., para. 1059.
[1606] *Eritrea Second Report*, *supra* note 569, para. 126.

commissions cautioning that their reports might have only partially captured the extent of SGBV.[1607]

Some feminist scholars critique IHL as reproducing structural gender inequalities by depicting women as "objects of vulnerability".[1608] That recent commissions were concerned to recognise the agency of those who suffered SGBV is reflected in a linguistic shift, through the use of the term 'survivor' rather than 'victim'. Some feminist scholars and activists deliberately use this term to recognise agency.[1609] For instance, the Eritrea Commission wrote:[1610]

> Prior, during, and after interviews with women and girls, the Commission highlighted the importance of their participation in its work, thereby contributing to the empowerment of survivors of sexual and gender-based violence through participation in the documenting/justice process. The Commission wishes to acknowledge the courage and strength of the Eritrean survivors who spoke in detail of the rapes they suffered.

The South Sudan Commission also used the term 'survivor' in relation to SGBV.[1611] This change in terminology is noticeable; most other commissions used the term 'survivor' to refer to those who escaped death.[1612] These developments have occurred along with increased recognition of gender issues at the UN generally[1613] and provision of gender expertise to UN atrocity inquiries.[1614] We see a development that commissions are giving more attention to SGBV while also gaining awareness of their own limitations in evaluating such violations.

While inquiry reports reveal increasing awareness of the different ways in which SGBV violates international law, there is some unevenness in commissions' investigative focus. Commissions which examined violations in the context of authoritarian regimes gave more attention to non-sexual gender-based violence as well as gendered dimensions of other violations. By contrast, investigations of conflict situations tended to focus on sexual violations involving physical violence. Fionnuala Ní Aoláin writes that focussing on sexual violence reinforces the "presumed extremity of certain harms (physical sexual for women) over other less documented violations (economic and equality based)."[1615] From this perspective, if commissions focus on sexual violence and overlook other gendered violence,

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[1607] *North Korea Report*, *supra* note 32, para. 17; *Eritrea First Report*, *supra* note 567, para. 52.
[1608] Ní Aoláin, *supra* note 1558, at 91. See Gardam, *supra* note 1558.
[1609] Anne-Marie de Brouwer, 'What the International Criminal Court Has Achieved and Can Achieve for Victims/Survivors of Sexual Violence', (2009) 16 *International Review of Victimology* 183-209, at 184.
[1610] *Eritrea Second Report*, *supra* note 569, para. 25.
[1611] *South Sudan First Report*, *supra* note 30, paras. 36, 39 and 71.
[1612] E.g., *CAR Report*, *supra* note 32, paras. 250, 313 and 366; *Syria Fourteenth Report*, *supra* note 982, paras. 45 and 59; *Libya Second Report*, *supra* note 853, para. 147. An exception is Syria Commission, *They Came to Destroy*, which uses the term 'survivors' in relation to SGBV: *supra* note 1602, paras. 114 and 117.
[1613] E.g., UN Sustainable Development Goal 5 (gender equality and women's empowerment); Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, SC Res. 1888 (2009); OHCHR, 'Human Rights Council holds annual discussion on the integration of a gender perspective in its work', 15 September 2014, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15037&LangID=E (accessed 1 May 2018).
[1614] E.g., HRC Res. 23/25, para. 17; *CAR Report*, *supra* note 32, para. 19; *HRC Burundi Mandate*, *supra* note 349, para. 25; *Myanmar Mandate*, *supra* note 2, para. 13.
[1615] Ní Aoláin, *supra* note 1558, at 90.

this can shape ideas of the types of harm experienced by women and imply that physical harm is more serious than socioeconomic harm.

4. Genocide

Several commissions examined whether atrocities amounted to genocide. According to the Genocide Convention, this international crime entails killing; causing serious bodily or mental harm; deliberately inflicting conditions of life calculated to bring about physical destruction; imposing measures intended to prevent births; or forcibly transferring children to another group, with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".[1616] This Section examines how commissions interpreted and applied pertinent facets of the prohibition of genocide, namely protected groups (4.1), special intent, or *dolus specialis* (4.2) and genocidal policy or a pattern of conduct (4.3). It then addresses possible reasons for the cautious approach taken by commissions in respect of findings of genocide (4.4).

4.1 Protected groups

The Genocide Convention requires that prohibited acts be committed against a "national, ethnical, racial or religious" group.[1617] The Rwanda Commission hinted at the possibility of subjective group identification when stating, "it is not necessary to presume or posit the existence of race or ethnicity itself as a scientifically objective fact."[1618] Later commissions endorsed the idea that protected groups may be subjectively identifiable.[1619] The Darfur Commission took a wider interpretation, citing ICTR's view that the Genocide Convention applied to "all stable and permanent groups".[1620] The Darfur Commission reasoned that this interpretation was well-accepted in international case law and state practice, so as to reflect custom. Schabas writes that this suggestion was "surely overstating the case",[1621] as such an approach was not supported at the ICTY or in subsequent ICTR case law. Moreover, it was not necessary to reach such a conclusion, as the Janjaweed subjectively considered the victims to belong to one of the enumerated groups.[1622]

Some commissions distinguished 'colloquial' or 'non-technical'[1623] understandings of genocide from the narrower legal concept and discussed the possibility of 'political' or 'cultural' genocide. The North Korea Commission and the CAR Commission considered that although it might be beneficial to include political groups, there was insufficient evidence that the customary prohibition had evolved to include such groups.[1624] The North Korea Commission found that extermination on political grounds and social class was beyond the

[1616] Genocide Convention, *supra* note 780, Art. 2; Rome Statute, *supra* note 1033, Art. 6.
[1617] *Ibid.*, Art. 2.
[1618] *Rwanda Final Report*, *supra* note 297, para. 159.
[1619] E.g., *They Came to Destroy*, *supra* note 1602, para. 104.
[1620] *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgement, 2 September 1998, paras. 511, 516 and 701-702, cited in *Darfur Report*, *supra* note 32, para. 498.
[1621] William Schabas, 'Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry's Findings on Genocide', (2006) 27(4) Cardozo L Rev 1703-1721, at 1712 [Schabas 2006].
[1622] Schabas 2006, *supra* note 1621, at 1713.
[1623] *They Came to Destroy*, *supra* note 1602, para. 13 and *North Korea Report*, *supra* note 32, para. 1158.
[1624] *They Came to Destroy*, *supra* note 1602, para. 13.

definition of genocide, but that such atrocities "[evoke] notions akin to 'genocide'"[1625] and "might be described as a 'politicide'."[1626] While sympathetic to the idea of expanding the definition of genocide, it was not considered necessary as atrocities could be characterised as crimes against humanity. Recalling this view, Michael Kirby explains:[1627]

> …[W]here international law was in a possible state of evolution (as in the availability of the international crime of genocide in cases of annihilation of a section of the population on grounds of political belief) the [North Korea Commission] held back from expressing a conclusion on the possible infringement of such a law. However, it did indicate its inclination in that respect. There was already so much material (and findings on so many human rights violations and crimes against humanity) that this approach of prudent restraint appeared to be appropriate.

The CAR Commission cited the North Korea Commission's view that it was not necessary to make findings of genocide, in light of its findings of crimes against humanity.[1628] The Darfur Commission aside, commissions exhibited caution when considering whether to expand protected groups beyond those specified in the Genocide Convention.

4.2 Dolus specialis

Commissions distinguished genocide from other species of international crimes by virtue of *dolus specialis*, namely "intent to destroy, in whole or in part" a protected group. According to the Darfur Commission, *dolus specialis* requires that "the perpetrator consciously desired the prohibited acts he committed"[1629] to result in the destruction of the group. Christine Byron writes that the reference to 'desire' "may confuse motive with intent".[1630] Other commissions distinguished intent from motive more clearly. In 1993, the Yugoslavia Commission reasoned that evidence that a defendant was aware of the consequences of his or her conduct could establish intent, but not necessarily motive.[1631] The Rwanda Commission similarly found, "the presence of political motive does not negate the intent to commit genocide if such intent is established in the first instance."[1632] The Syria Commission recognised that perpetrators with special intent "may also be fuelled by multiple other motives such as capture of territory, economic advantage, sexual gratification, and spreading terror."[1633]

When commissions appraised facts, they were rather cautious in identifying *dolus specialis*. The Cambodia Commission found that the Khmer Rouge committed genocide against minority ethnic groups and the Buddhist monkhood,[1634] but decide whether genocide was committed against the general population of Cambodia. While finding that the Khmer people constituted a 'national group', the Commission found that the question of whether genocide

[1625] *North Korea Report*, *supra* note 32, para. 1157.
[1626] *Ibid.*, para. 1158.
[1627] Kirby, *supra* note 97, at 8.
[1628] *CAR Report*, *supra* note 32, para. 460.
[1629] *Darfur Report*, *supra* note 32, para. 491.
[1630] Christine Byron, 'Comment on the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General', (2005) 5(2) Hum Rts L Rev 351-360, at 356.
[1631] *Yugoslavia Final Report*, *supra* note 39, para. 97.
[1632] *Rwanda Final Report*, *supra* note 297, para. 159.
[1633] *They Came to Destroy*, *supra* note 1602, para. 10.
[1634] *Cambodia Report*, *supra* note 324, para. 63.

was committed against them "turns on complex interpretive issues, especially concerning the Khmer Rouge's intent with respect to its non-minority-group victims", and reserved the question for a tribunal to consider, in the event that leaders were charged with genocide against the Khmer people.[1635] The CAR Commission considered whether atrocities by the *anti-balaka* against Muslims in amounted to genocide or alternatively as crimes against humanity of persecution and forcible population transfer.[1636] It assessed whether the *anti-balaka* "possessed the specific intent to destroy the Muslim community"[1637] as an element of genocide. The Commission considered that its 'reasonable grounds to believe' standard of proof was similar to that required to issue an ICC arrest warrant.[1638] While acknowledging that the ICC did not require genocidal intent to be the "only reasonable conclusion"[1639] to meet that threshold, the Commission considered that it should draw the conclusion with the greater evidentiary basis. It found insufficient evidence to establish that perpetrators acted with intent to destroy the targeted group.[1640] Boutruche observes that generally, fact-finding practitioners found it very difficult to gather information indicating *dolus specialis*.[1641]

4.3 Genocidal policy or pattern of conduct

Whether a genocidal 'policy' is a required element of genocide is controversial. The Yugoslavia Commission considered that ethnic cleansing, which it defined as a policy to violently remove another ethnic or religious group from certain geographic areas, could "fall within the meaning of the Genocide Convention".[1642] The Rwanda Commission suggested that a policy of systematic rape could amount to genocide.[1643] The Darfur Commission was the first to discuss the legal relevance of genocidal policy in detail, positing that such an element demonstrated *dolus specialis* on the part of governmental authorities.[1644] On the facts, the Commission found that the Sudanese Government's "policy of attacking, killing and forcibly displacing members of some tribes" did not indicate genocidal intent; rather, attacks were conducted in order to "drive the victims from their homes, primarily for purposes of counter-insurgency warfare"[1645] and "drive a particular group out of an area on persecutory and discriminatory grounds for political reasons."[1646] The Commission concluded that the Government had not committed genocide in Darfur due to the lack of a genocidal policy.[1647] The Commission cautioned that specific individuals might have had genocidal intent and be

[1635] *Ibid*., para. 65.
[1636] *CAR Report*, *supra* note 32, para. 453.
[1637] *Ibid*., para. 455.
[1638] *Ibid*., para. 456, citing Rome Statute, *supra* note 1033, Art. 58(1)(a).
[1639] *Ibid*., citing *Prosecutor v. Omar Al Bashir*, 'Decision on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir',' ICC-02/05-01/09OA, PTC I, 3 February 2010, para. 37.
[1640] *CAR Report*, *supra* note 32, para. 457.
[1641] Boutruche 2013, *supra* note 482, at 30.
[1642] *Yugoslavia Interim Report*, *supra* note 292, para. 56.
[1643] *Rwanda Final Report*, *supra* note 297, para. 145.
[1644] *Darfur Report*, *supra* note 32, para. 518.
[1645] *Ibid*., para. 518.
[1646] *Ibid*., para. 519.
[1647] *Ibid*., para. 522.

responsible for genocide on an individual basis,[1648] but that "it would be for a competent court to make such a determination on a case by case basis".[1649]

This aspect of the Darfur Commission's report provoked strong reactions in commentary.[1650] Nöelle Quénivet writes that the Commission gave the impression that it did not want to enter the fray with respect to whether Sudan was responsible for genocide, while seeming less reluctant in suggesting individual criminal responsibility. She surmises:[1651]

> To some extent, it is less dangerous for the [Darfur] Commission to declare that while some individuals may be held responsible for the crime of genocide, the State *per se* cannot be held accountable on the international level. The conclusion of the [Darfur] Commission is all the more disappointing as the group of experts had been commissioned to ascertain whether *inter alia* acts of genocide had occurred in Darfur.

By contrast, Schabas considers the Commission's affirmation of the centrality of a policy for the purposes of state responsibility as "helpful", as when instructing the Commission to investigate whether genocidal acts were committed, "the Security Council wanted to know whether genocide was being committed pursuant to a plan or policy of the State."[1652] Moreover, state responsibility for genocide must involve a policy: "Individuals have specific intent. States have policy. The term specific intent is used to describe the inquiry, but its real subject is State policy".[1653]

Other commissions have not discussed whether policy is a required element of state-sponsored genocide, nor engaged in much depth with the ICC's requirement that unless genocidal conduct could in itself destroy the targeted group, it must occur "in the context of a manifest pattern of similar conduct".[1654] The CAR Commission wrote that Rome Statute's definition of genocide reproduced that in the Genocide Convention[1655] and identified the 'manifest pattern' element, but did not discuss whether this was a new element or its relation to the idea of genocidal policy.[1656] Other commissions which cited Article 6 of the Rome Statute did not refer to the requirement for a manifest pattern.[1657] These elements remain rather unexplored in commissions' reports.

[1648] *Ibid.*, para. 520.
[1649] *Ibid.*, para. 520.
[1650] E.g., Ademola Abass, 'Proving State Responsibility for Genocide: The ICJ in *Bosnia v. Serbia* and the International Commission of Inquiry for Darfur', (2008) 31(871) Fordham Int'l LJ 871-910 and Andrew Loewenstein and Stephen Kostas, 'Divergent Approaches to Determining Responsibility for Genocide', (2007) 5 JICJ 839-858.
[1651] Noëlle Quénivet, 'The Report of the International Commission of Inquiry on Darfur: The Question of Genocide', (2006) *Human Rights Review* 39-68, at 52.
[1652] Schabas 2006, *supra* note 1621, at 1710.
[1653] William Schabas, 'State Policy as an Element of International Crimes', (2008) 98(3) J Crim L & Criminology 953-982, at 970.
[1654] *ICC Elements of Crimes*, Art. 6(a), para. 4.
[1655] *CAR Report*, *supra* note 32, para. 449.
[1656] *Ibid.*, para. 450.
[1657] E.g., *North Korea Report*, *supra* note 32, para. 1156 and *They Came to Destroy*, *supra* note 1602, para. 9.

4.4 Caution in making findings of genocide

Commissions generally assessed allegations of genocide with caution. It may be that the infamy of genocide as the 'crime of crimes' encouraged commissions to tread carefully.[1658] Such reservations are rarely found in inquiry reports, however, where crimes against humanity are acknowledged as potentially as serious and stigmatising as acts of genocide.[1659]

Some commentators suggest that some commissions' reticence to report findings of genocide in fact reflect policy considerations. The Sri Lanka Panel apparently chose not to report its finding that genocide had not occurred as "given the inflammatory nature of the issue, the practitioners figured that if the report mentioned genocide, no matter what the report said, the report was likely to be misinterpreted."[1660] The desire of the Security Council Inquiry on Burundi for a supportive relationship with the concerned state led it to revise its findings; after it "found both Tutsis and Hutus guilty of genocide, Burundi's Tutsi-led government opposed the release of the Commission's final report".[1661] The revised report found that the 1993 massacre of Tutsis amounted to genocide[1662] and that indiscriminate killings of Hutus was not stopped, but also not "centrally planned".[1663] A US official responsible for drafting the Commission's mandate opines that it "made a political decision that the government of Burundi had to approve the report" which led it to omit "any mention of Tutsis killing Hutus."[1664] It cannot be extrapolated that such considerations influenced all commissions, but these examples illustrate the special power that findings of genocide can carry.

Commissions have been criticized for avoiding issuing findings of genocide. Quénivet writes that the Darfur Commission's report gives the impression that it "did not wish to enter into the hot debate as to whether Sudan was, as a State, involved in the genocide",[1665] while also dodging the question of individual responsibility by stating that this was a question for a judicial body. Makane Mbengue and Brian McGarry are also critical of the Darfur Commission's refusal to make findings of individual responsibility, arguing that the terms of its mandate squarely put this question within its competence, and that:[1666]

> Passing the question of individual criminal responsibility to bodies such as the ICC may suggest an inherent structural weakness in quasi-judicial bodies *vis-à-vis* their conventional judicial counterparts. Therefore, despite the Commission's stated mandate 'to identify the perpetrators of such violations,' one may fairly wonder whether the UN Security Council's establishment of a commission of inquiry or other quasi-judicial body is, in fact, an appropriate response to an escalating humanitarian crisis.

[1658] Boutruche 2013, *supra* note 482, at 30. See Schabas 2006, *supra* note 1621, at 1717.
[1659] *CAR Report*, *supra* note 32, para. 78; *Darfur Report*, *supra* note 32, para. 506; *North Korea Report*, *supra* note 32, para. 1158 and *North Korea Report*, *supra* note 32, para. 1158.
[1660] Rob Grace, 'Communication and Report Drafting in Monitoring, Reporting, and Fact-finding Mechanisms', *HPCR Working Paper*, July 2014, at 50, available at http://ssrn.com/abstract=2462590 (accessed 1 May 2018), citing 'Interview conducted by the author on 5-1-2013 with Steven Ratner – Member, Secretary-General's Panel of Experts on Sri Lanka'.
[1661] Grace and Bruderlein, *supra* note 26, at 16-17.
[1662] *SC Burundi Report*, *supra* note 307, para. 483.
[1663] *Ibid*., para. 486.
[1664] Grace and Bruderlein, *supra* note 26, at 17, citing 'HPCR interview on 9/14/11 with Gregory Stanton, Mandate Drafter for the International Commission of Inquiry on Burundi'.
[1665] Quénivet, *supra* note 1651, at 52.
[1666] Mbengue and McGarry, *supra* note 775, at 457.

Whether commissions indeed consider genocide as the 'crime of crimes' or are concerned that audiences will perceive it as such, the upshot is that inquiry reports have taken a more cautious tone to assessing genocide than other violations.

5. Crimes Against Humanity

The final substantive legal area to be discussed is crimes against humanity. This Section discusses how commissions interpreted the contextual elements of this species of international crime (5.1) and qualified atrocities as crimes against humanity (5.2). Modes of liability and other elements of ICL are addressed in Chapter Six, which examines responsibility regimes.

5.1 Interpretation of contextual elements

Commissions agree that certain atrocities may amount to crimes against humanity when carried out in the context of a widespread or systematic attack against a civilian population.[1667] Commissions also considered other contextual elements, namely a nexus with armed conflict and that an attack be conducted pursuant to a state or organisational policy. Each is discussed in turn.

The question of whether crimes against humanity must have a nexus with armed conflict was raised from the IMT Charter's definition of crimes against humanity as committed "before or during the war".[1668] The Yugoslavia and Rwanda Commissions saw a nexus with armed conflict as necessary, writing that such crimes were "committed by persons demonstrably linked to a party to the conflict".[1669] The ICTY Statute reflects this view, providing that the ICTY may prosecute crimes against humanity "committed in armed conflict".[1670] However the ICTY subsequently ruled that a connection to armed conflict was not required, and that its statutory definition was narrower than the customary definition.[1671] Subsequently, commissions have affirmed that crimes against humanity may also occur in peacetime.[1672]

Commissions have taken different views as to whether attacks must be carried out pursuant to a state or organisational policy (commonly referred to as the 'policy requirement'), as stated in the Rome Statute.[1673] The Syria Commission cited the Rome Statute definition but omitted the policy element even though it found a state policy to commit violations on the facts.[1674] By contrast, the HRC's Burundi Commission discussed the ICC's interpretation of the policy requirement in detail and applied it to the facts.[1675] Commissions disagreed as to whether the policy requirement was part of the customary definition of crimes against humanity. The Eritrea Commission found that the policy requirement was implicitly part of the customary

[1667] E.g., *Cambodia Report*, *supra* note 324, para. 66(b); *Darfur Report*, *supra* note 32, para. 178 and *Sri Lanka Report*, *supra* note 29, para. 249.
[1668] IMT Charter, Art. 6(c) (emphasis added).
[1669] *Yugoslavia Interim Report*, *supra* note 292, para. 49; *Yugoslavia Final Report*, *supra* note 39, para. 75 and *Rwanda Final Report*, *supra* note 297, para. 135.
[1670] ICTY Statute, Art. 5.
[1671] *Tadić Interlocutory Appeal*, *supra* note 1294, para. 141.
[1672] E.g., *CAR Report*, *supra* note 32, para. 113; *Darfur Report*, *supra* note 32, para. 178; *Goldstone Report*, *supra* note 633, para. 293; *Cambodia Report*, *supra* note 324, para. 71; *Sri Lanka Report*, *supra* note 29, para. 250.
[1673] Rome Statute, *supra* note 1033, Art. 7(2)(a).
[1674] *Syria Third Report*, *supra* note 564, para. 57, Annex II, para. 16 and Annex V, para. 41.
[1675] *HRC Burundi Detailed Report*, *supra* note 405, paras. 675-678.

definition, "as it is difficult to conceive of international individual criminal liability for crimes that were random rather than organised."[1676] The Darfur Commission and Sri Lanka Panel considered that evidence of a policy or plan was relevant but unnecessary.[1677] The North Korea Commission took a hybrid approach, applying the "lowest common denominator"[1678] so that its findings would satisfy any definition and reasoned that the policy requirement ensured that crimes against humanity excluded "isolated or haphazard" atrocities.[1679] However, it did not conclude whether a policy was generally required, as it found a state policy on the facts.[1680]

Commissions also considered whether crimes against humanity were committed by members of armed groups. This gives rise to a question of the meaning of 'organisational' policy in the Rome Statute.[1681] In a split decision of an ICC Trial Chamber, two possible interpretations were identified. The broad approach of the majority included any group with "capability to perform acts which infringe on basic human values", regardless of the level of organisation,[1682] while Judge Hans-Peter Kaul in the minority would require that a group be "state-like".[1683] To adopt the minority view would narrow the scope of crimes against humanity. Commissions have not interpreted the meaning of 'organisational' policy, for various reasons. Some examined the conduct of states, so this issue was not material. Others ostensibly adopted the Rome Statute's definition but did not mention the policy requirement.[1684] Heller writes that the Libya Commission's omission of this requirement was "bizarre" as Bassiouni chaired the drafting committee which adopted the policy requirement, and that the omission was "anything but harmless… the policy requirement may limit the *thuwar*'s responsibility for crimes against humanity."[1685] Some commissions stated that atrocities were carried out in pursuit of a policy without discussing the meaning of this requirement.[1686]

5.2 Assessment of crimes against humanity

When assessing whether atrocities amounted to crimes against humanity, commissions first characterised violations as 'underlying acts' enumerated in the Rome Statute or the ICTY and ICTR Statutes.[1687] The Yugoslavia Commission did not identify underlying acts in its interim

[1676] *Eritrea Second Report*, *supra* note 569, para. 182.
[1677] *Darfur Report*, *supra* note 32, para. 179 and *Sri Lanka Report*, *supra* note 29, para. 250 and footnote 127.
[1678] *North Korea Report*, *supra* note 32, at 321, footnote 1541.
[1679] *Ibid*., footnote 1619, citing *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Decision on the Confirmation of Charges', ICC-01/04-01/07, PTC I, 30 September 2008, para. 396.
[1680] *North Korea Report*, *supra* note 32, at 321, footnote 1542.
[1681] E.g., Claus Kreß, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement. Some Reflections on the March 2010 ICC Kenya Decision', (2010) 23 LJIL 855.
[1682] *Situation in the Republic of Kenya*, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya', ICC-01/09-19, PTC III, 31 March 2010, para. 90 [*Kenya Investigation Decision*].
[1683] *Ibid*., 'Dissenting Opinion of Judge Kaul to the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya', para. 66.
[1684] E.g., *CAR Report*, *supra* note 32, para. 113; *Syria Third Report*, *supra* note 564, paras. 48-50; *supra* note 853, para. 25.
[1685] Heller, *supra* note 96, at 34.
[1686] E.g., *Syria Fourth Report*, *supra* note 1097, para. 109.
[1687] E.g., *Goldstone Report*, *supra* note 633, para. 294.

report, and in its final report cited acts in the ICTY Statute.[1688] Atrocities were characterised as crimes against humanity when underlying acts were carried out in a widespread or systematic way.[1689] Where contextual elements were not satisfied in situations of armed conflict, commissions tended to qualify atrocities as war crimes.[1690]

Commissions inferred the existence of a policy from evidence of coordination or patterns of attacks. For instance, the North Korea Commission found that "inhumane acts perpetrated in the DPRK's political prison camps occur on a large scale and follow a regular pattern giving rise to the inference that they form part of an overarching State policy."[1691] The Syria Commission found in respect of unlawful killings by Government forces, that the "coordination and active participation of Government institutions indicated the attacks were institutionalized and conducted as a matter of policy."[1692] The Guinea Commission considered that facts which supported the "systematic and widespread nature of the attack also support the conclusion that the attack should be deemed to have been committed pursuant to or in furtherance of a State or organizational policy".[1693] Where attacks were considered systematic, the 'policy requirement' was not an additional hurdle. Some commissions also recognised limits to their characterisations of crimes against humanity by indicating that only judicial bodies could enter definitive findings.[1694]

6. Cross-Cutting Analysis

The foregoing discussion demonstrated how commissions' legal analysis connected to their institutional features in relation to different bodies of law and types of violations. This Section conducts a cross-cutting analysis of commissions' interpretations and applications of international law. It discusses commissions' focus on incident-based violations (6.1), the certainty of their findings of violations (6.2) and the rigour of their legal analysis (6.3), and how these aspects are informed by commissions' roles and functions.

6.1 Focus on incident-based violations

Commissions tended to focus their legal analysis on incident-based violations involving specific victims and perpetrators rather than systemic or chronic harms. This tendency is reflected in commissions' focus on violations of civil and political rights, specific types of ESCR violations, and violations capable of being characterised as international crimes. Allison Corkery writes that fact-finding methods remain "predominantly legalistic and events-based" so that fact-finders are "poorly equipped to analyze the multidimensional factors and multitude of actors that create, perpetuate, or exacerbate chronic and entrenched violations."[1695] Eibe Reibel distinguishes micro and macro dimensions of ESCR: the micro-level concerns minimum core obligations to realize rights, while the macro-level "addresses

[1688] *Yugoslavia Final Report*, *supra* note 39, para. 81.
[1689] E.g., *CAR Report*, *supra* note 32, para. 195; *supra* note 853, paras. 63 and 536.
[1690] E.g., *Syria Third Report*, *supra* note 564, para. 89 and *Libya Second Report*, *supra* note 853, para. 64.
[1691] *North Korea Report*, *supra* note 32, para. 1062.
[1692] *Syria Sixth Report*, *supra* note 1126, para. 44.
[1693] *Guinea Report*, *supra* note 39, footnote 35.
[1694] E.g., *Sri Lanka Report*, *supra* note 29, paras. 51 and 260; *Goldstone Report*, *supra* note 633, para. 1335; *Guinea Report*, *supra* note 39, para. 180; *North Korea Report*, *supra* note 32, para. 1023.
[1695] Allison Corkery, 'Investigating Economic, Social and Cultural Rights Violations', in Alston and Knuckey, *supra* note 94, at 377-378.

the need for substantial system changes".[1696] Commissions tended to focus on micro dimensions of ESCR violations due to the practical difficulties in gathering information, carrying out systemic analysis and qualifying macro-level deficiencies as violations.

The functions of promoting accountability and encouraging compliance through naming and shaming invite a focus on violations involving identifiable victims and perpetrators. OHCHR observes that "[g]enerally, documenting a human rights violation involves gathering information to determine 'who did what to whom'."[1697] Reflecting on human rights fact-finding strategies, Kenneth Roth writes that to effectively shame a government into changing its behaviour:[1698]

> [C]larity is needed around three issues: violation, violator, and remedy. We must be able to show persuasively that a particular state of affairs amounts to a violation of human rights standards, that a particular violator is principally or significantly responsible, and that a widely accepted remedy for the violation exists. If any of these three elements is missing, our capacity to shame is greatly diminished. We tend to take these conditions for granted in the realm of civil and political rights because they usually coincide… In the realm of ESC rights, the three preconditions for effective shaming operate much more independently…

Such selectivity may unintentionally prioritize certain types of violations. Dustin Sharp cautions that if "direct victims and perpetrators occupy the foreground in most INGO reporting, broader or structural drivers of conflict and injustice tend to receive comparatively little emphasis",[1699] and that a focus on civil and political rights, "whether on the basis of self-imposed methodological restrictions or not, continues to have the effect of reifying historical hierarchies of rights".[1700] The accountability function also encourages a focus on violations that may be characterised as international crimes, which more readily translate to the international judicial context. Lars Waldorf suggests that ICL's emphasis on individual responsibility rather than structural causes might explain the lack of prosecutions for massive ESCR violations.[1701]

6.2 Level of certainty of findings of violations

Where a commission aims to provoke enforcement action, it may be less important for findings to have a high degree of certainty, in light of the expectation that further investigations will follow. For instance, the Darfur Commission justified its low standard of proof on the basis that the Commission "would obviously not make final judgments as to criminal guilt; rather, it would make an assessment of possible suspects that would pave the way for future investigations, and possible indictments, by a prosecutor."[1702] Mégret

[1696] Riedel, *supra* note 1411, at 445.
[1697] *Manual on Human Rights Monitoring*, *supra* note 1412, at 20.
[1698] Kenneth Roth, 'Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization', (2004) 26(1) HRQ 63-73, at 67-68.
[1699] Sharp, *supra* note 103, at 75.
[1700] *Ibid*., at 73.
[1701] Lars Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs', (2012) 21(2) *Social and Legal Studies* 171-186 at 173.
[1702] *Darfur Report*, *supra* note 32, para. 15 (citations omitted).

distinguishes facts needed for action from those needed for adjudication, and the dilemma for fact-finding:[1703]

> Facts needed for action are merely quasi-facts, facts as they can best be ascertained in the circumstances; there is a recognition that time is of the essence, that decisions cannot afford to wait for certainty. Facts as needed for adjudication are more in the manner of incontrovertible, demonstrable, or highly probable truth because of the negative consequences they portend for persons or institutions and because one does not have, unlike political action, the excuse that time is pressing. Human rights fact-finding, and therein lies some of its challenges, now more often than not identifies a dual space: providing facts both for the political decision-maker and potentially for the adjudicator.

Adding further complexity is the fact that commissions' findings of violations not only serve as stepping-stones for corrective action; they have also been cited by adjudicative bodies. For instance, the Gaza Flotilla Commission's finding of disproportionate use of force was cited in a dissenting opinion in a decision of the ICC PTC.[1704] The ECHR cited the Syria Commission's findings of serious violations of IHRL and IHL when assessing whether Russia would violate the principle of non-refoulement by forcibly returning the applicants to Syria.[1705] The Human Rights Committee cited the Cote d'Ivoire Commission's findings that the applicant suffered torture and that conditions of detention failed to meet human rights standards.[1706] Commissions' cognisance of the potential future use of their findings in judicial and adjudicative contexts may motivate them to devote resources towards reaching findings with a high degree of certitude. However, this may mean that commissions cannot communicate the full range or scope of violations, reducing the rhetoric impact of the report.

When making a case for corrective action and seeking to give a voice to victims, communicating the seriousness of violations may be prized over certainty. This is especially so where there is an urgent need for action to prevent violence; investigations are conducted under time pressure or with scarce resources; or where states refuse to cooperate. UN atrocity inquiries often operate under all three conditions. One strategy adopted by commissions in such cases is to find serious violations or patterns of atrocities on a qualified basis. Examples include the Goldstone Commission's findings reached on the basis of 'available information' and the Syria Commission's characterisation of complex events as massacres in violation of IHL and IHRL while noting the need for further investigations.

Commissions which made *prima facie* findings based on available information or drew adverse inferences were presented with a conundrum: concerned states could refuse to cooperate and then seek to benefit from criticizing the credibility of findings. There is no easy solution as to which approach a commission should choose. If broad or qualified findings are

[1703] Mégret 2016, *supra* note 460, at 43.

[1704] *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, 'Decision on Request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation: Partly Dissenting Opinion of Judge Peter Kovacs', ICC-01/13-34-Anx, PTC I, 16 July 2015, para. 38.

[1705] ECtHR, *L.M. and others v. Russia*, No. 40081/14, Judgment, 15 October 2015, paras. 76 and 113, citing *Syria Eighth Report*, *supra* note 983.

[1706] CCPR, *Traoré v. Ivory Coast*, UN Doc. CCPR/C/103/D/1759/2008, 31 October 2011, para. 3.4, citing *SC Côte d'Ivoire Report*, *supra* note 67.

subsequently shown to be incorrect, a commission's credibility may be diminished and its catalysing influence neutralised.[1707] However, as noted by the Gaza Commission, "[t]o empower noncooperating parties would be to defeat international fact-finding entirely."[1708] In assessing violations, therefore, commissions may face a trade-off between prioritising certainty at the cost of expressing the extent of harm; or making findings which command attention and demand action, whose credibility may be undermined. In practice, most commissions adopted the latter course of action, indicating a more advocatory rather than adjudicative approach which corresponds to functions of raising alert and provoking the mandating authority and other stakeholders to take corrective action.

6.3 Rigour of legal analysis

Commissions interpreted and applied international law with varying degrees of rigour. Some commissions discussed legal authorities at length before applying them to the facts, such as the Darfur Commission's examination of genocide. Yihdego argues that the Goldstone Commission's extensive legal analysis "raises the issue of whether the exercise was really fact-finding as opposed to 'law-finding'."[1709] Others, such as the HRC-led inquiry into Côte d'Ivoire, mentioned the applicable law very briefly and made findings of violations without discussing the content of legal norms.[1710] This Section discusses how the rigour of commissions' legal analysis corresponds to different roles and functions.

Rigorous legal reasoning may render a report less vulnerable to political challenge. Alston writes that the Darfur Commission's robust legal analysis galvanized "public opinion and inter-governmental action"[1711] and suggests that having to respond to a "carefully documented and powerfully argued analytical report"[1712] made it more difficult for the Security Council to avoid taking action. Van den Herik writes that in politically sensitive situations, commissions must "interpret and apply the law quite meticulously" and "such rigor adds to the authority of the report", which may "help to forestall, or at least de-legitimize, unilateral dismissal on legal grounds."[1713] Such an approach might also represent a degree of moral accountability where legal avenues for redress are unavailable for legal or political reasons.

Commissions exercised the most caution when interpreting elements of international crimes. With respect to genocide, they were hesitant to expand protected groups beyond those enumerated in the Genocide Convention and scrutinised the meaning of *dolus specialis*. More flexibility was shown in relation to the elements of crimes against humanity, but commissions still based their interpretations on a detailed analysis of legal authorities. Commissions' views were particularly diverse with respect to the policy requirement. As this element may be difficult to prove, commissions which omitted this requirement might reach findings of crimes against humanity more easily but may not satisfy the Rome Statute's definition. The North Korea Commission's decision to adopt stricter elements of crimes against humanity accepted

[1707] Zeray, *supra* note 96, at 48.
[1708] PoKempner, *supra* note 96, at 155.
[1709] Yihdego, *supra* note 96, at 47.
[1710] E.g., *HRC Côte d'Ivoire Report*, *supra* note 810, paras. 9-10 and 69-93.
[1711] Alston 2005, *supra* note 96, at 604.
[1712] *Ibid*., at 606.
[1713] Van den Herik, *supra* note 74, at 29.

the possibility of fewer findings of crimes in exchange for conclusions which would satisfy all definitions. This cautious approach could reduce the likelihood of inconsistent findings, should the DRRK come within the jurisdiction of an international court or tribunal. Such concerns may account for commissions' more conservative interpretations of elements of international crimes, in comparison with legal questions less likely to be adjudicated.

A commission aiming to promote a broad reach of human rights and IHL protections might adopt a more advocative approach rather than cleaving to settled legal authority. However, if legal analysis is perceived as beyond settled law, the authority of the report may be reduced. Hellestveit argues that the temptation to offer a progressive interpretation of international law in an inquiry report should be resisted, as it may interfere with the core objective of producing an authoritative report of facts upon which the international community can rely.[1714] For instance, the Libya Commission's view that IHL targeting rules might be displaced by the right to life is described by Kevin Heller as a "radical position".[1715] Marauhn writes that when commissions blur the lines between IHL and IHRL, they "not only put compliance with both bodies of law at risk by blurring the lines, but they also put their own credibility at risk."[1716] In the IHL context, principles of proportionality and precautions were not applied entirely consistently, such as by expressing the proportionality test as *ex post* rather than *ex-ante*, not identifying anticipated military advantage, or judging the effectiveness of warnings by whether they prompted evacuation. Concerned states may seek to undermine commissions' competence by pointing to such errors.[1717]

The rigour of a commission's legal analysis raises questions about its potential function of developing international law.[1718] Many scholars observe that commissions' legal analysis can be influential in practice.[1719] International courts and tribunals have been somewhat cognizant of inquiry reports as legal authorities. Legal interpretations of the Yugoslavia Commission were cited by *ad hoc* criminal tribunals[1720] and occasionally by regional human rights courts[1721] and the ICJ.[1722] Other inquiry reports were cited occasionally by the ICTR and the

[1714] Hellestveit, *supra* note 20, at 369.
[1715] Heller, *supra* note 96, at 27.
[1716] Marauhn, *supra* note 96, at 455.
[1717] E.g., Israel Ministry of Foreign Affairs, 'Israeli response to the UNHRC Commission of Inquiry', 22 June 2015, Point 3, available at http://mfa.gov.il/MFA/PressRoom/2015/Pages/Israeli-response-to-the-UNHRC-Commission-of-Inquiry-22-Jun-2015.aspx (accessed 1 May 2018).
[1718] Boutruche 2013, *supra* note 482, at 21.
[1719] Akande and Tonkin, *supra* note 777; Koutroulis, *supra* note 1730, at 613 and Frulli, *supra* note 102, at 1239; Grace and Coster van Voorhout, *supra* note 937, at 14; Boutruche 2013, *supra* note 482, at 21.
[1720] *Prosecutor v. Tadić*, IT-94-1-T, Trial Judgement, 7 May 1997, para. 638; *Prosecutor v. Jelisić*, IT-95-10, Trial Judgement, 14 December 1999, para. 55; *Prosecutor v. Martić*, IT-95-11-A, Appeals Judgement, 8 October 2008, para. 306; *Prosecutor v. Delalić and others*, IT-96-21-T, Trial Judgement, 16 November 1998, para. 90; *Prosecutor v. Strugar*, IT-01-42-T, Decision on Defence Motion Requesting Judgement of Acquittal pursuant to Rule 98 bis, 12 June 2004, para. 193 and *Prosecutor v. Prlić and others*, IT-04-74-T, Trial Judgement, 9 May 2013, para. 248; *Prosecutor v. Milutinović and others*, IT-99-37-PT, 'Decision on Motion Challenging Jurisdiction', 6 May 2003, para. 33 and *Prosecutor v. Brima and others*, SCSL-04-16-T, Trial Judgement, 20 June 2007, para. 692.
[1721] ECtHR, *Vasiliauskas v. Lithuania*, No. 35343/05, Judgment, Grand Chamber, 20 October 2015, para. 96 and IACHR, *Martí de Mejía v. Perú*, Case 10.970, Report No. 5/96, 1 March 1996, at 157.
[1722] *Bosnia Genocide Case*, *supra* note 1289, para. 190, citing *Yugoslavia Interim Report*, *supra* note 292.

ICC.[1723] Reviewing ICTY jurisprudence, David Re finds that UN fact-finding reports were "undoubtedly catalysts in developing [ICL], at least in facilitating investigations" but that reports "ultimately were probably more politically and historically important than judicially influential."[1724] Judicial expressions of commissions' legal authority are rather lukewarm.[1725] The ICTY Appeals Chamber described the authority of the Darfur Commission's report as "at best persuasive."[1726] In practice, judicial reliance has clustered around specific reports, reflecting the degree of judicial guidance available at the time. Darcy argues that commissions largely contributed to ICL when this field was still developing, and that future contributions will be "inconspicuous and inadvertent".[1727]

Scholars have engaged with inquiry reports that raise interesting or contentious issues of law and findings of violations.[1728] Commentary has converged around legal propositions not much addressed in judicial settings, such as state responsibility for genocide and human rights obligations of armed groups. Certain inquiry reports stimulated significant debate.[1729] Scholars engaged deeply with the legal analysis of commissions led by legal heavyweights such as Cherif Bassiouni, Philippe Kirsch and Antonio Cassese.

How is commissions' legal authority to be theorised? Some scholars argue that inquiry reports fall within the ambit of Article 38(1) of the ICJ Statute which reflects the classic theory of sources of international law. Vaios Koutroulis conceives of UN inquiry reports as "informed doctrine, due to the expertise of the missions' members".[1730] Darcy writes that commissions' reports can be considered subsidiary sources or should be analogised as such, as a hybrid of doctrine and jurisprudence.[1731] A formal account may alternatively rest on delegated state authority.[1732]

[1723] *Prosecutor v. Jean-Pierre Bemba Gombo*, 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute', ICC-01/05-01/08, PTC II, 15 June 2009, para. 431, citing *Yugoslavia Final Report*.

[1724] David Re, 'Fact-finding in the Former Yugoslavia: What the Courts Did', in Bergsmo, *supra* note 94, 279-323, at 286.

[1725] E.g., *Prosecutor v. Omar Al Bashir*, 'Second Decision on the Prosecution's Application for a Warrant of Arrest: Separate and Partly Dissenting Opinion of Judge Anita Ušacka', ICC-02/05-01/09, para. 6.

[1726] *Prosecutor v. Popović and others*, IT-05-88-A, Appeals Judgement, 30 January 2015, para. 464.

[1727] Darcy, *supra* note 101, at 256.

[1728] E.g., Schabas 2006, *supra* note 1621, Abass, *supra* note 1650, Clapham forthcoming, *supra* note 513, Henckaerts and Wiesener, *supra* note 1282, Yael Ronen, 'Human Rights Obligations of Territorial Non-State Actors', (2013) 46(1) Cornell Int'l LJ 21-50 and George Fletcher and Jens Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', (2005) 3 JICJ 539. For a formalist critique of this practice, see d'Aspremont, *supra* note 1387, at 133.

[1729] E.g., Alston 2005, *supra* note 96; Mbengue and McGarry, *supra* note 775 and William Schabas, 'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide', (2005) 18 LJIL 871-903, at 877, discussing the *Darfur Report*; Marauhn, *supra* note 96 and Rodenhäuser, *supra* note 1282 discussing reports of the Syria Commission; and Bell, *supra* note 1535, Falk, *supra* note 1007, PoKempner, *supra* note 96, Rosen, *supra* note 1490, Shany, *supra* note 1513 and Yihdego, *supra* note 96 discussing the *Goldstone Report*.

[1730] Vaios Koutroulis, 'The Prohibition of the Use of Force in Arbitrations and Fact-Finding Reports', in Marc Weller (ed.), *Oxford Handbook of the Use of Force in International Law* (Oxford: OUP, 2015) 605-626, at 612.

[1731] Darcy, *supra* note 101, at 234.

[1732] Kirby and Gopalan, *supra* note 60, at 236 and Ian Johnstone, 'Law-Making by International Organizations: Perspectives from IL/IR Theory', in Jeffrey Dunoff and Mark Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: CUP, 2013) 266-292, at 268.

Conversely, socio-legal scholars conceive of commissions as participants in the argumentative practice of international law.[1733] This practice is mediated through an 'interpretive community'[1734] where "the use of international law is part of a broader discursive process in which norms are invoked to explain, defend, justify and persuade."[1735] To exercise persuasive discursive power[1736] commissions must adhere to the disciplining rules of the interpretive community, including principles of legal interpretation. Ingo Venzke writes that actors contribute to the development of international law by exercising 'semantic authority', which is the "capacity to establish reference points for legal discourse that other actors can hardly escape".[1737] Sociological institutionalists similarly posit that ideas spread through the 'logic of arguing'[1738] but may also be propagated through "less cerebral processes, involving struggle, pressure, and trend-following."[1739] Hun Joon Kim argues that UN atrocity inquiries participate in norm diffusion as "[t]he process of comparing actions with standards to determine the appropriate response to norm violators feeds back into norm development by elaborating and entrenching the norm in question."[1740] Discursive approaches have also been adopted to explain the legal authority of other actors such as special rapporteurs[1741] and treaty bodies.[1742]

[1733] E.g., W. Michael Reisman, 'International Law-making: A Process of Communication', (1981) 75 Am Soc'y Int'l L Proc 101-120; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: OUP, 1995); José Alvarez, *International Organizations as Law-Makers* (Oxford: OUP, 2005) at 258; Martti Koskenniemi, 'Methodology of International Law', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2011) para. 1; Ian Johnstone, *The Power of Deliberation* (Oxford: OUP, 2011) at 14 and Jürgen Habermas, *Between Facts and Norms* (Cambridge: Polity Press, 1996) at 226.

[1734] Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1990); Harold Koh, 'How is International Human Rights Law Enforced?', (1999) 74(4) Ind LJ 1397-1417 and Michael Waibel, 'Interpretive Communities in International Law', in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (Oxford: OUP, 2015) 147-165.

[1735] Ian Johnstone, 'Security Council Deliberations: The Power of the Better Argument', (2003) 14(3) EJIL 437-480, at 439.

[1736] Sikkink, *supra* note 355, at 119.

[1737] Ingo Venzke, 'Semantic Authority, Legal Change and the Dynamics of International Law', (2015) 12 *No Foundations* 1 at 3 [Venzke 2015], citing Max Weber, *Economy and Society* (Oakland: University of California Press, 1978) at 36.

[1738] Hun Joon Kim and J. C. Sharman, 'Accounts and Accountability: Corruption, Human Rights, and Individual Accountability Norms', (2014) 68 *International Organization* 417-448, at 430. See Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change', (1998) 52(4) *International Organization* 887-917 and Kathryn Sikkink and Hun Joon Kim, 'The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations', (2013) 9 *Annual Review of Law and Social Science* 269-285.

[1739] Sikkink, *supra* note 355, at 261.

[1740] Hun Joon Kim, 'The Role of UN Commissions of Inquiry in Developing Global Human Rights: Prospects and Challenges', (2016) 14(2) *Korean Journal of International Studies* 241-264, at 252. See Susan Park, 'Theorizing Norm Diffusion Within International Organizations', (2006) 43(3) *International Politics* 342-361.

[1741] E.g., Christophe Golay, Claire Mahon and Ioana Cismas, 'The Impact of the UN Special Procedures on the Development and Implementation of Economic, Social and Cultural Rights', (2011) 15(2) *The International Journal of Human Rights* 299-318 and Tania Baldwin-Pask and Patrizia Scannella, 'The Unfinished Business of a Special Procedures System', in Bassiouni and Schabas, *supra* note 97, 419-478

[1742] E.g., Mechlem, *supra* note 1280; Nigel Rodley, 'The Role and Impact of Treaty Bodies', in Dinah Shelton (ed.), *Oxford Handbook of International Human Rights Law* (Oxford: OUP, 2013) 621-648; Birgit Schlutter, 'Aspects of Human Rights Interpretation by UN Treaty Bodies', in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies Law and Legitimacy* (Cambridge: CUP, 2012) 261-319 and Dinah Shelton, 'The Legal Status of Normative Pronouncements of Human Rights Treaty Bodies', in Holger Hestermeyer *et al* (eds), *Coexistence, Cooperation and Solidarity* (Leiden: Martinus Nijhoff, 2011) 553-575.

Where a commission adheres to conventions of legal interpretation, such as by identifying relevant legal authorities, applying principles of interpretation and providing detailed reasoning, its approach resembles that of courts and tribunals. Some scholars argue that commissions enjoy legal authority when they display 'quasi-judicial'[1743] or 'adjudicative'[1744] characteristics of producing "reasoned decisions in accordance with accepted legal principles".[1745] Such an approach is seen in commissions' detailed and cautious analyses of crimes against humanity and genocide, in respect of which coherence was sought with existing legal authorities. Commissions' role as a type of legal authority may also be linked to commissioners' identities as esteemed judges, as was the case for the inquiries into Darfur, Libya and North Korea. Authority could be linked both to commissioners' personal standing and the influence of their experience on the bench for their legal analysis and reporting.

By contrast, 'progressive' interpretations which depart from settled legal authority or pronounce upon novel legal questions reflect an outlook of advocacy as commissions seek to move international law in a particular direction. Examples include 'humanized' interpretations of IHL, such as the Libya Commission's view that IHRL may modify targeting rules, and the Goldstone Commission's view that compliance with the principle of precautions should be assessed by reference to a due diligence standard. Russell Buchan argues that where a commission adopts a progressive interpretation, it should be "substantiated by clear legal reasoning and justified in light of previous decisions in alternative adjudicatory forums."[1746] Darcy argues that "an overly creative approach which seeks to progress the law's development"[1747] could undermine the quality of commissions' legal analysis and reduce their credibility. James Devaney argues that the Syria Commission's 'progressive' interpretation of human rights obligations of armed groups could be seen as "attempting to extend the law to apply it to entities it was not intended to, and most crucially, to be doing so in a way that lacks rigor and legal justification"[1748] and cautions that it might undermine the report's legitimacy. If a commission's interpretation departs from settled authority, it may produce a smaller 'normative ripple',[1749] although its findings of violations may still build momentum for corrective action. In short, whether and how commissions may contribute to the incremental development of international law is shaped by their advocatory or adjudicative approach.

Conclusions

Commissions have interpreted and applied a wide array of international legal norms. Some legal areas, such as violations of economic, social and political rights and gender-based violence, have not been much adjudicated for several reasons, including practical challenges in building and bringing a case in respect of such violations, considerations of litigation strategy and cultural biases and assumptions. The inquiry context represents a dynamic new environment in which such norms can be affirmed, their content elaborated, and their

[1743] Darcy, *supra* note 101, at 234; Buchan 2014, *supra* note 372, at 481.
[1744] Henderson 2014, *supra* note 100, at 294.
[1745] Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: OUP, 2007) at 301. See Koutroulis, *supra* note 1730, at 612.
[1746] Buchan 2017, *supra* note 101, at 282.
[1747] Darcy, *supra* note 101, at 256.
[1748] Devaney, *supra* note 1283, at 13.
[1749] Alvarez, *supra* note 1733, at 122.

violation censured. Commissions also assessed commonly adjudicated legal norms, including violations of civil and political rights, IHL violations amounting to war crimes and other species of international crimes. In respect of such norms, commissions add their voices to the existing cacophony, and their legal analysis is more likely to catalyse corrective action than to develop international law.

Through the interpretation and application of legal norms, commissions tilt most directly away from politics and towards the realm of law. Classifying atrocities as violations channels follow-up action towards legal institutions and processes.[1750] Yet there are also pragmatic aspects of this turn to international law. At a basic level, the invocation of international law has strategic value. Classifying atrocities as violations appeals to the "symbolic power"[1751] of international law. Van den Herik observes that commissions use the language of international law "in a quest to make the facts more objective and to create political effects."[1752] Hellestveit sees their primary objective as to "move issues at the international level, influencing political processes", [1753] and Richard Falk writes that the Goldstone Commission's findings of violations were "influential with respect to world public opinion and help to mobilize solidarity initiatives in civil society".[1754]

Van den Herik observes that commissions "aim to stir, to evoke action, to opine and to condemn."[1755] These different functions call for different approaches to international law. A more adjudicative approach which borrows from judicial pedigree may be perceived as highly authoritative. Such an approach may boost the authority of findings and ward off critiques of unreliability or bias. In exchange, findings of violations may be truncated and not fully convey the scale or gravity of suspected atrocities. By contrast, from an advocatory perspective, *prima facie* findings of violations make a case for action but are vulnerable to rebuttal and channel attention towards violations which are more obviously justiciable. While plainly progressive legal interpretations may be deemed *de lege ferenda*, commissions may yet contribute to a groundswell in legal discourse with repercussions for normative development. These choices and tensions arising therefrom reflect the fact that commissions are poised between outlooks of advocacy and adjudication, suspended in a normative twilight zone between the realms of international law and politics.

[1750] See Chapter Two, Section 6.1.
[1751] Ingo Venzke, *How Interpretation Makes International Law* (Oxford: OUP, 2012) at 59.
[1752] Van den Herik, *supra* note 74, at 30.
[1753] Hellestveit, *supra* note 20, at 369.
[1754] Falk, *supra* note 1007, at 85.
[1755] Van den Herik, *supra* note 74, at 30.