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Navigating between principle and pragmatism : the roles and functions of atrocity-related United Nations Commissions of Inquiry in the international legal order

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CONCLUSIONS

The recent proliferation of UN atrocity inquiries has given rise to new questions regarding their identity in the international legal order. This Conclusion summarises the main findings of each Chapter and offers some overarching reflections as to the contemporary and future place of UN atrocity inquiries in the international legal order.

Summary of Findings

The Introduction set the research agenda and delineated UN atrocity inquiries as the subjects of research. While inquiries into situations of atrocities have been established in different settings, the UN context is special for two reasons. First, the UN has established the majority of international atrocity inquiries, giving rise to a degree of institutional consistency amidst the *ad hoc*-ery generally associated with such bodies. Secondly, the UN represents a forum and conduit for collective action on the part of the international community.

Chapter One situated UN atrocity inquiries within larger institutional and historical contexts. It traversed the history of international atrocity inquiries established between states, by international and regional organisations, and in the field of IHL. This Chapter then identified different periods in UN history and linked the rise of UN atrocity inquiries with geopolitical seismic shifts and new conceptual and institutional linkages between the fields of development, security, and human rights.

Chapter Two demonstrated how the institutional characteristics and choices of UN mandating authorities shaped the roles and functions of UN atrocity inquiries. It described how the Security Council, Secretary-General, General Assembly, and HRC acted as inquiry architects, sketching commissions' broad scope and aesthetics. The varied powers and purposes of these mandating authorities produced different degrees of consent and cooperation by concerned states. The HRC has emerged as the most prolific mandating authority and also the most politically polarizing. Written mandates giving rise to apprehensions of bias or predetermination set commissions at a significant disadvantage, as they were perceived as an instrument of the mandating authority. The turn towards international law in inquiry can be traced to the terms of written mandates which requested commissions to characterise facts on the basis of international law. Juridified inquiry was further emphasized through the practice of appointing international legal experts as commissioners. Mandating authorities also shaped commissions' roles and functions through operational aspects such as resourcing and time limits, but most operational aspects of inquiry were entrusted to commissions. These practices give rise to several tensions for the roles and functions of inquiry. Mandating authorities, especially those with power to take binding enforcement action, expressed concern about accountability while retaining discretion to act. Inquiries built pressure against those violating international law while releasing pressure directed at mandating authorities to act. There is also some disparity on the part of mandating authorities in bestowing upon commissions a function of ensuring accountability when their powers and operational capacities do not allow them to carry out corrective follow-up action directly. This invites critiques that the decision

to establish an inquiry in the absence of further follow-up action reflects subtle *realpolitik* at work.

Chapter Three examined how commissions acted as engineers of their mandates by interpreting and implementing the mandating authority's broad plan with an eye to feasibility and practicality. It discussed how commissions interpreted their mandates in an effort to reinforce their impartiality and ensure that mandates were of appropriate scope. Commissions' design of their working methods reflected a desire to carry out impartial and credible investigations in light of constraints posed by time, resources, and security concerns. Information gathering and assessment practices were also guided by key principles, such as the centrality of victims and accountability. Where states refused to cooperate, commissions found innovative ways to gather information so as not to frustrate their mandates. They responded to concerns of methodological *ad hoc*-ery by adopting best practices. The emergence of common standards and procedures invites the idea that inquiries occupy a unique institutional space.

Chapter Four discussed how commissions' roles and functions shaped their identification of the applicable legal framework and the substantive applicability of fields of law to the situation and actors under examination. Where denunciation and stimulation of enforcement action lay at the heart of the mandate, there was a strong emphasis on assessing atrocities on the basis of international law. By contrast, where de-escalation of tensions was the underlying purpose, legal assessment was depicted as less important and even as unhelpful. Within the former approach, commissions interpreted the legal lenses of their mandates broadly to include other legal fields deemed as relevant. Commissions drew links between these fields, giving the impression of a mutually reinforcing normative framework. Their interpretations of the substantive applicability of legal fields reflected their roles and functions as well as wider principles such as even-handedness in investigations.

Chapter Five thematically assessed commissions' approaches to interpretation and application of international law in light of their roles and functions. Commissions promoted an expansive reach of human rights and fundamental freedoms but also demonstrated a concern to remain within the bounds of accepted law. Commissions' approaches to making findings of violations revealed that different emphases were placed on the value of certainty or rhetorical impact. *Prima facie* findings of patterns of serious violations made a case for action but were vulnerable to rebuttal. Conversely, more circumspect findings with a high degree of certainty might form an authoritative narrative, but arguably did not fully convey the gravity of atrocities. These choices reflect the idea that commissions straddle advocatory and adjudicative approaches to legal interpretation and application. Whether commissions' legal pronouncements have the capacity to play a jurisgenerative role, or whether they are simply discourse *about* international law, depends on one's conception of international law more generally.

Chapter Six took a closer look at commissions' roles and functions with respect to ensuring accountability for violations of international law. It found that while commissions examined responsibilities of different actors, there was an emphasis on those of states and individuals. Commissions engaged with the ICL framework in a selective and strategic way, to promote

and complement criminal proceedings. Commissions recommended a range of corrective measures to give effect to the rights to the truth, justice and remedies. They also identified intermediate steps to monitor and report upon implementation, so as to maintain pressure after their mandates had come to an end. The Chapter also discussed commissions' roles with respect to legal, moral and political dimensions of accountability. Commissions acted as precursors or catalysts for international judicial proceedings, and more rarely, as outsourced criminal investigations. Where prosecutions did take place, a commission could complement the narrow focus of a trial by providing a broader account of the history, causes and contributing factors in a situation of atrocities. Where legal accountability was unlikely, a commission's role as an arbiter of moral judgement was brought to the fore. Inquiry reports also had an expressive function in affirming the rule of law. A strong legal focus does not fully insulate commissions from global politics, since international law is itself shaped by political forces and commissions are established by and report to political actors. Nonetheless, when commissions affirm the rule of law and raise expectations for corrective action, they condition that political context.

Reflections on Roles and Functions of Contemporary Inquiry

The turn to international law in most UN atrocity inquiries has fundamentally shaped their functional and relational identities in the international legal order. Commissions seeking to promote accountability for violations and the rule of law are associated with functions of truth-seeking, giving a voice to victims, condemning violations, raising alert, inducing compliance and provoking corrective follow-up action. Such commissions perform triage accountability assessments, bring situations to the attention of the international community and justify the engagement of international criminal justice. Such commissions represent a "sequential model" [2184] of international criminal justice, commencing with non-judicial evidence collection and followed by criminal trials. In practice, uneven implementation has engendered critiques that inquiries often serve as placeholders rather than as precursors for accountability.

More pragmatically, commissions also act as 'safety valves', as originally proposed by Martens at the 1899 Peace Conference, to slow down and guide stakeholders' responses in situations of concern. Additionally, the example of the Palmer Commission shows that an atrocity inquiry may function to deescalate tensions and resolve diplomatic ruptures rather than to condemn violations and trigger legal enforcement. The Palmer Commission acted as a neutral third party rather than a moral authority and emphasised diplomatic channels and policy considerations. The institution of inquiry thus remains flexible and may be established in pursuit of lofty legal principles as well as more pragmatic goals.

Commissions' interpretations and operationalisations of their mandates also reflect principled and pragmatic considerations, as informed by their roles and functions. Where the impartiality of an inquiry has been compromised by the mandating authority, commissions adopt a highly principled approach to mandate interpretation in an effort to insulate their work from the

[2184] Caroline Fehl and Eliška Mocková, 'Chasing Justice for Syria: Roadblocks and detours on the path to accountability,' *PRIF Spotlight 5/2017*, September 2017, available at http://www.hsfk.de/fileadmin/HSFK/hsfk_publikationen/Spotlight0517.pdf (accessed 1 May 2018).

politicised circumstances of their establishment. Yet in carrying out fact-finding, commissions facing non-cooperation by concerned states often find pragmatic workarounds to fact-finding challenges to prevent the frustration of their mandates. Commissions seeking to give a voice to victims and raise alert often adopt a victim-oriented perspective, enter more expansive findings with a lower degree of certainty, and adopt a more flexible legal approach. By contrast, commissions aiming to support prosecutions have taken a more cautious and technical approach to findings of fact and law. A more conservative approach may also neutralise accusations that commissions reproduce bias in their mandating authorities.

Commissions' engagement with international law places them firmly on the map of international legal discourse and arguably renders them participants in the argumentative practice of international law. Yet to analogise inquiry with adjudication would overlook central political dimensions to their work. The decision to establish an inquiry reflects a commitment to legal principle as well as institutional pragmatism. When using the language of international law, commissions make a case for principled action, but also display selective engagement with legal frameworks in light of practical realities. In addition, the informality of inquiry means that commissions are not restricted by judicial traditions of legal reasoning, nor are there binding consequences for implicated actors. Commissions are in this sense well-placed to propose innovative interpretations of legal norms and to draw attention to violations that have not received much attention in judicial settings. In this sense, commissions have roles as norm entrepreneurs and as norm amplifiers.

Back to the Future

Looking to the future of UN atrocity inquiries, some current trends suggest that their roles and functions may circle back to the essential task of finding facts. As new communicative technologies gain in popularity, information concerning situations of atrocities is increasingly acquired and shared through informal networks and communities. Initiatives such as *Bellingcat* use information from open sources and social media networks to investigate a variety of subjects, including situations of atrocities.[2185] International criminal proceedings have already evolved in response to the availability of digital and technologically derived evidence and the challenges of veracity posed by these information sources.[2186] Future commissions are also likely to have access to a huge amount of digital information and be confronted by issues of the chain of custody, authentication and reliability of open-source information, compounded by challenges of technical expertise and resources.[2187] The risks faced by those collecting information, and the protection of safety and privacy of victims and witnesses who may be identified on the basis of that information, are further concerns.

[2185] Bellingcat, 'About', http://www.bellingcat.com/about (accessed 9 June 2018).

[2186] International Bar Association, *Evidence Matters in ICC Trials*, August 2016, available at http://www.ibanet.org/Document/Default.aspx?DocumentUid=864b7fc6-0e93-4b2b-a63c-d22fbab6f3d6 (accessed 10 June 2018) and Lindsay Freeman, 'Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials', (2018) 41(2) Fordham Int'l LJ 283-336.

[2187] Jay Aronson, 'Mobile Phones, Social Media and Big Data in Human Rights Fact-Finding', in Alston and Knuckey, *supra* note 94, at 441-461. For an example of verification techniques, see Syrian Archive, 'Methodology', available at http://syrianarchive.org/en/tools_methods/methodology (accessed 15 June 2018).

The democratization of fact-finding also raises new questions regarding our understanding of facts and the truth-seeking function of UN atrocity inquiries. In addition to acting as a tool for mobilizing and empowering communities, 'bottom-up' fact-finding strategies can disrupt traditional hierarchies of knowledge production.[2188] The recent attacks against 'fake news', which refers both to deliberate misinformation and a pretext for undermining genuine journalism, gives rise to new challenges for the credibility of public information. In this context, commissions' function of producing authoritative narratives of events may become more pronounced. However, the associated phenomenon of 'post-truth'[2189] politics has seen a shift in the role of information in shaping public opinion and governmental policies. Impartial inquiry could counter such political strategies, but conversely this trend might weaken the extent of commissions' influence, at least in certain political contexts beyond the UN.[2190]

We may also see a shift in emphasis away from the role of inquiry in facilitating criminal accountability. In recent years the UN has established non-judicial investigative mechanisms to facilitate criminal proceedings, such as the IIIM in respect of Syria and the Security Council's investigative team in Iraq.[2191] In March 2018, several states called for a mechanism similar to the IIIM to be established in respect of Myanmar.[2192] Though such entities remain rare, commentators identify a trend towards their establishment: the IIIM has been hailed as "the crystallization of a new approach to international criminal justice and an enhanced role of the General Assembly in the area of accountability".[2193] As the establishment of such mechanisms marks a concrete commitment to criminal accountability and involves significant resources, commissions may be established to conduct reconnaissance, with their findings of crimes informing the decision to establish a formal investigative mechanism.

While mandating authorities might prefer to establish a criminal investigative mechanism instead of an inquiry in certain situations, it is unlikely that commissions will be entirely displaced. Such mechanisms lack the flexibility, breadth and essential publicness of inquiry. Their chief aim is not to issue public findings but rather to feed into judicial processes. A large part of their work must remain confidential to facilitate investigations and protect the

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[2188] Molly Land, 'Democratizing Human Rights Fact-Finding', in Alston and Knuckey, *supra* note 94, at 399-424.

[2189] 'Post-truth' (adj.) is defined as "[r]elating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief": Oxford English Dictionary, 'Post-truth', available at http://en.oxforddictionaries.com/definition/post-truth (accessed 10 June 2018).

[2190] A pertinent example is the omission of any mention of the human rights situation in North Korea at a diplomatic summit between the United States and North Korea on 12 June 2018: Human Rights Watch, 'The Singapore Summit's Failure on North Korean Human Rights', 13 June 2018, available at http://www.hrw.org/news/2018/06/13/singapore-summits-failure-north-korean-human-rights (accessed 15 June 2018).

[2191] See Chapter Two, Section 4.2.2 and Chapter Two, Section 4.2.4.

[2192] Statement by H.E. Ambassador Veronika Bard, 'Interactive Dialogue on Myanmar – Sweden', 37th Session of the Human Rights Council, 11 March 2018, available at https://www.swedenabroad.se/en/embassies/un-geneva/current/news/interactive-dialogue-on-myanmar---sweden (accessed 10 June 2018) and Canada, *"Tell them we're human" What Canada and the world can do about the Rohingya crisis: Report of the Prime Minister's Special Envoy, the Honourable Bob Rae*, 2018, available at http://international.gc.ca/world-monde/assets/pdfs/rohingya_crisis_eng.pdf (accessed 10 June 2018).

[2193] Christian Wenaweser and James Cockayne, 'Justice for Syria? The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice', (2017) 15(2) JICJ 211-230, at 229.

integrity of the trial process. They are ill-equipped to inform policy, provide a contextual account of a situation of atrocities, raise alert or express condemnation of violations. As these functions remain important in the UN context, inquiry can complement the work of criminal investigative mechanisms.

UN atrocity inquiries are not likely to be rendered obsolete by the emergence of new information technologies or investigative mechanisms. However, their roles and functions may evolve in response to the changing fact-finding landscape. In this context, the original function of finding facts may be revitalized and complement the narrow focus of criminal mechanisms. In turn, the equilibrium to be struck between principle and pragmatism may also shift. Should commissions focus less on analysing international crimes and more on constructing contextual narratives of events and indicating the range and extent of atrocities, they might take a more pragmatic approach to information-gathering and assessment without undermining their authority. If space is retained for diplomatic and policy-based responses, we might also see an expansion in the types of situations under scrutiny, such as interstate conflicts or uses of force. However, as findings of atrocities imply the need for corrective action whether expressly classified as violations or not, they will continue to draw the attention of actors in the international justice space. Ultimately, the flexibility of UN atrocity inquiries and their positioning between the realms of law and politics means that they will continue to occupy a liminal place in the international legal order.