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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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SUMMARY

The United Nations plays an important role in preventing and responding to situations of mass atrocities. The UN system provides for many strategies to address such situations, including fact-finding. Fact-finding may take different forms, including international commissions of inquiry. These bodies are established on the international legal plane, conduct *ad hoc* fact-finding, are impartial and independent, and issue non-binding reports and recommendations. The UN has established at least thirty atrocity-related inquiries, which are frequently mandated to investigate suspected violations of international law, identify those responsible for violations, and make recommendations. Their reports inform their mandating authorities and can feed into broader processes of justice and accountability. UN atrocity inquiries resemble judicial processes in some respects, while remaining non-legal in others.

The proliferation of UN atrocity inquiries during the past twenty-five years, in concert with their mandates to examine violations of international law, gives rise to new questions as to their identity in the international legal order. The thesis explores two elements of identity: functional and relational. Functional identity (functions) refers to the ends to be attained by UN atrocity inquiries, while relational identity (roles) refers to commissions' place vis-à-vis other institutions. These concepts illuminate the unique institutional space in which commissions are situated. In determining the roles and functions, and thus the identity of UN atrocity inquiries, the thesis interrogates their turn to international law (juridification) and their navigation of considerations of principle (the legal) and pragmatism (the political).

To set the scene, Chapter One contextualises UN practice through a historical and institutional taxonomy of international inquiries into situations of atrocities. The earliest inquiries were established pursuant to *ad hoc* interstate agreements. States established international humanitarian law (IHL) inquiry procedures but did not use them much in practice. Regional organisations have established a few inquiries. By contrast, the UN has a rich practice of establishing atrocity inquiries, particularly from 1992 onwards, where the Yugoslavia Commission represented a 'watershed moment'. This period also marked greater recognition of the links between the realms of development, security and human rights, and the revitalisation of international criminal law. The features of these different inquiries were inexorably shaped by wider institutional and political dynamics.

The roles and functions of UN atrocity inquiries are informed by the institutional dynamics and choices of their mandating authorities, namely the Security Council, Secretary-General, General Assembly, and Human Rights Council. Chapter Two explores how UN mandating authorities act as 'architects' by sketching out the aesthetics and conceptual plan of inquiries through their mandates. The varied powers and purposes of mandating authorities produce differences in state consent and cooperation. The HRC is currently the most prolific mandating authority and also the most politically polarizing. Mandates giving rise to apprehensions of bias set commissions at a disadvantage, as they are perceived as politicised instruments of their mandating authorities. The juridification of inquiry is linked to mandates requesting commissions to establish the facts of atrocities on the basis of international law. Juridified inquiry is further emphasized by appointing international legal experts as

commissioners. Mandating authorities also shape operational aspects of inquiry such as resourcing and time limits. Mandating authorities' practices give rise to several tensions. They express concern about situations while retaining discretion, so that commissions build pressure against those violating international law while releasing pressure directed at mandating authorities to act. There is also some disparity in bestowing an accountability function upon bodies whose powers and operational capacities prevent them from carrying out corrective follow-up action.

If mandating authorities are the architects of inquiries, commissions are the 'engineers', executing the mandating authority's plan with an eye to practicality. Chapter Three describes how commissions' roles and functions inform the interpretation and implementation of their mandates. Commissions generally interpret their mandates in an effort to reinforce impartiality and ensure that mandates are of appropriate scope. Commissions' design of their working methods reflects 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 are also guided by key principles such as the centrality of victims and accountability. Where states refuse to cooperate, commissions find innovative ways to gather information to avoid frustrating their mandates. Such pragmatic approaches can lead to trade-offs with respect to the authoritativeness of findings.

Commissions are often instructed to examine violations of international law, which involves norm-to-fact application. A first step in this process is the identification of the applicable international legal framework. Chapter Four discusses how commissions' roles and functions shape the identification of the applicable law and the substantive applicability of legal fields to the situation and actors under examination. Where accountability is at the heart of the mandate, there is a strong emphasis on assessing atrocities on the basis of international law. Where the aim is to de-escalate tensions, legal assessment is less crucial. Within the former approach, commissions interpret the legal lenses of their mandates broadly to include other fields deemed relevant. They draw links between fields, giving the impression of a mutually reinforcing normative framework. Commissions' interpretations of the substantive applicability of legal fields reflect their roles and functions and principles such as even-handedness in investigations.

Chapter Five discusses how commissions' engagement with substantive international law is shaped by their roles and functions. A thematic comparative analysis is conducted of commissions' interpretations and applications of substantive legal issues, namely economic, social and cultural rights, IHL principles and the right to life, sexual and gender-based violence, genocide and crimes against humanity. Cross-cutting issues are then discussed. Commissions promote an expansive reach of human rights norms while seeking to remain within the bounds of accepted law. Their findings of violations reveal differing emphases on certainty or rhetorical impact, reflecting the idea that commissions straddle advocacy and adjudicative approaches. Whether commissions' legal pronouncements can play a law-making role or are simply discourse *about* international law depends on one's conception of international law more generally.

In light of the recurrent emphasis on ‘accountability’ for violations in inquiry mandates and reports, Chapter Six takes a closer look at commissions’ roles and functions with respect to this concept. While commissions examine responsibilities of different actors, there is an emphasis on states and individuals. They engage with international criminal law in a selective and strategic way, and recommend a range of corrective measures to give effect to the rights to truth, justice and remedies. Commissions also identify intermediate steps to promote implementation of their recommendations. Different roles with respect to legal, moral and political dimensions of accountability are visible. Commissions can act as catalysts for international judicial proceedings, and more rarely, as outsourced criminal investigations. Commissions may also act as arbiters of moral judgement and have an expressive function in affirming the rule of law. While a strong legal focus does not fully insulate commissions from global politics, they can condition that political context.

In conclusion, UN atrocity inquiries continuously navigate between realms of law and politics, with the equilibrium shifting in different moments and contexts. The turn to international law has fundamentally shaped their identity in the international legal order. Commissions seeking to promote accountability 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. In practice, uneven implementation has engendered critiques that inquiries are placeholders for action rather than force-multipliers for accountability. Commissions may also act as ‘safety valves’, deescalate tensions and resolve diplomatic ruptures. The informality of inquiry means that commissions are not restricted by judicial traditions, nor are there binding consequences for implicated actors. Commissions are well-placed to propose innovative legal interpretations and draw attention to violations that have not received much attention in judicial settings. The decision to establish an inquiry reflects a commitment to legal principle as well as institutional pragmatism.

Looking to the future of UN atrocity inquiries, some current trends suggest that they may circle back to the essential task of finding facts. Emerging communicative technologies and the increasingly digital nature of information give rise to new issues around the authentication and veracity of information and the need for technical expertise. The democratization of fact-finding and the rise of ‘post-truth’ politics raise further questions regarding our understanding of facts and the role of public information. We may also see a shift away from the role of inquiry to facilitate criminal accountability in light of the recent establishment of UN mechanisms specifically for this purpose. Inquiry can complement the work of such bodies by informing policy, providing a contextual account of a situation and condemning violations. In short, UN atrocity inquiries are not likely to be rendered obsolete. Their roles and functions may instead evolve in response to the changing fact-finding landscape, with the equilibrium between principle and pragmatism also shifting. The flexibility of UN atrocity inquiries, and their positioning between realms of law and politics, means that they will continue to occupy a liminal space in the international legal order.