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## **International Commissions of Inquiry in a Networked World: Unveiling the Roles of Diasporas through an Eritrean Case Study**

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# International Commissions of Inquiry in a Networked World: Unveiling the Roles of Diasporas through an Eritrean Case Study

Larissa van den Herik\* and Mirjam van Reisen†

## ABSTRACT

International Commissions of Inquiry (COIs) have become important components of the human rights fact-finding, accountability and transitional justice architecture. The core task of COIs is to investigate international crises and construe what happened on the ground. The increasing tendency of states under scrutiny to refuse territorial access frustrates COI performance. It leaves COIs with no option but to operate from outside the state. COIs have developed various strategies to overcome the impediment of the uncooperative state, including the use of satellite imagery, conducting extraterritorial public hearings, interviewing individuals in the territory through Skype and other media as well as collecting accounts from individuals in the diaspora. This article focuses on the engagement of COIs with the diaspora. It presents diasporas as actors that may have considerable significance for COIs in a variety of ways, beyond sharing information. The article unveils the distinct roles that diasporic actors may entertain vis-à-vis international inquiries, as subjects in need of protection, information providers, and audience and mobilization forces. Looking at the COI for Eritrea, the article tests how these different roles play out in practice and how they interrelate. It thus sheds light on the capacity of COIs to make a difference extraterritorially for individuals in the diaspora, and on the capacity of diasporic actors to influence COI findings and shape follow up. The Eritrean COI experience illustrates that a purely instrumental approach towards diasporas – one which only regards diasporas as sources of information and which fails to protect extraterritorially or tap into the greater potential of diaspora mobilization – lessens COI effectivity for broader human rights and transitional justice purposes.

**KEYWORDS:** Eritrea, diaspora, commissions of inquiry

## INTRODUCTION

International Commissions of Inquiry (COIs) have become important components of the human rights fact-finding, accountability and transitional justice architecture.<sup>1</sup>

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1 L. van den Herik, 'An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of International Law,' *Chinese Journal of International Law* 13(3) (2014): 507–537.

The UN Human Rights Council (UNHRC) has been particularly active in establishing COIs and related fact-finding bodies. The core task of those COIs is to investigate international crises and thus to construe what happened on the ground. Paradoxically though, the tendency of states under scrutiny to refuse territorial access and cooperation more broadly seems to be on the rise. This leaves COIs with no option but to operate from outside the state. COIs have developed various strategies to overcome the impediment of the uncooperative state,<sup>2</sup> including the use of satellite imagery, conducting extraterritorial public hearings, interviewing individuals in the territory through Skype and other media as well as collecting first-hand accounts from individuals in the diaspora.

This article explores the engagement of COIs with the diaspora. As overseas political communities, diasporas may have considerable significance for COIs, something that has been largely ignored so far, in particular by international lawyers. The main purpose of this article is therefore to unveil the distinct roles that diasporic actors may entertain vis-à-vis international inquiries. Using Eritrea as a case study, it presents diasporic actors and identifies their three potentially different roles in the COI fact-finding process – as subjects of protection, information providers and mobilization forces. The article tests how these different roles play out in practice and how they interrelate. It thus sheds light on the capacity of COIs to make a difference extraterritorially for individuals in the diaspora as well as on the capacity of diasporic actors to influence COI findings and to shape follow up. The Eritrean COI experience illustrates that a purely instrumental approach towards diasporas – one which only regards diasporas as sources of information and which fails to protect extraterritorially or tap into the greater potential of diaspora mobilization – lessens COI effectiveness for broader human rights and transitional justice purposes.

### HOW DIASPORAS DO NOT FIT INTERNATIONAL LAW'S CHESSBOARD SQUARES

In her book *The Chess-Board and the Web*, Anne-Marie Slaughter invites readers to look at the world in stereo – to see it as a chessboard composed of 190+ separated squares that represent states and simultaneously to have a webview of the world, seeing it as a map of connections that ignore national borders.<sup>3</sup> The networked view goes beyond states and highlights the role of transnational actors, or web actors, on the global stage of international politics, law and justice. Slaughter laments that foreign policy makers still see the world through Westphalian glasses,<sup>4</sup> and the same may of course be said for international lawyers. While international lawyers are familiar with the concept of nonstate actors, this tends to be confined to a limited category of relatively fixed entities such as corporations, armed opposition groups and nongovernmental organizations (NGOs)/civil society. Diasporas are generally an

2 C. Harwood, 'Navigating between Principle and Pragmatism: The Roles and Functions of Atrocity-Related United Nations Commissions of Inquiry in the International Legal Order' (PhD thesis, Leiden University, 2018). Also see, Dan Saxon, 'Purpose and Legitimacy in International Fact-Finding Bodies,' in *Quality Control in Fact-Finding*, ed. Morten Bergsmo (Florence: Torkel Opsahl Academic EPublisher, 2013).

3 A.-M. Slaughter, *The Chess-Board and the Web: Strategies of Connection in a Networked World* (New Haven, CT: Yale University Press, 2017).

4 Ibid.

unknown category for international lawyers.<sup>5</sup> The limited attention devoted to diasporas from legal angles has so far mostly focused on citizenship questions and political rights, in particular the question of extraterritorial voting.<sup>6</sup> In contrast, other disciplines do recognize the increasing significance of diasporas, also in international justice processes and transnational relations more broadly.<sup>7</sup> Indeed, diasporas as transnational social movements or distinct political communities are studied from different angles in different disciplines, including international relations, sociology and anthropology, and have even generated their own subdiscipline of diaspora studies. Yet, the relatively new scholarship on the role of diasporas in international justice processes and human rights and international criminal law mechanisms that emerges in adjacent disciplines<sup>8</sup> has not yet been complemented much by legal or sociolegal analysis.<sup>9</sup>

Diasporas have probably largely remained beyond the horizon of international lawyers because they are not easily shoehorned into international law's subject-based approach. In fact, diasporas challenge the core of international lawyers' conceptual framework. They are, as such, quite a dramatic invitation to lawyers to consider a 'post-subject framework of analysis.'<sup>10</sup> As diasporic citizens are likely to become key figures of global modernity,<sup>11</sup> international lawyers might not be able to perpetuate their blind spot. They will, at some point, have to take on the challenge and find ways to grapple with this newly empowered phenomenon, including revisiting structures that have impeded this embrace so far. It is thus submitted that legal actors and scholars operating in the areas of human rights and international criminal law cannot continue to disregard diasporas just because they do not fit their boxes and approaches. As a first step, this article offers a diasporic perspective on COIs, using Eritrea as a case study.

## JUSTIFYING THE CASE STUDY AND INTRODUCING THE ERITREAN DIASPORA

The Eritrean COI is obviously not the only one that has been confronted with diaspora issues and pressures.<sup>12</sup> Nonetheless, it is considered particularly useful as a case

- 5 But see, A. Chander, 'Diaspora Bonds,' *New York University Law Review* 76 (2001): 1005–1099; A. Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora,' *Vanderbilt Journal of Transnational Law* 45 (2012): 963–1041; P. Shah, 'Diasporas as Legal Actors: Implications for Established Legal Boundaries,' *Non-State Actors and International Law* 5(2) (2005): 153–165.
- 6 See, e.g., F. Mégret and R. Girard, 'Diasporas, Extraterritorial Representation, and the Right to Vote,' *Canadian Yearbook of International Law* 52 (2015): 185–221.
- 7 See, e.g., M. Koinova, 'Diaspora Mobilisation for Conflict and Post-Conflict Reconstruction: Contextual and Comparative Dimensions,' *Journal of Ethnic and Migration Studies* 44(8) (2018): 1251–1269; C. Orjuela, 'Mobilising Diasporas for Justice: Opportunity Structures and the Presencing of a Violent Past,' *Journal of Ethnic and Migration Studies* 44(8) (2018): 1357–1373, as well as other contributions in the symposium of that journal issue.
- 8 See, e.g., Koinova, *supra* n 7; E. Wiebelhaus-Brahm, 'Exploring Variation in Diasporas' Engagement with Transitional Justice Processes,' *Journal of Peacebuilding and Development* 11(3) (2016): 23–36.
- 9 But see, F. Mégret, 'The "Elephant in the Room" in Debates about Universal Jurisdiction: Diasporas, Duties of Hospitality, and the Constitution of the Political,' *Transnational Legal Theory* 6(1) (2015): 89–116.
- 10 K. Knop, 'Lorimer's Private Citizens of the World,' *European Journal of International Law* 27(2) (2016): 475.
- 11 V. Bernal, *Nation as Network: Diaspora, Cyberspace and Citizenship* (Chicago, IL: University of Chicago Press, 2014).
- 12 See, e.g., '4,000 Tamils Protest in Geneva for Sri Lanka War Crimes Probe,' *Arab News*, 11 March 2014.

study for this inquiry because of the unique diasporic features of the state of Eritrea. As noted by Victoria Bernal, the Eritrean nation was founded on diasporic linkages.<sup>13</sup> After the war with Ethiopia ended in 1991 and in the run-up to the independence referendum, Eritreans worldwide – who had been Ethiopian citizens when they left – were offered Eritrean national identity cards allowing them to vote.<sup>14</sup> Ever since, Eritrea has retained its transnational orientation and has consolidated its rule over exiled communities.<sup>15</sup> Although numbers are contested, claims have surfaced that one-third of the Eritrean population lives abroad.<sup>16</sup> Given this sizeable number of overseas Eritreans, it has been argued that there are, in fact, two types of Eritreas: Eritrea ‘proper’ and Eritrea ‘diaspora.’<sup>17</sup>

Eritrea’s diaspora is not only substantial relative to the inhabitants of Eritrea as well as spread over different foreign countries; it is also heterogeneous. The diaspora is composed of different generations that migrated from Eritrea in phases,<sup>18</sup> each period relating to a different time in Eritrea’s political history.<sup>19</sup> Each generation and at times also their offspring hold a distinct range of beliefs in relation to their home country, largely determined by the political conditions at the moment of departure.<sup>20</sup> The first generation includes migrants from the 1960s up to the end of the 1980s – migrants who thus left as Ethiopians before Eritrea gained independence. The majority of those members of the diaspora community originally identified themselves strongly with the leader of the liberation movement and the Eritrean Peoples’ Liberation Front (EPLF), Isaias Afwerki.<sup>21</sup> Afwerki became president at

13 Bernal, *supra* n 11.

14 *Ibid.*, making the claim for Eritrea’s moment of independence. See, for a similar claim made in 2008, T.M.R. Hepner, ‘Transnational Governance and the Centralization of State Power in Eritrea and Exile,’ *Ethnic and Racial Studies* 31(3) (2008): 476–502.

15 Hepner, *supra* n 14.

16 *Ibid.*; Bernal, *supra* n 11.

17 D.R. Mekonnen, ‘The Case for Crimes against Humanity in Eritrea: Assessing the Reports of the Two UN Fact Finding Missions,’ *Journal of International Humanitarian Legal Studies* 7(2) (2016): 221–256. On Eritrea as a diasporic state, see also, R. Iyob, ‘The Ethiopian–Eritrean Conflict: Diasporic vs. Hegemonic States in the Horn of Africa, 1991–2000,’ *Journal of Modern African Studies* 38(4) (2000): 659–682.

18 Cf. T.R. Hepner, ‘Generation Nationalism and Generation Asylum: Eritrean Migrants, the Global Diaspora, and the Transnational Nation-State,’ *Diaspora: A Journal of Transnational Studies* 18(1–2) (2015): 184–207.

19 The diaspora is also fragmented along regional, ethnic and religious lines. A.S. Mohammad and K. Tronvoll, ‘Eritrean Opposition Parties and Civic Organisations,’ NOREF Expert Analysis (January 2015). Also see, P.A. Hoyle, ‘The Eritrean National Identity: A Case Study,’ *North Carolina Journal of International Law and Commercial Regulation* 24(2) (1999): 381–416.

20 T.M.R. Hepner, ‘Militarization, Generational Conflict, and the Eritrean Refugee Crisis,’ in *African Childhoods: Education, Development, Peacebuilding, and the Youngest Continent*, ed. M.O. Ensor (New York: Palgrave Macmillan, 2012). But also see Belloni, who detects the ambivalence of Eritreans in their attitude towards their homeland, oscillating between patriotism and disenchantment corresponding with their multiple social roles. M. Belloni, ‘Refugees and Citizens: Understanding Eritrean Refugees’ Ambivalence towards Homeland Politics,’ *International Journal of Comparative Sociology* 60(1–2) (2019): 55–73.

21 A number of migrants during this period were members of the defeated Eritrean Liberation Front (ELF) militia, from which the EPLF grew, and whom the EPLF eventually defeated and effectively exiled in a de facto ‘civil war.’ These migrants would not identify themselves with the EPLF, although they would identify with the liberation movement more generally. See generally, D.R. Mekonnen, *Transitional Justice: Framing a Model for Eritrea* (Saarbrücken: VDM Verlag Dr Müller, 2009).

independence and has been ever since, while the EPLF transformed into the People's Front for Democracy and Justice (PFDJ), the country's ruling party.<sup>22</sup> The children of these first-generation migrants are organized in a special youth movement of the PFDJ, called the Youth PFDJ or YPFDJ, also maintaining strong ties to Asmara – Eritrea's capital and most populous city.<sup>23</sup>

Under Afwerki's leadership, self-reliance became one of the core principles guiding the PFDJ and, thus, the state.<sup>24</sup> Registration for 18 months of national service began for all citizens aged between 18 and 40, with a view to building a force to defend and rebuild the country,<sup>25</sup> and elections were indefinitely postponed on national security grounds.<sup>26</sup> Eritrea's continuing struggles with Ethiopia escalated to a full-fledged border war from 1998 to 2000. This altered Eritrea's political trajectory and left state institutions to atrophy while the PFDJ resumed its posture as a fighting front.<sup>27</sup> Eritrea as a garrison state<sup>28</sup> can thus be understood as a continuation of the EPLF military liberation movement, under the absolute power of President Afwerki and his three trusted advisors, with the almost total absence of rule of law.<sup>29</sup> Political opponents questioned Afwerki's leadership, which led to a complete political crackdown. The second generation of migrants are those who fled the country during the war with Ethiopia and in its aftermath, when a clampdown on all democratic institutions, the press, the media and independent organizations was realized,<sup>30</sup> and mandatory conscription into national service became a permanent feature.<sup>31</sup> A culture of fear dominates segments of the diaspora, in part because the PFDJ holds an iron grip, especially in places with a large diaspora population, using spy networks composed of more loyal first-wave migrants.<sup>32</sup> Informants are used to collect information on second-wave members of the Eritrean diaspora, and critics of the Eritrean government do not receive assistance from the Eritrean embassy. The ultimate retaliation includes denial of family reunions, penalizing family members still residing in Eritrea, voidance of inheritance rights, threat of detention and denial of exit visas in cases of return to Eritrea.<sup>33</sup> The second migration

22 On the blurring between the PFDJ and the state of Eritrea, also see, 'Report of the Monitoring Group on Somalia and Eritrea,' UN Doc. S/2011/433 (18 July 2011), para. 367.

23 On fundraising and mobilization by the PFDJ in the diaspora through youth conferences and other events, see, *ibid.*, paras. 388–390.

24 UN Doc. A/HRC/29/CRP.1 (5 June 2015), para. 105.

25 *Ibid.*, para. 106.

26 See generally, G. Kibreab, *Critical Reflections on the Eritrean War of Independence: Social Capital, Associational Life, Religion, Ethnicity and Sowing Seeds of Dictatorship* (Trenton, NJ: Red Sea Press, 2008).

27 UN Doc. S/2011/433 (18 July 2011), para. 256.

28 K. Tronvoll and D.R. Mekonnen, *The African Garrison State: Human Rights and Political Development in Eritrea* (London: James Currey, 2014).

29 For an analysis of power structures and internal political dynamics in Eritrea, see, M. Plaut, *Understanding Eritrea: Inside Africa's Most Repressive State* (London: Hurst Publishers, 2017); 'Report of the Monitoring Group,' UN Doc. S/2013/440 (25 July 2013), paras. 9–25. For a more positive appraisal of the situation in Eritrea, see, for example, B. Bruton, 'It's Bad in Eritrea, but Not That Bad,' *New York Times*, 23 June 2016.

30 UN Doc. A/HRC/32/CRP.1 (8 June 2016), para. 60.

31 UN Doc. A/HRC/29/CRP.1 (5 June 2015), paras. 1172–1397.

32 D. Bozzini, 'The Fines and the Spies: Fears of State Surveillance in Eritrea and in the Diaspora,' *Social Analysis* 59(4) (2015): 32–49. Also see, UN Doc. A/HRC/29/CRP.1 (5 June 2015), para. 340.

33 'Report of the Monitoring Group on Somalia and Eritrea,' UN Doc. S/2012/545 (13 July 2012), para. 91 and Annex 3.1.

wave is still ongoing. Today, it consists particularly of young people fleeing the continuing policy of open-ended national service.<sup>34</sup> Stringent measures aimed at curbing the exodus include a shoot-to-kill policy,<sup>35</sup> thereby also creating the conditions in which members of the military, especially the Border Control Authority, are able to exploit the desperation of prospective refugees to expand a trade of illegal smuggling and human trafficking (Sinai trafficking), with Eritrean refugees held captive for ransom in Egypt, Sudan and Libya, among other countries.<sup>36</sup>

Although these migration waves point to substantial intergenerational and political differences, there are also similarities in how members of the different generations are treated by their home state. Eritrea pursues active diaspora policies with significant financial dimensions treating the diaspora as some kind of 'offshore citizens'.<sup>37</sup> Key components of this policy include: collecting diaspora taxes,<sup>38</sup> fundraising at specially organized social and political diaspora events and illicit revenue generated through human smuggling and trafficking.<sup>39</sup> In addition to generating economic revenue, Eritrea's 'tentacular [extraterritorial] governance' also aims to export fear to diaspora communities and to colonize social relations abroad.<sup>40</sup> Eritrea state control thus transcends its national borders in very critical ways.<sup>41</sup>

### ESTABLISHMENT AND MANDATE OF THE COIE FROM A DIASPORIC PERSPECTIVE

Eritrea's repressive internal policies contributed to the country becoming one of the greatest migrant-generating states in the world, despite its relatively small population. Western states largely bore the consequences of the policies of Eritrea's regime in the form of an ever-greater influx of asylum seekers. This led to the tabling of the matter at the UNHRC and the establishment of the Commission of Inquiry for Eritrea (COIE).<sup>42</sup> Yet, as illustrated in this section, although the exodus of Eritreans may have been a factor leading to the establishment of the COIE, its mandate did not extend to scrutinizing their wellbeing.

34 International Crisis Group, 'Eritrea: Ending the Exodus?' Briefing No. 100/Africa (8 August 2014).

35 According to this policy, there is a standing instruction to shoot and kill anyone illegally crossing the border. UN Doc. A/HRC/29/CRP.1 (5 June 2015), paras. 1111–1116.

36 M. van Reisen and M. Mawere, eds., *Human Trafficking and Trauma in the Digital Era: The Ongoing Tragedy of the Trade in Refugees from Eritrea* (Bamenda: Langaa, 2017).

37 This term is borrowed from Bernal, *supra* n 11 at chap. 1.

38 This extraterritorial income tax of two percent is also called the development and rehabilitation tax and payment is a precondition for government services such as passport renewal or issuance of a visa, services related to family reunification and inheritance matters. UN Doc. S/2012/545 (13 July 2012), paras. 87–99. Also see, S. Teclé and L. Goldring, 'From "Remittance" to "Tax": The Shifting Meanings and Strategies of Capture of the Eritrean Transnational Party-State,' *African and Black Diaspora: An International Journal* 6(2) (2013): 189–207.

39 These practices were detailed in reports of the Sanctions Monitoring Group on Somalia and Eritrea, established by the UN Security Council. See, UN Docs. S/2011/433 (18 July 2011), S/2012/545 (13 July 2012), S/2013/440 (25 July 2013), S/2014/727 (15 October 2014), S/2015/802 (20 October 2015), S/2016/920 (31 October 2016).

40 Bozzini, *supra* n 32 at 44.

41 *Ibid.*

42 See, e.g., UN Doc. A/HRC/29/42 (4 June 2015), para. 155, noting the number of near 50,000 asylum seekers leaving Eritrea in 2015, rendering Eritrea the fifth largest generator of asylum seekers that year.

The COIE was established by the UNHRC on 14 June 2014 with a mandate 'to investigate all alleged violations of human rights in Eritrea, as outlined in the reports of the Special Rapporteur.'<sup>43</sup> The COIE interpreted this mandate as follows:

Competence *ratione personae*: the Commission shall only investigate alleged violations that are imputable on Eritrean authorities. This means violations directly committed by Eritrean public officials; committed at their instigation or with their consent or acquiescence; or when the relevant authorities have abstained to prevent, investigate and prosecute authors of violations of the fundamental rights of a person.

Competence *ratione loci*: the geographic scope of the investigation is human rights violations allegedly committed on the territory of Eritrea, without any exclusion of a specific area of the country and including the border zones and Eritrean maritime territory.

Competence *ratione temporis*: the temporal scope of the investigation covers the period from the independence of Eritrea until present day.

Competence *ratione materiae*: the Commission shall investigate the human rights violations 'as outlined in the reports of the Special Rapporteur', which 'include but are not limited to':

Extrajudicial killings

Enforced disappearances and incommunicado detention

Arbitrary arrest and detentions

Torture

Violations occurring during compulsory national service, including those affecting children's rights

Restrictions to freedoms of expression and opinion, assembly, association, religious belief and movement.<sup>44</sup>

The COIE did not justify or explain this interpretation of the mandate, but the specific interpretive choices of the COIE deviated from the practice of other commissions. Comparative analysis with others indicates that the COIE's construction of its mandate was relatively restrictive on various counts, particularly in relation to its personal and substantive jurisdiction. Indeed, the COIE adhered to traditional, state-oriented standards, focusing exclusively on state officials and human rights law proper. Some COIs have exhibited a more flexible approach whereby the circumstances and conditions in which they were placed to operate have informed the construction of their mandate. For instance, the Libya and Syria COIs justified reading international humanitarian law into their human rights-oriented mandate by reference to the ongoing armed conflict.<sup>45</sup> This allowed those commissions to engage

43 UN Doc. A/HRC/RES/26/24 (14 July 2014), para. 8.

44 UN Doc. A/HRC/29/CRP.1 (5 June 2015), para. 10.

45 'The Libya Commission of Inquiry,' UN Doc. A/HRC/17/44 (1 June 2011), para. 4; 'Syria Commission of Inquiry,' UN Doc. A/HRC/21/50 (16 August 2012), para. 12.

with areas of law beyond human rights law and to scrutinize a range of nonstate actors. In contrast, the COIE noted that the ‘no war, no peace’ term proffered by the PFDJ as a justification for human rights violations<sup>46</sup> had no legal status and that, apart from concrete timeframes and concrete situations such as unreleased prisoners of war, international humanitarian law did not apply.<sup>47</sup> Another example of strict interpretation by the COIE concerned its decision not to read international criminal law into its first mandate,<sup>48</sup> in contrast to the practice of many other commissions.<sup>49</sup> Ultimately, the COIE alluded in its first report to the possibility that crimes against humanity had been committed, inviting an express second mandate on this.<sup>50</sup> The COIE made explicit findings on crimes against humanity only after having been directly invited to do so.<sup>51</sup>

While taking a restrictive approach to the *ratione personae* and *materiae* dimensions of its mandate, the COIE took a broad approach to the temporal scope of its mandate, dating it back to the moment of de facto independence in 1991. Although many COIs are given narrower timeframes in their mandates,<sup>52</sup> unlimited temporal mandates are not uncommon and the COIE’s approach was thus not out of tune with general practice.<sup>53</sup> In turn, the geographical scope of the mandate was literally interpreted and confined to the situation within Eritrea itself, excluding consideration of the government’s extraterritorial activities. In contrast, the North Korea Commission of Inquiry explicitly extended its mandate to covering violations involving extraterritorial action, such as abductions, provided they were attributable to the state.<sup>54</sup>

46 Referring to the lingering discord with its neighbouring states, Eritrea claimed a ‘no war, no peace’ status to justify derogations from its human rights obligations and restrictions on persons under its jurisdiction. UN Doc. A/HRC/29/CRP.1 (5 June 2015), para. 55.

47 UN Doc. A/HRC/32/CRP.1 (8 June 2016), para. 190, and specifically fn. 257.

48 UN Doc. A/HRC/29/CRP.1 (5 June 2015), para. 11.

49 See, e.g., C. Harwood, ‘Human Rights in Fancy Dress? The Use of International Criminal Law by Human Rights Council Commissions of Inquiry in Pursuit of Accountability,’ *Japanese Yearbook of International Law* 58 (2015): 71–100.

50 For a critique of the Commission’s hesitance, see, Mekonnen, *supra* n 17.

51 At the COIE’s extension, the UNHRC further specified its mandate, requesting the Commission to ‘investigate systematic, widespread and gross violations of human rights in Eritrea with a view to ensuring full accountability, including where these violations may amount to crimes against humanity.’ See, UN Doc. A/HRC/RES/29/18 (22 July 2015), para. 10. This mandate is patterned upon the COIE’s finding of systematic, widespread and gross violations of human rights in its first report.

52 For example, the Central African Republic COI had the mandate to investigate violations since January 2013. UN Doc. S/RES/2127 (5 December 2013), para. 24. The mandate of the Sri Lanka Panel of Experts was less clear-cut, referring to ‘final stages of the war,’ which the Panel interpreted as ranging from September 2008 to May 2009. ‘Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka’ (31 March 2011), paras. 12–13.

53 See, e.g., ‘Report North Korea Commission of Inquiry,’ UN Doc. A/HRC/25/63 (7 February 2014), para. 7. The Libya COI also interpreted its mandate as being without temporal limitation. UN Doc. A/HRC/17/44, para. 4.

54 UN Doc. A/HRC/25/63, para. 8. Yet, a subsequent UNHRC resolution establishing a group of experts to explore accountability options focused more exclusively on human rights violations in North Korea, thus leaving claims of North Korean policies to export its own citizens to work as slaves extraterritorially unaddressed. Resolution adopted by the Human Rights Council on 23 March 2016. ‘Situation of Human Rights in the Democratic People’s Republic of Korea,’ UN Doc. A/HRC/RES/31/18 (8 April 2016). For more on this North Korean slavery practice, see, R. Breuker, ‘Slaves to the System: Researching North Korean Forced Labor in the EU,’ Leiden Asia Centre (6 July 2016).

From a diasporic perspective, the COIE's limited territorial focus was striking. Although illicit diaspora tax practices had been extensively documented by the UN Security Council Sanctions Monitoring Group,<sup>55</sup> and while violations of human rights obligations in connection with the diaspora tax had been strongly condemned in the resolutions establishing the mandates of the special rapporteur and the COIE, the Commission's restrictive geographical reading did not allow it to scrutinize those practices and address them with human rights vocabulary. The restrictive interpretation also left Sinai trafficking outside the COIE's purview, despite the Security Council Sanctions Monitoring Group's observation that this practice was so pervasive that the state had to be involved.<sup>56</sup> The COIE offered a few observations on these practices, despite its own construction of the mandate,<sup>57</sup> but, generally, the territorially limited mandate meant that the COIE did not address the diaspora as a subject of protection in its own right. Instead, the diaspora was approached instrumentally as a source of information.

### DIASPORA AS INFORMATION PROVIDER: ERITREA'S LONG ARM EXPOSED

As with the special rapporteur, the COIE did not gain access to Eritrea,<sup>58</sup> and reliable data concerning the demographics, economy and development of Eritrea are either in short supply, fabricated or subject to factual dispute. Instead, the COIE gathered witness testimonies from Eritreans residing in third countries. The COIE delivered its reports in June 2015 and June 2016.<sup>59</sup> Based on the confidential first-hand testimony of 550 interviewees outside Eritrea, 160 written submissions, and other information (including satellite imagery) provided by the UN and other entities, the COIE made findings in its first report of systematic, widespread and gross human rights violations committed in Eritrea since 1991.<sup>60</sup> The second report presented the finding that there were reasonable grounds to believe that crimes against humanity had been committed and were ongoing and it offered recommendations aimed at ensuring accountability.

For reasons of safety, the COIE excluded the names and other identifying details of interviewees from the report.<sup>61</sup> The COIE noted:

Almost all victims and witnesses in contact with the Commission feared reprisals by Eritrean authorities, be it against themselves or targeting their family

55 After Eritrea invaded Djibouti in 2008, and following the determination that Eritrean actions to militarily support Al-Shabaab in Somalia had destabilized the region, the UN Security Council imposed an arms embargo and extended the Somali sanctions regime and the role of the Sanctions Monitoring Group to Eritrean political and military leadership. UN Doc. S/RES/1907 (23 December 2009), para. 15.

56 UN Doc. S/2011/433 (18 July 2011), para. 421.

57 On the involvement of Eritrean nationals in Sinai trafficking, see, UN Doc. A/HRC/29/CRP.1 (5 June 2015), para. 155. On Eritrea's treatment of people in the diaspora, see, paras. 348–351 and 440–442 in the same document.

58 See, e.g., UN Doc. A/HRC/32/47 (9 June 2016), para. 4.

59 'Reports of the Commission of Inquiry on Human Rights in Eritrea,' UN Docs. A/HRC/29/42 (4 June 2015) and A/HRC/32/47 (9 May 2016). Also see, UN Docs. A/HRC/29/CRP.1 (5 June 2015) and A/HRC/32/CRP.1 (8 June 2016).

60 UN Doc. A/HRC/29/CRP.1 (5 June 2015), summary.

61 *Ibid.*, paras. 29, 30.

members still living in Eritrea. Irrespective of the country or location where the interviews were organized, the persons who agreed to speak on a confidential basis to the Commission were convinced that the Eritrean authorities were in a position to monitor their conduct through a network of spies and informants within the Eritrean diaspora. Indeed, the Commission was able to witness one specific episode of such monitoring.<sup>62</sup>

In its report, the Commission described the efforts it took to ensure that it was able to consider a wide range of submissions, including from survivors of gender-based violence. The difficulty of collecting material and protecting witnesses was recognized by the Commission, which found it necessary to keep all names of submissions confidential in order to protect victims and witnesses from intimidation.<sup>63</sup> As the Commission's chairman Mike Smith stated at the presentation of the second report, diaspora communities were living in continuous fear.<sup>64</sup>

In the run-up to the second report, and following its own call to submit information or documentation, the Commission received approximately 45,000 submissions by mail and email. The bulk of this very high number of submissions was critical of the Commission's first report. The COIE lacked the necessary resources to contact each individual who had filed a written submission, so instead designed a methodology to test the authenticity of submissions, to inquire whether those who made submissions had read the first report, and to learn about their motivation for writing. The procedure of direct engagement with the witness submissions was detailed in the second report, but basically involved contacting a sample of 500 individuals from 16 different countries.<sup>65</sup>

These follow-up efforts resulted in a number of findings. First, the Commission found that those who voiced the most fervent criticism of its first report were Eritreans who had left the country before or immediately after 1991, as well as their relatives – thus first-wave migrants and their offspring.<sup>66</sup> Yet petitioners who were critical of the first report also included Eritrean guest workers without dual nationality and in need of a valid Eritrean passport for visa renewal – and thus dependent on Eritrean consular services. These petitioners told the Commission that writing in support of the government had been set as a precondition for passport renewal.<sup>67</sup> Secondly, many of the petitioners contacted admitted that they had not read the report and some were even unaware they had signed a petition.<sup>68</sup> The similarities in a great number of the submissions suggested a well-organized campaign by the government and pro-government diasporic groups to discredit the inquiry, as also expressly noted by the COIE chairman upon presentation of the second report.<sup>69</sup> Leaked

62 Ibid., para. 27.

63 UN Doc. A/HRC/32/47 (9 June 2016), para. 13.

64 'Commission of Inquiry on Eritrea – Press Conference,' UN Web TV, 8 June 2016, <http://webtv.un.org/watch/commission-of-inquiry-on-eritrea-press-conference-geneva-8-june-2016/4930296361001> (accessed 19 August 2019).

65 UN Doc. A/HRC/32/47 (9 June 2016), paras. 16–22.

66 Ibid., para. 19.

67 Ibid., para. 20.

68 Ibid.

69 'Commission of Inquiry on Eritrea,' *supra* n 64.

documents posted on the internet<sup>70</sup> later confirmed the existence of a government strategy in which fabricated witness forms stating that no human rights violations had occurred in Eritrea were distributed to members of the diaspora through embassies, intimidating door-to-door visits and gatherings, and Facebook accounts, combined with coercive Paltalk videos.<sup>71</sup>

The COIE's engagement with the Eritrean diaspora clearly highlights how fault lines in diaspora communities may play out. It also underscores that COI outreach to diaspora groups may provoke uncooperative states to become more openly obstructive, relying on broader authoritarian governance modalities in deterritorialized spaces.<sup>72</sup>

### RECEPTION AND FOLLOW-UP: TESTING THE POTENTIAL AND LIMITS OF DIASPORA MOBILIZATION

The COIE presented its reports to its parent body, the UNHRC, but its recommendations were also addressed to Eritrea, as the state under scrutiny, as well as to the UN member states, thus including host states of the Eritrean diaspora. Host states were specifically requested to shield interviewees from Eritrea's network of spies and informants and to implement protective measures.<sup>73</sup> In addition to home and host states, the COIE addressed other actors as well. Even transnational corporations operating in Eritrea were given concrete recommendations as they were advised to conduct human rights assessments to verify that they were not using conscript labour. In line with the blind spot identified above, the diaspora as such was not mentioned in the COIE's recommendations.

This section chronicles how the COIE reports were received by the various stakeholders involved and how this got meshed into broader strategic interests. This highlights that effective sequels are sometimes better sought at the domestic plane, including through domestic courts, using the energy present in diaspora communities as driving forces. Yet, as will be discussed, there are also limits to diasporic interventions flowing from the particular qualities of diaspora communities.

### International Politics and a Window of Opportunity

A window of opportunity or 'policy window' is a moment in time with a beginning and end when new points can be added to a policy agenda and when new ideas can emerge within the political process.<sup>74</sup> A COI may open a policy window and could be evaluated in terms of its influence in putting new ideas onto the policy agenda.

70 On a Facebook page called SACTISM. Also see, M. Plaut, 'Eritrea: The Battle for International Opinion,' 16 May 2016, <https://martinplaut.wordpress.com/2016/05/16/eritrea-the-battle-for-international-opinion/> (accessed 19 August 2019).

71 Paltalk is said to be the largest video chat room community. For a discussion on how Paltalk videos were used in the context of the COIE process, see, S. Höfner and Z. Tewolde-Berhan, 'Crimes against Humanity: The Commission of Inquiry Reports on Eritrea,' in *Ongoing Vulnerability of Refugees from Eritrea: A Crisis of Accountability*, ed. M. van Reisen and M. Mawere, EEPA Report (2016).

72 Bozzini, *supra* n 32.

73 UN Doc. A/HRC/29/CRP.1 (5 June 2015), paras. 27–28.

74 The concept of the 'policy window' was first launched by John Kingdon in *Agendas, Alternatives and Public Policies* (Harlow: Pearson Education, 2014[1984]). The 'policy window' was examined as a tool to understand processes of history making changes in international relations by Mirjam van Reisen, *Window*

The reception of the COIE report in policy circles, and in particular at the European Union (EU) as a host of many Eritreans, is analyzed from this perspective in this subsection.

Eritrea's stance towards the COIE and the reception of its report was straightforward. In conformity with the mainstream attitude of states under UNHRC scrutiny, Eritrea tried to fend off the COIE and offered only minimal cooperation, as it had also done with the special rapporteur and, perhaps to a slightly lesser extent, with the Security Council Sanctions Monitoring Group. Yet, it was keenly aware of the process. From the outset, it rejected the COIE, as well as the special rapporteur, and held that these 'duplicate mandate holders' were 'extra-procedurally appointed',<sup>75</sup> thus raising a general objection to country-specific mandates. In response to the first report, Eritrea specifically opposed the COIE's methodology, particularly its broad interpretation of the temporal scope of its mandate,<sup>76</sup> a standard of proof that it deemed too low,<sup>77</sup> and the reliance on anonymous witness testimony from asylum seekers who had an interest in 'hyperbolic accounts of persecution from repression'.<sup>78</sup>

In the face of the regime's efforts to discredit the COIE, segments of the diaspora opposed to the government attempted to capitalize on the COIE process, using it as an instrument to influence policy in different circles. Hence, as the EU considered resuming its donor and development programmes for Eritrea in March 2015, with a view also to curbing the Eritrean exodus, diaspora actors and Eritrea experts issued a statement requesting the European Commission to put its preparations for an aid package to the Eritrean government on hold 'until such time that the UN Commission of Inquiry on Eritrea has been given full and unfettered access to Eritrea so that it can carry out its investigation and has presented its conclusions'.<sup>79</sup>

Subsequent to these developments, the second COIE report came out in June 2016. It was more forceful in its findings and recommendations: it concluded that crimes against humanity had been committed, it compiled files with data on suspects, and it made several recommendations regarding accountability mechanisms. In particular, the recommendation that the Security Council refer the situation in Eritrea to the International Criminal Court (ICC) was championed by members of the victim diaspora.<sup>80</sup> Yet, the COIE recommendations did not effectuate political action in more formal circles.<sup>81</sup> The UNHRC only 'requested' the General Assembly to share the report with relevant UN organs for consideration and appropriate action, without explicitly mentioning or endorsing the ICC referral recommendation.<sup>82</sup> In its

*of Opportunity: EU Development Cooperation after the End of the Cold War* (Trenton, NJ: Africa World Press, 2009).

75 Eritrea, Ministry of Information, 'Commission of Inquiry Report: Devoid of Credibility and Substance' (19 June 2015), paras. 1 and 3. See also, Eritrea, Ministry of Information, 'Commission of Inquiry Report: Cynical Political Travesty that Undermines Human Rights' (11 June 2015).

76 Eritrea, Ministry of Information, 19 June 2015, *supra* n 75 at para. 4.

77 *Ibid.*, para. 5.

78 *Ibid.*, para. 6.

79 A. Arnone & Others, 'Statement on EU Asylum and Aid Policy to Eritrea' (31 March 2015).

80 See, for example, the Stop Slavery in Eritrea Campaign on Facebook.

81 See also Mekonnen, *supra* n 17, who argues that the diplomatic milieu in 2016 was less favourable than in 2015.

82 'Situation of Human Rights in Eritrea,' Resolution 32/24, UN Doc. A/71/53 (1 July 2016), para. 17. In comparison, the UNHRC and General Assembly resolutions regarding North Korea were more

Statement at the Interactive Dialogue of the General Assembly Third Committee, Eritrea subsequently stated that it no longer wanted to enter into a debate and merely insisted that the COI had ceased to exist. It translated the UNHRC's mild reception of the report as follows:

The Council had considered the report, took note of it and decided to reject its key recommendations, which included astonishingly sending yet another African country, Eritrea, to the International Criminal Court.<sup>83</sup>

On 28 January 2016, several months before publication of the second COIE report, the EU and Eritrea signed a National Indicative Programme for investment and aid of US\$200 million.<sup>84</sup> The programme was supported by the European Parliament, which mainly emphasized the requirement that the recommendations of the Universal Periodic Review processes be implemented, while access for the COI was mentioned in passing, but rather obliquely at that point in time.<sup>85</sup> The European Parliament's tepid statement evidences that the momentum from June 2015 had already dissipated and, despite the COIE's explicit conclusions in June 2016 that crimes against humanity were being committed, the EU Emergency Trust Fund adopted project proposals in December 2016 involving new development aid packages.<sup>86</sup>

In response to these developments, the special rapporteur observed in her 2017 report that,

The Special Rapporteur takes note of EU efforts to respond to the migration influx, but is concerned about an approach that appears to focus predominantly on external border protection and increased return rates. She stresses that any effort to curb the flow of refugees from Eritrea should not come at the expense of addressing the root causes of ongoing human rights violations in the country, which are the real drivers of forced migration from Eritrea.<sup>87</sup>

The special rapporteur also noted that, 'for reasons unrelated to the human rights situation in Eritrea, it is unlikely that a referral to the International Criminal Court is an imminent option.'<sup>88</sup> She thus proposed exploring alternative accountability avenues, such as the exercise of universal jurisdiction by domestic courts.<sup>89</sup> The special

straightforward, and explicitly encouraged a follow up to the ICC referral recommendation, e.g., UNHRC Resolution 28/22, UN Doc. A/70/53 (27 March 2015), para. 6 and General Assembly Resolution 69/188.

83 Statement by Yemane Ghebreab, adviser to the president, at the Interactive Dialogue, UN General Assembly, Third Committee, New York, 27 October 2016.

84 Eritrea–EU Cooperation, 11th European Development Fund, National Indicative Programme 2014–2020, signed in Asmara, 28 January 2016.

85 European Parliament resolution of 10 March 2016 on the situation in Eritrea (2016/2568(RSP)), paras. 6 and 10.

86 European Commission, International Cooperation and Development, 'Support for the Creation of Employment Opportunities and Skills Development in Eritrea,' 22 December 2016.

87 UN Doc. A/HRC/35/39 (7 June 2017), para. 35.

88 Ibid., para. 64.

89 Ibid., para. 67.

rapporteur acknowledged that effective use of this option depended, *inter alia*, on the availability of evidence and observed that civil society could play a role in collecting documentation.<sup>90</sup> In addition, she indicated that civil society actors were crucial in generating and maintaining the political will needed for such actions.<sup>91</sup> In a subsequent resolution adopted in July 2017, the European Parliament stressed the need for accountability on the conclusions of the COIE and expressed support for the special rapporteur, but it did not reiterate the rapporteur's suggestions about the exercise of universal jurisdiction.<sup>92</sup>

At the international political level broader strategic interests, including those of host states to curb migration flows, have thus to some extent outweighed the concerns expressed in the COIE reports and the framing of the situation in international criminal law terms. The search for accountability mechanisms, then, refocused and shifted to the domestic level, thereby clearly envisaging a role for civil society actors, possibly in tandem with diaspora communities.

### Domestic Courts and Transnational Justice and Protection Strategies

The use of universal jurisdiction as a transnational justice strategy and the particular role of victim diasporas as central dynamos of these processes has been theorized by Frédéric Mégret.<sup>93</sup> He articulates a diasporic model of universal jurisdiction as a form of rooted cosmopolitanism and he normatively grounds this model in a duty of hospitality of the host state coupled with a transnational right to remedy for victims. Mégret invites us to see universal jurisdiction as a sociolegal practice and to study it 'from the ground up.' In the specific context of our analysis, several Eritrean organizations can be identified that have the express aim to contribute to accountability. Most prominently, the Eritrean Law Society (ELS) seeks to investigate and assess human rights violations against Eritreans, specifically including Eritreans outside Eritrea, and subsequently to lobby governments and organizations to pay attention to those violations.<sup>94</sup> The ELS website announces collaboration with the NGO European Center for Constitutional and Human Rights (ECCHR) to jointly develop strategies aimed at triggering universal jurisdiction processes in European states.<sup>95</sup> These initiatives correspond with the call of the special rapporteur to refocus on the potential of universal jurisdiction as the avenue for accountability with most current potential. So far, no universal jurisdiction cases have materialized. The usefulness of the COIE process and its findings for achieving justice and protection of the Eritrean victim diaspora has been tested though, through different domestic procedures.

The COIE reports have, for instance, been invoked by asylum seekers to corroborate claims regarding the risks involved in forcible return. However, this has not

90 Ibid., para. 73.

91 Ibid., para. 74.

92 European Parliament resolution of 6 July 2017 on Eritrea, notably the cases of Abune Antonios and Dawit Isaak (2017/2755(RSP)). The European Parliament did address the tension between its calls for accountability and the EU's support for the aid package, as it 'Denounced the resumption of major EU aid to Eritrea and in particular the signing off of the NIP for Eritrea of EUR 200 million,' para. 10.

93 Mégret, *supra* n 9.

94 See, [www.erilaw.org/](http://www.erilaw.org/).

95 Notice on website of 15 September 2018, 'ELS and ECCHR Exploring Possible Areas of Collaboration.'

been entirely successful. In the asylum case between *MST, MYK, AA and the Secretary of State for the Home Department*, the UK dismissed the relevance of the reports for this procedure. The Upper Tribunal summarized the critique as follows:

The respondent's main criticisms in full are that: (i) the overbroad temporal scope renders the report's methodology 'entirely opaque'; (ii) the Commission does not set out how the interviewees were selected or what steps were taken to protect against interview bias; (iii) the Commission does not explain what percentage of respondents were asylum seekers and does not grapple with the issue of whether the evidence of asylum seekers can always be taken at face-value; (iv) the Commission does not give any detail about the nature and methodology of the questioning, who carried out the interviews, whether the questions were open or closed; or whether interlocutors were alone or not; (v) it is not clear how written submissions were checked or verified – only selected extracts of interviews were made available and there is use of paraphrase; (vi) the vast majority of propositions are supported by very few sources.<sup>96</sup>

The Tribunal did not make a definitive finding about the validity of these critiques. It just pointed out that its own task was very different from that of the COIE. It stated:

we are not tasked with deciding on the nature and extent of human rights violations in that country over a 25 year period and it would be arrogant in the extreme for a domestic tribunal dealing with a country guidance case focusing on risk of forcible return to try and pass judgement on a large-scale international inquiry which has taken several years and involved a prodigious amount of work. On the other hand, we cannot avoid identifying certain difficulties posed by these two reports that impinge on our own task and we agree with the respondent that we cannot apply different standards from that we apply to e.g. government Fact-Finding Missions, just because the report is carried out by UN officials.<sup>97</sup>

Hence, the Tribunal questioned whether the COIE had applied 'rigorous standards,' as asserted, and regretted the lack of further context regarding methodology.<sup>98</sup> Nonetheless, the Tribunal did conclude that Eritreans who had left illegally or were likely to be perceived upon return as draft evaders or deserters would face a risk of persecution.<sup>99</sup> The concerns about methodology did not prevent some degree of reliance on the report,<sup>100</sup> but they do indicate that the low level of methodological

96 UK, Upper Tribunal (Immigration and Asylum Chamber), *MST and Others (national service – risk categories) Eritrea CG* [2016] UKUT 00443 (IAC), Between *MST, MYK, AA and The Secretary of State for the Home Department*, and UNHCR intervening, June 2016, para. 210.

97 Ibid., para. 214.

98 Ibid., para. 216; for example, as regards matters such as whether questions were open or closed, and whether anyone else was present during the interviews.

99 Ibid., para. 431.

100 As also noted by the special rapporteur. UN Doc. A/HRC/35/39 (7 June 2017), para. 39.

rigour (or perceptions of it) may limit the report's influence in domestic judicial or administrative settings.

Somewhat similar evidentiary reservations informed a very different type of legal case in Canada – the action against Canadian mining company Nevsun. This case came before the Supreme Court of British Columbia, Canada, pursuant to a civil claim brought by members of the Eritrean diaspora. For purposes of addressing *forum non conveniens* and non-jurisdictional applications brought by Nevsun, the Court had to decide whether various reports on the situation in Eritrea, including the COIE reports, but also state and NGO reports, were admissible as evidence.<sup>101</sup> Analyzing previous cases in which Canadian courts referred to governmental, NGO and UN reports, the Court pointed out that the weight given to such reports depended on 'the context of the proceeding, including the type of hearing, and the circumstances of the individual case.'<sup>102</sup> Nonetheless, distinguishing between 'social facts' and 'adjudicative facts',<sup>103</sup> the various reports – including the COIE report – were admitted, but only for the limited purpose of offering a social, historical and contextual framework in which first-hand evidence could be assessed.<sup>104</sup> Subsequently, the Supreme Court concluded that there was a real risk of an unfair trial in Eritrea, basing its assessment on the secondary reports, but not singling out the COIE reports.<sup>105</sup> The case was allowed to proceed to trial.

In these cases, the UN signature on the COIE reports did not offer special status and the COIE reports were treated on a par with NGO and other reports, while the authority such reports had depended mainly on their methodological rigour. In this respect, the courts, and in particular the UK court, noted the complexities inherent in the reliance on testimonies from individuals that have fled their state. The broad timeframe of the COIE, spanning over 25 years, also diminished the possibility for individuals in the diaspora to usefully rely on them in subsequent litigation, an element that the COIE probably did not sufficiently appreciate while interpreting its mandate.

### COIs AS OPPORTUNITY STRUCTURES FOR DIASPORAS<sup>106</sup>

The dissonance between the COIE's interpretation of its mandate and concrete diaspora interests reinforces the suggestion made at the outset of this article that COIs do not typically regard diasporas as relevant interlocutors beyond their instrumental role as information providers. The North Korea COI may have been an exception in that it organized public hearings in cities with large diaspora communities, but

101 Canada, Supreme Court of British Columbia, *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856 (6 October 2016), para. 8.

102 *Ibid.*, para. 165.

103 'Social facts' are 'used to construct a frame of reference or background for deciding factual issues crucial to the resolution of a particular case'; they are general in nature. In turn, 'adjudicative facts' encompass 'the where, when and why of the accused is alleged to have done.' *Araya v. Nevsun*, supra n 101 at para. 169, referring to *Isakhani v. Al-Saggaf*, 2007 ONCA 539, para. 38.

104 *Ibid.*, para. 138.

105 *Ibid.*, para. 296.

106 The term 'opportunity structure' is borrowed from Orjuela, supra n 7.

diasporas certainly do not feature prominently on the radar of commissions, or of international law scholars more broadly for that matter.

Yet, many states subjected to international human rights inquiries will have generated significant diasporas. Since the composition and relation of these diaspora communities to the home state will vary, the aim of this article and the Eritrean case study has not been to make generic claims on diasporas and COIs. Rather, this article was informed by a more modest ambition, namely to set the stage for some deeper reflection on COIs as opportunity structures for diasporas and to expose how the current international architecture may be inapt to capture present-day diasporic realities.

The Eritrean case study quite pertinently elucidates why international lawyers have difficulty with this concept and why diasporas are not easily conceptualized as subjects in a legal sense. As is the case with most diasporas, the Eritrean diaspora is not monolithic at all and as a result of this very heterogeneity diasporas may well be too elusive for any type of traditional legal recognition.<sup>107</sup> Indeed, the argument has been made in other disciplines that we should not think of diasporas 'in substantialist terms as a bounded entity but rather as an idiom, a stance, a claim.'<sup>108</sup> Lawyers may well have difficulty grappling with such intangible constructs. Diasporas thus challenge international law's reflex to engage with entities and phenomena through a subject-based approach only. They also test international law's underlying territorial assumptions.

Indeed, the COIE case study is spot on in its illustration of how the structures of human rights law are rather ill-equipped to offer protection to diasporas. While the long-arm practices of the Eritrean government, including allegedly the Sinai trafficking, clearly evoke questions regarding the need for human rights protection of diasporas against home state actors, the COIE chose to largely ignore this exercise of transnational authority. Why did the COIE not pierce the diaspora phenomenon to embrace the individual diaspora member as a subject of its inquiry? Most likely, the COIE refrained from adding a broad extraterritorial dimension to its mandate because it was blinkered by human rights' more traditional parameters. As a result, Asmara's long-arm practices largely remained unscrutinized. While in line with prevalent understandings of human rights law, the COIE approach left victims in the diaspora wanting. On a deeper level, the omission highlights that human rights law's territorial starting point and its subject-based approach may be ever more out of tune with the pace and configuration of our present globalized world. Acts such as those scrutinized by COIs often do not occur in one place only. The Sinai trafficking, for example, is marked by ransom kidnapping and extortion of family members who are located in other territories than the direct victims.<sup>109</sup> Moreover, as observed by Mégret, when victims travel (or flee), their harm travels with them.<sup>110</sup> Ignoring those victims in diasporas leaves certain facts unreported.

107 L. van den Herik, 'Diasporas and International Law,' *ESIL Reflections* 7(6) (2018).

108 R.W. Brubaker, 'The "Diaspora" Diaspora,' *Ethnic and Racial Studies* 28(1) (2005): 12, as affirmatively quoted by R. Bauböck, 'Cold Constellations and Hot Identities: Political Theory Questions about Transnationalism and Diaspora,' in *Diaspora and Transnationalism: Concepts, Theories and Methods*, ed. R. Bauböck and T. Faist (Amsterdam: Amsterdam University Press, 2010).

109 Yehuda Goor, 'Ransom Kidnapping and Human Trafficking: The Case of the Sinai Torture Camps,' *Berkeley Journal of International Law* 36(1) (2018): 111–165.

110 Mégret, *supra* n 9.

Apart from highlighting these structural discords, the article aimed to deepen and broaden perspectives on which roles diasporas can and do play in COI contexts. Thus far, COIs have mostly approached members of diaspora communities instrumentally, for information-gathering purposes. By lack of territorial access, this method may bring a COI as close to the 'crime scene' as it can get. While diasporas are immensely useful as information providers, the COIE also exhibited the extremely complex nature of diasporas and their intensely political nature, raising the question of how this impacts on the suitability of individuals in diasporas to function as information providers. As is commonly the case with diasporas, Eritreans abroad vary in their stance towards 'home' and may entertain positive, sceptical or hostile relations to their home state.<sup>111</sup> Obviously, this also informed their attitude towards the human rights inquiry. The COIE experience revealed how contestations impacted both the process of fact-finding as well as the reception of outcomes. More generally, it has been observed that diasporas have a past-oriented identity that can become frozen in time and which is very much tied to a vision of the homeland at a specific point in time, namely the moment of departure.<sup>112</sup> These features do not render diaspora members unsuitable as information providers per se, but they should inform methods of fact-finding. The two domestic cases which were discussed revealed how methodological choices and restraints may influence domestic reception and how overreliance on diasporic voices may weaken findings if not properly embedded in a broader corroborative methodology.

The two cases were also presented as examples of transnational justice and protection strategies at the domestic level, tying in with another role that diasporas can play and which could be further enhanced, namely as mobilizers of legal action. The energy that flows from the intrinsic political engagement of diasporas can ensure active follow up of COI outcomes, if channelled properly. For instance, diasporas can play key roles in triggering the exercise of universal jurisdiction.<sup>113</sup> The two cases also offer a glimpse of broader protection and accountability possibilities at the domestic level, although admittedly universal jurisdiction remains the most obvious entry point for this. As international inquiry outcomes may often not produce the desired international response, domestic strategies must be pursued by default. In domestic settings, recognizing relevant migrant groups as diasporas better appreciates their inherent mobilizing force.<sup>114</sup> This insight can be extrapolated to the other roles too. In conclusion, it is thus submitted that recognition of the different roles that diasporas can play as well as appreciating their specific diasporic condition may help COIs evolve as more effective instruments in the contemporary world.

111 For a similar categorization in relation to the Rwanda diaspora, see, Orjuela, *supra* n 7, referring to S. Turner, 'Staging the Rwandan Diaspora: The Politics of Performance,' *African Studies* 72(2) (2013): 265–284.

112 Koinova, *supra* n 7.

113 H. Haider, 'Transnational Transitional Justice and Reconciliation: The Participation of Conflict-Generated Diasporas in Addressing the Legacy of Mass Violence,' *Journal of Refugee Studies* 27(2) (2014): 207–233.

114 Bauböck, *supra* n 108, argues that diasporas must be understood as a political project and that this understanding differentiates diasporas from general transnational migrant communities. Bauböck also notes the performative quality that has been ascribed to the term, as well as the focus on politics of passion that the concept entails.