Commissions of Inquiry as Bulwarks Against Impunity

Sarthak Roy[**]

> *"Who controls the past controls the future. Who controls the present controls the past."*
>
> *George Orwell*

Commissions of Inquiry encompass a wide range of bodies across the international legal and political landscape. From fact-finding missions, Commissions of Inquiry now confront institutional normative shifts of magnitude in the areas of international humanitarian, human rights, and criminal law. This article traces their historical evolution, the language and exercise of their mandates, and their potential to address the issue of accountability in the evolving contexts that international law finds itself operating.

Keywords: IHL, Commissions of Inquiry, United Nations, Fact-finding Commissions, International Criminal Law

1. Setting the Context

In the aftermath of the escalation of the hostilities in Ukraine, the United Nations Human Rights Council ("UNHRC") at its emergency special session decided by an overwhelming majority in its resolution of 4 March 2022 "to urgently establish an ongoing independent, international commission of inquiry".[1] Ranging from the Ivory Coast to Darfur, Libya, Syria, North

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[1] UNHRC Res. A/HRC/49/1, 4 March 2022.

Korea, Eritrea, South Sudan and Sri Lanka, United Nations ("UN")-mandated commissions of inquiry, independent investigative mechanisms and fact-finding missions (hereinafter collectively referred to as "COIs") are increasingly being relied on to respond to and investigate alleged violations of international human rights law ("IHRL"), international humanitarian law ("IHL") and international criminal law ("ICL"), and their documentation and recommendations have considerably strengthened the international law protection to combat mass atrocities.[2] In his landmark Agenda for Peace, then UN Secretary-General ("UNSG") Boutros-Ghali reemphasized the importance of fact-finding as a tool for preventive diplomacy and encouraged an increased resort to fact-finding by the UN's primary organs.[3]

Once the UN came into existence, such bodies were created mainly by the UN Security Council ("UNSC"),[4] the UN General Assembly ("UNGA"),[5] the UNHRC,[6] its predecessor, the Commission on Human Rights,[7] the UNSG[8] and the High Commissioner for Human Rights ("OHCHR").[9] States and regional organisations[10] have also established different types of bodies that may fit in the general category of COI. Even human rights treaty instruments allow for inquiry over violations which can only be conducted if States Parties to respective treaties recognize the competence of the relevant committee for this purpose. As Dapo Akande observes, "in the absence of universal compulsory jurisdiction by international judicial bodies, these commissions of inquiry are a way in which the international community can obtain an authoritative determination of whether these violations have taken place and who is responsible."[11]

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[2] M. Cherif Bassiouni and C. Abraham (eds), *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies*, Intersentia, Cambridge, 2013, p.8.

[3] Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council, An Agenda for Peace; Preventive diplomacy, peacemaking and peacekeeping, UN Doc. A/47/277–S/24111, 31 January 1992, paras 23 and 25.

[4] UNSC Res. 780, 6 October 1992.

[5] UNGA Res. A/RES/52/135(1), 27 February 1998.

[6] UNHRC Res. A/HRC/RES/S-15/1, 25 February 2011.

[7] Report of the Fourth Special Session, U.N. Doc. E/CN.4/RES/1999/S-4/1, 1999.

[8] The United Nations Secretary-General ("UNSG") established in 2000 the International Commission of Inquiry for Togo to look into allegations of extrajudicial killings in 1998.

[9] Fact-finding mission on the situation of human rights in Mali, U.N. Doc A/68/53, 21 March 2013.

[10] Report of the Commission of Inquiry into the Events of December 17, 2001, in Haiti, OEA/Ser.G, CP/INF 4702/02, 1 July 2002.

[11] Dapo Akande and Hannah Tonkin, "International Commissions of Inquiry: A New Form of Adjudication?", *EJIL: Talk!,* 6 April 2012, available at: https://www.ejiltalk.org/

1.1. Hallmark of COIs

Questions often arise on whether COIs primarily act as fact-finders or as *de facto* law-applying authorities.[12] Bassiouni approaches this question thus: "Commissions of Inquiry are fact-finding mechanisms intended to correct violations of human rights and humanitarian law by investigating and reporting on a particular situation and providing recommendations to the mandating body."[13] Moreover, the consistent recourse to inquiry suggests a widespread assumption or intuition that COIs are useful.[14] For the purpose of this paper, the minimal qualifying features of a COI are the following: (i) they are *ad hoc* and temporary, designed and implemented to address specific situations; (ii) they engage with matters that raise questions of international law and contribute towards its development; (iii) they are established by a "public" body—whether by one or more States or by an international organisation; and (iv) their findings and conclusions are non-binding (thus, distinguishing COIs from most of the activities of international courts and tribunals).

However, once a COI has been established, does it make a difference? Do they function as self-standing institutions or should they also operate in tandem with other accountability mechanisms? Do their terms of reference permit only backward-looking issues of accountability? Or can they address future-looking issues and problem-solving? Overall, in its elaborate efforts at preventing impunity, can COIs also contribute to the progressive development of related areas of international law?

In attempting to answer the questions above, this paper begins by tracing the history and spawning of COIs over the last two and a half centuries. Subsequently, the paper focuses upon the evolution of their mandates over time, the use of relevant provisions, their interpretation and application to the facts and the interplay between IHRL, IHL and ICL in the

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international-commissions-of-inquiry-a-new-form-of-adjudication/ (accessed 3 December 2021).

[12] Larissa J. 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*, Volume 13, Issue 3, 2014, pp. 507–537.

[13] Bassiouni and Abraham, above note 2, p. 8.

[14] Antonio Cassese, "Fostering Increased Conformity with International Standards: Monitoring and Institutional Fact-Finding", in A. Cassese (ed.), *Realizing Utopia: The Future of International Law*, Oxford University Press, Oxford, 2012, pp. 302– 303.

final reports of COIs. The penultimate segment of the paper addresses some of the fundamental scepticisms that remain associated with COIs. The paper concludes by highlighting that, despite the fracturing of the global political order, there is widespread "consciousness that instead of imposed amnesia, atrocities must be addressed", the existence of COIs provides a "contagion of accountability against atrocities", since "sweeping them under the carpet" is not a viable option.[15]

2. Evolution of COIs from the Lens of History

The growth and evolution of COIs can be divided into three phases. The genesis of COI as a new construct of dispute settlement can be traced back to the Maine explosion of 1898 in Cuba which resulted in the death of 266 American crew members on board a United States ("US") battleship. Friedrich Martens propounded that an impartial establishment of the facts and circumstances would answer these questions and help cool off emotions in the context of already estranged relations over Cuba.[16] Shortly thereafter, prominent leaders from fifty-nine States participated in a peace conference at The Hague which led to the creation of 1899 Hague Convention for Pacific Settlement of Disputes ("Hague I Convention") under which the States agreed to institute an International Commission of Inquiry as a means for settlement of their international differences or conflicts "involving neither honour nor vital interests, and arising from a difference of opinion on points of fact".[17] The mechanism for an international commission of inquiry was further developed under the 1907 Hague Convention on Pacific Settlement of Disputes ("Hague II Convention") in the Second Hague Peace Conference which set the procedural rules for the composition and functioning of the commission.[18]

Subsequently, in the second phase, COIs were created to primarily investigate a wide range of flotilla attacks during a volatile period of global politics culminating with the creation of the League of Nations. They included the following:

- the creation of the Dogger Bank commission by agreement following an incident in which the Russian Baltic fleet mistook

[15] Payam Akhavan, *In Search of A Better World: A Human Rights Odyssey,* House of Anansi Press Inc., Toronto, 2017, p. 81.
[16] Van Den Herik, above note 12, p. 510.
[17] *Ibid*.
[18] *Ibid*.

British vessels for Japanese warships, resulting in British fatalities. The COI investigated the facts of the incident and indemnified the British in a report handed down on 26 February 1905;[19]

- the establishment of the Tavignano inquiry in the aftermath of an incident which occurred during the Turco-Italian war of 1911-1912. The Commission set up by virtue of the Hague II Convention was tasked to investigate an incident which involved the arrest of the French vessel Tavignano and two other vessels which were also fired upon in what Italy claimed was the high seas and what France claimed was Tunisian waters. The COI, in its report on 23 July 1912, concluded that though the arrest may or may not have been carried out in Tunisian waters, the firing incidents certainly happened in Tunisian waters;[20]
- the formation of the Tiger inquiry to examine an incident involving a German submarine which had sunk a Norwegian ship allegedly carrying contraband. The COI had to decide where the act took place. The final report of the COI was released on 9 November 1918 and it found Germany liable and directed it to pay six million dollars;[21]
- the establishment of the Tubantia inquiry to investigate the sinking of the Dutch steamer Tubantia which was carrying eighty passengers and 280 crew members on its way towards South America. In its final report on 27 February 1922, it was determined that the Dutch vessel was sunk by a torpedo fired from a German submarine. However, the report did not conclusively answer whether the act of firing the torpedo was accidental or intentional;[22] and
- the formation of the Red Crusader inquiry involving the arrest and pursuit of a United Kingdom ("UK")-registered trawler (Red Crusader) by a Danish warship exercising Danish and Faroese fisheries jurisdiction (Niels Ebbesen). The COI released its report

[19] R.N. Lebow, "Accidents and Crises: The Dogger Bank Affair", *Naval War College Review*, Volume 31, 1978, p. 66.

[20] International Commission of Inquiry, *Capture of the "Tavignano" and cannon shots fired at the "Canouna" and the "Galois" (France vs. Italy),* 1916 The Hague Court Reports 413, 23 July 1912.

[21] Van Den Herik, above note 12, p. 513.

[22] International Commission of Inquiry, *Loss of the Dutch Steamer "Tubantia" (Germany v. The Netherlands)*, 16 American Journal of International Law 485, ICI Report of 27 February 1922, p. 8.

> on 23 March 1962 and concluded that the Danish fire on the escaping trawler failed a proportionality test as it was not the least harmful means available and therefore "exceeded legitimate use of armed force".[23] The 1961 Red Crusader incident has now become a milestone in the development of law and practice of hot pursuit, and the use of force, in maritime law enforcement operations.[24]

Afterwards, COIs of a different nature were set up within the multilateral framework of the League of Nations governed by Articles 11, 12, 15 and 17. Some of the prominent inquiries under the aegis of the Council concerned: (1) the Aaland Island affair of 1921;[25] (2) the frontier dispute between Iraq and Turkey of 1924-1926;[26] (3) the Greco-Bulgarian incident of 1925;[27] (4) the Northern Chaco affair of 1928-1935;[28] and (5) the Sino-Japanese conflict of 1931-1935.[29]

Entrusted with a distinct role of resolving ongoing or past disputes either independently or as part of a larger institutionalized structure, these COIs blended inquiries with techniques of conciliation or used inquiry as a precursor or substitute to arbitration. However, despite the use of legal terms, Van Den Herik observed that in this phase "the inquiries functioned as mechanisms of peace rather than as instruments of law fully embedded in a legal framework and procedure".[30] Additionally, during times of volatile international legal order, findings from these inquiries faced a lot of political pushbacks and criticisms. For instance, after the Lytton Report on the

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[23] Report of 23 March 1962 of the Commission of Enquiry established by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Denmark, 29 RIAA 521, 15 November 1961, p. 539.

[24] Jan Martin Lemnitzer, "International Commissions of Inquiry and the North Sea Incident: A Model for a MH17 Tribunal?", *European Journal of International Law*, Vol. 27, No. 4, 2016, pp. 923–944

[25] Report presented to the Council of the League by the Commission of Rapporteurs, Doc. no. 21/68/106, 1921.

[26] Nevin Cosar and Sevtap Demirci, "The Mosul Question and the Turkish Republic: Before and After the Frontier Treaty,1926", *Turkish Yearbook of International Law*, Volume 35, 2004, p. 43.

[27] James Barros, *The League of Nations and the Great Powers, The Greek-Bulgarian Incident 1925*, Clarendon Press, Oxford, 1970, p. 89.

[28] "Report of the League of Nations Commission on the Chaco Dispute between Bolivia and Paraguay", *American Journal of International Law*, Volume 28, Issue S4, 1934, p. 137.

[29] Arthur K. Kuhn, "The Lytton Report on the Manchurian Crisis", *American Journal of International Law*, Volume 27, 1933, p. 96.

[30] Van Den Herik, above note 12, p. 519.

Manchurian crisis,[31] Japan rejected the Commission's finding branding it an aggressor, leading to its 1933 departure from the League of Nations and wrecking any prospects for reconciliation.[32]

2.1. COIs in Contemporary Times

Ultimately, the final phase in the development of COIs coincides with the emergence of the UN. Pursuant to Article 34 of the UN Charter, the UNSC was entrusted with investigatory powers geared towards prevention of any situation which might endanger international peace and security.[33] Unlike the UNSC, the UNGA was not vested with an express power to investigate. However, subject to Article 12 of the UN Charter, the UNGA can establish fact-finding bodies pursuant to Articles 10, 11, 14 and 22. The UNGA has used its implied investigative powers to report on situations, such as apartheid in South Africa,[34] the circumstances surrounding the 1961 deaths of Patrice Lumumba[35] and Dag Hammarskjöld,[36] as well as the assassination of the prime minister of Burundi.[37]

In instances where international politics paralysed the UNSC or the UNGA, the UNHRC increasingly stepped in to establish various COIs to investigate human rights abuses. Despite not being specifically vested with the powers of establishing COIs, the HRC's implied powers permit it to address and respond to human rights violations and make recommendations on the protection of human rights. As Chinkin observes, "the principal idea underlying human rights inquiries is that exposure may contribute to better compliance."[38]

Aside from these UN bodies, the UNSG can also set up a COI under Article 99 of the UN Charter, which provides that "the Secretary-General

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[31] A. Kuhn, above note 34, p. 96.

[32] "The Japanese Reply to the Lytton Report", *Current History (1916-1940)*, Volume 37, No. 4, 1933, pp. 504–512, available at: http://www.jstor.org/stable/45335063.

[33] T. Schweisfurth, "Article 34", in Bruno Simma, et al. (eds.), *The Charter of the United Nations: A Commentary,* Oxford University Press, Oxford, 2012, p. 1089.

[34] UNGA Res. 616 A (VII), 5 December 1952.

[35] UNGA Res. 1601 (VX), 15 April 1961.

[36] UNGA Res. 1628 (XVI), 26 October 1961.

[37] UNGA Res. 1627 (XVI), 6 November 1961.

[38] Christine Chinkin, "UN Human Rights Council Fact-FindingMissions: Lessons from Gaza", in M.H. Arsanjani, et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, Martinus Nijhoff, 2010, pp. 475–198.

may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security." By virtue of this provision, the UNSG has exercised fact-finding powers in Zimbabwe,[39] Timor-Leste[40] and Fiji,[41] among others. Recently, in the midst of the ongoing Russian invasion in Ukraine, the UNSG launched a fact-finding mission to investigate the deadly 29 July 2022 incident at Olenivka, Ukraine, following requests from the governments of Ukraine and the Russian Federation.[42] Both countries accused each other concerning the attack on Olenivka prison in Donetsk Oblast which killed fifty-three Ukrainian prisoners on 29 July 2022.[43] The UNSG appointed Lieutenant General (Retired) Carlos Alberto dos Santos Cruz of Brazil to lead the fact-finding mission, with other members being Ingibjörg Sólrún Gísladóttir of Iceland and Issoufou Yacouba of Niger.[44]

The European Union also intervened for the first time in 2008. By its decision of 2 December 2008, the Council of the European Union established an Independent International Fact-Finding Mission on the Conflict in Georgia ("IIFFMCG").[45] In this conflict, heavy fighting had erupted in and around the town of Tskhinvali in South Ossetia in August 2008 between forces from Georgia and Russia along with the presence of South Ossetian and Abkhaz military units.[46]

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[39] Anna Kajumulo Tibaijuka, *Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina*, United Nations, 2005.

[40] Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste, 2 October 2006, pp. 109–34.

[41] UN Press Release, "Secretary-General Dispatches Fact-Finding Mission to Fiji", *United Nations*, 2007, available at: https://www.un.org/press/en/2007/sgsm10955.doc.htm.

[42] UN Press Release, "Members of Fact-finding Mission regarding Incident at Olenivka, Ukraine, on 29 July 2022", *United Nations*, 2022, available at: https://www.un.org/sg/en/content/sg/personnel-appointments/2022-08-22/members-of-fact-finding%C2%A0mission-regarding-incident-olenivka-ukraine-29-july-2022%C2%A0.

[43] The Kyiv Independent News Desk, "UN announces fact-finding mission to investigate Olenivka tragedy", *The Kyiv Independent*, 3 August 2022, available at: https://kyivindependent.com/uncategorized/un-announces-fact-finding-mission-to-investigate-olenivka-tragedy.

[44] *Ibid*.

[45] Council Decision 2008/901/CFSP of 2 December 2008 concerning an independent international fact-finding mission on the conflict in Georgia OJ L 323, 3.12.2008, p. 66–66

[46] Independent International Fact-Finding Mission on the Conflict in Georgia, "Report", Volume I, pp. 1-33, available at https://www.echr.coe.int/Pages/home.aspx?p=home.

For the purpose of specifically investigating grave breaches and other serious violations of the Geneva Conventions, the International Humanitarian Fact-Finding Commission ("IHFFC") was established under Article 90 of Additional Protocol I ("AP I") to the Geneva Conventions in 1991. Pursuant to the Geneva Conventions and AP I, the IHFFC is mandated to enquire into alleged grave breaches and also facilitate through its good offices the restoration of an attitude of respect for the Conventions and AP I.

Unlike many other COIs, the IHFFC is a permanent international body based in Bern, Switzerland and is composed of fifteen members including medical doctors, judges, high ranking military experts, diplomats and international law scholars elected for a five-year period.[47]

The IHFFC has a consent-based mechanism, be it during peacetime or when an armed conflict has broken out, with declarations being made by States of becoming a Party to AP 1 and thus allowing all Parties to resort to the Commission. It is also worth highlighting the International Committee of the Red Cross' ("ICRC") landmark Customary International Law Study, which indicates that "States must investigate war crimes allegedly by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects."[48] However, with States being recalcitrant about international recognition of an armed conflict, the IHFFC remained idle for years.[49] Nonetheless, the IHFFC was granted observer status by the UNGA in October 2009[50] and in the very same year the UNSC called for its possible use in Resolution 1894.[51]

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[47] C. Azzarello, C. and M. Niederhauser, "The Independent Humanitarian Fact-Finding Commission: Has the 'Sleeping Beauty' Awoken?", *ICRC Humanitarian Law & Policy Blog*, 9 January 2018, available at: https://blogs.icrc.org/law-and-policy/2018/01/09/the-independent-humanitarian-fact-finding-commission- has-the-sleeping-beauty-awoken/.

[48] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, *Volume 1: Rules*, Rule 158, Cambridge University Press, Cambridge, 2005; Noam Lubell, Jelena Pejic and Claire Simmons (eds), *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice*, The Geneva Academy of International Humanitarian Law and Human Rights and the International Committee of the Red Cross, September 2019.

[49] Marco Sassoli, "Challenges and opportunities to increase respect for IHL: specificities of the Additional Protocols", in Fausto Pocar (ed.), *The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives*, International Institute of Humanitarian Law, 2017.

[50] UNGA Res. A/RES/64/121, 15 January 2010.

[51] UNSC Res. 1894, 11 November 2009.

Ultimately, it was only in 2017, that a situation was referred for investigation to the IHFFC when an Organization for Security and Cooperation in Europe ("OSCE") armoured vehicle patrolling through Eastern Ukraine exploded resulting in the death of an OSCE paramedic.[52] Aside from forensic investigation by IHFFC's independent forensic team ascertaining the *modus operandi* of the attack, the IHFFC also provided a legal analysis of the incident outlining the indiscriminate nature of the attack being a violation of IHL. Later, the IHFFC also came close to initiating an inquiry in the context of the Colombian conflict but it ultimately fell through.[53] Despite suggestions for amendments made by ICRC towards the IHFFC being able to act on its accord away from State seizure, it has not materialized yet. This conundrum came to the fore when in October 2019, Russian President Vladimir Putin signed an executive order revoking the statement accompanying Russia's ratification of AP I, accepting the competence of the Article 90 IHFFC.[54] According to the Kremlin, it was disappointed that the IHFFC did not include a Russian representative even though Russia continued to make annual contributions to the budget of the Commission.[55] Additionally, it was felt that there was a risk of the Commission's powers being abused by unscrupulous States for political purposes.[56]

In recent years, there has thus been a shift in the work of COIs—whereas historically they focused on finding facts, the modern phase has witnessed COIs' strengthening demands for accountability especially when there is a dearth of effective international remedies. Moreover, contemporary situations of armed conflict, often being of an internal nature, is usually characterized by the frequent failure by domestic judicial and public institutions to investigate, mediate or resolve the underlying circumstances.

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[52] Independent Forensic Investigation Team, "Executive Summary of the Report of the Independent Forensic Investigation in relation to the Incident affecting an OSCE Special Monitoring Mission to Ukraine (SMM) Patrol on 23 April 2017", *Organisation for Security and Co-Operation in Europe*, 7 September 2017, available at: https://www.osce.org/home/338361.

[53] Robert Heinsch, "The Future of the International Humanitarian Fact-Finding Commission: A Possibility to Overcome the Weakness of IHL Compliance Mechanisms?", in Dra□an Djukić and Niccolò Pons (ed.), *The Companion to International Humanitarian Law,* Brill | Nijhoff, 2018.

[54] Reuters Staff, "Russia's Putin revokes Geneva convention protocol on war crimes victims", *Reuters*, 17 October 2019, available at: https://www.reuters.com/article/us-russia-warcrimes-convention-idUSKBN1WW2IN.

[55] *Ibid*.

[56] *Ibid*.

Additionally, the UNSC has been consistently hamstrung by veto-wielding representatives upholding self-serving strategic interests by blocking resolutions with dire consequences on civilian lives and property.[57] With the International Criminal Court ("ICC") also limited in its jurisdictional reach, COIs are often described as "second-best options".[58]

Beyond documentation and earmarking of accountability, COIs also act as tools for awareness and generate pressure on Parties to follow the rules of IHL. Therefore, as Federica D'Alessandra highlights, lately COIs have witnessed a proverbial "Accountability Turn",[59] which would be dealt with in depth in the subsequent section by surveying the constitutive language of a few mandates which have established COIs and other such mechanisms since the mid-2000s.

3. Analysis of Mandates

The language of the constituting mandates of COIs has evolved from purely fact-finding to documenting IHRL abuses and determining IHL and ICL violations. Analysis of these mandates shows that they have varied on the basis of the area, nature of violations and time period covered. As one commentator observes, unlike traditional COIs which were meant to "pacify and defuse a conflict, contemporary human rights commissions rather aim to stir, to evoke action, to opine and to condemn".[60] By analysing some of the mandates, this section identifies the engagement of COIs with international law; in particular, it has been observed that contemporary COIs have often been mandated to work as *de facto* law-applying authorities alongside their fact-finding exercises,[61] since most of these bodies interpret their mandates making inroads into legal analysis, by identifying the applicable legal framework, discussing the relevant norms and characterizing the facts in their

[57] Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes,* Cambridge University Press, 2020

[58] Julia Crawford, "What's behind the rise of evidence-gathering bodies", *Justiceinfo.net*, 30 November 2018, available at: https://www.justiceinfo.net/en/39637-what-s-behind-the-rise-of-evidence-gathering-bodies.html.

[59] Federica D'Alessandra, "The Accountability Turn in Third Wave Human Rights Fact-Finding", *Utrecht Journal of International and European Law*, Volume 33, No. 84, 2017, pp. 59-76.

[60] Van Den Herik, above note 12, pp. 507–537.

[61] Larissa van den Herik and Catherine Harwood, "Commissions of Inquiry and the Charm of International Criminal Law: Between Transactional and Authoritative Approaches", in Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding*, Oxford University Press, Oxford, 2016, pp. 233-254.

light.[62] In that pursuit, the substantial analysis offered below would also identify the possible interplay between IHRL and IHL norms, and the work of COIs.

3.1 Juridification of COIs' Mandates

A COI's mandate indicates its perceived role as an exclusive fact-finding mission[63] or as a mission which also undertakes judicial exercise.[64] They outline violations and legal rules that ought to be taken into account while investigations are carried out. Contemporary COIs have used international law as a reference point for selecting which facts are relevant. Experts have observed that there is now a trend towards "juridification of the mandates",[65] which is retained on the basis of two elements:

- commissions' mandates "refer to legal standards as a yardstick for collection and evaluation of relevant facts"; and[66]
- COIs "are increasingly expressly mandated to make legal findings and determinations".[67]

In other words, the work of a COI is based on the analysis of facts in tandem with the applicable law. It goes without saying that mandates generally provide references to a wide spectrum of violations and the related set of applicable laws. Here, it is pertinent to highlight examples that indicate a recent general shift towards "juridification of mandates". Then UN Secretary-General Kofi Annan, in his letter to the UNSC on the establishment of the UN Headquarters Board of Inquiry for the 2008/2009 Gaza Strip incidents, expressly underlined that the Commission would not act as a judicial body or court of law and that it would not make legal findings or consider questions of legal liability.[68] Earlier, the Commission of Experts for the former Yugoslavia interpreted its mandate as providing the UNSG only with conclusions on the evidence of violations without an analysis of the legal

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[62] Micaela Frulli, "Fact-Finding or Paving the Road to Criminal Justice?", *Journal of International Criminal Justice*, Volume 10, 2012, p. 1323.
[63] Fact-finding Mission regarding Incident at Olenivka, above note 42.
[64] UNHRC Res. A/HRC/49/1, above note 1, para.11.
[65] Van Den Herik, above note 12, p. 531.
[66] *Ibid*.
[67] *Ibid*.
[68] Security Council (2009), UN Doc. A/63/855-S/2009/250.

issues or legal findings in connection with particular cases.[69] Instead, it stated that it was the prerogative of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") to come to definitive legal conclusions in relation to particular cases and situations.[70] Similarly, the Democratic Republic of Congo Mapping Exercise held that "the legal classification of the acts of violence identified ultimately relies on a judicial process."[71]

Subsequently, the trend started shifting when the mandate of the UN Commission on Timor-Leste (2006) requested the Commissioners to "recommend measures to ensure accountability for crimes and serious violations of human rights";[72] in Libya (2011) the COI members had to "identify those responsible, to make recommendations, in particular, on accountability measures", all with a view to ending impunity;[73] in the Syrian Arab Republic (2011) the Commissioners were tasked to "identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable";[74] in the Occupied Palestinian Territory (2014) the COI members had to "make recommendations, in particular on accountability measures, all with a view to avoiding and ending impunity and ensuring that those responsible are held accountable".[75] The latest Myanmar and Syrian COIs were also asked to provide recommendations on accountability measures with a view to ending impunity. The Myanmar Commission (2018) recommended prosecuting the senior military officials named in an international criminal tribunal for genocide, crimes against humanity and war crimes,[76] while the Syrian COI (2016) has repeatedly called for the UNSC to "refer urgently the situation in

[69] Letter dated 24 May 1994 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/1994/674.
[70] *Ibid.*, p. 41.
[71] UN Office of the High Commissioner for Human Rights, "Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003", *United Nations Digital Library*, August 2010, p. 463, available at: https://digitallibrary.un.org/record/709895?ln=en.
[72] Report of the Independent Special Commission of Inquiry for Timor-Leste Established by UNHRC Res S-4/1, UN Doc. S/2006/822, 2006, Annex, p. 4(c).
[73] UNHRC Res. A/HRC/RES/S-15/1, above note 6, para. 11.
[74] UNHRC Res. A/HRC/RES/ S-17/1, 23 November 2011, para. 13.
[75] UNHRC Res. A/HRC/RES/S21/1, 23 July 2014, para. 13.
[76] UNHRC Res. A/HRC/RES/39/2, 3 October 2018.

Syria to the International Criminal Court, or to establish an ad hoc tribunal with relevant geographic and temporal jurisdiction".[77]

Just days after the Russian invasion of Ukraine, the OSCE's Moscow Mechanism was invoked by Ukraine with the support of forty-five participating States.[78] Three experts were appointed for a Special Mission which was mandated to identify the possible violations of OSCE commitments, abuses of IHL, as well as IHRL.[79] Additionally, they also had to ascertain *jus in bello* violations concerning war crimes and crimes against humanity with a view to presenting it to relevant accountability mechanisms, as well as national, regional or international courts or tribunals that have, or may in future have, jurisdiction.[80]

Therefore, some of the common features of the mandates which establish modern COIs are observed to be as follows:

- Investigation and establishment of facts;
- Legal examination of relevant facts;
- Collection and storage of evidence for prospective judicial proceedings; and
- Recommendations to various stakeholders.

4. Interplay of IHRL, IHL and ICL Norms

Throughout the last decade and a half, various COIs have made either explicit or implicit references to IHRL, IHL, and sometimes even to ICL. COIs which are mainly established by the UNHRC not only use IHRL as a frame of reference but also refer to other branches of international law. Although now a settled practice, questions have nonetheless been raised as to the propriety

[77] UNGA RES/71/248, 21 December 2016.

[78] Wolfgang Benedek, Veronika Bilkova and Marco Sassòli, "Summary of the Report by a Mission of Experts under the OSCE Moscow Mechanism", *EJIL:Talk!,* 19 April 2022, available at: https://www.ejiltalk.org/violations-of-international-humanitarian-and-human-rights-law-war-crimes-and-crimes-against-humanity-committed-in-ukraine-since-24-february-2022-summary-of-the-report-by-a-mission-of-experts-under-t/.

[79] OSCE, Report On Violations Of International Humanitarian And Human Rights Law, War Crimes And Crimes Against Humanity Committed In Ukraine Since 24 February 2022, 13 April 2022, ODIHR.GAL/26/22/Rev.1.

[80] *Ibid*.

thereof.[81] It is largely accepted and also expressed by the International Court of Justice ("ICJ") in its widely noted *Wall* opinion[82] that IHL and IHRL may apply in parallel, depending on the specific circumstances of each situation. In a situation of armed conflict, IHL standards provide for a more comprehensive and unbiased account of a conflict that examines the acts perpetrated by all sides. In a case of a non-international armed conflict, mere reliance on IHRL would predominantly highlight a State's actions while paying less attention to the acts of non-State actors who have "limited direct obligation under this area of law".[83] Notwithstanding challenges relating to extradition and jurisdiction, reference to ICL norms not just serves accountability purposes, but also induces the international community to take actions. Therefore, due to the mutual correlation, IHL and ICL have been incorporated in the reports of several COIs despite their mandates making references only to general human rights violations.

Acts such as rape and torture may amount to crimes against humanity or war crimes, depending on the context, the victims and the extent (widespread or systematic practice)[84] of the acts. For example, the Cote d'Ivoire Commission was mandated to investigate "allegations of serious abuses and violations of human rights".[85] However, the final report includes a brief examination of violations of both IHL[86] and ICL[87] in addition to human rights violations. This addition was justified by the Report, indicating the legal framework of the COI, and that Côte d'Ivoire was Party to most international and regional instruments relating to IHRL and IHL.[88] It was

[81] D. Richmond-Barak, "The Human Rights Council and the Convergence of Humanitarian Law and Human Rights Law", in W. Banks (ed.), *Shaping a Global Legal Framework for Counterinsurgency: New Directions in Asymmetric Warfare,* 2012, pp. 3–23.

[82] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* ICJ Rep 136, 2004, p. 106.

[83] United Nations Secretary-General, "Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka", *refworld*, 31 March 2011, available at: https://www.refworld.org/docid/4db7b23e2.html.

[84] International Criminal Tribunal for Yugoslavia, *Naletilić and Martinović*, ICTY Trial Chamber, ICTY-IT-98-34-T, 2003, p. 236; International Criminal Tribunal for Rwanda, *Akayesu,* ICTR Trial Chamber, ICTR-96-4-T 579, 1998.

[85] UNHRC Res. A/HRC/RES/16/25, 13 April 2011, para.10.

[86] Rapport de la Commission d'enquête Internationale Indépendante sur la Côte d'Ivoire, UN Doc A/HRC/17/48, 14 June 2011, paras 88–90.

[87] *Ibid*., at paras 91–93.

[88] *Ibid*., at para. 10.

later supported by the fact that the commissioners perceived the three types of legal rules as complementary.[89]

The COI for Libya detailed the various international legal standards applicable to the country's changing national situation. Three periods were identified that, "in legal terms [can] be demarcated as (i) 'peacetime', (ii) 'non-international armed conflict', and (iii) 'co-existing international armed conflict'".[90] Subsequently, its Second Report considered that "[w]ith the end of armed conflict (Phase III), international human rights law became predominant."[91] Furthermore, Philip Kirsch, who chaired the Libya Commission, affirmed that:

> we did not think it was stepping outside the mandate. We concluded the broad human rights legal framework encompassed human rights and international humanitarian law as *lex specialis* applicable in times of armed conflicts. Also, the resolution that created the commission required us to establish the facts and circumstances not only of human rights violations but also "of the crimes perpetrated", regardless of their nature.[92]

The final conclusion from the OSCE Mission's recent report ascertained that during the period of investigation, violations occurred on both the Ukrainian and Russian sides with clear patterns of IHL violations by Russia which were greater in scale and nature.[93] Despite not being provided with physical access, the Mission obtained information from various sources and examined two specific attacks in great detail. The Mission concluded that the 9 March 2022 attack on Mariupol Maternity House and Children's Hospital was undertaken by Russia with full knowledge and no warning, thereby constituting a clear violation of IHL and those responsible for it having committed a war crime.[94] Subsequently, the report also determined that the 16

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[89] *Ibid.*, at paras 88–93.
[90] Report of the International Commission of Inquiry to investigate all Alleged Violations of International human rights law in the Libyan Arab Jamahiriya, UN Doc A/HRC/17/44, 1 June 2011, paras 60-80.
[91] *Ibid.*, at para. 5.
[92] R. Grace, "The Design and Planning of Monitoring, Reporting, and Fact-Finding Missions", *Center for Human Rights and Humanitarian Studies; US Institute of Peace; Harvard Program on Negotiation*, 2013.
[93] OSCE, above note 80.
[94] OSCE, above note 80.

March 2022 strike on the Mariupol Drama Theatre constituted "most likely an egregious violation of IHL" leading to the death of approximately 300 people including women and children.[95] In its treatment of IHRL, the report took note of the view expressed by the UNHRC in its General Comment 36 where it underlined that "every killing in furtherance of an act of aggression violates the human right to life of the person killed, whether or not that killing also violates international humanitarian law."[96]

4.1. COIs and the development of International Law

When armed with a broader mandate to make determinations on the applicable legal regimes, clarifications by COIs of the different stages, degrees and types of violence can facilitate the growth of interrelated areas of law and confirm the idea that IHL is a *lex specialis* applicable when the required threshold of intensity of violence and organisation of armed groups are met. Considering the fact that COIs are not monolithic institutions, it could be considered that the determination of these elements based on factual evidence may be one of their main functions since factual elucidation helps determine relevant legal applicability.[97] Moreover, if the mandate so allows, the risk of not making a comprehensive analysis of IHL and ICL norms alongside IHRL violations might attract criticism from various stakeholders and affected parties.[98] This supports the idea that these three branches of international law have been developed to protect the rights of persons affected by a conflict and that these legal regimes "are complementary and mutually reinforcing".[99] By attracting more credibility to their work, COIs can ensure that its reports serve as advocacy tools, the main purpose being one of inducing compliance or, alternatively, instigating external action designed to halt human rights violations.[100]

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[95] *Ibid*.

[96] Adil Haque, "The OSCE Report on War Crimes in Ukraine: Key Takeaways", *Just Security*, 15 April 2022, available at: https://www.justsecurity.org/81143/the-osce-report-on-war-crimes-in-ukraine-key-takeaways/#:~:text=The%20report%20was%20written%20by,conflict%20between%20Russia%20and%20Ukraine.

[97] Marco Odello, "The Interplay between International Human Rights Law and International Humanitarian Law in the Practice of Commissions of Inquiry", in Christian Henderson (ed.), *Commissions of Inquiry— Problems and Prospects,* Hart Publishing, 2017.

[98] Grace, above note93.

[99] Outcome of the Expert Consultation on the Issue of Protecting the Human Rights of Civilians in Armed Conflict: Report of the United Nations High Commissioner for Human Rights, U.N. Doc. A/HRC/11/31, 4 June 2009, para. 5.

[100] Chinkin, above note 38.

This returns us to the initial issue: although COIs in contemporary times extensively utilize law to the facts elucidated, these mechanisms do not by themselves create binding legal obligations. Being neither courts of law nor creating legal liabilities or other legal affects, COIs' use of international law nevertheless helps bolster the validity of facts elucidated which may then foster political impacts. In the words of Politis, "non-binding and non-legal determinations can have legal implications in terms of attribution and responsibility."[101] Irrespective of the blurring of the fact-law distinction, the flexibility afforded to COIs allow them to assess not just previous issues of accountability but facilitate a review of long-standing issues that, if unaddressed, risk flaring up in future.

5. Criticisms and Drawbacks

Despite the growth and contributions made by various COIs, they are not beyond criticism from various stakeholders. Here, we shed light on certain deficiencies of COIs which, in the long run, can prove counterproductive due to lack of political legitimacy.

5.1. Procedural and Structural Challenges

First, and unlike formal judicial organs, COIs are not bound by a standard of proof "beyond reasonable doubt", the principle of equality of arms nor the principle of individual criminal responsibility.[102] Instead, due to the flexibility afforded to COIs, they apply lower evidentiary thresholds such as "reasonable suspicion",[103] "preponderance of evidence"[104] or "balance of probabilities".[105] In several circumstances, this has led to widespread outcry with fingers being

[101] N. Politis, "Les Commissions internationales d'enquête", *Revue générale de droit international public*, 1912, pp. 149-153.

[102] M. Aksenova, and M. Bergsmo, "Defining the purposes, mandates and outcomes of fact-finding commissions beyond international criminal justice", *FICHL Policy Brief Series No. 38*, 2015, available at: https://www.toaep.org/pbs-pdf/38-aksenova-bergsmo.

[103] "Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste", *OHCHR*, 2 October 2006, paras 12 and 110.

[104] Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance, U.N. Doc. A/HRC/15/21, 27 September 2010.

[105] Full Report of the International Commission of Inquiry to investigate all alleged violations of international law in Libya, annexed to Report of the International Commission of Inquiry on Libya, U.N Doc. A/HRC/19/68, 28 January 2014.

pointed towards the validity of the findings. For instance, the UNHRC-mandated COI for the Israeli flotilla raid of 2010 simply stated that, "[t]he Mission found the facts set out below to have been established to its satisfaction."[106] This standard was even lower that than the lowest standard of "reasonable grounds" required by the ICC to issue arrest warrants. Türkiye, being a party to the dispute, was upset by the findings of the COI which concluded that Israel's naval blockade was in keeping with international law and that its forces had the right to stop Gaza-bound ships in international waters. Nevertheless, Türkiye argued that the conclusion overstepped the mandate of the four-member panel appointed by the UNSG and was at odds with other UN decisions.[107]

However, in recent years, course correction has been undertaken with the standard of proof used by COIs established by UNHRC being elevated to "reasonable grounds".[108] For instance, the International, Impartial and Independent Mechanism for Syria established by the UNGA stated in its terms of reference that:

> these procedures shall be based on international law and standards, notably the right to a fair trial and other due process provisions under international human rights law, as well as on the jurisprudence, procedural standards and best practices of the international criminal tribunals.[109]

Juxtaposed to the aspect of "standard of proof" is the issue of premature determination of accountability that some COIs have been accused of previously. Oftentimes, by going beyond the monitoring mandate, these COIs have acted as quasi-judicial bodies, engaged in what Van der Herik refers to as the "judicialisation of factual findings".[110] Fingers have been pointed at an apparent blurring of lines between an international criminal court and a COI.[111] Reports documenting incidents of IHL violations as

[106] U.N. Doc. A/HRC/15/21, above note 105.
[107] Neil MacFarquhar and Ethan Bronner, "Report Finds Naval Blockade by Israel Legal but Faults Raid", *New York Times*, 1 September 2011.
[108] Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc A/HRC/40/70, 31 January 2019.
[109] UNGA RES/71/248, 21 December 2016.
[110] Van Den Herik, above note 12.
[111] R. Grace and Coster Van Voorhout, "From Isolation Eo Interoperability: The Interaction of Monitoring, Reporting, and Fact-finding Missions and International Criminal Courts

crimes against humanity, war crimes or genocide are based only on victim and witness interviews or extracted from other non-governmental organisation ("NGO") or UN reports. This ultimately has a cascading affect since it raises questions of authenticity and impartiality at subsequent criminal trials. For example, to open an investigation on the situation of the Republic of Côte d'Ivoire, the ICC Prosecutor relied on reports from COIs "to gain information on the exact locations where crimes were committed, the pattern of attacks, and indicate indicia of state involvement through the instigation of xenophobia and the fanning of ethnic and political hate".[112] However, the ICC pre-trial chamber in *Laurent Gbagbo* while raising concerns about the ICC Prosecutor's sole reliance on the NGO reports, UN reports and press articles, declared them as being "anonymous hearsay" from outside entities.[113]

Moreover, many of these reports document facts as violations of IHL without hearing the defence side, due to concerned States' refusal to provide information. Nevertheless, this should not give COIs a free pass to not adhering to the principles of presumption of innocence and the right to legal representation of the defendant.[114] Otherwise, when these reports with their premature pronouncement of accountability are made publicly available, they have a potential to influence the minds of judges in prospective criminal proceedings.

For the relevant methodology, there is often no consistent pattern of mandates providing the applicable legal rules for COIs. While some make general references to violations of international law, references are often made to IHL or IHRL or ICL or all of them. On several occasions, COIs end up making legal conflations by failing to make appropriate distinctions between the various branches of law which might be at play in a particular situation.[115] In some instances, instead of adequately identifying the type of armed

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and Tribunals", *The Hague Institute for Global Justice*, 2014, available at: https://www.thehagueinstituteforglobaljustice.org/wp-content/uploads/2015/10/working-paper-4-fact-fin ding.pdf.

[112] International Criminal Court, *Situation in the Republic of Ivory Coast, Request for an Authorization of Investigation Pursuant to Article 15*, ICC-02/11-3, 2011.

[113] International Criminal Court, *Prosecutor v. Laurent Koudou Gbagbo (Pre-Trial Chamber)*, Decision adjourning the hearing on the confirmation of charges pursuant to Art 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, 2013.

[114] Grace and Voorhout, above note 112.

[115] Report of the Secretary General`s Panel of Experts on Accountability in Sri Lanka, above note 84, p.185.

conflict, COIs would end up focusing on the types of violations, while in other cases members of a COI could re-interpret or expand their original mandates to include overlapping violations of international law in a particular conflict. Boutruche has criticized this approach as being legally inadequate and insufficiently sensitive to the intricacies of the interplay between the two fields of law.[116] At this point it would be worth reflecting upon a very pertinent question that Marco Odello raises:

> if the situation in the specific country is changing, should the commission of inquiry wait for a new mandate or, either implicitly or explicitly, interpret its mandate and include in its terms of reference the possible determination of the existence of an armed conflict, based on the facts which are under its consideration? Would this lead to an ultra vires situation or would it be a necessary fine-tuning of the powers that derive from the function of the commission of inquiry?[117]

The answer likely lies in the nature and scope of the constituted COI. If the COI is vested only with powers of collection and consolidation of facts without any scope for determining possible responsibilities and accountability for violations, then the COI would be exceeding its given mandate. However, if the original mandate allows for broader functions, including the possibility of determination of violations of international law and identification of responsible individuals, then the role of COI can be consequential whilst being allowed to collect facts and make legal qualifications of the situation on the ground.

Time and again, individual members of COIs are often questioned over their independence and impartiality. Following his comments in an interview in July 2022, human rights expert Miloon Kothari faced a diplomatic maelstrom. Mr. Kothari is one of the three members of a COI set up by UNHRC under Resolution S-30/1 to investigate alleged violations of IHL and IHRL in the Occupied Palestinian Territory, including East Jerusalem.[118] In the said interview Mr. Kothari stated:

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[116] T. Boutruche, "Selecting and Applying Legal Lenses in Monitoring, Reporting and Fact-Finding Missions", *HPCR Working Paper*, 2013.
[117] Odello, above note 98.
[118] UNHRC Res. A/HRC/S-30/1, 28 May 2021

> I would go as far as to raise the question of why [Israel is] even a member of the United Nations. Because … the Israeli government does not respect its own obligations as a UN member state. They, in fact, consistently, either directly or through the United States, try to undermine UN mechanisms,[119]

Led by Israel, the USA, UK and several other Western governments, Mr. Kothari and other members of the COI were promptly undermined for being "biased", "selective" and "antisemitic".[120]Accusations were also levelled against the chair of the COI, Ms Navi Pillay for some of her previous comments decrying Israel's "ever-expanding discrimination and systemic oppression of the Palestinian people."[121]

Notwithstanding the political sensitivity associated with COIs, members should be appointed only when they "have a proven record of independence and impartiality" and that "prior public statements" could not impact their "independence and impartiality" or "create perceptions of bias".[122] According to Professor Thomas M. Franck, the late New York University scholar and former president of the American Society of International Law, this requirement implies that "the persons conducting an investigation should be, and should be seen to be, free of commitment to a preconceived outcome."[123] The credibility and impact of fact-finding depend

[119] David Kattenburg, "Apartheid is not sufficient: an interview with UN Human Rights Commissioner Miloon Kothari", *Mondoweiss*, 25 July 2022.

[120] Rosa Freedman, "'Biased', 'Selective', 'Antisemitic': Accusations against the UN Commission of Inquiry on Israel and the Occupied Palestinian Territories", *EJIL: Talk!,* 1 August 2022, available at: https://www.ejiltalk.org/biased-selective-antisemitic-accusations-against-the-un-commission-of-inquiry-on-israel-and-the-occupied-palestinian-territories/.

[121] Navi Pillay, "General statement about colonization, discrimination, and apartheid, delivered at the United Nations International Day of Solidarity with the Palestinian People Seminar: The Year of O.R. Tambo and The Palestinian Struggle under Apartheid Rule, Pretoria, South Africa," *Youtube* 29 November 2017, available at: https://www.youtube.com/watch?v=nF61qfb5J-k.

[122] OHCHR, "Commissions of Inquiry and Fact-Finding Missions on International Human Rights Law: Guidance and Practice", 2015, p. 106, available at: https://www.ohchr.org/documents/publications/coi_guidance_and_practice.pdf.

[123] T.M. Franck & H.S. Fairley, "Procedural Due Process in Human Rights Fact-Finding by International Agencies", American Journal of International Law, Volume 74, 1980, pp. 313.

upon the extent to which it is perceived to have been objective, fair and impartial.

5.2. Substantive Challenges

Lately COIs tasked with investigation of alleged IHL violations stem not from UNSC directives but are instead established by UNHRC. Due to the overlapping nature of IHRL and IHL violations, many of these COIs apply these two sets of rules in situations of armed conflict. In such circumstances, experts have highlighted that the focus on human rights violations and the involvement of human rights law experts in COIs established by UNHRC tasked to investigate violations committed in the context of an armed conflict, may lead to distortion with respect to the evaluation of the lawfulness of the conduct of military operations.[124]

Previously, a COI established by UNHRC framed a mandate to investigate violations committed only by one of the parties to an armed conflict. Such was the case with the much-disparaged Commission led by Richard Goldstone which investigated alleged violations committed by Israel during Operation Cast Lead in Gaza,[125] and also an earlier COI in Lebanon.[126] While the Goldstone Report did not reveal serious violations committed by Hamas, it is worth mentioning that Israel could have saved itself a lot of trouble had it cooperated with the inquiry from the start and allowed access to the West Bank for investigations.[127] Nevertheless, any politically imbalanced mandates may have serious consequences for the credibility and impartiality of the findings involving legal assessment of facts and conduct.

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[124] T. Boutruche, "Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice", *Journal of Conflict and Security Law,* Volume 16, 2011, p. 105.

[125] Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48, 15 September 2009, p. 25.

[126] J. Stewart, "The UN Commission of Inquiry in Lebanon: A Legal Appraisal", *Journal of International Criminal Justice*, Volume 5, 2007, p.1039.

[127] OHCHR Press Release, "UN Fact Finding Mission finds strong evidence of war crimes and crimes against humanity committed during the Gaza conflict; calls for end to impunity", 15 September 2009, available at: https://www.ohchr.org/en/press-releases/2009/10/un-fact-finding-mission-finds-strong-evidence-war-crimes-and-crimes-against?LangID=E&NewsID=91.

Most COIs being established focus more on accountability and compliance with international law, disregarding the will of the States in focus. The Myanmar and Syrian governments have consistently opposed the establishment of COIs to investigate their internal conflicts, claiming that these would breach their territorial integrity and sovereignty.[128] This has led to access being extremely limited and thus leading to the same structural flaws highlighted previously.

In concluding this section, stakeholders should consider issues arising from shortcomings that have been identified. Can the UNHRC continue to remain the appropriate body to establish a COI to investigate situations where serious IHL violations are going on? If there are lingering doubts, would it not be more prudent for COIs established by the UNHRC to be composed of a multidisciplinary team with investigators, forensic experts, anthropologists and legal experts, instead of an exclusive grouping of only human rights experts? Funding would be a constant challenge, but lessons can be learned from the IHFFC which includes diverse teams of experts as part of its commissions. Most importantly, concerted diplomatic outreach ought to ensure that other political organs such as the UNSC and the UNGA share the burden of establishing COIs instead of shifting the onus for global accountability only on the UNHRC. This would in turn prevent some of the widespread criticism that many UNHRC-established COIs face. In the interim, COIs being established should imbibe in their workings the fundamental principles of IHRL and IHL, namely, "do no harm, independence, impartiality, transparency, objectivity, confidentiality, credibility, visibility, integrity, professionalism and consistency".[129]

6. Conclusion

While reminding the world that human rights is and will continue to remain at the core of the UN, Kofi Annan in his seminal memoir provides an antidote to complacency by underlining that:

> When civilians are attacked or killed because of their ethnicity, the world looks to the UN to speak up for them. When women

[128] Report of the independent international fact-finding mission on Myanmar, U.N. Doc. A/HRC/39/64, 12 September 2018; Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/40/70, 31 January 2019.
[129] OHCHR, above note 123, pp. 33-35.

> and girls are denied their right to equality, the world looks to the UN to take a stand.[130]

This paper has attempted to reveal that in the face of impunity, *ad hoc*, impartial and independent COIs can act as bridges between the enforcement of international laws and political will (or the lack thereof).

6.1 COIs and Global Governance

Despite potential pitfalls relating to various concerns on the provision of fair trial, COIs provide first-hand accounts of the conflict, situation of victims and the degree of involvement of various parties to a conflict. Due to this structural and operational flexibility COIs can have a positive effect on various aspects surrounding a conflict situation. By documenting atrocities, COIs strengthen advocacy campaigns as they bear witness to people's suffering. By focusing on truth-seeking and preservation of historical facts, COIs play a critical role in transitional justice initiatives by potentially:

> contribut[ing] to the embedding of a new human rights culture through the active dissemination of personal testimonies which can sensitise the public to past violations, assist[ing] in rewriting of school textbooks and other educational materials, and lead[ing] to recommendations for new forms of human rights practice.[131]

Creating a record of past abuses is indeed "helpful with the prosecution of perpetrators, identification of victims for reparations programs, and the planning of memorials".[132] By reinforcing the notion of "individual" as opposed to "group" responsibility, COIs pave the way for post-war inter-ethnic reconciliation whilst absolving groups of collective guilt that might have the potential of spurring nationalist narratives for the next war.[133]

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[130] Kofi Annan, *Interventions: A Life in War and Peace*, Penguin Group, p. 89.
[131] Elisabeth Baumgartner and others, "Documentation, Human Rights and Transitional Justice", *Journal of Human Rights Practice*, Volume 8, 2016, p. 1.
[132] *Ibid*.
[133] Akhavan, above note 15, p. 81.

From Côte d'Ivoire[134] to Darfur[135] and Libya,[136] COIs have not just functioned as a self-standing institutional arrangement but operated at the services of judicial mechanisms such as the ICC and various regional human rights courts.[137] For instance, the ICC was assisted in its criminal investigations by material from the Waki Commission Inquiry Report into Post-Election Violence concerning the post-2007 presidential election upheaval in Kenya.[138] That Commission placed the names of those deemed most culpable of the violence concerned within a sealed envelope which was then sent to the Panel of Eminent African Personalities chaired by former UNSG Annan, then was eventually transferred to the Prosecutor of the ICC.[139] Alongside factual and legal assessments of circumstances, various COIs have also provided recommendations for the future resolution of disputes.[140] The Independent Fact-Finding Mission ("IFFM") had a great impact in recent years when it determined the need for Myanmar to be held liable for the crime of genocide against the Rohingyas.[141] The IFFM's report outlining systematic stripping of human rights and dehumanisation of the Rohingyas[142] formed the basis of The Gambia's application before the ICJ followed by its extensive analysis by the World Court in its declaration of Provisional Measures.[143]

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[134] International Criminal Court, *Situation in Côte d'Ivoire, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire*, ICC-02/11–14, 2011, p. 16.

[135] ICC Press Release, "ICC – The Prosecutor of the ICC opens investigation in Darfur", ICC-OTP-0606-104, 2005, available at: https://www.icc-cpi.int/Pages/item.aspx?name=the%20prosecutor%20of%20the%20icc%20opens%20investigation%20in%20darfur.

[136] UNHRC Res. A/HRC/RES/S-15/1, 25 February 2011.

[137] European Court of Human Rights, *A.H. and J.K. v. Cyprus*, Applications nos. 41903/10 and 41911/10, 2015, p.121.

[138] "Report of the Commission of Inquiry into Post Election Violence", 2008, available at: https://www.worldcat.org/title/report-of-the-commission-of-inquiry-into-post-election-violence-cipev/oclc/263606369.

[139] International Center for Transitional Justice, "The Kenyan Commission of Inquiry into Post-Election Violence", available at: https://www.ictj.org/sites/default/files/ICTJ-Kenya-Dialogue-Inquiry-2008-English.pdf.

[140] J.-N. Agnieszka, "Fact-Finding", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2011.

[141] Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2, 17 September 2018.

[142] *Ibid*., para. 1440.

[143] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, (*Gambia v Myanmar)*, Provisional measures, ICJ GL No 178, ICGJ 540, 23 January 2020.

Reports of COIs have also led to the coherent development of international law. One of the ground-breaking contributions of the "Bassiouni Commission", created by UNSC in the aftermath of the wars in Yugoslavia, was to facilitate the gradual recognition of sexual crimes as not just war crimes but as systematic methods or means of warfare.[144] Various international tribunals tried many cases on this basis.[145] The latest report of the South Sudan Commission, in its forty-six pages of analysis, anchored around 140 witness statements and 234 documents, makes a significant contribution to the development of jurisprudence on starvation in conflict as a method of warfare.[146] "Starvation" implicates not just civil and political rights but also economic, social and cultural rights ("ESCR") such as the right to food.[147] While previous scholarly works have focused primarily on the interactions between civil and political rights and their related IHL rules, this report makes consequential jurisprudential contributions towards the interactions between ESCR obligations alongside relevant IHL provisions.[148] Similarly, the OSCE Mission on Ukraine also outlined several ESCR violations stemming from the devastating Russian invasion. In its report, the Mission deplored the negative impact that Russian aggression has had on the rights to education, to health, to social security, to food and water and to a healthy environment.[149] Hence, by including ESCRs within its mandate COIs can help provide crucial insight into the causes of past conflict and address socioeconomic grievances which can then reduce the chances of future rights violations.[150]

Findings from COIs that identify potential instigators and perpetrators of serious crimes can further a deterrent effect particularly towards those not yet implicated. Although a thorough study ought to be completed in this area, the possibility of being named and shamed, imposed with sanctions and travel

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[144] Final Report of the Commission of Experts Established Pursuant to SC Resolution 780 (1992), UN Doc. S/1994/674, 27 May 1994, Part IV, Section F.

[145] M. Bergsmo, A. Butenschn Skre, and E.J. Wood (eds), *Understanding and Proving International Sexual Crimes*, TOAEP E-Publishers, 2012.

[146] "There is nothing left for us": starvation as a method of warfare in South Sudan, U.N. Doc A/HRC/45/CRP.3, 2020, p. 25.

[147] Tom Dannenbaum, "A Landmark Report on Starvation as a Method of Warfare", *Just Security,* 13 November 2020, available at: https://www.justsecurity.org/73350/a-landmark-report-on-starvation-as-a-method-of-warfare/.

[148] "There is nothing left for us": starvation as a method of warfare in South Sudan, above note 147, p. 8.

[149] OSCE, above note 80.

[150] Sam Szoke-Burke, "Not Only Context: Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights", *Texas. Internationall Law Journal*, Volume 50, 2015, pp. 477-483.

bans or the stigma of possibly indictment may deter potential wrongdoers. According to the 2019 report by the IFFM, "45 companies and organizations provided the Tatmadaw with USD 6.15 million in financial donations that were solicited in September 2017 by senior Tatmadaw leadership in support of the clearance operations."[151] Following the release of the report, the European Union also began reassessing trade sanctions to potentially deny Myanmar tariff-free access to the world's largest trading bloc.[152] The report also raised prospects for bringing domestic criminal charges for corporate complicity in crimes against humanity in jurisdictions across the world.

In conclusion, it is evident that COIs encompass a wide range of bodies across the international legal and political landscape. From being fact-finding missions, COIs now confront institutional normative shifts of magnitude. Yet in a world besieged by great power competition, universality of justice remains a work in progress. As this paper has indicated, international courts and tribunals, often hamstrung by the non-cooperation of States render a "reflexive" resort to COIs remarkable.[153] While not a panacea for all forms of violation, COIs are a force for good by being "at least something" as well as providing a basis for "rethinking accountability".[154] As the article demonstrates, documentations and recommendations from several COIs have considerably strengthened international law protection to combat mass atrocities. Findings from reports of COIs have the potential of being the basis on which universal jurisdiction cases can be pursued or political traction generated for preventing and halting mass atrocities through the principle of "Responsibility to Protect". Notwithstanding the ambivalent and often unintended consequences, this article underscores that faith in COIs as a bulwark against impunity remains paramount. As David Koller forewarned: "In the absence of empirical answers… one can either act on the basis of faith or refuse to act until [the] questions can be answered."[155]

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[151] Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, above note 142.

[152] Simon Adams, "The UN Security Council, the Rohingya Genocide and the Future of International Justice", *Opinio Juris,* 27 August 2020, available at: http://opiniojuris.org/2020/08/27/rohingya-symposium-the-un-security-council-the-rohingya-genocide-and-the-future-of-international-justice/.

[153] Michael A Becker, Sarah M H Nouwen, "International Commissions of Inquiry: What Difference Do They Make? Taking an Empirical Approach", *European Journal of International Law*, Volume 30, Issue 3, 2019, p. 833.

[154] *Ibid*. at 840.

[155] Koller, "The Faith of the International Criminal Lawyer", *New York University Journal of International Law and Politics*, Volume 40, No. 4, 2008, p. 1019.