

UNITED NATIONS INQUIRIES TOWARDS ACCOUNTABILITY FOR CIVILIAN HARMS IN ARMED CONFLICT: ARE THEY FIT FOR PURPOSE?

Catherine Harwood*

In recent years, we have seen a proliferation of commissions of inquiry established by the United Nations to investigate situations involving civilian harms, towards accountability for violations of international law. Taking stock of the past thirty years of inquiry practice, this article considers whether such commissions are fit for purpose. After outlining UN commissions' general characteristics and the institutional context, the article discusses key challenges arising in respect of their investigations and strategies adopted by commissions in an effort to overcome those challenges. The article next assesses whether and how commissions contribute to accountability for civilian harms amounting to violations of international law from the perspectives of victims, perpetrators, and the international community as a whole. Some final reflections are then offered on the utility of UN commissions towards accountability for civilian harms in armed conflict.

I INTRODUCTION

More than a decade has passed since unrest in 2011 spiralled into armed conflict in the Syrian Arab Republic. At least 200,000 civilians are estimated to have lost their lives, more than 6.6 million people fled the country and 6.7 million more have been internally displaced.¹ The serious harms suffered by civilians, as documented by the Independent International Commission of Inquiry on the

* Dr Catherine Harwood is a Legal Officer of the Office of Legal Affairs of the United Nations. This article was finalised for publication in August 2022. The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations.

1 Syrian Network for Human Rights "Civilian Death Toll" (March 2022) <www.snhr.org>; United Nations High Commissioner for Refugees "Syria Emergency" <www.unhcr.org>.

Syrian Arab Republic (Syria Commission),² make for sobering reading. Murder, enforced disappearance, arbitrary detention, torture and sexual and gender-based violence are among the grave harms found to have been committed by various parties to the conflict.³ As for the conduct of hostilities, the Syria Commission found widespread indiscriminate attacks, bombardment of civilian areas and targeting of protected objects, notably hospitals, as well as siege warfare and deliberate starvation of the civilian population, amounting to war crimes and crimes against humanity.⁴ After more than ten years of work, 33 reports containing hundreds of recommendations and dozens of other publications,⁵ impunity for these violations prevails within Syria, and the Security Council of the United Nations (UN) has not taken up the Commission's repeated recommendation that this situation be referred to the International Criminal Court (ICC).⁶ In lieu of these avenues for justice, prosecutions have taken place in third states on the basis of universal jurisdiction,⁷ and an investigative body was established by the General Assembly in 2016 to collect evidence and prepare files to facilitate criminal proceedings.⁸

The Syria Commission exemplifies a recent trend of commissions of inquiry (commissions) being established by UN organs and bodies to investigate violations of international law in situations of concern, including armed conflicts, in pursuit of accountability. Cherif Bassiouni, who served on numerous commissions, notes that the concept of accountability "embodies the goals of both retributive and restorative justice", requiring "sanctions for those responsible, the establishment of a clear record of truth and efforts made to provide redress to victims."⁹ As non-judicial bodies without binding powers, commissions face significant challenges in discharging their mandates. Looking to the past 30 years of UN practice, this article assesses whether commissions are fit for purpose, with a

2 Established by *Situation of human rights in the Syrian Arab Republic* HRC Res S-17/1 (2011) [*Syria Mandate*]. The mandate has been renewed several times, for instance by *Situation of human rights in the Syrian Arab Republic* HRC Res 46/22 (2021).

3 *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic* UN Doc A/HRC/46/55 (11 March 2021). Such violations were also committed against persons *hors de combat*.

4 At [22]–[68]; and Office of the United Nations High Commissioner for Human Rights [OHCHR] "Independent International Commission of Inquiry on the Syrian Arab Republic: Documentation" <www.ohchr.org>.

5 See *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic* UN Doc A/HRC/46/54 (21 January 2021) [*Syria Twenty-Second Report*] for an overview of its work.

6 At [79]–[81].

7 At [89].

8 *International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011* GA Res 71/248 (2016) [*IIIM Mandate*].

9 M Cherif Bassiouni "Justice and Peace: The Importance of Choosing Accountability over Realpolitik" (2003) 35 Case W Res J Intl L 191 at 191.

focus on seeking accountability for civilian harms amounting to violations of international law. It first recounts the proliferation of UN commissions as responses to situations of concern, and their general characteristics. Next, it discusses some key challenges in commissions' investigations of civilian harms, namely information gathering, assessment of violations and implementation of recommendations, and different strategies employed by commissions to address those challenges. Finally, some overarching reflections are offered as to the utility of UN inquiry towards accountability for civilian harms in violation of international law.

II PROLIFERATION OF UN COMMISSIONS IN PURSUIT OF ACCOUNTABILITY

The institution of the international commission of inquiry has a long history in international relations, being recognised by states as a tool to resolve international disputes since at least 1899.¹⁰ Historically, several international inquiry mechanisms mandated to investigate civilian harms were established on an ad hoc basis among states and pursuant to multilateral treaties.¹¹ Inquiry is recognised in the UN Charter as a means to resolve international disputes,¹² but in earlier decades, such inquiries tended to focus on interstate issues such as violations of sovereign rights.¹³

It was not until the 1990s that UN organs and bodies began to use inquiry to investigate civilian harms in armed conflict. The new multilateralism that was made possible by the dissolution of the Soviet Union was accompanied by greater recognition in the Security Council that human rights violations could threaten international peace and security,¹⁴ as well as of a strengthening of the UN

10 Convention for the Pacific Settlement of International Disputes 32 Stat 1779 (opened for signature 29 July 1899, entered into force 4 September 1900). See, for instance, Dogger Bank Inquiry, pursuant to Declaration signed at St Petersburg November 25, 1904, for reference of North Sea incident to International Commission of Inquiry, Russia–Great Britain (25 November 1904).

11 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (1919 Commission); Inter-Allied Commission of Inquiry into the Greek Occupation of Smyrna and adjoining Territories; Inter-Allied Commission on the violations of the Hague Conventions and of international law in general, committed between 1915 and 1918 by the Bulgars in occupied Serbia; United Nations War Crimes Commission; and International Humanitarian Fact-Finding Commission, established by Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts 1125 UNTS 3 (opened for signature 8 June 1977, entered into force 7 December 1978), art 90 [Additional Protocol I].

12 Charter of the United Nations, art 33.

13 See for example Commission of Investigation on Greek Frontier Incidents: SC Res 15 (1946). See Edwin Brown Firmage "Fact-Finding in the Resolution of International Disputes – From the Hague Peace Conference to the United Nations" [1971] Utah L Rev 421.

14 See for example SC Res 688 (1991), art 1. See also Kelly Kate Pease and David P Forsythe "Human Rights, Humanitarian Intervention, and World Politics" (1993) 15 HRQ 290; and Richard B Lillich "The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post-Cold War World" (1994) 3 Tul J Intl & Comp L 1.

human rights system, including through the General Assembly's establishment of the post of the High Commissioner for Human Rights.¹⁵ Against this backdrop, in 1992 the Security Council established the Commission of Experts on the former Yugoslavia (Yugoslavia Commission) to investigate and provide conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law (IHL).¹⁶ Finding serious violations and international crimes, the Yugoslavia Commission recommended that those responsible be prosecuted before an international criminal tribunal.¹⁷ The Council subsequently established the International Criminal Tribunal for the former Yugoslavia (ICTY).¹⁸ The Yugoslavia Commission has been heralded as representing "a new model of commission vested with authority to investigate violations of international law".¹⁹

In the following three decades, there has been a proliferation of commissions under UN auspices established to investigate violations in situations of concern, including those amounting to armed conflict.²⁰ For instance, commissions have examined armed conflicts in the Central African Republic

15 *High Commissioner for the promotion and protection of all human rights* GA Res 48/141 (1993); and OHCHR "Brief history of UN Human Rights" <www.ohchr.org>.

16 SC Res 780 (1992), art 2; Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 31 (opened for signature 12 August 1949, entered into force 21 October 1950), art 50; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 UNTS 85 (opened for signature 12 August 1949, entered into force 21 October 1950), art 51; Convention (III) relative to the Treatment of Prisoners of War 75 UNTS 135 (opened for signature 12 August 1949, entered into force 21 October 1950), art 130; and Convention (IV) relative to the Protection of Civilian Persons in Time of War 75 UNTS 287 (opened for signature 12 August 1949, entered into force 21 October 1950), art 147 [Geneva Conventions of 1949]. See also Additional Protocol I, above n 11, arts 11 and 85.

17 *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)* UN Doc S/25274 (10 February 1993) at [74].

18 SC Res 808 (1993).

19 Triestino Mariniello "The Impact of International Commissions of Inquiry on the Proceedings before the International Criminal Court" in Christian Henderson (ed) *Commissions of Inquiry: Problems and Prospects* (Hart, Oxford, 2017) 171 at 173. See also Federica D'Alessandra "The Accountability Turn in Third Wave Human Rights Fact-Finding" (2017) 33 *Utrecht J Intl & Eur L* 59 at 63.

20 Some commissions investigated situations not classified as armed conflict, for instance, the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea: *Situation of human rights in the Democratic People's Republic of Korea* HRC Res 22/13 (2013); and the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela: *Situation of human rights in the Bolivarian Republic of Venezuela* HRC Res 42/25 (2019).

(CAR),²¹ Côte d'Ivoire,²² Darfur,²³ Ethiopia,²⁴ Israel/Palestine,²⁵ Lebanon,²⁶ Libya,²⁷ Mali,²⁸ Myanmar,²⁹ Rwanda,³⁰ South Sudan,³¹ Sri Lanka³² and, most recently, Ukraine.³³ Commissions have been established by four mandating authorities, each with their own institutional quirks: the Security

-
- 21 International Commission of Inquiry on the Central African Republic: SC Res 2127 (2013) [*CAR Mandate*].
 - 22 International Commission of Inquiry on Violations of Human Rights in Côte d'Ivoire: *Statement by the President of the Security Council* UN Doc S/PRST/2004/17 (25 May 2004); and International Commission of Inquiry on Côte d'Ivoire: *Situation of human rights in Côte d'Ivoire* HRC Res 16/25 (2011).
 - 23 International Commission of Inquiry on Darfur: SC Res 1564 (2004) [*Darfur Mandate*]; and High-Level Mission on the Situation of Human Rights in Darfur: *Situation of human rights in Darfur* HRC Decision S-4/101 (2006).
 - 24 International Commission of Human Rights Experts on Ethiopia: *Situation of human rights in Ethiopia* HRC Res S-33/1 (2021).
 - 25 High-Level Fact-Finding Mission in Beit Hanoun: *Human rights violations emanating from Israeli military incursions in the Occupied Palestinian Territory, including the recent one in northern Gaza and the assault on Beit Hanoun* HRC Res S-3/1 (2006); Fact Finding Mission on the Gaza Conflict [Goldstone Commission]: *The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip* HRC Res S-9/1 (2009) [*Goldstone Mandate*]; International Fact-finding Mission to Investigate Violations of International Law Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance: *The grave attacks by Israeli forces against the humanitarian boat convoy* HRC Res 14/1 (2010); Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident: *Letter Dated 2 August 2010 from the Secretary-General addressed to the President of the Security Council* UN Doc S/2010/414 (2 August 2010); International Fact-Finding Mission on Israeli Settlements in the Occupied Palestinian Territory: *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan* HRC Res 19/17 (2012); International Commission of Inquiry for the Occupied Palestinian Territory: *Ensuring respect for international law in the Occupied Palestinian Territory, including East Jerusalem* HRC Res S-21/1 (2014) [*Gaza Mandate*]; UN Commission of Inquiry on the 2018 protests in the Occupied Palestinian Territory: *Violations of international law in the context of large-scale civilian protests in the Occupied Palestinian Territory, including East Jerusalem* HRC Res S-28/1 (2018); and UN Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel: *Ensuring respect for international human rights law and international humanitarian law in the Occupied Palestinian Territory, including East Jerusalem, and in Israel* HRC Res S-30/1 (2021).
 - 26 International Commission of Inquiry on Lebanon: *The grave situation of human rights in Lebanon caused by Israeli military operations* HRC Res S-2/1 (2006).
 - 27 International Commission of Inquiry on Libya: *Situation of human rights in the Libyan Arab Jamahiriya* HRC Res S-15/1 (2011) [*Libya Mandate*]; and Independent Fact-Finding Mission on Libya: *Technical assistance and capacity-building to improve human rights in Libya* HRC Res 43/39 (2020).
 - 28 International Commission of Inquiry on Mali: *Letter dated 19 January 2018 from the Secretary-General addressed to the President of the Security Council* UN Doc S/2018/57 (23 January 2018).
 - 29 Independent International Fact-Finding Mission on Myanmar: *Situation of human rights in Myanmar* HRC Res 34/22 (2017).
 - 30 Commission of Experts concerning Rwanda: SC Res 935 (1994).

Council; the General Assembly; the Human Rights Council (HRC) and the Secretary-General. The Security Council establishes commissions pursuant to its primary responsibility to maintain international peace and security.³⁴ The General Assembly has a complementary role to maintain international peace and security and also initiates studies to assist in the realisation of human rights.³⁵ Nowadays, the latter activities are usually undertaken by the HRC, one of its subsidiary bodies. The HRC, charged with protecting human rights and responding to human rights emergencies, has become the most prolific mandating authority of UN commissions.³⁶ The Secretary-General also undertakes fact-finding activities and has established commissions on his own initiative as well as upon the request of member states.³⁷

While the establishment of a particular UN commission turns on the functions, processes and sometimes political dynamics of its mandating authority, commissions share several features. They are independent and impartial, and commissioners serve in their personal capacities. Each commission has a unique mandate, as defined by the mandating authority. The mandate specifies the situation under investigation and may also indicate the types of violations to be assessed and general purpose of the inquiry. In situations of armed conflict, commissions have assessed violations of IHL and international human rights law (IHRL), as well as international crimes. Those appointed as commissioners frequently have expertise as jurists, practitioners and professors in these fields of international law.

31 Commission on Human Rights in South Sudan: *Situation of human rights in South Sudan* HRC Res 31/20 (2016) [*South Sudan Mandate*].

32 Panel of Experts on Accountability in Sri Lanka: *Joint Statement by United Nations Secretary-General, Government of Sri Lanka* UN Doc SG/2151 (26 May 2009).

33 Independent International Commission of Inquiry on Ukraine: *Situation of human rights in Ukraine stemming from the Russian aggression* HRC Res 49/1 (2022).

34 Charter of the United Nations, art 34.

35 Arts 11–13.

36 Established by *Human Rights Council* GA Res 60/251 (2006). See, for example, International Commission of Inquiry on Lebanon; High-Level Fact-Finding Mission in Beit Hanoun; High-Level Mission on the Situation of Human Rights in Darfur; Goldstone Commission; International Fact-finding Mission to Investigate Violations of International Law Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance; Libya Commission; International Commission of Inquiry on Côte d'Ivoire; International Commission of Inquiry on the Syrian Arab Republic [Syria Commission]; International Fact-Finding Mission on Israeli Settlements in the Occupied Palestinian Territory; Independent International Commission of Inquiry on the 2014 Gaza Conflict; Commission on Human Rights in South Sudan; Commission of Inquiry on Human Rights in Burundi; Commission of Inquiry on the 2018 protests in the Occupied Palestinian Territory; Independent Fact-Finding Mission on Libya; and Independent International Commission of Inquiry on Ukraine.

37 Charter of the United Nations, art. 99. See for example the Panel of Experts on Accountability in Sri Lanka, above n 32.

Commissions decide their own working methods to carry out their mandate. While this methodological autonomy enables investigations to be tailored to the needs of the mandate, it has also required commissions to "reinvent the wheel"³⁸ and arguably jeopardised investigative rigour.³⁹ Recently, commissions have responded to these concerns by standardising their work through the adoption of best practices of human rights fact-finding bodies.⁴⁰ Lacking binding powers, commissions cannot compel the production of information and their reports have no direct legal effect.

After setting out their findings, UN commissions routinely make recommendations for corrective action, including accountability measures. Many commissions were instructed in their mandates to provide recommendations with a view to ensuring that those responsible are held accountable.⁴¹ Commissions have identified dimensions of accountability beyond the enforcement of legal responsibilities. The Sri Lanka Panel of Experts defined accountability as "a broad process that addresses the political, legal and moral responsibility of individuals and institutions for past violations of human rights and dignity".⁴² In line with this broad view of accountability, commissions have recommended a range of measures beyond prosecutions of individual perpetrators. For instance, the International Commission of Inquiry on Libya (Libya Commission) noted that accountability measures also included "disciplinary measures, administrative procedures and victim compensation measures".⁴³ The emphasis on accountability in commissions' mandates and reports has led scholars

38 M Cherif Bassiouni "Appraising UN Justice-Related Fact-Finding Missions" (2001) 5 Wash U J L & Poly 35 at 41.

39 Juan Mendez "Commissions of Inquiry: Lessons Learned and Good Practices" (2012) 54 Politorbis 47.

40 OHCHR *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice* UN Doc HR/PUB/14/7 (2015).

41 See for example *Darfur Mandate*, above n 23; *CAR Mandate*, above n 21; *Libya Mandate*, above n 27; *Syria Mandate*, above n 2; *Gaza Mandate*, above n 25; and *South Sudan Mandate*, above n 31.

42 *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka* (31 March 2011) at iv [Sri Lanka Report]. See *Secretary-General Releases Expert Panel's Report on Accountability with Respect to Final Stages of Sri Lanka Conflict* UN Doc SG/SM/13524 (25 April 2011).

43 *Report of the International Commission of Inquiry on Libya (Advance Unedited Version)* UN Doc A/HRC/19/68 (2 March 2012) at [763] [Libya Second Report].

to identify an "accountability turn" in UN inquiry practice,⁴⁴ alongside a proliferation of international criminal justice institutions and espousals of a "new age of accountability"⁴⁵ in international relations.

At this juncture, commissions should be distinguished from other UN fact-finding entities, including HRC special procedures,⁴⁶ fact-finding missions conducted by staff members of the Office of the UN High Commissioner for Human Rights (OHCHR)⁴⁷ and panels of experts supporting sanctions regimes of the Security Council.⁴⁸ Commissions also differ from investigative mechanisms such as those recently established for Syria and Myanmar,⁴⁹ which exercise a "quasi-prosecutorial function"⁵⁰ by collecting evidence and preparing files to facilitate criminal proceedings. They are also distinct from truth commissions, which seek to comprehensively address large-scale abuses and are usually based in domestic jurisdictions.⁵¹ UN commissions may be sequenced with such other truth-seeking and investigative mechanisms.

III CHALLENGES AND STRATEGIES IN INVESTIGATING CIVILIAN HARMS

UN commissions have faced many challenges in the course of investigating civilian harms in armed conflicts. This part highlights three different aspects of commissions' work in which challenges have arisen in practice, namely information gathering, qualification of civilian harms as legal

44 D'Alessandra, above n 19; 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" (2014) 13 Chinese JIL 507; and 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) 233.

45 UN Secretary-General "Secretary-General's Remarks to the Media at ICC Review Conference" (31 May 2010) United Nations <www.un.org>. See D'Alessandra, above n 19, at 66.

46 OHCHR "Special Procedures of the Human Rights Council" <www.ohchr.org>.

47 Some OHCHR missions recommended that investigations be continued by a commission of inquiry, for example *Report on the independent investigation on Burundi carried out pursuant to Human Rights Council resolution S-24/1* UN Doc A/HRC/33/37 (25 October 2016) at [156].

48 See for example Panel of Experts on South Sudan established pursuant to SC Res 2206 (2015).

49 *IIIM Mandate*, above n 8; and Independent Investigative Mechanism for Myanmar, established by *Situation of human rights of Rohingya Muslims and other minorities in Myanmar* HRC Res 39/2 (2018).

50 *Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011: Report of the Secretary-General* UN Doc A/71/755 (19 January 2017) at [32] [*IIIM Report*].

51 Priscilla B Hayner *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd ed, Routledge, New York, 2011) at 11–12.

violations and the implementation of recommendations, and discusses different strategies employed to address these challenges in light of the goal of ensuring accountability.

A Information-Gathering Challenges in Armed Conflict

A fundamental aspect of commissions' investigations of civilian harms is also one of the most challenging: the task of gathering information. Dinah Pokempner observes:⁵²

... fact-finding with respect to ongoing or recent armed conflicts presents particular challenges; among them, access to the battlefield; the need for forensic, ballistic, and other technical evaluations; issues of security, credibility, and partiality of witnesses; and the obtainment of sensitive internal information that is relevant to weighing the lawfulness of attacks ...

Commissions' information-gathering efforts have been impeded as a result of security concerns, resource limitations and less than full cooperation from the parties to the conflict.

Security issues severely constrained some commissions' information-gathering efforts. For instance, the International Commission of Inquiry on the Central African Republic (CAR Commission) could not conduct some of its planned investigative missions due to ongoing hostilities and some of its support staff were targeted and held hostage.⁵³ The Libya Commission also faced significant security issues and could not visit sites where hostilities continued.⁵⁴ That Commission reported victims and witnesses as being fearful of cooperating with it due to risks posed to them or to their families.⁵⁵

Further information-gathering challenges were posed by limitations in resources and the timeframes for producing reports, which in turn shaped commissions' methods of work. In a stark example, the Human Rights Commission on South Sudan initially decided that it did not have the mandate or resources to carry out investigations or fact-finding, and later reported that although in some instances it had received credible information regarding violations, responsibility could not be established due to the limited resources and time available to it.⁵⁶ The Yugoslavia Commission wrote

52 Dinah Pokempner "Valuing the Goldstone Report" (2010) 16 *Global Governance* 144 at 149. See for example *Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1* UN Doc A/HRC/29/CRP.4 (24 June 2015) at [114] [*Gaza Report*].

53 International Commission of Inquiry on the Central African Republic *Final Report* UN Doc S/2014/928 (22 December 2014) at [7] and [21] [*CAR Report*].

54 *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 (12 January 2012) at [11] [*Libya First Report*].

55 At [11].

56 *Report of the Commission on Human Rights in South Sudan* UN Doc A/HRC/34/63 (6 March 2017) at [9]; and *Report of the Commission on Human Rights in South Sudan* UN Doc A/HRC/37/CRP.2 (6 March 2018) at [34]. See also *Libya Second Report*, above n 43, at [7].

that due to resource constraints, it had to adopt a selective approach to investigations, but endeavoured to remain impartial in choosing its investigative methods.⁵⁷ The Independent Commission of Inquiry established pursuant to Human Rights Council Resolution S-21/1 (Gaza Commission) decided that it was not feasible to hold public hearings in light of the timeframe for its work.⁵⁸ Barred from territorial access, it made a public call for submissions and held interviews in other locations. As the Libya Commission only had about two months in which to conduct its investigation, it "necessarily had to be selective in the choice of issues and incidents for investigation".⁵⁹ Commissions frequently direct their information-gathering efforts towards harms considered as representative of violations,⁶⁰ the most serious in nature⁶¹ or those amounting to international crimes. The CAR Commission expressly linked its decisions in this regard to the goal of accountability, stating that it focused on serious violations "for which it is reasonable to expect that accountability might be exacted in the future".⁶²

Perhaps the most difficult challenge for information gathering results from a lack of cooperation on the part of the parties to a conflict. While there may be a general obligation on states to cooperate with a commission, especially one established by the Security Council,⁶³ a commission cannot directly compel parties to cooperate or turn over information. For instance, the International Commission of Inquiry on Darfur (Darfur Commission) explained:⁶⁴

The Commission has not been endowed with the powers proper to a prosecutor; in particular, it may not subpoena witnesses, or order searches or seizures, nor may it request a judge to issue arrest warrants against suspects. It may rely only upon the obligation of the Government of the Sudan and the rebels to cooperate. Its powers are therefore limited by the manner in which the Government and the rebels fulfil that obligation.

57 *Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)* UN Doc S/1994/674 (27 May 1994) at [30] [*Yugoslavia Final Report*].

58 *Gaza Report*, above n 52, at [10].

59 *Libya First Report*, above n 54, at [5].

60 See for example *Report of the International Commission of Inquiry on Darfur to the Secretary-General* UN Doc S/2005/60 (1 February 2005) at [223] [*Darfur Report*].

61 At [223]; *Report of the United Nations Fact-Finding Mission on the Gaza Conflict* UN Doc A/HRC/12/48 (25 September 2009) at [157] [*Goldstone Report*]; *Report of the independent international commission of inquiry on the Syrian Arab Republic* UN Doc A/HRC/21/50 (16 August 2012) at [37] [*Syria Third Report*]; and *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1* UN Doc A/HRC/3/2 (23 November 2006) at [20] [*Lebanon Report*].

62 *CAR Report*, above n 53, at [9].

63 Charter of the United Nations, art 25. See for example SC Res 1564 (2004) at [12], calling upon all parties to the conflict to cooperate fully with the Darfur Commission.

64 *Darfur Report*, above n 60, at [6].

While states usually consent to inquiries by the Secretary-General and Security Council, this does not always translate to full cooperation in practice.⁶⁵ Several states have refused to cooperate with HRC-mandated commissions on the basis that their mandates were one-sided or biased in favour of one party to the conflict.⁶⁶ Where states blocked territorial access, this had the effect of preventing *in situ* examinations of theatres of combat and denying physical access to victims and witnesses.

Where state cooperation is not forthcoming due to perceptions of bias, commissions have sought to address those concerns by interpreting their mandates to remove any one-sided elements and examine all relevant actors and territories.⁶⁷ For instance, the original mandate of the Goldstone Commission, as formulated by the HRC, was to investigate violations "by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip".⁶⁸ After Israel rejected the resolution as biased,⁶⁹ the mandate was reformulated as the investigation of violations "in the context of the military operations that were conducted in Gaza", and the Commission interpreted that amended mandate to examine the actions of all parties in Palestine and Israel.⁷⁰ However, Israel considered that the mandate could only be changed by the HRC and did not cooperate. This turn of events had repercussions for the Commission's ability to assess violations, and is discussed further below.

Where parties could not be persuaded to cooperate and refused to grant territorial access, commissions gathered information in other ways, such as by conducting hearings and interviews in third States.⁷¹ For instance, the Syria Commission collected witness accounts from people who had left Syria and interviewed people within the country by Skype and telephone.⁷² Commissions also gathered documentary information such as satellite imagery,⁷³ public communications by defence

65 Zeray Yihdego "The Gaza Mission: Implications for International Humanitarian Law and UN Fact-Finding" (2012) 13 MJIL 158 at 203.

66 Laurie R Blank "Investigations into Military Operations: What Impact on Transitional Justice?" (2014) 47 ILR 85.

67 Exceptionally, the Lebanon Commission criticised its one-sided mandate, but did not consider that it had authority to interpret it to examine the actions of both parties to the conflict: *Lebanon Report*, above n 61, at [15].

68 *Goldstone Mandate*, above n 25, art 14.

69 Israel Ministry of Foreign Affairs "Israel rejects one-sided resolution of UN Human Rights Council in Geneva" (press release, 12 January 2009).

70 *Goldstone Report*, above n 61, at [151]–[152].

71 At [166].

72 *Syria Third Report*, above n 61, at [9].

73 *Goldstone Report*, above n 61, at [53]; and *Gaza Report*, above n 52, at [260].

forces,⁷⁴ videos and photographs published by extremist groups and images taken by clandestine means.⁷⁵ As the authenticity of such sources could be difficult to verify, such information was often treated as of corroborative value.⁷⁶

B Qualification of Civilian Harms as Violations of International Law

In recognition of the hard realities of warfare, IHL anticipates and tolerates a certain degree of incidental harm to civilians in armed conflict. However, direct or indiscriminate attacks against civilians and civilian objects such as houses, schools or medical facilities are prohibited, as are attacks against military objectives that are expected to cause excessive civilian damage in relation to the anticipated concrete military advantages.⁷⁷ In assessing whether harms suffered by civilians amounted to violations requiring accountability responses, commissions faced challenges due to lack of access to material information as well as the difficulties in applying IHL principles in practice.

The above-mentioned information-gathering challenges have flow-on effects for assessing violations. Although commissions generally adopt a low standard of proof of "reasonable grounds to believe" that violations have occurred,⁷⁸ they have found it very difficult to reach findings in some cases where an uncooperative party exclusively held material information, such as intelligence underlying targeting decisions. As discussed below, refusals to turn over such information has stemmed both from reticence to disclose sensitive or confidential information, as well as general perceptions that commissions are biased against one of the parties to a conflict. In response to this challenge, some commissions limited their findings of violations to those whose veracity would be difficult to challenge. For instance, a commission which investigated the Israel/Hezbollah conflict in 2006 enjoyed full cooperation from Lebanon but not from Israel and considered relevant material from Israel that was publicly available.⁷⁹ In assessing an Israeli attack against a convoy of civilians, the Commission noted that in a public statement Israel had justified the attack on the basis that it had

74 See for example *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic* UN Doc A/HRC/36/55 (8 August 2017) at fns 10 and 11 [*Syria Fourteenth Report*]; *Sri Lanka Report*, above n 42, at [54]; *Goldstone Report*, above n 61, at [173]; and *Gaza Report*, above n 52, at [14] and [114].

75 See for example *Report of the independent international commission of inquiry on the Syrian Arab Republic* UN Doc A/HRC/27/60 (13 August 2014) at [26], [37] and [40].

76 See for example *Syria Fourteenth Report*, above n 74, Annex II at [8]; *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic* UN Doc A/HRC/37/72 (1 February 2018) Annex IV at [24] [*Syria Fifteenth Report*]; and *Libya First Report*, above n 54, at [229].

77 See Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (Cambridge University Press, Cambridge, 2005) Vol I, in particular Rules 7, 11 and 14 [*ICRC Customary IHL Study*] and Additional Protocol I, above n 11, art 51(5)(b).

78 See for example *Gaza Report*, above n 52, at [19]; *Syria Fifteenth Report*, above n 76, at [5]; and *Darfur Report*, above n 60, at [15].

79 *Lebanon Report*, above n 61, at [19] and [24].

detected suspicious movement along a route used by Hezbollah to transport weaponry. Lacking access to that intelligence, the Commission wrote that even if there were Hezbollah members among those civilians, the attack would be "utterly disproportionate and beyond any concept of military necessity or the principle of distinction".⁸⁰ Other commissions acknowledged limits to their abilities to assess compliance with IHL. For instance, in assessing airstrikes conducted by the North Atlantic Treaty Organization (NATO), the Libya Commission wrote that it could not determine the full circumstances of some attacks which had killed civilians and so could not evaluate whether the attacks were intentional, indiscriminate or disproportionate.⁸¹ With regard to a small number of NATO airstrikes, the Commission concluded that "NATO's response to the Commission has not allowed it to draw conclusions on the rationale for, or the circumstances of the attacks", so that it could not assess whether all feasible precautions were taken.⁸²

A third general approach, adopted by commissions in an effort to prevent non-cooperation from frustrating their mandates, has been to draw adverse inferences. Adverse inferences are sometimes drawn in judicial settings, such as at the European Court of Human Rights, which has ruled that when events in issue lie within the exclusive knowledge of the state and the facts give rise to a strong presumption of violations, the burden of proof shifts to the state to provide a satisfactory explanation.⁸³ In the inquiry context, a UN commission chaired by Richard Goldstone responded to Israel's refusal to provide information about its military operations in Operation Cast Lead by drawing adverse inferences. The Goldstone Commission made findings on the basis of "the information available"⁸⁴ or "in the absence of any information refuting the allegations", including that Israel had a policy of intentionally attacking protected civilians.⁸⁵ Israel criticised the findings as made "in the absence of the sensitive intelligence information which Israel did not feel able to provide".⁸⁶ The Commission was alternatively heralded as adhering to the highest standards of legality given the lack

80 At [135].

81 *Libya First Report*, above n 54, at [156].

82 *Libya Second Report*, above n 43, at [89].

83 *Khashiyev and Akayeva v Russia* ECHR 57942/00 and 57945/00, 24 February 2005.

84 *Goldstone Report*, above n 61, at [32], [75], [389], [437], [494], [629], [652], [701], [1102] and [1167].

85 At [595], [838], [1167] and [1191].

86 Israel Ministry of Foreign Affairs "Israel's Analysis and Comments on the Gaza Fact-Finding Mission Report" (press release, 15 September 2009).

of cooperation⁸⁷ and criticised for basing its findings on information from only one party to the conflict.⁸⁸

Perhaps cognizant of these controversies, a slightly different approach to assessing violations in the absence of material information was taken by a commission on the 2014 Gaza conflict. Like the Goldstone Commission, the Gaza Commission made tentative findings of violations, but its findings were more strongly caveated. For instance, it wrote that there was little information available as to how residential buildings, as prima facie civilian objects, were regarded by Israel as military objectives.⁸⁹ As almost all targeted residential buildings were located in densely populated areas and attacked at times when it could be expected that family members were at home, the Commission found that it was reasonable to conclude that such attacks would likely result in a high number of civilian casualties. Given the absence of information that the expected civilian damage was not excessive in relation to the anticipated military advantage, the Gaza Commission concluded that "there are strong indications that these attacks could be disproportionate, and therefore amount to a war crime".⁹⁰ It also addressed its general approach to non-cooperation in some detail. Israel had argued that IHL does not require disclosure of sensitive information and that it "cannot publicize detailed reasoning behind every attack without endangering intelligence sources and methods".⁹¹ While accepting certain limits to disclosure, the Gaza Commission countered that accepting Israel's view "would undermine any efforts to ensure accountability".⁹² The Commission noted that the onus remained on Israel:⁹³

to provide sufficient details on its targeting decisions to allow an independent assessment of the legality of the attacks conducted by the [IDF] and to assist victims in their quest for the truth.

Critiquing this approach, Benjamin Wittes and Yishai Schwartz write:⁹⁴

87 Richard Falk "The Goldstone Report and the Goldstone Retreat: Truths Told by Law and Reviled by Geopolitics" in Chantal Meloni and Gianni Tognoni (eds) *Is there a Court for Gaza? A Test Bench for International Justice* (TMC Asser Press, The Hague, 2012) 83 at 97.

88 Trevor Norwitz "Letter to Justice Goldstone" in Gerald M Steinberg and Anne Herzberg (eds) *The Goldstone Report "Reconsidered": A Critical Analysis* (NGO Monitor, Jerusalem, 2011) 153 at 155.

89 *Gaza Report*, above n 52, at [215].

90 At [221].

91 Israel Ministry of Foreign Affairs *Israel's Investigation of Alleged Violations of the Law of Armed Conflict* cited in *Gaza Report*, above n 52, at [215].

92 At [215].

93 At [669].

94 Benjamin Wittes and Yishai Schwartz "What to Make of the UN's Special Commission Report on Gaza?" (24 June 2015) Lawfare <www.lawfareblog.com>.

Having put the burden on Israel to prove every attack legitimate and having no access to Israeli decisionmaking, it is no wonder that the commission regularly finds that many of the strikes it examines may have been war crimes.

However, its approach reflects guidance from the Human Rights Committee that states should disclose the criteria for conducting attacks that are expected to result in loss of life, including information underlying targeting decisions.⁹⁵

Challenges in qualifying civilian harms as violations also arise from complexities in applying IHL principles in practice. The principle of distinction requires that parties distinguish protected civilians and civilian objects from military objectives⁹⁶ and do not make them the object of attack.⁹⁷ Most armed conflicts examined by commissions have been non-international in nature, where combatant status is not formally recognised and civilians enjoy protection from attack unless and for such time as they take a "direct part in hostilities", which is a narrow, activity-based concept.⁹⁸ Some commissions considered mere membership in an armed group as sufficient to lose protection on a continuous basis,⁹⁹ while others adopted the International Committee of the Red Cross's "continuous combat function" concept, whereby civilian protection is lost when an individual assumes a continuous function for an organized armed group involving her or her direct participation in hostilities.¹⁰⁰ Commissions faced challenges in assessing compliance with the principle of distinction, especially in respect of attacks conducted in densely populated areas.¹⁰¹ For instance, the Goldstone

95 Human Rights Committee *General Comment No 36 – Article 6: right to life* UN Doc CCPR/C/GC/36 (3 September 2019) at [64].

96 Additional Protocol I, above n 11, arts 48, 51(2) and 52(2); and *ICRC Customary IHL Study*, above n 77, rule 1.

97 Common Article 3 to the Geneva Conventions; Additional Protocol I, above n 11, arts 51, 52 and 57; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts 1125 UNTS 609 (opened for signature 8 June 1977, entered into force 7 December 1978), art 13 [Additional Protocol II]; and *ICRC Customary IHL Study*, above n 77, rules 1, 6 and 12.

98 Additional Protocol II, above n 97, art 13(3). See Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross [ICRC] and Martinus Nijhoff, Geneva, 1987) at [1944]–[1945] and [4787]–[4789] [*Commentary on the Additional Protocols*].

99 See for example *Sri Lanka Report*, above n 42, at [194]; *Goldstone Report*, above n 61, at [431]; and *Darfur Report*, above n 60, at [264] and [292].

100 Nils Melzer *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, Geneva, 2009) at 33 [*ICRC Interpretive Guidance*]. See for example *Gaza Report*, above n 52, at [220]; *Syria Third Report*, above n 61, Annex II at [32]; and *Libya Second Report*, above n 43, at [138].

101 Additional Protocol I, above n 11, art 58(b); and *ICRC Customary IHL Study*, above n 77, rule 23.

Commission found that while Hamas operated in Gaza, it did not intend to use the civilian population to shield its operations, and that Israel had deliberately attacked civilians.¹⁰² Those findings were critiqued by scholars who saw Hamas' failure to distinguish itself as to blame for high rates of civilian casualties.¹⁰³

As for direct participation in hostilities, the requirement of a "belligerent nexus", that is, for an act to be designed to cause harm in support of a party to the conflict and to the detriment of another,¹⁰⁴ was at issue in the situation concerning Israel's interception of a humanitarian aid flotilla bound for Gaza, during which Israel's use of force onboard the *Mavi Marmara* resulted in the deaths of nine passengers and wounding of over 50 others. Israel had characterised passengers who engaged in violence as directly participating in hostilities,¹⁰⁵ while a UN commission found that although some passengers had resisted the interception and attacked Israeli soldiers, they were nonetheless protected civilians whose deaths amounted to grave breaches of Geneva Convention IV.¹⁰⁶ While the Commission did not expressly articulate its reasoning for that conclusion, it seems to be based on lack of a belligerent nexus.¹⁰⁷

To provide another example, the proportionality principle, which prohibits the launching of attacks expected to cause incidental civilian harm that is excessive in relation to the concrete and direct military advantage anticipated,¹⁰⁸ is notoriously difficult to apply in practice, as not only does the balancing exercise require an estimation of future effects but the language used in IHL treaty law

¹⁰² See for example *Goldstone Report*, above n 61, at [389], [483]–[488] and [1026].

¹⁰³ Laurie Blank "The Application of IHL in the Goldstone Report: A Critical Commentary" in Gerald M Steinberg and Anne Herzberg (eds) *The Goldstone Report "Reconsidered": A Critical Analysis* (NGO Monitor, Jerusalem, 2011) 203 at 216; and Richard D Rosen "Goldstone Reconsidered" (2011–2012) 21 *J Transnatl L & Poly* 35 at 91.

¹⁰⁴ *ICRC Interpretive Guidance*, above n 100, at 46.

¹⁰⁵ The Turkel Commission *The Public Commission to Examine the Maritime Incident of 31 May 2010: Report Part One* (January 2011) at 233–242 and 278.

¹⁰⁶ *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* UN Doc A/HRC/15/21 (27 September 2010) at [66] and [170] [*Gaza Flotilla Report*].

¹⁰⁷ See ICC Office of the Prosecutor *Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report* (ICC-01/13-6-AnxA, 6 November 2014) at [50], reasoning that while some passengers' efforts to breach the blockade, including through violence against Israeli soldiers, may have amounted to acts causing the required threshold of harm to Israel's military operations, "[t]he information available does not indicate that the crew and passengers' actions were specifically designed to support Hamas by harming Israel."

¹⁰⁸ *ICRC Customary IHL Study*, above n 77, rule 14; and Additional Protocol I, above n 11, arts 51(5)(b) and 57. See generally Michael Newton and Larry May *Proportionality in International Law* (Oxford University Press, Oxford, 2014).

was intended to allow military commanders a broad margin of judgment.¹⁰⁹ The proportionality test has not always been applied accurately in commissions' reports. For instance, some commissions found disproportionate attacks without identifying a specific military advantage.¹¹⁰ Other times, commissions weighed the actual rather than expected civilian harm suffered against military advantage,¹¹¹ instead of adopting the *ex ante* perspective of the reasonable military commander.¹¹² Finally, commissions' varied approaches regarding the scope of operations to be assessed in the proportionality exercise sometimes led to different legal conclusions. For instance, two commissions which examined the Gaza flotilla situation viewed the scope of Israel's naval blockade differently in assessing its proportionality vis-à-vis damage caused to the civilian population in Gaza. The Commission, established by the Secretary-General and headed by the former Prime Minister of New Zealand, Sir Geoffrey Palmer, assessed the effects of the blockade separately to the land closure policy, finding that the blockade did not have a "significant humanitarian impact",¹¹³ and was therefore proportionate. By contrast, a commission established by the HRC viewed the blockade as "implemented in support of the overall closure regime" and was "part of a single disproportionate measure of armed conflict and as such cannot itself be found proportionate".¹¹⁴

Commissions' assessments of the principle of precaution have also been subject to critique. This principle requires that parties take all feasible precautions to avoid or minimise incidental civilian harm,¹¹⁵ including by verifying the military nature of targets and giving effective advance warning to civilians where possible.¹¹⁶ In assessing the effectiveness of warnings, the Goldstone Commission was criticised for applying an unduly high standard, based on whether warnings were heeded rather than successfully communicated.¹¹⁷ To give another example, the Syria Commission found that the United States of America did not comply with the principle of precautions in an airstrike at a mosque

109 *Commentary on the Additional Protocols*, above n 98, at [2210]; and Rogier Bartels "Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials" (2013) 46 ILR 271 at 275. See also ICRC "Practice Relating to Rule 14. Proportionality in Attack" IHL Database: Customary IHL <ihl-databases.icrc.org>.

110 See for example *Syria Third Report*, above n 61, Annex VI, at [25]; and *Libya Second Report*, above n 43, at [600]. For a contrary view, see *Gaza Report*, above n 52, at [368]–[370] and [393]–[394].

111 See for example *Syria Third Report*, above n 61, at [29]; and *Darfur Report*, above n 60, at [260].

112 *ICRC Customary IHL Study*, above n 77, rule 14; and *Prosecutor v Galić (Judgment)* ICTY Trial Chamber I IT-98-29-T, 5 December 2003 at [58].

113 Geoffrey Palmer and others *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident* (United Nations, July 2011) at [78].

114 *Gaza Flotilla Report*, above n 106, at [59].

115 *ICRC Customary IHL Study*, above n 77, rule 15; Additional Protocol I, above n 11, art 57.

116 Additional Protocol I, above n 11, art 57.

117 Blank, above n 103, at 247, citing *Goldstone Report*, above n 61, at [527].

complex that was intended to target an Al Qaeda meeting, but which instead killed dozens of civilians.¹¹⁸ The Commission found that while the mosque could have been attacked if an Al Qaeda meeting was taking place, intelligence to that effect was three days old and additional verification should have been carried out due to the protected nature of the building.¹¹⁹ In response, two members of the United States military wrote that the Syria Commission tried to "impose an absolute requirement" to minimise incidental civilian harm, reflecting "a common conflation perpetrated by those who attempt to usurp [IHL] by injecting some version of human rights laws."¹²⁰

Commissions have also qualified civilian harms as violations of human rights, noting the continued applicability of this legal field in situations amounting to armed conflict. Conceptualising IHL as the *lex specialis*, commissions qualified lethal attacks as violations of the right to life when they did not satisfy the IHL principles of distinction or proportionality.¹²¹ Some harms were also recognised beyond the IHL framework, notably violations of economic, social and cultural rights, including the rights to housing, health and education,¹²² and of legal norms more fully developed under IHRL, including the prohibitions against torture and sexual and gender-based violence. Theodor Meron observes that using IHRL to fill the gaps in humanitarian protections reflects a desire to "humanize" IHL.¹²³ Some commissions' analysis has been challenged as blurring the lines between these legal fields. For instance, the Libya Commission's view that IHRL could modify targeting rules¹²⁴ and the Goldstone Commission's assessment of compliance with the principle of precautions by reference to a due diligence standard¹²⁵ were criticised as distorting the careful balance struck in

118 *Syria Fourteenth Report*, above n 74, at [52].

119 At [61].

120 Shane Reeves and Ward Narramore "The UNHRC Commission of Inquiry on Syria Misapplies the Law of Armed Conflict" (15 September 2017) Lawfare <www.lawfaremedia.org>.

121 See for example *Gaza Report*, above n 52, at [22]; *Syria Third Report*, above n 61, Annex II at [30]–[31]; and *Libya Second Report*, above n 43, at [144]. On the *lex specialis* principle, see *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 at 240; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 at 178; and *Armed Activity on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168 at 242–245.

122 See for example *Darfur Report*, above n 60, at [318] and [356]; and *Syria Third Report*, above n 61, at [59] and [124].

123 Theodor Meron "The Humanization of Humanitarian Law" (2000) 94 AJIL 239 at 267.

124 *Libya Second Report*, above n 43, at [145].

125 *Goldstone Report*, above n 61, at [862].

IHL between humanity and military necessity, and uncoupling law from conditions of warfare.¹²⁶ Daphné Richemond-Barak cautions that such approaches may reduce compliance if regarded as being out of sync with battlefield realities.¹²⁷

When assessing violations against civilians, many commissions also apply international criminal law, qualifying harms as war crimes, crimes against humanity and genocide.¹²⁸ This legal field, perhaps more so than IHL or IHRL, is traditionally associated with the judicial setting, giving rise to questions about how international criminal law may be applied beyond the courtroom.¹²⁹ In this regard, commissions were cognizant of their distinct institutional context, noting that their findings of crimes did not replace prosecutions, but rather could facilitate criminal justice processes. For instance, the Darfur Commission stated that its assessments of international crimes would "pave the way for future investigations, and possible indictments, by a prosecutor."¹³⁰ Some commissions took a cautious approach to legal analysis with this in mind, as exemplified by the CAR Commission's decision to identify distinct non-international armed conflicts between different parties and intervening periods in which IHL was not applicable, with reference to ICTY jurisprudence. While noting the ICTY's caution against making many changes in conflict classification,¹³¹ the CAR Commission sought to avoid thwarting prosecutions as a result of incorrect classifications.¹³²

Most commissions limited their analysis to contextual elements and core elements of international crimes, and did not examine modes of liability or defences,¹³³ leaving these aspects for prosecutions. Commissions also stressed that their findings were based on a lower standard of "reasonable grounds to believe" rather than the rigorous standard of "beyond reasonable doubt" required for criminal

126 Yuval Shany "Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror" in Orna Ben-Naftali (ed) *International Humanitarian Law and International Human Rights Law* (Oxford University Press, Oxford, 2011) 13 at 29.

127 Daphné Richemond-Barak "The Human Rights Council and the Convergence of Humanitarian Law and Human Rights Law" in William Banks (ed) *Counterinsurgency Law: New Directions in Asymmetric Warfare* (Oxford University Press, Oxford, 2013) 3 at 18.

128 Rome Statute of the International Criminal Court 2187 UNTS 90 (opened for signature 17 July 1998, entered into force 1 July 2002), arts 6, 7 and 8.

129 See Dov Jacobs and Catherine Harwood "International Criminal Law Outside the Courtroom: The Impact of Focusing on International Crimes for the Quality of Fact-Finding" in Morten Bergsmo (ed) *Quality Control in Fact-Finding* (Torkel Opsahl, Florence, 2013) 325.

130 *Darfur Report*, above n 60, at [15].

131 *CAR Report*, above n 53, at [99].

132 At [101].

133 The latter elements were considered by earlier commissions, including the Yugoslavia and Rwanda Commissions.

conviction.¹³⁴ The broad nature of their assessments are comparable to those undertaken in earlier phases of criminal proceedings, such as the decision to launch a criminal investigation¹³⁵ or the confirmation of indictments.¹³⁶ In this way, commissions' selective engagement with international criminal law norms would not necessarily invite critiques of inconsistencies or contradiction, should different legal conclusions regarding the same incidents be reached in the context of criminal investigations and prosecutions, in light the focus on the criminal responsibility of specific individuals pursuant to different rules of procedure and a much higher standard of proof.

C Implementation of Recommendations to Ensure Accountability for Civilian Harms

In post-conflict societies, justice and accountability are vital for durable peace.¹³⁷ Compensation and reparations for violations are also imperative to rebuild lives and livelihoods.¹³⁸ Commissions have made wide-ranging recommendations with a view to ensuring accountability, including prosecutions of international crimes, truth-seeking measures and compensation for harms suffered by victims. However, as a commission's mandate typically ends upon submission of its final report, commissions depend on stakeholders to take corrective action.

With regard to accountability for international crimes, there are some notable instances where commissions' recommendations for prosecutions were implemented. The Security Council established the ICTY and the International Criminal Tribunal for Rwanda (ICTR) following the endorsement of such actions by the commissions on the former Yugoslavia and Rwanda. The Security Council also took up the Darfur Commission's recommendation to refer that situation to the ICC.¹³⁹ However, it is not clear whether in each case, the recommendations inspired Council action or were rather consistent with its prior intentions.¹⁴⁰ Moreover, all of those commissions were established by

134 *CAR Report*, above n 53, at [16]. See for example Rome Statute, above n 128, art 66(3).

135 Rome Statute, above n 1288, art 53(1)(a) provides, inter alia, that in deciding whether to initiate an investigation, the Prosecutor shall consider whether the information available "provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed".

136 Article 58(1)(a). See also *Darfur Report*, above n 60, at [15], citing the practice of the ICTR and ICTY.

137 Tove Grete Lie, Helga Malmin Binningsbø and Scott Gates *Post-Conflict Justice and Sustainable Peace* (World Bank, WPS4191, April 2007). See for example *Transitional justice and accountability: a roadmap for sustainable peace in South Sudan – Conference room paper of the Commission on Human Rights in South Sudan* UN Doc A/HRC/45/CRP.4 (5 October 2020) at [68].

138 See for example Elke Schwager "The Right to Compensation for Victims of an Armed Conflict" (2005) 4 Chinese JIL 417.

139 *Darfur Report*, above n 60, at [584]; and SC Res 1593 (2005), art 1.

140 M Cherif Bassiouni "Current Developments: The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)" (1994) 88 AJIL 784 at 790–791; and Bassiouni, above n 38, at 43.

the Security Council. It has been less responsive to recommendations of other commissions, especially those established by the HRC. It has not, for instance, taken up any HRC-mandated commissions' recommendations regarding prosecutions of international crimes.¹⁴¹ By way of example, despite support from several Security Council members and many UN member states,¹⁴² a draft decision which would have referred the situation in Syria to the ICC, as recommended by the Syria Commission, failed due to vetoes from two permanent members.¹⁴³ Some authors suggest that investigations of IHL violations should only be established by the Security Council, due to the HRC's inability to take binding enforcement action.¹⁴⁴ Yet, other scholars observe a corrective dynamic between New York and Geneva, with the HRC establishing commissions in situations that would have faced a veto in the Security Council and with a "de facto aim to express condemnation, to present a compelling conflict narrative so as to counter the Security Council inaction or to elicit alternative involvement by the [ICC]".¹⁴⁵

Looking beyond criminal justice, the implementation of other types of accountability recommendations has been patchy. For instance, with regard to compensation for internationally wrongful acts, the Darfur Commission considered that in respect of human rights violations amounting to international crimes, the States of which the perpetrators were nationals must make reparations for the harms suffered, and prepared a detailed proposal for an international compensation commission to determine such claims, but the Security Council reserved questions of compensation for peace negotiations.¹⁴⁶ Drawing the HRC's attention to "the serious lacunae in international law, international humanitarian and human rights law as regards the possibility of victims to seek and obtain reparations and compensation", the Lebanon Commission recommended that the HRC consider creating "a commission competent to examine individual claims".¹⁴⁷ The HRC requested that the

141 For example, the Syria Commission, Myanmar Commission and Goldstone Commission. While the Council did refer the situation in Libya to the ICC, it did so only one day after the HRC decided to establish the Libya Commission: SC Res 1970 (2011); and *Libya Mandate*, above n 27.

142 58 UN Member States issued a statement on 19 May 2014 calling on the Security Council to adopt that resolution: Human Rights Watch "Syria: 58 Countries Urge ICC Referral" (20 May 2014) <www.hrw.org>.

143 *Draft Resolution* UN Doc S/2014/348 (22 May 2014).

144 Micaela Frulli "Fact-Finding or Paving the Road to Criminal Justice? Some Reflections on United Nations Commissions of Inquiry" (2012) 10 JICJ 1323 at 1333.

145 van den Herik, above n 44, at 528. See Lyal Sunga "What Should be the UN Human Rights Council's Role in Investigating Genocide, War Crimes and Crimes Against Humanity?" in M Cherif Bassiouni and William A Schabas (eds) *New Challenges for the UN Human Rights Machinery: What future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia, Cambridge, 2011) 319.

146 *Darfur Report*, above n 60, at [590]. See *Doha Document for Peace in Darfur* (UNAMID, May 2011).

147 *Lebanon Report*, above n 61, at [31(n)].

OHCHR consult with Lebanon, but no mechanism was established.¹⁴⁸ The Goldstone Commission recommended that the General Assembly establish an escrow fund to pay compensation to Palestinian victims who had suffered loss and damage as a result of unlawful acts attributable to Israel during the military operation, and that Israel should pay the required amounts into such fund.¹⁴⁹ The HRC recommended that the OHCHR explore modalities for such a fund, but it was not established.¹⁵⁰

Some commissions sought to bridge the implementation gap by recommending follow-up monitoring of the implementation of their recommendations. For instance, the Goldstone Commission recommended that a committee be established to report on parties' efforts to prosecute serious violations and that absent such action, the situation should be referred to the ICC.¹⁵¹ The HRC established such a committee which found few indications of accountability action.¹⁵² The HRC then requested the UN Secretary-General to continue to report on progress.¹⁵³ Eventually, its attention shifted to other crises, and no ICC referral eventuated. Though innovative, this "legacy planning" initiative did not resolve implementation challenges. Later, the Gaza Commission criticised the non-implementation of recommendations as "at the heart of the systematic recurrence of violations in Israel and [Palestine]".¹⁵⁴ The OHCHR reported that the rate of implementation was 0.4 per cent for Israel,

148 *Report of the Commission of Inquiry on Lebanon* HRC Res 3/3 (2006), art 2. See *Report of the United Nations High Commissioner for Human Rights on the follow-up to the report of the Commission of Inquiry on Lebanon* UN Doc A/HRC/5/9 (4 June 2007) at [47].

149 *Goldstone Report*, above n 61, at [1971(b)].

150 *Follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict* HRC Res 16/32 (2011), art 6; *Report of the United Nations High Commissioner for Human Rights on follow-up to the report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict: Addendum – Advice of the Office of Legal Counsel on the establishment of an escrow fund pursuant to Human Rights Council resolution 13/9* UN Doc A/HRC/15/52/Add.1 (11 October 2010); *Progress report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolution 16/32* UN Doc A/HRC/18/50 (11 August 2011); and *Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1: Addendum – Implementation of the recommendations contained in the reports of the independent commission of inquiry on the 2014 Gaza conflict and of the United Nations Fact-Finding Mission on the Gaza Conflict* UN Doc A/HRC/31/40/Add.1 (7 March 2016) at [15] and [55].

151 *Goldstone Report*, above n 61, at [1969(b)–(e)].

152 *Follow-up to the report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict* HRC Res 13/9 (2010), art 9; and *Report of the Committee of independent experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards* UN Doc A/HRC/15/50 (23 September 2010).

153 *Follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict* HRC Res 19/18 (2012).

154 *Gaza Report*, above n 52, at [676].

1.3 per cent for Palestine and 17.9 per cent for the UN and the international community.¹⁵⁵ Rob Grace observes that generally, recommendations addressed to other governments and UN entities have been "more impactful" than those addressed to the parties to conflicts, suggesting that such mechanisms "play[ed] a role in drawing governments into a process of monitoring global developments regarding accountability during and after armed conflicts and internal disturbances."¹⁵⁶

IV UTILITY OF INQUIRY TOWARDS ACCOUNTABILITY FOR CIVILIAN HARMS

In light of the difficulties faced by commissions in carrying out their mandates, it may be queried whether these institutions represent "strength and creativity or weakness and superficiality"¹⁵⁷ in pursuit of accountability. Some commentators suggest that intergovernmental resort to fact finding signals "concern without commitment"¹⁵⁸ and that a commission may serve as a "placeholder" for action when the international community cannot agree on how to respond to a crisis.¹⁵⁹ These views harken back to a fundamental critique of the international legal order, namely that there is an undesirable gap between primary norms and their enforcement. Indeed, the lack of a centralised enforcement mechanism has led some scholars to explore the question of whether international law is really "law" at all.¹⁶⁰ Indeed, commissions do not disrupt the status quo in that there is no seismic shift regarding the centrality of state consent. Nevertheless, they can incrementally move the needle towards greater accountability for civilian harms in violation of international law. Commissions' contributions to accountability can be characterised from at least three vantage points, namely vis-à-vis victims, culpable actors and the international community as a whole.

155 *Ensuring accountability and justice for all violations of international law in the Occupied Palestinian Territory, including East Jerusalem: comprehensive review on the status of recommendations addressed to all parties since 2009* UN Doc A/HRC/35/19 (12 June 2017) at [60]–[62]. See *Ensuring accountability and justice for all violations of international law in the Occupied Palestinian Territory, including East Jerusalem* UN Doc A/HRC/37/41 (19 March 2018).

156 Rob Grace "An Analysis of the Impact of Commissions of Inquiry" in Rob Grace and Claude Bruderlein (eds) *HPCR Practitioner's Handbook on Monitoring, Reporting, and Fact-Finding: Investigating International Law Violations* (Cambridge University Press, Cambridge, 2017) 279 at 314.

157 Zachary D Kaufman "The Prospects, Problems and Proliferation of Recent UN Investigations of International Law Violations" (2018) 16 JICJ 93 at 106–107.

158 Cecilie Hellestveit "International Fact-Finding Mechanisms: Lighting Candles or Cursing Darkness?" in Cecilia Marcela Bailliet and Kjetil Mujezinovic Larsen (eds) *Promoting Peace Through International Law* (Oxford University Press, Oxford, 2015) 368 at 369.

159 Dan Saxon "Purpose and Legitimacy in International Fact-Finding Bodies" in Morten Bergsmo and Carsten Stahn (eds) *Quality Control in Fact-Finding* (2nd ed, Torkel Opsahl, Brussels, 2020) 219 at 220.

160 See for example Anthony D'Amato "Is International Law Really 'Law'?" (1985) 79 NWULR 1293.

A Accountability vis-à-vis Victims

Commissions' reports go towards giving effect to the rights of victims and their families to the truth regarding violations they have suffered.¹⁶¹ The Yugoslavia Commission wrote that victims had high expectations that it would establish the truth and that "peace in the future requires justice, and that justice starts with establishing the truth".¹⁶² As "[t]ruth is fundamental to the inherent dignity of the human person",¹⁶³ recognition of victims' suffering can be a source of empowerment and have cathartic value.¹⁶⁴ For instance, the Yugoslavia Commission observed in respect of its investigation into sexual violence that "[i]nvariably to such traumatized victims, the mere fact that a United Nations body tangibly expressed its concern for them was comforting and uplifting" and "[i]f nothing else, this unique investigation brought some human comfort and support to these victims."¹⁶⁵

As well as hearing victims' voices and acknowledging their experiences, commissions can provide a means for their amplification. For instance, the Gaza Commission wrote that its activities were "informed by the wish to ensure that the voices of all victims are heard".¹⁶⁶ The Goldstone Commission considered that its public hearings, some of which were broadcast live, aimed "to enable victims, witnesses and experts from all sides to the conflict to speak directly to as many people as possible in the region as well as in the international community".¹⁶⁷ However, where serious violations are widespread, commissions' investigations are necessarily selective due to resource limitations and time constraints. Such benefits may be experienced by comparatively few victims. The example of the Yugoslavia Commission is again instructive, as it could not conduct interviews with all interested victims due to it nearing the end of its mandate.¹⁶⁸

161 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* GA Res 60/147 (2006), annex at principle 22(b); and Pablo de Greiff *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence* UN Doc A/HRC/21/46 (9 August 2012) at [30].

162 *Yugoslavia Final Report*, above n 57, at [320].

163 *Study on the right to the truth: Report of the Office of the United Nations High Commissioner for Human Rights* UN Doc E/CN.4/2006/91 (8 February 2006) at [57].

164 M Cherif Bassiouni "The Commission of Experts Established pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia" (1994) 5 *Crim LF* 279 at 313.

165 *Yugoslavia Final Report*, above n 57, at 82 fn 65.

166 *Gaza Report*, above n 52, at [6].

167 *Goldstone Report*, above n 61, at [22].

168 *Yugoslavia Final Report*, above n 57, at 82 fns 65 and 69. See Bassiouni, above n 1644, at 304.

While the scope of commissions' findings is often limited due to the challenges described above, they nonetheless have value as an official record.¹⁶⁹ Their findings of violations can stand as a counterpoint to narratives put forward by parties in which such harms are not acknowledged. For instance, the Sri Lanka Panel noted that it offered an alternative account of the Sri Lankan civil war which challenged governmental denial of atrocities.¹⁷⁰ In highly polarized situations, however, commissions' findings may reinforce pre-existing perceptions and be used as a tool by the parties in the "struggle for control of the narrative".¹⁷¹

B Accountability vis-à-vis Perpetrators

Commissions' reports expose violations and implicated actors. While some commissions were instructed to identify those responsible in pursuit of accountability,¹⁷² most did not publicly identify individual suspects, mindful of the presumption of innocence and the right to a fair trial.¹⁷³ Instead, most commissions confidentially transmitted such information for use by competent authorities. In this regard, the OHCHR recommends that suspected perpetrators only be publicly named in exceptional circumstances where they have been afforded a right of reply and suggests identifying their roles or institutional affiliations instead.¹⁷⁴

Commissions have identified responsible collective entities such as states and organised armed groups, as well as corporate entities. For instance, the Independent International Fact-Finding Mission on Myanmar (Myanmar Commission) examined the role of social media platforms in spreading hate speech and enabling the incitement of violations, and was particularly critical of the failure of Facebook to remove such content.¹⁷⁵ Commissions' findings of human rights violations on the part of organised armed groups affirm that these entities can hold such obligations in certain

169 Antonio Cassese "Gathering Up the Main Threads" in Antonio Cassese (ed) *Realizing Utopia: The Future of International Law* (Oxford University Press, Oxford, 2012) 645 at 675.

170 *Sri Lanka Report*, above n 42, at [403].

171 Blank, above n 66, at 102.

172 See for example *Syria Mandate*, above n 2; SC Res 1564 (2004); and *CAR Mandate*, above n 21.

173 See for example *Goldstone Report*, above n 61, at [25]; *Darfur Report*, above n 60, at [526]; *Libya Second Report*, above n 43, at [760]; *CAR Report*, above n 53, at [24]; and *Syria Third Report*, above n 61, at [131].

174 OHCHR *Who's Responsible? Attributing Individual Responsibility for Violations of International Human Rights and Humanitarian Law in United Nations Commissions of Inquiry, Fact-Finding Missions and Other Investigations* UN Doc HR/PUB/18/3 (2018) at 85–89.

175 *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar* UN Doc A/HRC/39/CRP.2 (17 September 2018) at [1342]–[1354] [*Myanmar Report*].

circumstances,¹⁷⁶ despite practical difficulties in enforcing them. As a "naming and shaming" strategy, commissions' findings confer a degree of moral accountability and can generate reputational costs,¹⁷⁷ especially for states wishing to be perceived as trustworthy members of the international community¹⁷⁸ and non-state actors seeking legitimacy. Such effects may, however, be limited for parties which reject international law altogether.¹⁷⁹

While commissions' reports have no direct legal effect, they can facilitate multiple legal processes through which actors implicated in violations may be held to account, including individuals suspected of committing international crimes.¹⁸⁰ As noted above, in some instances, commissions' investigations facilitated the establishment of international criminal tribunals and contributed to the triggering of ICC jurisdiction. Their reports have guided criminal investigations¹⁸¹ and been relied upon as evidence, including in decisions to issue arrest warrants and confirm charges against defendants.¹⁸²

Where direct recourse to international criminal courts and tribunals has not been possible, commissions' investigations have in some cases led to the development of innovative accountability

176 See for example *Sri Lanka Report*, above n 42, at [188]; *Libya Second Report*, above n 43, at [181]; *Syria Third Report*, above n 61, Annex II at [10]; *CAR Report*, above n 53, at [107]; and *Gaza Report*, above n 52, at [45].

177 See for example James C Franklin "Human Rights Naming and Shaming: International and Domestic Processes" in H Richard Friman (ed) *The Politics of Leverage in International Relations: Name, Shame, and Sanction* (Palgrave Macmillan, Basingstoke (Hampshire), 2015) 43; and Emilie M Hafner-Burton "Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem" (2008) 62 *Intl Org* 689. See also Michael Kirby and Sandeep Gopalan "'Recalcitrant' States and International Law: The Role of the UN Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of Korea" (2015) 37 *U Pa J Intl L* 229 at 294.

178 Kenneth W Abbott and others "The Concept of Legalization" (2000) 54 *Intl Org* 401 at 418.

179 Darin EW Johnson "The Problem of the Terror Non-State: Rescuing International Law from ISIS and Boko Haram" (2019) 84 *Brook L Rev* 475.

180 David Kaye "Human Rights Prosecutors? The High Commissioner for Human Rights, International Justice, and the Example of Syria" in Felice D Gaer and Christen L Broecker (eds) *The United Nations High Commissioner for Human Rights: Conscience for the World* (Martinus Nijhoff, Leiden, 2014) 245 at 262; and Annemarie Devereux "Investigating Violations of International Human Rights Law and International Humanitarian Law through an International Commission of Inquiry: Libya and Beyond" in David W Lovell (ed) *Investigating Operational Incidents in a Military Context: Law, Justice, Politics* (Brill Nijhoff, Leiden, 2015) 99 at 119.

181 Lyal S Sunga "How Can UN Human Rights Special Procedures Sharpen ICC Fact-Finding?" (2011) 15 *IJHR* 187 at 193.

182 See for example *Prosecutor v Al Bashir (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir)* ICC Pre-Trial Chamber I ICC-02/05-01/09, 4 March 2009 at [88]; and *Prosecutor v LBagbo (Decision on the confirmation of charges)* ICC Pre-Trial Chamber I ICC-02/11-01/11, 12 June 2014 at [75(i)].

responses. Pertinent examples are the investigative mechanisms for Syria and Myanmar. In 2016, following multiple reports by the Syria Commission of grave violations and a situation of stalemate in the Security Council, the General Assembly established an investigative mechanism for Syria with a "quasi-prosecutorial function"¹⁸³ to collect evidence and facilitate criminal proceedings.¹⁸⁴ The HRC took a similar step by implementing the Myanmar Commission's recommendation to create an investigative mechanism for Myanmar.¹⁸⁵ The Myanmar Mechanism has compiled several dossiers of information and evidence for use in criminal proceedings and is also cooperating with the International Criminal Court and the International Court of Justice in respect of proceedings involving Myanmar.¹⁸⁶ The Syria Mechanism has similarly built case files and established cooperation frameworks and, at the time of reporting, had assisted 36 distinct investigations at the domestic level.¹⁸⁷ Such mechanisms represent a further step towards ensuring that responsible individuals are held accountable.

Some commissions encouraged the investigation and prosecution of international crimes before domestic courts in third states on the basis of universal jurisdiction. For instance, the Myanmar Commission urged UN member states to prosecute suspected perpetrators of international crimes in Myanmar on the basis of universal jurisdiction.¹⁸⁸ The Syria Commission has to date provided information in respect of more than 60 such investigations.¹⁸⁹ Its reports have been used as evidence in numerous proceedings, including the trial before a German court of a former Syrian colonel for crimes against humanity.¹⁹⁰ In 2022, that defendant was sentenced to life imprisonment.¹⁹¹ As the first case to be brought against a ranking government official for atrocities committed in the Syrian conflict, this landmark trial was heralded by victims as the beginning of a long path to justice.¹⁹² With

183 *IIIM Report*, above n 50, at [32].

184 *IIIM Mandate*, above n 8. See *IIIM Report*, above n 50, at [30].

185 *Report of the independent international fact-finding mission on Myanmar* UN Doc A/HRC/39/64 (12 September 2018) at [106]; and *Situation of human rights of Rohingya Muslims and other minorities in Myanmar* HRC Res 39/2 (2018), art 22.

186 *Report of the Independent Investigative Mechanism for Myanmar* UN Doc A/HRC/48/18 (5 July 2021) at [24]–[26].

187 *International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011: Note by the Secretary-General* UN Doc A/75/743 (12 February 2021) at [30].

188 *Myanmar Report*, above n 1755.

189 *Syria Twenty-Second Report*, above n 5, at [89] and [99].

190 At [89].

191 OLG Koblenz [Higher Regional Court of Koblenz] 1 StE 9/19, 13 January 2022.

192 Ben Hubbard and Katrin Bennhold "Murder, Torture, Rape: A Landmark Conviction on State Violence in Syria" *The New York Times* (online ed, New York, 13 January 2022). See Human Rights Watch "These are

initial expansive visions of the promise of international criminal courts and tribunals giving way to the formulation of more modest goals,¹⁹³ some authors suggest that the future of international criminal law lies in universal jurisdiction.¹⁹⁴ Prosecuting international crimes on the basis of universal jurisdiction is not without challenges and controversies, including the political discretion involved in invoking universal jurisdiction, difficulties in gathering evidence and concerns of fragmentation of international law.¹⁹⁵ Nevertheless, it remains a valuable tool to seek accountability for international crimes, at least as a last resort.¹⁹⁶ Commissions are well placed to encourage prosecutions on this basis, at least for those suspects located in third states.¹⁹⁷

Commissions' reports may also be utilised in civil proceedings against states, individuals and private enterprises. For instance, the International Court of Justice (ICJ) cited the Yugoslavia Commission's findings throughout its *Bosnia Genocide* judgment.¹⁹⁸ In 2020, the Netherlands invoked Syria's responsibility for torture under the Convention Against Torture, citing the reports of the Syria Commission, and requested Syria to enter into negotiations as a first step before submitting the matter to arbitration or, as a last resort, the ICJ.¹⁹⁹ As for examples in private law, a civil suit

the Crimes we are Fleeing': Justice for Syria in Swedish and German Courts" (3 October 2017) <www.hrw.org>.

193 Mirjan Damaška "What is the Point of International Criminal Justice?" (2008) 83 Chi-Kent L Rev 329.

194 See for example Howard Varney and Katarzyna Zduńczyk *Advancing Global Accountability: The Role of Universal Jurisdiction in Prosecuting International Crimes* (International Center for Transitional Justice, December 2020).

195 Matthew Garrod "Unraveling the Confused Relationship Between Treaty Obligations to Extradite or Prosecute and 'Universal Jurisdiction' in the Light of the *Habré Case*" (2018) 59 Harv Intl LJ 125; Charles Chernor Jalloh "Universal criminal jurisdiction" in International Law Commission *Report of the International Law Commission* UN Doc A/73/10 (2018) Annex A; TRIAL International *Evidentiary challenges in universal jurisdiction cases* (Universal Jurisdiction Annual Review 2019); and Maria Antonella Pasculli "Universal Jurisdiction between Unity and Fragmentation of International Criminal Law" (2011) 5 Rivista di Criminologia, Vittimologia e Sicurezza 34.

196 *Syria Twenty-Second Report*, above n 5, at [85]; Jalloh, above n 1955, at [7]; and *Concluding Debate on Universal Jurisdiction Principle, Sixth Committee Speakers Wrestle with Challenging Balance between State Sovereignty, Fighting Impunity* UN Doc GA/L/3642 (22 October 2021).

197 The possibility of *in absentia* trials on the basis of universal jurisdiction gives rise to further complications: see Tim Kluwen "Universal Jurisdiction *in Absentia* Before Domestic Courts Prosecuting International Crimes: A Suitable Weapon to Fight Impunity?" (2017) 8 GoJIL 7; and Ryan Rabinovitch "Universal Jurisdiction *in Absentia*" (2005) 28 Fordham Intl LJ 500.

198 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43 at 130, 144, 148 and 149.

199 Government of the Netherlands "The Netherlands holds Syria responsible for gross human rights violations" (press release, 18 September 2020); and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987) art 30. In 2021, Canada joined the Netherlands in this action: Global Affairs Canada and Government

brought in the United States against an individual for inciting genocide referred to the Rwanda Commission's findings²⁰⁰ and in Canada, the Eritrea Commission's report²⁰¹ was entered into evidence in a civil suit against mining company Nevsun for committing human rights violations in Eritrea.²⁰²

C Accountability vis-à-vis the International Community

Finally, commissions contribute to accountability vis-à-vis the international community. Flowing from the positive duties to "respect and to ensure respect" for the Geneva Conventions and customary IHL,²⁰³ commissions' findings of serious violations put the international community on notice of the need to ensure that violations are not encouraged or assisted, which could give rise to international responsibility on the part of the assisting state.²⁰⁴ Such findings also imply that all states must do everything reasonably within their power to prevent and bring such violations to an end. Past efforts to ensure respect for IHL and stop violations thereof have included diplomatic protests, sanctions and peacekeeping missions.²⁰⁵

Beyond IHL, there are broader obligations on the part of the international community to prevent and respond to situations of atrocities arising from both legal duties and political commitments. The prohibitions of war crimes, crimes against humanity and genocide are peremptory norms of international law, requiring states to cooperate to bring such violations to an end through lawful means.²⁰⁶ The concept of the responsibility to protect, as recognised and articulated by the General Assembly, provides, inter alia, that the international community has a responsibility to encourage states to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity, to use peaceful means to help to protect populations from such atrocities and, should

of the Netherlands "Joint statement of Canada and the Kingdom of the Netherlands regarding their cooperation in holding Syria to account" (press release, 12 March 2021).

200 *Mushikiwabo v Barayagwiza* No 94 CIV 3627 (JSM) (SDNY 9 April 1996).

201 *Report of the commission of inquiry on human rights in Eritrea* UN Doc A/HRC/32/47 (9 May 2016).

202 *Araya v Nevsun Resources Ltd* 2016 BCSC 1856, (2016) 408 DLR (4th) 383 at [138].

203 Common Article 1 to the Geneva Conventions of 1949; and *ICRC Customary IHL Study*, above n 77, rule 144.

204 International Law Commission *Articles on the Responsibility of States for internationally wrongful acts*, annexed to *Responsibility of States for internationally wrongful acts* GA Res 56/83 (2001), art 16 [ARSIWA]; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 at 114–115.

205 *ICRC Customary IHL Study*, above n 77, rule 144.

206 Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277 (opened for signature 9 December 1948, entered into force 12 January 1951), art 1; ARSIWA, above n 2044, art 41; and Alexander Orakhelashvili *Peremptory Norms in International Law* (Oxford University Press, Oxford, 2008) at 43.

peaceful means be inadequate, to consider the use of collective action through the Security Council.²⁰⁷ Noting the importance of the principle of non-intervention²⁰⁸ and the contentiousness of humanitarian intervention involving the use of force in the absence of Security Council authorization,²⁰⁹ the international community nonetheless has an obligation to prevent and respond to situations of atrocities. As a political commitment, the responsibility to protect implies that the international community cannot stand by in the knowledge of atrocities without incurring some degree of political accountability for such inaction. For instance, the UN's inaction during the Rwandan genocide has been roundly criticized as a serious failure.²¹⁰

V FINAL REFLECTIONS

In qualifying civilian harms as violations of international law, commissions have faced a series of trade-offs. Where commissions lacked access to material information, they could choose to either prioritise certainty at the cost of expressing the extent of harms; or to make findings on a qualified basis or by resort to adverse inferences whose veracity could be challenged, potentially reducing the catalysing influence of their reports. In assessing violations, commissions could cleave to the traditional paradigm of IHL which might find traction with parties to a conflict or adopt a progressive approach that maximizes protective aspects of IHL and the effect of human rights norms, at the potential cost of their analysis being perceived as *lex ferenda*. At each of these forks in the road, commissions have generally favoured victim-centred approaches that recognise the harms suffered and uphold human rights alongside humanitarian protections in armed conflict.

The co-applicability of IHL and IHRL can involve complex legal analysis, and application of the *lex specialis* principle can be far from straightforward.²¹¹ Where commissions interpreted divergent

207 2005 World Summit Outcome GA Res 60/1 (2005) at [138]–[139]. SC Res 2150 (2014), art 1 "Calls upon states to recommit to prevent and fight against genocide, and other serious crimes under international law, [and] reaffirms paragraphs 138 and 139 of the 2005 World Summit Outcome Document (A/60/L.1) on the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity..." See also Louise Arbour "The responsibility to protect as a duty of care in international law and practice" (2008) 34 Rev Intl Stud 445.

208 Maziar Jamnejad and Michael Wood "The Principle of Non-Intervention" (2009) 22 LJIL 345.

209 Alex J Bellamy "Humanitarian Intervention and the Three Traditions" (2003) 17 Global Society 3.

210 Record of the 7155th meeting of the Security Council UN Doc S/PV.7155 (16 April 2014) at 3, intervention of Colin Keating: "This briefing also provides a fitting opportunity, for me in my capacity as former President of the Council in April 1994, to apologize for what we failed to do in 1994 and for that to be formally recorded in the official records of the Security Council." In 1999, the *Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda* stated that the UN had "failed the people of Rwanda during the genocide" and "should acknowledge its part of the responsibility for not having done enough to prevent or stop the genocide": UN Doc S/1999/1257 (16 December 1999) at 51 and 54.

211 Sarah McCosker "The 'Interoperability' of International Humanitarian Law and Human Rights Law: Evaluating the Legal Tools Available to Negotiate Their Relationship" in Andrew Byrnes, Mika Hayashi and Christopher Michaelsen (eds) *International Law in the New Age of Globalization* (Martinus Nijhoff, Leiden,

IHL norms in light of IHRL, such as in respect of targeting, they have faced criticism as destabilizing the balance struck in IHL between humanity and military necessity. While such interpretations may be aimed at strengthening humanitarian protection, they may have little practical effect if perceived by those applying the law on the ground as idealistic *lex ferenda* or even as an undesirable overreach into the law applicable to armed conflict. Yet, some resistance in this regard may be expected when the scope of military necessity is reduced. With relatively sparse judicial guidance available, commissions have often forged the way in assessing facts on the basis of both IHL and IHRL. As jurisprudence and other guidance develops further, including from human rights treaty bodies, careful legal analysis by commissions, based on such guidance, could bolster the authority of their findings of violations.

As a broad and multifaceted concept, accountability cuts across legal, political and moral dimensions. Consequently, there is no one-size-fits-all accountability response, but rather a patchwork of complementary measures that engage different actors, processes and enforcement mechanisms under international law. In recognising victims' experiences, affirming rights and protections and denouncing violations, commissions not only serve as catalysts for binding accountability action, but can arguably be considered as accountability mechanisms in their own right.²¹² Commissions should, therefore, be considered as a valuable part of the contemporary accountability architecture of the UN.

At the same time, the utility of commissions could be enlarged with respect to ensuring accountability. In particular, this utility could be enhanced through greater operational support for their work, since high-quality investigations can produce credible findings that in turn catalyse accountability responses. A basic requirement, but one not always met in practice, is for commissions to be adequately resourced in order to be able to carry out their mandates. As for what constitutes 'adequate' resourcing, OHCHR notes that this will depend on the investigative scope and operational context, including logistics, security concerns and methodological aspects.²¹³

Ideally, commissions would also enjoy greater state cooperation. In practice, this remains one of the biggest obstacles to the fulfilment of commissions' mandates. Even the Darfur Commission did not enjoy full cooperation with government officials when it had been established by the Security Council and the Government of Sudan was threatened with sanctions if full cooperation was not forthcoming.²¹⁴ Where commissions are established by other mandating authorities, there may be more limited recourse through UN channels to incentivize cooperation. Commissions have enjoyed

2013) 145 at 158–161; and Françoise J Hampson "The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body" (2008) 90 IRRC 549 at 558–562.

212 Patrick Butchard and Christian Henderson "A Functional Typology of Commissions of Inquiry" in Christian Henderson (ed) *Commissions of Inquiry: Problems and Prospects* (Hart, Oxford, 2017) 11 at 21.

213 OHCHR, above n 40, at 28–29.

214 *Darfur Report*, above n 60, at [29]–[36].

greater cooperation when they were established with the consent of concerned states²¹⁵ or where the objectives of fact-finding were more diplomatic in nature.²¹⁶ However, the establishment of inquiries into civilian harms cannot be conditional on state consent. Otherwise, as noted by PoKempner in reference to the Gaza Commission report, this would "empower noncooperating parties [...] to defeat international fact-finding entirely."²¹⁷ By ensuring that the terms of the mandate and the conduct of investigations are demonstrably impartial, commissions may at least be insulated from claims of bias which otherwise be cited as a justification for non-cooperation.

There could also be consideration towards regularizing the monitoring of implementation of commissions' recommendations. As discussed above, so far this has been done in an ad hoc way, but it could be a standard part of the inquiry process, perhaps by a standing team within each mandating authority. This is not to suggest that all recommendations should necessarily be implemented, and indeed it may be difficult to measure the degree of implementation for some types of recommendations. However, continued scrutiny in the follow-up phase could extend the momentum generated by commissions' reports and encourage stakeholders to actively engage with their recommendations, especially by UN entities. Such reporting could also inform the formulation of future recommendations and illuminate the engagement of UN entities with the work of commissions.

Looking beyond the operational level, many other challenges to accountability fall outside commissions' remit, as they concern the general dynamics and structures of the international legal order. The enduring centrality of state consent, in particular, has implications for the conduct of commissions' investigations as well as the availability of accountability processes and mechanisms. Within this context, some commentators see commissions' main role as influencing international politics,²¹⁸ while others consider commissions as a type of adjudication.²¹⁹ As both a means towards accountability and accountability ends in themselves, commissions are in a state of flux. However, this does not leave them mired in an accountability 'no man's land.' Since progress towards

215 For example, the parties to the conflict in Mali agreed to the establishment of an international commission of inquiry: *Agreement on Peace and Reconciliation in Mali Resulting from the Algiers Process*, art 46. The Mali Commission reported that it enjoyed "satisfactory cooperation": *Report of the International Commission of Inquiry for Mali* UN Doc S/2020/1332 (29 January 2021) at [28].

216 For example, Israel cooperated with the Palmer Commission regarding the flotilla of vessels bound for Gaza, but refused to do so with an HRC-established commission on the same situation.

217 PoKempner, above n 52, at 155. See *Gaza Report*, above n 52.

218 See for example Hellestveit, above n 158, at 369; and Larissa van den Herik "Accountability Through Fact-Finding: Appraising Inquiry in the Context of Srebrenica" (2015) 62 NILR 295 at 297.

219 See for example Christian Henderson "Commissions of Inquiry: Flexible Temporariness or Permanent Predictability?" (2014) 45 NYIL 287 at 290; and Dapo Akande and Hannah Tonkin "International Commissions of Inquiry: A New Form of Adjudication?" (6 April 2012) EJIL:Talk! <www.ejiltalk.org>.

accountability requires political will as well as international law, commissions' ability to speak to both law and politics is, simply put, essential.