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Commissions of Inquiry and the Charm of International Criminal Law

Between Transactional and Authoritative Approaches

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I. Introduction

International commissions of inquiry and other international fact-finders are increasingly called upon to determine whether international crimes, genocide, crimes against humanity, or war crimes have been committed in a given situation of armed conflict or distress. This trend toward a certain criminalization of human rights fact-finding has been duly noted in academia and policy circles.[1] It has raised questions regarding the possibilities of evidence-sharing between commissions of inquiry and criminal prosecutors[2] and the potential for other forms of cooperation.[3] Several studies have examined and tested the impact of this turn to international criminal law on the quality and effectiveness of human rights fact-finding,[4] and more concretely whether this trend should also translate into more rigorous investigative methodologies and the development of standardized guidelines.[5]

The above-raised questions address the concomitant existence of commissions of inquiry and international criminal courts from an empirical and pragmatic perspective. Complementing such functional queries, this chapter takes a more conceptual approach. Rather than pursuing questions related to the *sharing of facts*, it analyzes the phenomenon of *sharing the law*. International criminal law is the traditional language of international criminal courts. These entities apply international criminal law to prosecute, to determine individual guilt, and to convict or acquit, and in case of the former to impose punishment. Commissions of inquiry are gradually taking on the same language, the same body of law, but for different purposes. They are not vested with the formal authority to adjudicate. This

The Transformation of Human Rights Fact-Finding. Philip Alston and Sarah Knuckey.

chapter interrogates what the consequences are of the incidence that the same body of law is utilized by different entities for different purposes. Or phrased more provocatively: Should commissions of inquiry apply international criminal law in exactly the same manner as international criminal courts, or is there ground for legitimate difference? Must commissions of inquiry in analogy abide by the principle of strict construction that flows from the legality principle, a principle that governs criminal prosecutions, or do the different underlying purposes that guide and inform the mandates of commissions of inquiry offer room to engage in more flexible interpretations of international criminal law? And if commissions of inquiry were indeed to interpret international criminal law in a more lenient fashion, would this not undermine the authority and credibility of this body of law as such? This chapter will grapple with these pressing questions, which may to some extent be reminiscent of debates that were particularly prominent in the context of Darfur in 2005. In that setting, the argument was presented that determinations of genocide made in preventive or R2P spheres do not require the same technical and detailed approach as findings in the context of a criminal trial, and that there is ground for a legitimate difference in the application of the same concept when utilized for either preventive or punitive purposes.

Pursuing this line of thought, the current chapter is structured as follows. First, Section II situates the modern human rights commissions of inquiry within the broader institutional fact-finding framework of the UN. Within this milieu, Section III revisits the purported different functions of modern human rights commissions of inquiry and examines how these are fostered or undermined by the utilization of international criminal law. Subsequently, Section IV compares the approaches of a variety of commissions of inquiry in their application and interpretation of international criminal law in light of their distinct identity. This section tests whether the commissions' use of international criminal law is coherent with mainstream understandings and the application by international criminal courts and tribunals. It shows that despite overall adherence to the concepts of international criminal law, on concrete occasions commissions of inquiry do engage in selective engagement and more relaxed interpretive approaches of international law, and in particular international criminal law. Section V sets out three justifications to ground the idea of "legitimate difference"[6] and to justify *slightly* divergent approaches by commissions of inquiry on the basis of their distinct mandate and function. To conclude, Section VI offers some thoughts on the ramifications of these divergences. It emphasizes the need that the distinct settings in which international criminal law is invoked be appreciated, and consequently that no immediate precedential value is attached to detailed legal findings of commissions of inquiry. Pursuant to this idea, legal findings and interpretations from commissions of inquiry can only be transposed to the context of a criminal trial with a certain care and diligence.

II. The UN Institutional Fact-Finding Framework

Article 33 of the UN Charter promotes the use of fact-finding as a distinct means of dispute settlement. This reflects the traditional understanding of the use of fact-finding as it was codified in the early Hague Conventions.[7] In addition, following the practice under the League of Nations, the primary UN organs have resorted to fact-finding as a means

to receive information about a situation of international concern that would enable the recipient organ to determine the best course of action to respond to the situation. This practice is recognized and encouraged in the 1991 Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security (the "1991 Declaration"):[8]

> In performing their functions in relation to the maintenance of international peace and security, the competent organs of the [UN] should endeavour to have full knowledge of all relevant facts. To this end they should consider undertaking fact-finding activities.

The Security Council is the only primary organ that has been expressly vested with investigatory powers. Article 34 of the Charter authorizes the Council to undertake fact-finding in respect of matters of international peace and security. Yet, the Council has established commissions pursuant to Article 34 on two occasions only, after which the provision came into disuse. [9] In other cases, the Council has established commissions of inquiry on the basis of its implied powers.[10] The Security Council has a long history of establishing commissions directly[11] but more recently it has tended to request the Secretary-General to do so on its behalf.[12] Security Council commissions have inquired into diverse matters relating to international peace and security, including situations of aggression, terrorist attacks, violations of international humanitarian law, and genocide.

Although the Security Council is primarily responsible for the maintenance of international peace and security,[13] the General Assembly also has responsibilities in this area.[14] In addition, the General Assembly is charged with, inter alia, initiating studies and making recommendations to assist in the realization of human rights.[15] In its earlier years, the General Assembly established a substantive number of special commissions and committees to examine and report on situations of concern.[16] Some of these bodies were asked to assist peaceful dispute settlement,[17] investigate discrete incidents,[18] or provide technical assistance, such as monitoring elections.[19] The Assembly also established several commissions to investigate human rights violations.[20] Modern commissions under the General Assembly's auspices have been established by its subsidiary body, the Human Rights Council (HRC), which in 2006 replaced the Commission on Human Rights. The fact-finding competencies of these bodies are discussed further below.

Pursuant to Article 99 of the Charter, the Secretary-General can bring the Security Council's attention to any matter that may threaten the maintenance of international peace and security. The 1991 Declaration also acknowledges the Secretary-General's role in fact-finding, providing that the Secretary-General should consider using fact-finding "to contribute to the prevention of disputes and situations"[21] and "on his own initiative or at the request of the States concerned, should consider undertaking a fact-finding mission when a dispute or a situation exists."[22] The Secretary-General has established commissions in response to requests by the Security Council[23] and the General Assembly[24] as well as on his own initiative[25] and following requests of, or agreements with, concerned states.[26] The Office of the High Commissioner for Human Rights (OHCHR), part of the UN

Secretariat, has conducted investigations on behalf of the Secretary-General[27] and the HRC. [28] The OHCHR also engages in significant human rights fact-finding independently of these actors.[29]

The Commission on Human Rights (CHR) was established by the Economic and Social Council (ECOSOC) in 1946. Its mandate had a clear focus on encouraging compliance with human rights,[30] although ECOSOC also resolved that the CHR could not "take action on individual human rights complaints."[31] However, the CHR was empowered to "call in ad hoc working groups of non-governmental experts"[32] and in 1967, was authorized to investigate alleged human rights violations.[33] CHR fact-finding thus focused on human rights rather than on wider issues of international peace and security. In its early years, the CHR established several working groups that inquired into thematic and geographic situations of human rights concern.[34] These working groups evolved into the Special Procedures system that has continued under the mandate of the CHR's successor, the HRC. The CHR established two commissions, both of which were instructed to inquire into alleged violations of human rights and international humanitarian law (IHL).[35] The CHR was disestablished in 2006 in the wake of criticisms regarding its effectiveness, credibility, and independence.[36]

In its place, the General Assembly established the HRC. Its mandating resolution charges it with, inter alia, addressing situations of human rights violations and making recommendations.[37] As observed by Rosa Freedman, the HRC holds a proactive mandate to address human rights violations,[38] which has led it to establish commissions to investigate allegations of serious human rights violations. These commissions were often established in special sessions convened to respond to specific human rights crises.[39] While the HRC's mandating documentation specifies several different fact-finding mechanisms,[40] there is no express recognition of its capacity to establish commissions of inquiry. Christine Chinkin observes that the HRC as a subsidiary body of the General Assembly rather than ECOSOC shares the former's "residual responsibility for international peace and security and its authority to establish fact-finding missions."[41] In lieu of express authorization, the HRC's authority can be inferred from the links between human rights and international peace and security[42] and the implied powers theory. The HRC has firmly taken the lead in establishing commissions, being the mandating body for 60 percent of all UN commissions established since 2006.[43] HRC commissions rely on states' cooperation when undertaking their investigations. On occasion, they have met resistance from concerned states and have been denied territorial access,[44] which has hindered investigations.

III. The Evolution of the Ulterior Functions of UN Fact-Finding Missions

Within the broad purposes of the UN—maintenance of international peace and security and promotion and protection of fundamental human rights—commissions have been established to fulfill different functions. Observing the evolution of commissions' mandates throughout the twentieth and early twenty-first centuries discloses three distinct

fact-finding functions: to inform, to alert, and to seek accountability. All commissions' reports necessarily inform specific recipients of a state of affairs. The "alert" function goes beyond "informing" by directing findings to a wider audience, and utilizing legal language to induce compliance or corrective action. The "accountability" function builds on the "alert" function by connecting violations to concrete actors and analyzing the viability of appropriate accountability mechanisms. Each function influences the scope of the intended audience as well as the presentation of the findings and the substantive recommendations and follow-up to reports.

A. The Original Informing Function

At the turn of the twentieth century, commissions of inquiry were envisaged to aid the peaceful settlement of international disputes, alongside other dispute resolution processes such as mediation, conciliation, and arbitration. These commissions aimed to provide an impartial account of the facts pertaining to a concrete incident.[45] In that sense they were "transactional"; commissions were consensually established to assist in the resolution of a dispute, and directed their findings to the parties. They made factual determinations and were rarely permitted to draw legal conclusions.[46] Emphasis of the commission's role to produce factual findings is also found in the 1991 Declaration, which provides that a report "should be limited to a presentation of findings of a factual nature."[47] The Declaration is dispute resolution-oriented, as evidenced by its direction that missions should "contribute to building confidence and defusing the dispute or situation while avoiding any aggravation of it."[48]

Informing remains the chief function of some commissions, such as UN Boards of Inquiry, which confidentially investigate and report to the Secretary-General on matters involving UN personnel and property.[49] In addition, some commissions that issued public reports were also established to inform the mandating body of states of affairs. Examples include commissions established by the Security Council to inquire into the invasion of the Seychelles by mercenaries in 1981,[50] damage resulting from the South African invasion of Angola in 1985,[51] and armed attacks on peacekeeping personnel in Somalia in 1993.[52] Commissions established by the Secretary-General to inquire into UN actions during the 1994 Rwandan genocide,[53] and the assassination of the former prime minister of Pakistan, Benazir Bhutto[54] were also highly factual inquiries that refrained from in-depth legal analysis and served primarily to inform key recipients of facts and circumstances in respect of those states of affairs.

B. From Informing to Alerting

UN organs have established fact-finding missions not to merely inform but to raise alerts regarding situations threatening international peace and security and serious human rights violations, and encourage appropriate institutional and stakeholder responses. Robert Miller, writing in the 1970s, observed that UN fact-finding missions were created to assist in the protection of human rights.[55] By exposing the facts, legal and political bodies could take steps to "redress those situations affecting human rights."[56] By framing certain facts as violations of human rights norms rather than describing these facts in other, non-legal,

language, the commissions went beyond their function of offering information on a given state of affairs. Indeed, the mere framing of a fact as a violation of the law solicits some kind of response or corrective action. Commissions with an alert function thus disseminate findings of violations to a wider audience in order to induce a range of stakeholders to respond, comply with obligations, and/or undertake corrective action. Commissions instructed to make findings of "violations" necessarily qualify facts under a legal framework.[57]

The specific use of international criminal law corresponds to the alert function in two ways. This particular area of law embodies a spirit of action and enforcement. Concepts of international criminal law, such as genocide and crimes against humanity, have an acute emotive value. They are thus exceptionally suitable to place certain situations on the international agenda, to mobilize public opinion, and to prepare a case for action. In addition, the language of international criminal law implies a moral and political responsibility for the international community to act and to protect as the Responsibility to Protect (R2P) doctrine makes use of the same legal categories.

Paradoxically therefore, it is through their use of international criminal law that the commissions tie into calls for better early warning systems that are linked to the gradual acceptance of the R2P-concept. They allow the primary organs of the UN to take on their moral and political responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity as formulated in the World Summit Outcome Document.[58] The R2P-concept emphasizes the use of appropriate diplomatic, humanitarian, and other peaceful means rather than coercive action under Chapter VII. In this context, the Secretary-General has expressed the UN's preference for dialogue and peaceful persuasion.[59] He has encouraged the use of fact-finding missions as an instrument that would enable the primary organs to take timely and decisive action.[60]

Pre-R2P UN commissions with a dominant alert function include a commission that investigated human rights violations committed by the Vietnamese government,[61] a General Assembly commission that examined atrocities in Mozambique,[62] and a Security Council commission that examined the situation relating to settlements in occupied Arab territories.[63] More recent commissions established to raise an alert regarding the existence of violations include the CHR commission established to investigate Israeli actions in the occupied Palestinian territories,[64] the Secretary-General's DRC Mapping Exercise, and the HRC's High-Level Fact-Finding Mission in Beit Hanoun,[65] all of which were asked to investigate alleged violations of international law, particularly international human rights law.

C. From Alerting to Accountability

The alert function is closely linked with the accountability function. The accountability function is geared toward the exploration and recommendation of possible avenues for accountability. In this sense, fact-finding investigations are seen as an opportunity to deliver a clear message to key decision-makers in areas of crisis that their actions could be subject to criminal prosecution or other forms of accountability. This form of dissuasion is not meant as offering direct accountability in itself, but should be seen as an initial step toward action. Glimmers of the accountability function can be detected in early international fact-finding bodies such as the 1919 Commission[66] and the United Nations War Crimes Commission,[67]

which both investigated responsibilities for violations of international law and possibilities of enforcement by way of prosecutions. The HRC has initiated several commissions that serve an accountability function. Indeed, of 12 HRC commissions, the mandates of six[68] expressly instruct commissions to investigate violations *in order to* ensure that those responsible are held accountable. However, the HRC is not alone; recently the Security Council and Secretary-General have also, albeit less frequently, established commissions with accountability functions.[69] The below graph depicts the number of UN commissions established each year since 1990, as compared with the number of mandates that refer to the goal of ensuring accountability. The graph below in Figure 12.1 shows that there is a trend toward establishing commissions with an accountability function:

The possibility of framing IHL and human rights violations as international crimes has led commissions to go beyond findings of the responsibilities of states and nonstate armed groups, and also to locate responsibilities with individuals. Similarly, they consistently recommend criminal law responses to serious situations and acts that they characterize as international crimes, either by way of international or internationalized prosecutions, or equivalent proceedings in domestic jurisdictions. However, the Sri Lanka Panel of Experts has advocated that the notion of accountability should not be reduced to findings of individual criminal responsibility. The Panel observed that accountability implies a broader process that has political, legal, and moral dimensions and requires broad civil participation.[70] An overemphasis on strict international criminal law standards might risk unnecessarily restricting the notion of accountability. There thus seems to be a potential tension between a strong focus on individual criminal responsibility in current mandates of commissions of inquiry and the broader alert and accountability functions of these commissions.

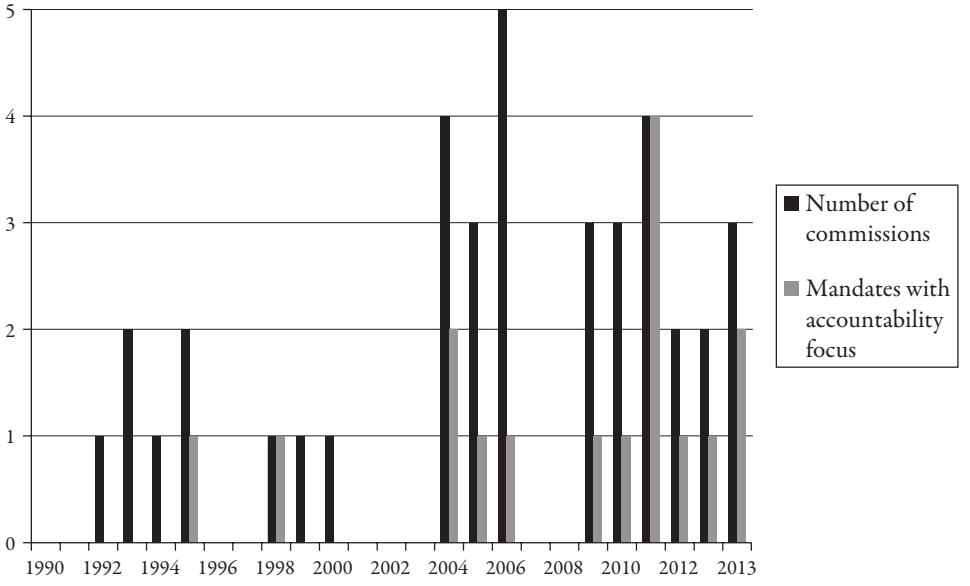

FIGURE 12.1 UN commissions established each year from 1990–2013, as compared with the number of mandates with an accountability focus.

IV. The Use of ICL in Substantive Findings of Reports

The R2P-doctrine has tied the responsibility of the international community to act and to protect quite directly to the commission of international crimes. The vocabulary of international criminal law thus serves as a reminder to international actors of their moral, political, and possibly legal responsibilities. It also expresses a strong condemnation toward the state where the acts are being committed. The authority of these expressions hinges on the legitimate and credible use of international criminal law. In this respect, it is crucial that the competence of commissions of inquiry to resort to ICL-concepts is accepted, and that their application of relevant ICL-concepts is found to be convincing.

A. Competence to Make ICL-Related Findings

Lacking the powers to create directly binding obligations, commissions rely on perceptions of legitimacy in order to carry out their investigations as well as in the reception of their findings and implementation of recommendations. Chinkin notes that the concept of legitimacy is "the normative belief that a rule or institution ought to be obeyed"[71] and provides a "pull factor"[72] for compliance. Perceptions of legitimacy can hinge on related perceptions as to whether the commission acts within its mandate, operates independently and fairly, and does so with technical competence. James G. Devaney notes that although UN commissions possess legitimacy from their relationship to the UN, if their findings lack substantiation or a "progressive" legal framework is insufficiently supported by legal sources, commissions' legitimacy can be undermined. [73]

In this respect, it is important to note that commissions must comply not only with the terms of their specific mandates, but with that of their parent, as organs may only bestow functions and powers on subsidiary bodies that they already possess. Allegations that commissions have exceeded their competence can raise questions regarding the legitimate functions of their parent organs. Perceptions of legitimacy can strongly influence the extent to which concerned states, affected individuals, and other actors are willing to engage with commissions, and thus such perceptions can play a decisive role in the effectiveness of an investigation. Refusals by concerned states to grant commissions' entry into their territories, for example, can greatly affect the processes and outcomes of inquiries. Moreover, follow-up on commissions' recommendations is also intimately dependent on the perceived legitimacy and credibility of commissions' output.

Although all HRC commissions investigate alleged violations of human rights, some have also made findings of IHL violations[74] and international crimes.[75] While some violations of IHL might also be conceived of under a human rights rubric, other violations belong firmly to the field of IHL. For instance, both the Syria Commission and Libya Commission investigated the use of prohibited weapons[76] and the latter also made findings in respect of the use of mercenaries.[77] Likewise, while IHL and human rights violations form the constituent acts of international crimes, international criminal law (ICL) is a distinct field of law. ICL is focused on individuals as subjects, more than states; and many ICL rules, such

as those regarding modes of liability and mens rea, are vital to ICL but are not part of the determination as to whether human rights have been violated.

The HRC as a subsidiary body possesses only the competences bestowed upon it (expressly or impliedly) by the General Assembly, in conformity with its own functions. In light of the HRC's human rights-focused mandate, the question of whether its commissions have jurisdiction to make findings of IHL violations and international crimes has been explored in academic debate[78] and as well as forming the basis of objections of concerned states.[79] HRC jurisdiction to make findings of IHL violations has been variously defended on the basis of implied acquisition at its establishment, on an inherited CHR mandate, on the links between IHL and human rights law, and on policy grounds, to avoid an "accountability vacuum" in light of the absence of effective IHL enforcement mechanisms.[80] Each of these grounds has been refuted, including on the basis that applying IHL in a human rights normative framework poses risks to the coherence of IHL and could discourage practical compliance.[81] Jurisdiction to make findings of international crimes has not been addressed to the same extent in commentary, but commissions have justified their application of ICL on the basis that it is triggered by the factual situation, on the basis that it is an enforcement mechanism of IHL and IHRL, or by dint of the broader goal of ensuring accountability.[82] Although none of these grounds are decisive, it has become regular practice that HRC commissions make findings of IHL violations and international crimes that stem from, or occur in connection with, human rights violations.[83]

B. A Critical Appraisal of the Application and Interpretation of ICL

As commissions of inquiry use international criminal law notions to select and evaluate facts, the question arises as to how this use compares to the application and interpretation of ICL by international criminal courts and tribunals. As the same law and notions are used for different purposes, a preliminary observation might be that there is a ground for legitimate differentiation. This section discusses in turn (1) the implications of the identity difference for the respective engagement with international criminal law by commissions of inquiry and international criminal courts; (2) the selective application of international criminal law by commissions of inquiry in terms of only applying crime definitions and not, or to a lesser extent, modes of liability; and (3) some significant examples of a more flexible interpretive approach by commissions of inquiry namely as regards elements of crimes against humanity.

1. The Different Identities of Commissions of Inquiry and International Criminal Courts

In their reports, international commissions have repeatedly qualified their identity as not being courts of law.[84] In so doing, they emphasize that they do not make strict legal findings or consider questions of legal liability. The Commission of Experts for the former Yugoslavia interpreted its mandate as providing the Secretary-General with conclusions on the evidence of violations and as not to provide an analysis of the legal issues or to make legal

findings in connection with particular cases. It expressly stated that it was the prerogative of the International Tribunal for the Former Yugoslavia (ICTY) to come to definitive legal conclusions in relation to particular cases and situations.[85] Similarly, the DRC Mapping Exercise held that "the legal classification of the acts of violence identified ultimately relies on a judicial process."[86] In a more refined manner, the Sri Lanka Panel of Experts clarified that its mandate required that a legal characterization be given of certain allegations.[87] However, it also emphasized that it did not have the power to draw definitive conclusions as to culpability or to determine legal liabilities.[88] The Libya Commission, in turn, stated that:[89]

> [I]t is not a court of law and that its investigations were not undertaken with the time, resources, and judicial tools (such as subpoena powers), that normally characterize criminal investigations. It further recognizes that the legal regimes applicable to the crimes and violations under review here comprise a complex arena of international law and the jurisprudence on some issues is not altogether settled. Thus, the findings and conclusions with respect to specific crimes and violations must be read in that light.

Other commissions have given even less emphasis to the legal characterizations of events. A fact-finding mission to Zimbabwe engaged to some extent with ICL, but also considered that reflections as to whether atrocities amounted to crimes against humanity and whether the Rome Statute could be invoked were "bound to be acrimonious and protracted" and "would serve only to distract the attention of the international community from focusing on the humanitarian crisis facing the displaced who need immediate assistance."[90] By far the most blunt repudiation of international law as such came from the Palmer Commission that was requested by the Secretary-General to investigate the Gaza flotilla incident shortly after the HRC had decided to create a commission to examine this incident as well. The Palmer Commission was outspoken regarding its self-identity as a nonjudicial body.[91] As to the overall relevance of international law, it held that: [92]

> [T]he Panel will not add value for the United Nations by attempting to determine contested facts or by arguing endlessly about the applicable law. Too much legal analysis threatens to produce political paralysis. Whether what occurred here was legally defensible is important but in diplomatic terms it is not dispositive of what has become an important irritant not only in the relationship between two important nations but also in the Middle East generally.

This dismissive attitude toward international law is exceptional. Although there is general agreement that commissions of inquiry are not law-applying authorities, international law does feature in their mandates and plays a distinctive role in their evaluation and characterization of facts. Overall, there is a genuine attempt toward an authentic application that respects the outer limits and intrinsic essence of relevant concepts.

2. A Selective Application of International Criminal Law

The turn to international criminal law by commissions of inquiry has been selective. Only certain parts of international criminal law are utilized, namely the legal categories pertaining to the crime definitions. Procedural international criminal law—to the extent that this exists *in abstracto*—has perhaps occasionally inspired certain commissions, but it has generally been disregarded. Modes of liability are a key component of international criminal law that have also received disparate attention in commissions' reports. In criminal judgments, an inquiry into modes of liability is a vital aspect of a finding of criminal guilt. However, when making findings of international crimes, many commissions have tended to deal with modes of liability briefly, if at all. In its first report, the Libya Commission concluded that international crimes had been committed, even though the Commission was "not in a position of identifying individual criminal responsibility or command responsibility for [. . .] potential violations of international criminal law."[93] The International Commission of Inquiry on Darfur (Darfur Commission) took a different approach, stating that "[t]o render any discussion on perpetrators intelligible, two legal tools are necessary: the categories of crimes for which they may be suspected to be responsible, and the enumeration of the various modes of participation in international crimes under which the various persons may be suspected of bearing responsibility."[94] Whether it is indeed necessary for commissions to address modes of liability when making findings of international crimes has not been explored at great length in academic commentary.[95] The question whether findings of international crimes in the absence of appraisal of modes of liability are in substance any different from findings of widespread or systematic human rights violations is worth further consideration. The accountability function of commissions of inquiry as described in the previous section is somewhat ambiguous in this respect. The alert function is more preventive in nature and uses ICL-language primarily to warn key actors involved in the crisis and to engage the political and moral responsibility of external actors. The accountability function, however, aims to prepare more directly for criminal prosecutions, and in particular the instruction to commissions of inquiry to identify individuals would seem to require a more rigorous and refined approach toward modes of liability. However, also in this context, it has been emphasized that a commission "does not [. . .] make final judgement as to criminal *guilt*; rather, it makes an assessment of possible suspects that will pave the way for future investigations, and possible indictments, by a prosecutor, and convictions by a court of law."[96] Consequently, the general approach of commissions of inquiry has been not to publicly disclose names of suspected perpetrators, which may explain the lack of intense consideration of modes of liability.[97] As indicated by the Libya Commission, the decision not to disclose concrete names was partly inspired by the wish to prevent reprisals, and partly to avoid prejudicing future fair trials.[98]

3. The Interpretive Approach of Commissions of Inquiry to International Criminal Law

In relation to the interpretations specifically of international criminal law, it can be observed that in their general legal qualifications, commissions refer to prevailing legal standards and interpretations. They cite international case law quite abundantly, even if in doing so

they generally display a preference for the more flexible case law of the ICTY. The more demanding standards of the Rome Statute have sometimes been neglected. For instance, despite claiming to adopt the Rome Statute's definition of crimes against humanity, some commissions omitted observing the policy requirement in Article 7(2)(a).[99] Conversely, the Sri Lanka Panel of Experts Report mentioned the ICC policy requirement while adding its assessment that this element does not exist under customary international law. It found in passing—in a footnote—that the element would nevertheless have been fulfilled in the context of Sri Lanka.[100] Such a relatively brief analysis stands in contrast with the more elaborate and not yet fully decided discussions on the policy element at the ICC. Particularly prominent in this discussion is the question regarding the notion of "organizational policy" and more specifically which organizations come within the realm of Article 7, and which organizations are thus capable of committing crimes against humanity that would subject their leaders potentially to prosecution. The majority of ICC Pre-Trial Chamber III in deciding to authorize an investigation into the situation in Kenya had an inclusive approach that would capture any group regardless of the precise level of organization.[101] By contrast, in his dissent, Judge Hans-Peter Kaul adhered to the more traditional approach that focuses on two principal features, namely ability to control a territory or govern a civilian population and/or the group's command structure.[102] Another pertinent discussion regards the question of what constitutes sufficient evidence to prove an "attack." This question has been intensely argued before the ICC Appeals Chamber in the *Gbagbo* case.[103] Commissions of inquiry generally do not engage in such sophisticated analyses. Even if they single out and address all the different elements of crime, commissions of inquiry overall have a less technical and detailed approach compared with international criminal jurisdictions.

V. A Justification to Ground the Idea of "Legitimate Difference"

The main justification to ground the idea of "legitimate difference" in terms of partial application of international criminal law and a more relaxed interpretive approach lies in the distinct identity of commissions of inquiry as non-law-applying authorities. As these commissions do not prosecute and have also chosen not to disclose names of individuals, the rationale of the legality principle, which is to protect individuals from arbitrariness, does not need to be applied in any straightforward sense. Consequently, it can be argued that commissions of inquiry are not analogously bound by the legality principle and its sub-elements such as the idea of strict construction simply because their operation does not directly affect individuals. Commissions of inquiry borrow certain terms from international criminal law, but this does not mean that they do or must copy-paste the entire system. To a certain extent, the borrowing exercise can be equated to instances where language A borrows a word from language B. In these circumstances single words, such as "computer," "email," or "apartheid" are internationalized, but the grammar of the original language does not travel along, and in particular verbs of a foreign language tend to be conjugated according to the rules of the borrowing language.

In a similar vein, the argument can be made that international criminal law concepts that are used in the R2P-sphere should be governed by a preventive spirit and purpose rather than a punitive one. In particular in the context of the Darfur Commission's mandate to determine whether genocide had been committed, the argument has been presented that this determination did not require the same detailed analysis as is needed in the context of a criminal prosecution that might result in the incarceration of an individual.[104] Indeed, several scholars and practitioners, including one of the conceptual fathers of R2P, Gareth Evans, have advised against too intensely technical approaches to the understanding of crimes in the preventive sphere.[105] In his words, the idea of R2P is to energize mass popular and state support for effective action rather than ending up in endless definitional cul de sacs.[106] Going one step further, Leila Sadat has also suggested that there might be reason to differentiate the interpretation of notions such as genocide depending on whether individual or state responsibility is attached.[107] There is thus ground to argue that approaches to the interpretation of international crimes can be more flexible if used in preventive spheres, whereas the standards must be meticulously adhered to when applied with a view to establishing individual criminal responsibility.

A last argument pertains specifically to the mandate of commissions of inquiry, which may require a more instrumental approach to law. In this regard, it should be noted that, despite one notable exception,[108] commissions mostly have all-encompassing mandates and are committed to applying this in an even-handed manner by looking at the behavior of *all* parties to a conflict.[109] Inspired by this commitment, commissions do often not go into much detail regarding the legal basis and extent to which nonstate actors are bound by international law. Questions pertaining to the legal basis would pose particular problems in relation to the applicability of human rights, but also raise issues under international criminal law. The concrete question under international criminal law is what type of organizations and nonstate armed groups are covered by the definition of Article 7 of the Rome Statute on crimes against humanity.[110] A narrow reading of Article 7 that would cover only well-coordinated groups would impede the ability of commissions of inquiry to scrutinize the behavior of more unstructured armed opposition movements. This in turn might lead to an uneven account of the conflict that would undermine the primary task of commissions of inquiry, which is to inform.

On the basis of functionality, a certain flexible interpretive approach could thus be justified from a policy perspective. The question remains how commissions should legally justify such an approach to apply the law to nonstate actors. The Libya Commission and Syria Commission found the legal basis for their statement that nonstate groups must abide by human rights in areas where they exercise territorial control in customary international law without providing any evidence of how they identified such custom.[111] This is perhaps not the most convincing reasoning possible. Preference can be given to the more intellectually honest approach of the Sri Lanka Panel of Experts.[112] This Panel held that the rule that nonstate groups exercising de facto territorial control must respect fundamental human rights of persons within their power was increasingly accepted. It also admitted, however, that differences in views on this subject remained among international actors, and that it would therefore proceed on the basis of the *assumption* that nonstate actors such as the Liberation

Tigers of Tamil Eelam (LTTE) had to respect the most basic human rights.[113] This transparency underscores the instrumental use of the law, which should facilitate the commission's mandate of offering a full account. In this context, law is used as a yardstick rather than it being formally applied with legally binding consequences. The instrumental versus the formal-legal approach is thus a clear example of a legitimately different understanding of and engagement with the law.

On a final note that is related to the question of applying the law to nonstate actors, it is interesting to observe that commissions of inquiry also seem to regard international criminal law as an avenue to scrutinize nonstate armed groups in the absence of the above-mentioned certainty and agreement regarding the applicability of human rights obligations. Through international criminal law commissions can identify IHL and human rights violations that underpin international crimes without having to make findings as to the content of human rights obligations held by nonstate actors. For instance, commissions have been divided as to whether nonstate actors are legally bound by human rights treaty law prohibiting use of children in armed conflict, which can only be ratified by states.[114] The Libya Commission held that nonstate actors were not bound by the treaty.[115] The Syria Commission at first took the same view,[116] but later reached the opposite conclusion.[117] Both commissions have however observed that the prohibition on child soldiers under the Rome Statute applies to all parties to a conflict.[118] The use of child soldiers by individual members of nonstate armed groups may be condemned as international crimes, despite lingering uncertainties regarding the applicability of human rights treaty law to the armed group as such.[119] International criminal law is, in this sense, thus also used instrumentally with a view to circumventing claims that other areas of law are applied too progressively, which could undermine the legitimacy and authority of the commissions findings.[120]

VI. Sharing the Law: Ramifications of Legitimately Different Approaches

The predominant argument made in this chapter is sophisticated and nuanced. On the basis of the idea of legitimate difference, it accepts slight divergences in the application and interpretation of international criminal law by commissions of inquiry in comparison to international criminal courts. However, at the same time, it has been shown that commissions of inquiry invoke the language of international criminal law precisely because of its authority. Yet, authority hinges on legitimacy and credibility. The legitimacy of commissions of inquiry and their use of international criminal law may be undermined by the perception that commissions trespass their mandates, while fragmentation of the law will dilute its credibility. The margins for deviation are thus present and justifiable, but modest. With a view to preserve the cogency of international criminal law, significant variations in interpretation and application are unwelcome. Transparent approaches on the basis of assumptions rather than unfounded assertions as undertaken by the Sri Lanka Panel of Experts are most certainly preferable from a systemic perspective.

On a more radical level, the systemic argument could advise against the migration of international criminal law and its use outside the courtroom without proper guarantees. However, such an argument would be merely academic as commissions of inquiry are effectively using these concepts. Perhaps the transfer of legal categories to the context of R2P was unfortunate as this concept is intrinsically not a legal one, but it is a fait accompli. Therefore, the more useful question is what the ramifications should be of the sharing of the law as described and analyzed in this chapter. In our view, the fact that the language of international criminal law is used in distinct settings and shared by different entities should be appreciated in particular by two concrete communities. The first are scholars. They tend to evaluate, assess, and critique the findings of commissions of inquiry through the strict lenses of comparative findings by international criminal courts.[121] They generally disregard the distinct purposes of commissions of inquiry that might, as argued in this chapter, warrant a slightly more flexible approach to international criminal law. The second community concerns the international criminal courts. It is suggested that these entities should be aware of the legitimate difference in approach that *might* exist. They can certainly take the findings, including legal analyses, of commissions of inquiry into account, but they should attach any immediate precedential value with care and diligence.

Notes

1. See e.g. Alston, "The Criminalisation of International Human Rights Fact-Finding," (Keynote Address) Conference on Fact-Finding on Gross Violations Human Rights during and after Conflicts, Norwegian Centre for Human Rights (17-18 November 2011), at http://www.jus.uio.no/smr/english/research/areas/conflict/events/conferences/fact-finding/; and Van den Herik, "The Migration of International Criminal Law: Moving beyond the Court Room in The Hague," War Crimes Research Office and The Academy on Human Rights and Humanitarian Law, American University Washington College of Law (April 4, 2013).
2. See e.g. "From Fact-Finding to Evidence: Harmonizing Multiple Investigations of International Crimes" (expert meeting) Grotius Centre for International Legal Studies, The Hague Institute for Global Justice and the Monitoring, Reporting, and Harvard University Program on Humanitarian Policy and Conflict Research, (26-27 October 2012).
3. Stahn and Jacobs, "The Interaction between Human Rights Fact-Finding and International Criminal Proceedings: Towards a (New) Typology," Chapter 13 in this volume.
4. Jacobs and Harwood, "International Criminal Law outside the Courtroom: The Impact of Focusing on International Crimes for the Quality of Fact-Finding by International Commissions of Inquiry," in Bergsmo (ed.), *Quality Control in Fact-Finding* (2013) 325.
5. Bassiouni and Abraham (eds,), *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies* (2013).
6. The term is borrowed from Slaughter, *A New World Order* (2004) 29.
7. See more elaborately, Van den Herik, "An Inquiry into Commissions of Inquiry: Navigating between Fact-Finding and Law-Application," paper presented at ASIL MidYear Meeting (November 2013).
8. Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security 1991, GA Res. 46/59, 9 December 1991, Art. 1 [hereinafter "1991 Declaration"].
9. UN Commission of Investigation on Greek Frontier Incidents, SC Res. 15 (1963); UN Commission for India and Pakistan, SC Res. 39 (1948).
10. *Reparation of Injuries Suffered in Service of the United Nations*, ICJ Reports (1949) 174, at 180; see also generally Schermers and Blokker, *International Institutional Law* (2011), at paras. 232-236; Fromageau, "Collaborating with the United Nations: Does Flexibility Imply Informality?," 7 *Int. Org. L. Rev.* (2010) 405, at 409.

11. E.g., UN Commission of Investigation concerning Greek Frontier Incidents; UN Commission for India and Pakistan; Security Council Commission, SC Res. 446 (1979); Commission of Inquiry in Connection with the Republic of the Seychelles, SC Res. 496 (1981); Commission of Investigation for Angola, SC Res. 571 (1985); UN International Independent Investigation Commission, SC Res. 1595 (2005).
12. E.g., Group of Experts on South Africa, SC Res. 182 (1963); Commission of Experts established concerning the former Yugoslavia, SC Res. 780 (1992); Commission of Inquiry concerning Somalia, SC Res. 885 (1993); Commission of Experts established pursuant to resolution 935 (1994) concerning Rwanda, SC Res. 935 (1994); International Commission of Inquiry concerning Burundi, SC Res. 1012 (1995); UN SC, Commission d'enquête internationale sur les allégations de violations des droits de l'homme en Côte d'Ivoire, UN Doc. S/PRST/2004/17 (25 May 2004) [hereinafter "Côte d'Ivoire Commission"]; International Commission of Inquiry on Darfur, SC Res. 1564 (2004) [hereinafter "Darfur Commission"].
13. Charter of the United Nations (26 June 1945), UNCIO XV, 335; amendments by General Assembly Resolution in UNTS 557, 143/638, 308/892, 119, Art. 24(1).
14. Ibid., Arts. 10, 11, and 13. See also 1991 Declaration, *supra* note 8, Arts. 10-11, which provides that the General Assembly should consider undertaking fact-finding in discharging its responsibilities for the maintenance of international peace and security.
15. Ibid., Art. 18.
16. E.g., UN Commission on the Racial Situation in the Union of South Africa, GA Res. 616A (VII), 5 December 1952, at 1; Inquiry of the Secretary-General on the Situation in Hungary (established at the request of the General Assembly), GA Res. 1004 (ES-II), 4 November 1956 (replaced by UN Special Committee on the Question of Hungary, GA Res. 1132 (XI), 10 January 1957), at 1; Subcommittee on the Situation in Angola, GA Res. 1603 (XV), 20 April 1961, at 2.
17. The UN Special Committee on the Balkans was established to observe compliance with, and assist in the implementation of, recommendations for peaceful dispute settlement: GA Res. 109 (II), 21 October 1947, at 6.
18. UN Commission of Inquiry on the Circumstances of the Death of Mr. Lumumba, GA Res. 1601 (XV), 15 April 1961, as requested by the Security Council, SC Res. 4741 (1961), at 4; UN Commission on Ruanda-Urundi, GA Res. 1627 (XVI), 23 October 1961; Commission of Investigation into the Conditions and Circumstances Resulting in the Tragic Death of Mr. Dag Hammarskjold and Members of the Party Accompanying Him, GA Res. 1628 (XVI), 26 October 1961, at 3 and 4.
19. E.g., Impartial International Commission under UN Supervision to Investigate Elections in Germany, GA Res. 510 (VI), 20 December 1951, at 2; UN Temporary Commission on Korea, GA Res. 112 (II), 14 November 1947, at 2.
20. UN Special Committee on Palestine, GA Res. 106 (S-1), 15 May 1947, at 1; Special Committee on South Africa, GA Res. 1702 (XVI), 19 December 1961, at 2; Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa (renamed UN Special Committee against Apartheid), GA Res. 1761 (XVII), 10 November 1962, at 5; UN Mission to South-Vietnam, "Statement by the President of the General Assembly," UN Doc. A/PV1239 (11 October 1963); Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, GA Res. 2243 (XXIII), 19 December 1968, at 1; Commission of Inquiry on the Reported Massacres in Mozambique, GA Res. 3114 (XXVIII), 12 December 1973, at 1 and 2.
21. 1991 Declaration, *supra* note 8, Art. 12.
22. Ibid., Art. 13.
23. E.g., Fact-finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri was established pursuant to the Security Council's request that the Secretary-General "follow closely the situation in Lebanon and to report urgently on the circumstances, causes and consequences of this terrorist act": UN SC, "Statement by the President of the Security Council," UN Doc. S/PRST/2005/4 (15 February 2005).
24. Group of Experts for Cambodia established pursuant to GA Res. 52/135, 12 December 1997, para. 16 [hereinafter "Cambodia Group of Experts"]. The General Assembly requested the Secretary-General to consider appointing a group of experts to respond to Cambodia's request for assistance in responding to serious legal violations.
25. E.g., Investigative Team charged with investigating serious violations of human rights and international humanitarian law in the Democratic Republic of the Congo, established by letter from Secretary-General

to President Kabila, UN SC, "Letter Dated 29 June 1998 from the Secretary-General Addressed to the President of the Security Council," UN Doc. S/1998/581 (29 June 1998); International Commission of Inquiry for Togo, established by agreement between Secretary-General and Organization of African Unity on 7 June 2000, CHR, "Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World," UN Doc. E/CN.4/2001/134 (22 February 2001), at para. 1; Independent Inquiry into the Actions of the UN during the 1994 Genocide in Rwanda, UN SC, "Letter Dated 18 March 1999 from the Secretary-General Addressed to the President of the Security Council," UN Doc. S/1999/339 (26 March 1999); Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste in 1999, UN SC, "Letter Dated 11 January 2005 from the Secretary-General Addressed to the President of the Security Council," UN Doc. S/2005/96 (18 February 2005); Mapping Exercise documenting the most serious violations of human rights and [IHL] committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, "Twenty-first report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo," UN Doc. S/2006/390 (13 June 2006), at para. 54 [hereinafter "DRC Mapping Exercise"]; Panel of Experts on Accountability in Sri Lanka, established by the Secretary-General following Joint Statement by the Secretary-General and the President of Sri Lanka, UN Doc. SG/2151 (26 May 2009) [hereinafter "Sri Lanka Panel of Experts"]; Panel of Inquiry on the 31 May 2010 Flotilla Incident, established following agreement of Secretary-General, Israel and Turkey, UN SC, "Letter Dated 2 August 2010 from the Secretary-General Addressed to the President of the Security Council," UN Doc. S/2010/414, (3 August 2010); UN GA, "Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the alleged use of chemical weapons in the Ghouta area of Damascus on 21 August 2013," UN Doc. A/67/997 (13 September 2013), at 4, para 1.

26. E.g. UN SC, "Report of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict between the Islamic Republic of Iran and Iraq," UN Doc. S/17911 (12 March 1986), at para. 1; Tibaijuka, "Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in Zimbabwe" (2005) at 13: www1.umn.edu/humanrts/research/ZIM%20UN%20Special%20Env%20Report.pdf [hereinafter "Report of the Fact-Finding Mission to Zimbabwe"]; Commission of Inquiry on the Events Connected with the March Planned for 25 March 2004 in Abidjan, established by UN SC, "Letter Dated 12 May 2004 from the Secretary-General Addressed to the President of the Security Council," UN Doc. S/2004/384 (13 May 2004), at para. 1 [hereinafter "Abidjan Commission"]; UN Independent Special Commission of Inquiry for Timor-Leste, established following invitation from Timor-Leste, as noted in Report, 2 October 2006, para. 1: www.ohchr.org/Documents/Countries/COITimorLeste.pdf [hereinafter "Timor-Leste Commission"]; "Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste" (2 October 2006), at para 1: http://www.ohchr.org/Documents/Countries/COITimorLeste.pdf [hereinafter "Timor-Leste Commission"]; UN Commission of Inquiry into the Benazir Bhutto assassination, established following request from Pakistan, UN SC, "Letter Dated 2 February 2009 from the Secretary-General Addressed to the President of the Security Council," UN Doc. S/2009/67 (3 February 2009), at para. 1; International Commission of Inquiry Mandated to Establish the Facts and Circumstances of the Events of 28 September 2009 in Guinea, established following request of Guinea and other states, UN SC, "Letter Dated 28 October 2009 from the Secretary-General Addressed to the President of the Security Council," UN Doc. S/2009/556 (28 October 2009), at para. 1 [hereinafter "Guinea Commission"].
27. E.g. Abidjan Commission, *supra* note 26, at para. 1; Timor-Leste Commission, *supra* note 26, at para. 1; DRC Mapping Exercise, *supra* note 25.
28. E.g. Mission to the Syrian Arab Republic to Investigate Alleged Violations of International Human Rights Law, HRC Res. S-16/1, 4 May 2011 [hereinafter "OHCHR Mission to Syria"], at para. 7.
29. See e.g. OHCHR Fact-Finding Mission to Kenya, OHCHR, "Report from OHCHR Fact-Finding Mission to Kenya, 6-28 February 2008" (28 February 2008): www.refworld.org/docid/47e21bc82.html; OHCHR Mission to Egypt, OHCHR, "Report from OHCHR Mission to Egypt" (27 March-4 April 2011): www.ohchr.org/Documents/Countries/EG/OHCHR_MissiontoEgypt27March_4April.pdf; OHCHR Assessment Mission to Tunisia, 26 January-2 February 2011, OHCHR, "Report from OHCHR Assessment Mission to Tunisia" (26 January-2 February 2011): www.ohchr.org/Documents/Countries/TN/OHCHR_Assessment_Mission_to_Tunisia.pdf.

30. ECOSOC Res. 1/5, 16 February 1946.
31. ECOSOC Res. 728F (XXVIII), 30 July 1959, para. 1.
32. ECOSOC Res. 2/9, 21 June 1946.
33. ECOSOC Res. 1235 (XLII), 6 June 1967, para. 3 authorized the CHR to "make a thorough study of situations which reveal a consistent pattern of violations of human rights." See also ECOSOC Res. 1503 (XLVIII), 27 May 1970, para. 6, which authorized the CHR with the express consent of the state concerned to establish ad hoc committees to investigate alleged human rights violations.
34. Working Group of Experts on Southern Africa, CHR Res. 2 (XXIII), 6 March 1967; Working Group on Arab Territories, CHR Res. 6 (XXV), 4 March 1969, at para. 4; Working Group to Inquire into the Situation of Human Rights in Chile, CHR Res. 8 (XXXI), 27 December 1975, at para. 1; Working Group on Disappearances, CHR Res. 20 (XXXVI), 29 February 1980, at para.1.
35. International Commission of Inquiry for East Timor, CHR Res. S-4/1, 27 September 1999, at para. 6, and Human Rights Inquiry Commission established pursuant to CHR Res. S-5/1, 19 October 2000 [hereinafter "Human Rights Inquiry Commission"], at para. 6.
36. See generally Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment* (2013), at 17–54. In 2005 the Secretary-General observed that states "sought membership of the [CHR] not to strengthen human rights but to protect themselves against criticism or criticize others. As a result, a credibility deficit has developed, which casts a shadow on the reputation of the [UN] system as a whole": UN GA, Report of the Secretary-General, "In Larger Freedom: Toward Development, Security and Human Rights for All," UN Doc. A/59/2005, (21 March 2005), at para. 182.
37. GA Res. 60/251, 3 April 2006, para. 3.
38. Freedman, *supra* note 36, at 107-108.
39. Freedman considers that special sessions have been used for "selective and politicized aims": ibid. at 290.
40. See generally HRC Res. 5/1, 18 June 2007, endorsed in GA Res. 62/219, 22 December 2007.
41. Chinkin, "U.N. Human Rights Council Fact-Finding Missions: Lessons from Gaza," in Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (2011) 475, at 481.
42. Ibid. at 480.
43. The UN established 20 commissions from 2006 to 2013; of those, the HRC established 12.
44. Territorial access was denied by investigated states in respect of the High-Level Mission on the Situation of Human Rights in Darfur, HRC Decision S-4/101, 13 December 2006; OHCHR Mission to Syria, HRC Res. S-16/1, 4 May 2011, at para. 8; Independent International Commission of Inquiry on the Syrian Arab Republic, HRC Res. S-17/1, 23 August 2011, at para. 10 [hereinafter "Syria Commission"]; UN Fact Finding Mission on the Gaza Conflict, HRC Res. S-9/1, 12 January 2009 [hereinafter "Goldstone Commission"]; International Fact-Finding Mission on Israeli Settlements in the Occupied Palestinian Territory, HRC Res. 19/17, 22 March 2012, at para. 2 [hereinafter "Israeli Settlements Commission"]; International Commission of Inquiry for the Democratic People's Republic of Korea, HRC Res. 22/13, 21 March 2013, at para. 2 [hereinafter "North Korea Commission"].
45. Examples include, see generally *Incident in the North Sea (The Dogger Bank Case)* (Britain/Russia), 26 February 1905; *Capture of the "Tavignano" and Cannon Shots Fired at the "Canouna" and the "Galois"* (France/Italy), 23 July 1912; *The Steamship "Tiger"* (Germany/Spain), 8 November 1918; *Loss of the Dutch Steamer "Tubantia"* (Germany/The Netherlands), 27 February 1922; *Red Crusader Incident* (Britain/Denmark), 23 March 1962.
46. 1907 Hague Convention for the Pacific Settlement of International Disputes, Art. 9 provides that in respect of an international dispute "arising from a difference of opinion on points of fact," states may establish a commission to "facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation." Under the Convention, a commission's report is limited to a "statement of facts": Art. 14. A notable exception is the *Dogger Bank Inquiry*, which was charged with not only reporting on the facts but with determining responsibilities. See more elaborately: Van den Herik, *supra* note 1.
47. 1991 Declaration, *supra* note 8, Art. 17.
48. Ibid., Art. 5.
49. E.g. in 2009 the Secretary-General established a Board of Inquiry to inquire into incidents in Gaza, and uncharacteristically released a summary of its findings: UN GA, "Letter dated 4 May 2009 from the Secretary-General addressed to the President of the Security Council," UN Doc. A/63/855 (15 May 2009),

at 1. Also in 2009 the Secretary-General established a Board of Inquiry to investigate a terrorist attack on a guesthouse in Kabul where UN staff were residing: UN SG, "Secretary-General Orders Review of Findings by Inquiry into Kabul Attack, as Report Highlights 'Shortcomings' in Joint Security Measures," UN Doc. SG/SM/12857 (26 April 2010).

50. UN SC, "Report of the Security Council Commission of Inquiry Established under Resolution 496 (1981)," UN Doc. S/14905/Rev. 1, 1982 at paras. 1-5.
51. UN SC, "Report of the Security Council Commission of Investigation Established under Resolution 571 (1985)," UN Doc. S/17648, (22 November 1985), at para. 6.
52. UN SC, "Report of the Commission of Inquiry Established Pursuant to Security Council Resolution 885 (1993) to Investigate Armed Attacks against UNOSOM II Personnel Which Led to Casualties among Them," UN Doc. S/1994/653 (1 June 1994) at 7.
53. Independent Inquiry into the Actions of the UN during the 1994 Genocide in Rwanda, established by Letter from the Secretary-General to the Security Council, UN SC, "Letter Dated 18 March 1999 from the Secretary-General Addressed to the President of the Security Council," UN Doc. S/1999/339 (26 March 1999).
54. UN Commission of Inquiry into the Benazir Bhutto assassination, established by UN SC, "Letter dated 2 February 2009 from the Secretary-General to the President of the Security Council," UN Doc. S/2009/67 (2 February 2009), at 1.
55. Miller, "United Nations Fact-Finding Missions in the Field of Human Rights," 1970-1973 *Aust. YBIL* (1970-1973) 40, at 40.
56. Ibid. at 49.
57. See similarly, Boutruche, "Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice," 16 *J. Conflict & Sec. L.* (2011) 105, at 112.
58. 2005 World Summit Outcome Document, UN GA, "2005 World Summit Outcome," UN Doc. A/60/L.1 (15 September 2005), at para. 139.
59. UN GA, "Report of the Secretary-General: Implementing the Responsibility to Protect," UN Doc. A/63/677 (12 January 2009), at para. 51.
60. Ibid., para. 52.
61. UN Mission to South-Vietnam, "Statement by the President of the General Assembly," UN Doc. A/PV1239 (11 October 1963), cited in its Report, UN Doc. A/5630, 7 December 1963, at 5.
62. Commission of Inquiry on the Reported Massacres in Mozambique, *supra* note 20.
63. Security Council Commission, SC Res. 446 (1979). Following the Commission's second report UN Doc. S/13679 (4 December 1979), its mandate was amended to include investigation of "the reported serious depletion of natural resources, particularly water resources, with a view to protecting those important natural resources of the territories under occupation." SC Res. 465 (1980), para. 8.
64. Human Rights Inquiry Commission, *supra* note 35, at para. 6.
65. High-Level Fact-Finding Mission in Beit Hanoun, HRC Res. S-3/1, 15 November 2006, at paras. 4 and 7.
66. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, established at the Paris Peace Conference, 26 January 1919 (Minute No. 2).
67. Statement in the House of Lords, HL Deb 07 October 1942 vol 124 cc555-94 (7 October 1942), at 577: http://hansard.millbanksystems.com/lords/1942/oct/07/punishment-of-war-criminals#S5LV0124P0_19421007_HOL_32; Franklin Roosevelt, "Statement on the Plan to Try Nazi War Criminals" (7 October 1942): www.presidency.ucsb.edu/ws/index.php?pid=16174&st=&st1=#axzz2hmp6QATP.
68. International Commission of Inquiry on Libya, HRC Res. S-15/1, 25 February 2011, at para. 11 [hereinafter "Libya Commission"]; Côte d'Ivoire Commission, *supra* note 12; OHCHR Mission to Syria, *supra* note 44, at para. 7; Syria Commission, *supra* note 44, at para. 13; Special Inquiry on Events in Al-Houla, HRC Res. S-19/1, 1 June 2012, at para. 8; North Korea Commission, *supra* note 44, at para. 5.
69. Darfur Commission, *supra* note 12; Cambodia Group of Experts, *supra* note 24, at para. 6; Timor-Leste Commission, *supra* note 26, at para. 4; Guinea Commission, *supra* note 26, at para. 2.
70. UN SG, "Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka" (31 March 2011), at paras. 8 and 262-277: www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf [hereinafter "Report of the Sri Lanka Panel of Experts"].
71. Chinkin, *supra* note 41, at 483.

72. Ibid., citing Franck, *The Power of Legitimacy among Nations* (1990) 16.
73. Devaney, "Killing Two Birds with One Stone: Can Increased Use of Article 34(2) of the ICJ Statute Improve the Legitimacy of UN Commissions of Inquiry & the Court's Fact-finding Procedure?," Sant'Anna Legal Studies Research Paper No. 2/2013, at 14.
74. Commissions instructed to investigate IHL violations include the Commission of Inquiry on Lebanon, HRC Res. S-2/1, 11 August 2006, at para. 6; Goldstone Commission, *supra* note 44, at para. 14; and International Fact-Finding Mission to Investigate Violations of International Law Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance, HRC Res. 14/1, 2 June 2010, at para. 8. Commissions that made findings of IHL violations in the absence of express permission include the Libya Commission, *supra* note 68, at para. 1; the Israeli Settlements Commission, *supra* note 44, at para. 4; and the Syria Commission, *supra* note 44.
75. The mandates of the Syria Commission and the North Korea Commission both refer to "crimes against humanity": *supra* note 44, HRC Res. 17/1, at para. 13; and HRC Res. S-22/13, at para. 5. The mandate of the Special Inquiry on Al-Houla; and Libya Commission, *supra* note 68, at para. 1, refer to "crimes" generally. Commissions that made findings of international crimes in the absence of mandatory instruction include the Goldstone Commission and the Israeli Settlements Commission, *supra* note 44, at paras. 1 and 5.
76. See e.g. HRC, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic," UN Doc. A/HRC/21/50 (16 August 2012), at Annex VI, para. 23 [hereinafter "August 2012 Report of the Syria Commission"]; "HRC, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic," UN Doc. A/HRC/23/58 (4 June 2013), at paras. 136-140; HRC, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic," UN Doc. A/HRC/24/46 (16 August 2013), at para. 170; and HRC, "Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya," UN Doc. A/HRC/17/44 (1 June 2011), at paras. 171-179 [hereinafter "Report of the Libya Commission"].
77. Report of the Libya Commission, *supra* note 76, at paras. 180-191.
78. Alston, Morgan-Foster, and Abresch, "The Competence of the UN Human Rights Council and Its Special Procedures in relation to Armed Conflicts: Extrajudicial Executions in the 'War on Terror,'" 19 *Eur. J. Int. L.* (2008) 183, at 207; Richemond-Barak, "The Human Rights Council and the Convergence of Humanitarian Law and Human Rights Law," in Banks (ed.), *Shaping a Global Legal Framework for Counterinsurgency: New Directions in Asymmetric Warfare* (2012) 29, 30–32; and Marauhn, "Sailing Close to the Wind: Human Rights Council Fact-Finding in Situations of Armed Conflict—the Case of Syria," 43 *Cal. W. Int. L. J.* (2013) 401, at 434.
79. E.g. Syria objected to the investigation of cluster munitions by the Syria Commission, on the basis that IHL is outside the Commission's mandate: Letter from the Permanent Mission of the Syrian Arab Republic, 7 January 2013, reproduced in UN Doc. A/HRC/22/29, Annex I, at 31. Syria also objected to the findings of crimes against humanity made by the OHCHR Mission to Syria on the basis that legal evaluation was outside the Mission's jurisdiction: HRC, "Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Syrian Arab Republic," UN Doc. A/HRC/18/53 (15 September 2011), Annex VI, at 111.
80. Alston et al., *supra* note 78, at 207. See also Meron, who argues that because few expert bodies are charged with the application of IHL, that human rights bodies "fill an institutional gap and give [IHL] and even more pro-human rights orientation": Meron, "The Humanization of Humanitarian Law," 94 *Am. J. Int. L.* (2000) 239, at 247. The only international fact-finding mechanism with a specific IHL mandate—the International Humanitarian Fact-Finding Commission—has never been used: Protocol Additional to the Geneva Conventions of 12 August 1949, Art. 90.
81. Richemond-Barak, *supra* note 78, at 7, 29, and 30. Boutruche writes that "the increasing involvement of human rights law experts in fact-finding missions that relate to an armed conflict may also lead to distortion, with too much focus on human rights rather than on the lawfulness of the conduct of military operations": Boutruche, *supra* note 57, at 107.
82. See e.g. Harwood, "Human Rights in Fancy Dress? The Use of International Criminal Law by Human Rights Council Commissions of Inquiry in Pursuit of Accountability", in 58 Jap. YBIL (2015) (forthcoming): http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2627058.

83. Ibid. For example, the Syria Commission was at the time of this writing investigating the use of chemical weapons as part of its general mandate to investigate human rights violations and crimes against humanity. It is however unlikely that the HRC would establish a commission solely to examine whether prohibited weapons were used in armed conflict.
84. See e.g. UN SC, "Letter dated 4 May 2006 from the Secretary-General addressed to the President of the Security Council," UN Doc. A/63/855-S/2009/250 (15 May 2009), at 1.
85. See UN SC, "Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council," UN Doc. S/1994/674 (27 May 1994), at para. 41 (Final Report of the Yugoslavia Commission of Experts): "The Commission's mandate is to provide the Secretary-General with its conclusions on the evidence of such violations and not to provide an analysis of the legal issues. It will be for the [ICTY] to make legal findings in connection with particular cases."
86. OHCHR, "Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003" (August 2010), at para. 463: www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf [hereinafter "Report of the DRC Mapping Exercise"].
87. Report of the Sri Lanka Panel of Experts, *supra* note 70, at para. 178.
88. Ibid. at paras. 9 and 53.
89. HRC, "Report of the International Commission of Inquiry," UN Doc. A/HRC/19/68 (8 March 2012), at para. 8 [hereinafter "Full Report of the Libya Commission"].
90. Report of the Fact-Finding Mission to Zimbabwe, *supra* note 26, at 78.
91. Palmer et al., "Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident" (September 2011), at paras. 5, 13-14: www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf.
92. Ibid. at para. 15.
93. Report of the Libya Commission, *supra* note 76, at paras. 245-246.
94. UN SC, "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General," UN Doc. S/2005/60 (25 January 2005), at para. 530 [hereinafter "Report of the Darfur Commission"].
95. See e.g. Jacobs and Harwood, *supra* note 4, at 325.
96. Report of the Darfur Commission, *supra* note 94, at para. 524.
97. Confidential lists of suspected perpetrators were drawn up by the Syria Commission, Libya Commission, Cote d'Ivoire Commission, and the OHCHR Mission to Syria. Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea", UN Doc. S/2009/693 (18 December 2009), at para. 215; and the Timor-Leste Commission, *supra* note 26, at paras. 113-134.
98. Full Report of the Libya Commission, *supra* note 89, at para. 14. The Darfur Commission also chose to keep its list of suspects confidential in recognition of "principles of due process and respect for the rights of the suspects": Report of the Darfur Commission, *supra* note 94, at para. 645.
99. E.g. August 2012 Report of the Syria Commission, *supra* note 76, at paras. 48-50; Report of the DRC Mapping Exercise, *supra* note 86, at paras. 488-491; Report of the Fact-Finding Mission to Zimbabwe, *supra* note 26, at 64-66.
100. Report of the Sri Lanka Panel of Experts, *supra* note 70, at fn. 127.
101. ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, Pre-Trial Chamber III (31 March 2010), at paras 90 and 93.
102. ICC, "Situation in the Republic of Kenya, Dissenting Opinion of Judge Kaul to the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya," ICC-01/01-19, 31 March 2010. See generally Kress, "On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement. Some Reflections on the March 2010 ICC Kenya Decision," 23 *Leiden J. Int. L.* (2010) 855, at 862–871.
103. See generally ICC, "Situation in the Republic of Cote d'Ivoire," *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11; ICC, "Amicus Curiae Observations of Professors Robinson, deGuzman, Jalloh and Cryer," ICC-02/11-01/11-534, 9 October 2013, at paras. 4-6 and 14-44.

104. Van Schaak, "Darfur and the Rhetoric of Genocide," 26 *Witthier L. Rev.* (2004) 1101, at 1103.
105. Evans, "Crimes against Humanity and the Responsibility to Protect," in Sadat (ed.), *Forging a Convention for Crimes against Humanity* (2011) 1, at 3. See also Van den Herik, "The Schism between the Legal and Social Concept of Genocide in Light of the Responsibility to Protect," in Henham and Behrens (eds.), *The Criminal Law of Genocide; International, Comparative and Contextual Aspects* (2007) 75.
106. Evans, *supra* note 105.
107. Sadat, "Crimes against Humanity in the Modern Age," 107 *Am. J. Int. L.* (2013) 334, at 340.
108. The Commission of Inquiry on Lebanon was mandated by HRC Res. S-2/1 to investigate Israeli actions in Lebanon. The Commission stated that its mandate did not permit "a full examination of all of the aspects of the conflict, nor does it permit consideration of the conduct of all parties," but went on to reason that a fundamental point in relation to the conflict and its mandate was the conduct of Hezbollah, and that an independent, impartial investigation "must of necessity be with reference to all the belligerents involved. Thus an inquiry into the conformity with [IHL] of the specific acts of IDF in Lebanon requires that account also be taken of the conduct of the opponent": HRC, "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 paras. 10, 14.
109. Full Report of the Libya Commission, *supra* note 89, at para. 39.
110. Kress, *supra* note 102, at 855.
111. E.g. Report of the Libya Commission, *supra* note 76, at para. 62; August 2012 Report of the Syria Commission, *supra* note 76, at para. 10.
112. See on this Panel, Ratner, "Accountability and the Stri Lankan Civil War," 106 *Am. J. Int. L.* (2012) 795.
113. Report of the Sri Lanka Panel of Experts, *supra* note 70, at para. 188. Also see para. 243 where the panel eventually only evaluated LTTE behavior against IHL standards given the uncertainties whether nonstate armed groups are bound by human rights obligations beyond situations of territorial control. Also see the Libya Commission taking on a similar approach: Full Report of the Libya Commission, *supra* note 89, at para. 18.
114. See generally Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, GA Res. 54/263, 25 May 2000.
115. Reports of the Libya Commission, *supra* note 76, at para. 62; Full Report of the Libya Commission, *supra* note 89, at paras. 18 and 710.
116. August 2012 Report of the Syria Commission, *supra* note 76, at Annex II para. 10, Annex X para. 35.
117. Report of the Syria Commission, UN Doc. A/HRC/22/59 (5 February 2013), at Annex X, para. 44 [hereinafter "February 2013 Report of the Syria Commission"].
118. Full Report of the Libya Commission, *supra* note 89, at para. 699; August 2012 Report of the Syria Commission, *supra* note 76, at Annex X, para. 36; February 2013 Report of the Syria Commission, *supra* note 117, Annex X, para. 44.
119. See also on this matter Rodenhauser, "Progressive Development of International Human Rights Law: The Reports of the Independent International Commission of Inquiry on the Syrian Arab Republic," *EJILTalk* (13 April 2013): www.ejiltalk.org/progressive-development-of-international-human-rights-law-the-reports-of-the-independent-international-commission-of-inquiry-on-the-syrian-arab-republic/.
120. Devaney writes that "[i]n making such bold legal determinations without proper legal substantiation, acknowledging different legal positions or authority or articulating a coherent standard of proof, the reports potentially undermine their legitimacy." Devaney, *supra* note 73, at 14.
121. See e.g. Heller, "The International Commission of Inquiry on Libya: A Critical Analysis" in Meierhenrich (ed.), *International Commissions: The Role of Commissions of Inquiry in the Investigation of International Crimes* (forthcoming): http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2123782.