Fact-Finding or Paving the Road to Criminal Justice?

Some Reflections on United Nations Commissions of Inquiry

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To Nino:
I'm for truth, no matter who tells it. I'm for justice, no matter who it is for or against. I'm a human being, first and foremost, and as such I am for whoever and whatever benefits humanity as a whole.
— Malcom X

Abstract

This article analyses the work of a number of fact-finding commissions established by the United Nations (UN) with a view to assessing their impact on subsequent criminal prosecutions for war crimes and other international crimes and to trigger some reflections on the merits and pitfalls of these bodies. In the first place, the author takes into consideration UN commissions of inquiry leading to the establishment of international criminal tribunals. Fact-finding bodies that have prompted a UN Security Council referral to the International Criminal Court are then examined. The major case in point is the International Commission of Inquiry on Darfur that interpreted its mandate in the broadest possible manner and acted as a quasi pre-judicial body. The author then observes that in recent years there has been a gradual shift and many UN commissions of inquiry — even those that were mainly tasked with the investigation of alleged violations of international humanitarian law — have been established by the Human Rights Council and not by the Security Council. Until now though, there has been a dearth of encouraging results corroborating the validity of such a change of approach. In fact, some of the bodies

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established by the Human Rights Council have attracted criticism, either because of a one-sided or unbalanced mandate or because they could not gain access to the territory where violations of international humanitarian law were being committed. The author concludes that, for the purposes of gathering evidence for future criminal prosecutions, it is advisable not to assign mandates combining investigations into violations of international humanitarian law together with human rights violations. The author also suggests a division of labour among the various UN bodies undertaking fact-finding activities, the drawing of a ready-to-use set of guidelines and the establishment of a roster of independent experts. These are all measures that could foster the prompt and effective deployment of fact-finding missions.

1. International Fact-Finding Missions with a Mandate to Assess Violations of International Humanitarian Law: A Fragmented Picture

There is a huge and multifaceted array of fact-finding bodies and missions created within the framework of international organizations. Some are established on the basis of previous existing rules, but the great majority of these bodies and missions are created on an ad hoc basis. The creation, methodology, mandate and objectives of a fact-finding mission depend on a variety of factors: the organization or organ that establishes it; the powers bestowed on it; the consent and cooperation of the state where the mission will be carried out; and the degree of political support for the investigation.[1]

1 The only definition of fact-finding contained in an international document is that set out in the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security, adopted in 1991, namely, 'any activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent United Nations organs need in order to exercise effectively their functions in relation to the maintenance of international peace and security.' There are several definitions in academic literature, one of the most comprehensive being: "'Fact-finding" or "inquiry" is a recognized form of international dispute settlement through the process of elucidating facts, given that it is the varied perceptions of these facts that often gives rise to the dispute in the first place. The fact-finding process is frequently employed in addition to other diplomatic dispute resolution means such as negotiation, mediation, good offices, and conciliation as well as in arbitration and litigation. Fact-finding is a process distinct from other forms of dispute settlement in the sense that it is aimed primarily at clarifying the disputed facts through impartial investigation, which would then facilitate the parties' objective of identifying the final solution to the dispute. The fact-finding process may involve an impartial and neutral body carrying out the inquiry — either a body appointed ad hoc or a standing panel available at every stage of a dispute — or a joint body consisting of the representatives of the disputing parties, which conducts the fact-finding activities. Additionally, *the same body charged with the establishment of the facts may be required by the parties to evaluate the facts, including a legal assessment of responsibility and relevant recommendations for the future resolution of the dispute.*' See, J.-N. Agnieszka, 'Fact-Finding', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2011) (emphasis added). In this article, the terms 'fact-finding commissions' and 'commissions of inquiry' are used interchangeably.

It is well known that the only fact-finding body with a permanent character — the International Humanitarian Fact-Finding Commission, created by virtue of Article 90 of Additional Protocol I of 1977 for the purposes of assessing violations of international humanitarian law (IHL) — was never assigned a concrete inquiry to pursue.[2] It is difficult to predict whether it will become 'an awakening beauty',[3] and until now different avenues have been followed on a case-by-case basis.[4]

One recent relevant example is the Independent International Fact-Finding Mission on the Conflict in Georgia, the so-called 'Tagliavini Commission', established by the Council of the European Union — for the first time in its history — in order to investigate the origins and the course of the conflict in Georgia, including possible IHL and human rights law (HRL) violations.[5] In the comprehensive report issued in 2009, the Commission reported allegations of serious violations of rules on the conduct of hostilities (many of which may amount to war crimes),[6] and recommended that Russia and Georgia undertake prompt, independent and impartial investigations into these violations and prosecute the alleged perpetrators. Regrettably, the states involved made no serious attempt to bring those responsible to trial. The Tagliavini Commission shows that there will be no predictable judicial follow-up on fact-finding when the criminal investigation and prosecution is left to the states involved.

On the basis of a general overview of fact-finding missions, the most interesting cases with regard to their potential impact on subsequent criminal prosecutions for war crimes and other international crimes are found in the practice of the United Nations (UN). In many cases, the UN established commissions of inquiry moved beyond mere fact-finding to also foster criminal prosecutions. At the outset, however, it should be underlined that it is not easy to assess the influence of UN fact-finding commissions on related criminal prosecutions, even if one confines the analysis to those bodies expressly tasked with investigating IHL violations such as war crimes. While UN commissions of inquiry are often mandated to investigate both IHL and HRL violations,

2 All relevant information concerning the International Humanitarian Fact-Finding Commission (IHFFC) may be found on its institutional website, available online at http://www.ihfcc.org (visited 9 September 2012). The IHFFC has been adopting a proactive approach in view of obtaining an inquiry mandate; however, such efforts have not been successful in concrete cases.

3 See E. Mikos-Skuza, 'The International Humanitarian Fact-Finding Commission: An Awakening Beauty', in A. Fischer-Lescano, H.P. Gasser, T. Marauhn, and N. Ronzitti (eds), *Frieden in Freheit: Festschrift fur Michael Bothe zum 70 Geburstag* (Nomos, 2008), at 481–492.

4 Antonio Cassese recalls the Dutch proposal presented in 1967 to the United Nations (UN) General Assembly to establish a permanent commission of inquiry, which was rejected and led to the adoption of GA Res. 2329 (XXII), 18 December 1967, simply requesting the UN Secretary-General to establish a roster of experts for future fact-finding missions. See A. Cassese, 'Fostering Increased Conformity with International Standards: Monitoring and Institutional Fact-Finding', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012), at 295, 297.

5 EU Council Decision 2008/901/CFSP, 2 December 2008.

6 See *Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (IFFMCG)*, Vol. II (September 2009), at Chapter VII, available online at http://www.ceiig.ch/Report.html (visited 9 September 2012).

accountability for the perpetrators of war crimes is rarely established as a goal of such commissions.[7] The lack of standardized practice and of guidelines to steer fact-finding bodies does not help to clear the picture. There is no manual to assist the members of UN commissions to carry out their mandate, nor is there a specific software programme to input and archive collected data. The absence of applicable standards 'means that there is no basis to test the validity of the research in order to assess the plausibility of the conclusions. It is safe to say that no scientific research methodology would consider the above-described approach as anything but selective, insufficient, unreliable, and, at best, anecdotal'.[8] In addition, there is no universally accepted standard of proof to which commissions of inquiry must conform.[9]

These are not the most solid grounds on which credible criminal prosecutions may be based. Indeed many reports issued by fact-finding commissions expressly state that 'the findings do not attempt to identify the individuals responsible for the commission of offences nor do they pretend to reach the standard of proof applicable in criminal trials'.[10] Yet in many cases these reports represent the basis of allegations leading to criminal prosecution.

In the following paragraphs, some examples of UN commissions of inquiry are examined with a view to assessing the relevance of their work vis-à-vis subsequent criminal prosecution of the alleged perpetrators of war crimes.[11] This article aims to trigger some reflections on the merits and pitfalls of these bodies as well as on possible lessons to be learned from their practice.

2. Fact-Finding Missions Leading to Establishment of International Criminal Tribunals

One the most significant fact-finding commissions established by the UN Security Council is the so-called 'Bassiouni Commission', which was created by the Security Council in 1992 in order to investigate 'grave breaches of the Geneva Conventions and other serious violations of international humanitarian law committed in the territory of the former Yugoslavia'.[12] On the basis of

7 T. Boutruche, 'Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice', 16 *Journal of Conflict and Security Law* (2011) 105.

8 M.C. Bassiouni, 'Appraising UN Justice-Related Fact-Finding Missions', 5 *Journal of Law and Policy* (2001) 35, at 41.

9 See on this specific aspect, S. Wilkinson, *Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions*, Geneva Academy of International Humanitarian Law and Human Rights in close cooperation with Geneva Call, available online at http://www.adh-geneva.ch/docs/Standards%20of%20proo%20report.pdf (visited 9 September 2012). See also Boutruche, *supra* note 7.

10 *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48, 25 September 2009, §§ 1, 25 (hereinafter 'Goldstone Report').

11 The (obviously incomplete) selection consists of bodies established by the UN Security Council and, more recently, by the Human Rights Council to which a mandate including investigation of possible IHL violations was conferred. The effort was made to choose cases that may exemplify problems and/or offer good practices to follow.

the initial findings of the Bassiouni Commission the Security Council decided to establish the International Criminal Tribunal for the former Yugoslavia (ICTY).[13]

While the Commission was not established with the objective of gathering evidence for subsequent criminal prosecutions, the decision to create an ad hoc criminal tribunal was made swiftly as a consequence of its first interim report.[14] After that moment, the Bassiouni Commission focused on gathering prosecution oriented criminal evidence; however, no institutional link was ever established between the Commission and the ICTY. Admittedly, the findings of the Commission contributed greatly to a quick and efficient start to the work of the ICTY prosecutor, who took office almost 14 months after the establishment of the ICTY.[15]

One of the main contributions of the Bassiouni Commission to the investigation into violations of IHL was its findings on the systematic and widespread use of rape and other sexual crimes against the enemy.[16] One may contend that this report was a first step towards the gradual recognition of sexual crimes not only as war crimes but also as a method or means of warfare, when perpetrated in a systematic way and used as a strategy to weaken the enemy.[17] The ICTY and subsequently other international and mixed tribunals tried many cases on this basis.[18]

The Bassiouni Commission also stressed that serious crimes were perpetrated against cultural property on a massive scale. Unfortunately, the drafters of the ICTY Statute did not follow the advice of the Commission on this point and no specific provision addressing war crimes against cultural property or heritage was inserted therein. Notwithstanding the lack of a specific provision, jurisprudence of the ICTY was built on the findings of the Bassiouni

12 SC Res. 780 (1992), § 2.

13 SC Res. 808 (1993); SC Res. 827 (1993).

14 *Interim Report of the Commission of Experts Established Pursuant to SC Resolution 780 (1992)*, UN Doc. S/25274, 10 February 1993, § 74.

15 The Commission worked for two years and during this time it conducted 35 field investigations, established an extensive database for gathering evidence and information about violations of IHL, identified over 800 places of detention, estimated 50,000 cases of torture, 200,000 deaths, and 2 million displaced persons as a result of ethnic cleansing that was documented in connection with some 2,000 towns and villages where the practices took place. The Commission, moreover, conducted the first extensive investigation into systematic rape. The latter produced over 500 affidavits of victims who identified their perpetrators. Interviews were conducted with 223 victims and witnesses, gathered information led to the identification of close to 1,500 cases and other information revealed the possibility of an additional approximately 4,500 victims. See M.C. Bassiouni, 'The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia', 5 *Criminal Law Forum* (1994) 279.

16 See *Final Report of the Commission of Experts Established Pursuant to SC Resolution 780 (1992)*, UN Doc. S/1994/674, 27 May 1994, at Part IV, Section F, which shows patterns and a systematic policy of rape and other sexual crimes.

17 See SC Res. 1820 (2008), on sexual violence during conflicts.

18 See M. Bergsmo, A. Butenschøn Skre, and E.J. Wood (eds), *Understanding and Proving International Sexual Crimes* (TOAEP E-Publishers, 2012).

Commission in order to criminalize and prosecute crimes against cultural treasures, such as the shelling of the old city of Dubrovnik, of the Mostar bridge or the destruction of the library of Sarajevo.[19]

The International Criminal Tribunal for Rwanda (ICTR) was also founded on the basis of a report of a fact-finding commission, established by the UN Security Council.[20] In the Rwandan case, however, the Security Council established a commission of inquiry more as an attempt to show that it would follow the procedure used for the former Yugoslavia, than as a genuine effort to establish a functioning body endowed with an adequate mandate and the necessary resources to investigate genocide and the other appalling crimes committed in Rwanda. For several reasons — principally the failure by the UN and the international community to prevent the genocide — the Commission was given a limited mandate. It worked for a mere three months and accomplished only one short visit to Rwanda. The Commission submitted its final report on 9 December 1994, confirming that genocide and other systematic, widespread and flagrant violations of IHL had been committed in Rwanda. The report also commended the establishment by the UN Security Council of another ad hoc tribunal to investigate those crimes and to bring those responsible to trial.[21]

These two examples stand in contrast to a number of other commissions of inquiry that were not provided with the instruments necessary to fulfill their mandate and which did not gather evidence for future criminal prosecutions.[22] Indeed it is not realistic to envisage — nor is it suitable — that each and every UN fact-finding commission leads to the creation of an ad hoc international or internationalized criminal tribunal, especially now that a permanent body, the International Criminal Court (ICC), is in place. The relevance of these two commissions of inquiry should be nevertheless emphasized — they represent a turning point as they paved the way for prosecution oriented investigations led by UN fact-finding missions.

The UN, moving beyond traditional fact-finding, has begun to entrust commissions of inquiry with the search for evidence of IHL violations and with a

19 See M. Frulli, 'Advancing the Protection of Cultural Property Through the Implementation of Individual Criminal Responsibility: The Case-Law of the International Criminal Tribunal for the Former Yugoslavia', 15 *Italian Yearbook of International Law* (2005) 195.

20 The Commission was established pursuant to SC Res. 935 (1994).

21 *Final Report of the Commission of Experts Submitted Pursuant to Resolution 935 (1994)*, UN Doc. S/1994/1405, 9 December 1994, at Annex.

22 See, for instance, the International Commission of Inquiry for Burundi established under SC Res. 1012 (1995). This Commission had the following mandate: first, to establish the facts relating to the assassination of the President of Burundi on 21 October 1993, the massacres and other related serious acts of violence which had followed; second, to recommend measures of a legal, political or administrative nature, as appropriate, after consultation with the government of Burundi; and third, measures to bring to justice persons responsible for those acts, to prevent any repetition of similar actions and, in general, to eradicate impunity and promote national reconciliation in Burundi. The Commission worked in difficult conditions and its reports never gave rise to concrete measures concerning the prosecution of the serious crimes allegedly committed.

prima facie evaluation of the facts based on international legal parameters, so as to ensure accountability for serious IHL violations and other international crimes.

3. The International Commission of Inquiry on Darfur: Fact-Finding Mission or Pre-Judicial Body?

The International Commission of Inquiry on Darfur (Darfur Commission) was established pursuant to Security Council Resolution 1564, adopted on 18 September 2004.[23] The set of functions entrusted to this body of experts was unprecedented. The mandate included the following tasks: 'to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.'[24] Such a wide and, at the same time, focused and accountability driven mandate induced the Darfur Commission to perform an incredible amount of work within the short period of time at its disposal. The result was the issuance of an authoritative determination of serious IHL violations that prompted the Security Council to refer the situation to the ICC.[25]

The Commission found that no acts of genocide had occurred, but nonetheless that serious violations of IHL had been committed, which amounted to crimes under international law. More specifically, it concluded that both government forces and rebel movements committed indiscriminate attacks against civilians, the deliberate destruction of villages and acts of pillage.[26]

23 In October 2004, the UN Secretary-General appointed a body of five experts which designated Cassese as the chairman. The Commission assembled in Geneva and began its work on 25 October 2004. The UN Secretary-General requested the Commission to report within three months, thus on 25 January 2005.

24 SC Res. 1564 (2004), § 12.

25 Credit must be given to Cassese for the amount and quality of work that was accomplished in a short period of time by the International Commission of Inquiry on Darfur (Darfur Commission).

26 'Based on a thorough analysis of the information gathered in the course of its investigations, the Commission established that the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law. In particular, the Commission found that Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity. The extensive destruction and displacement have resulted in a loss of livelihood and means of survival for countless women, men and children ... it is clear from the Commission's findings that most attacks were deliberately and indiscriminately directed against civilians. Moreover even if rebels, or persons supporting rebels, were present in some of the villages — which the Commission considers likely in only a very small number of instances — the attackers did not take precautions to enable civilians to leave the villages or otherwise be shielded from attack. Even where rebels

It determined the nature of the conflict — which was one of the crucial issues to be established since it determines which set of rules of IHL are applicable to a case — it set out the relevant international obligations binding on both the government and the rebels in a precise manner, listing all applicable prohibitions and building on the case law of the ad hoc tribunals and on the rules contained in the ICC Statute.[27]

The Commission interpreted its mandate in a broad manner and acted as a quasi pre-judicial body. It assumed that it was entrusted not only to find material perpetrators of alleged crimes but also those who bore the greatest responsibility for the commission of the crimes. The Commission itself stated that 'in classifying the facts according to international criminal law, the Commission adopted an approach proper to a judicial body'.[28] Moreover, that it 'it would make an assessment of possible suspects that would pave the way for future investigations, and possible indictments, by a prosecutor'.[29]

The Darfur Commission marks another watershed for prosecution oriented fact-finding and it could represent a model for drafting guidelines and regulations to be adopted for analogous cases in the future.[30] Commissions of inquiry modelled on this precedent could have great potential — they may be rapidly deployed in situations where serious crimes are allegedly being committed and, if adequately equipped, be capable of gathering information or helping preserve evidence that could be valuable, at a later stage, to build a criminal case and that could otherwise get lost before a proper criminal investigation is put in place. This may hold especially true for violations of the rules on the conduct of hostilities — an assessment of disproportionate damage may be

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may have been present in villages, the impact of the attacks on civilians shows that the use of military force was manifestly disproportionate to any threat posed by the rebels. The Commission ... found credible evidence that rebel forces, namely members of the SLA and JEM, also are responsible for serious violations of international human rights and humanitarian law which may amount to war crimes. In particular, these violations include cases of murder of civilians and pillage.' See *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, UN Doc. S/2005/60, 1 February 2005 (submitted by the Commission to the Secretary-General on 25 January 2005), at Section I, 3 (hereinafter 'Darfur Report').

27 Darfur Report, §§ 154–171.

28 Darfur Report, § 14.

29 Darfur Report, § 15. In the same paragraph it is stated: 'In view of the limitations inherent in its powers, the Commission decided that it could not comply with the standards normally adopted by criminal courts (proof of facts beyond a reasonable doubt), or with that used by international prosecutors and judges for the purpose of confirming indictments (that there must be a *prima facie* case). It concluded that the most appropriate standard was that requiring a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime. The Commission would obviously not make final judgments as to criminal guilt; rather, it would make an assessment of possible suspects that would pave the way for future investigations, and possible indictments, by a prosecutor.' See also Darfur Report, § 524.

30 See P. Alston, 'The Darfur Commission as a Model for Future Responses to Crisis Situations', 3 *Journal of International Criminal Justice* (2005) 600; Cassese, *supra* note 4.

more easily done in the immediate aftermath of an attack.[31] In addition, fact-finding missions are often flexible instruments and may be adapted to different situations. Flexibility may be an advantage to allow for gathering information from a number of different sources and, for instance, be of crucial help in establishing the contextual elements of certain crimes, the existence of patterns and/or systematic policies that could later be useful for criminal prosecution of some of the most serious crimes.

In the Darfur case, the work of the Commission had a strong impact on the referral of the situation to the ICC. The UN Security Council was convinced by the evidence presented in the report that there was indeed room for the ICC prosecutor to commence its investigation in Darfur. It may be stressed in this case that the persuasive assessment on the necessity of further investigations made by an independent and competent body cleared the way for the first referral to the ICC and was essential in avoiding allegations of political bias.

The UN Security Council is an inherently political body and reliance on the work of credible, competent and independent commissions of inquiry as a basis for its decisions regarding which situations are to be further investigated and even referred to the ICC prosecutor may help the Council to fulfill the role conferred to it by the ICC Statute. Reliance on impartial and professional reports may enhance the credibility of the Security Council as a guarantor in the struggle against impunity for the most serious international crimes.

In addition, one must not forget that these bodies may also collect information that point to the liability of states and other non-state actors in the commission of serious violations of IHL. Leaving aside the possible use of this information by international courts adjudicating state responsibility,[32] the work of fact-finding missions may lead the Security Council to determine the existence of a threat to peace and to adopt measures not involving the use of force against states or other actors causing the threat. The link between state and individual responsibility is also very important in light of the obligation of states to prosecute the most serious international crimes. If there are strong allegations of serious crimes the territorial state — which is often also the state of nationality of the perpetrators — has an obligation to investigate and prosecute those responsible. The work of fact-finding commissions may be also important in order to make a preliminary assessment of the willingness and/or ability of a state to prosecute serious crimes, hence on the conditions of admissibility of a case before the ICC.

31 Of course challenges to find evidence of violations that may be used for criminal prosecution ought not to be undermined. On these difficult challenges, see Wilkinson, *supra* note 9.

32 See the interesting article by K. Del Mar, 'Weight of Evidence Generated Through Intra-Institutional Fact-finding Before the International Court of Justice', 2 *Journal of International Dispute Settlement* (2011) 393.

4. The Mixed Experience of Commissions of Inquiry Established by the Human Rights Council

Unfortunately, until now, the Darfur Commission has not served as a model for drafting guidelines and standard procedures for UN fact-finding missions, in particular, for the gathering of evidence for criminal prosecution of those responsible for serious international crimes. Some recent missions established by the Human Rights Council attracted great criticism instead of serving to clarify the overall picture of the UN's role in fact-finding, nor to enhance the potential of these bodies for subsequent criminal prosecutions.

The first thing to be observed is that in recent years there has been a gradual shift: the most important commissions of inquiry — even those that were tasked with the investigation of alleged IHL violations — were established by the UN Human Rights Council and not by the UN Security Council or by the UN Secretary-General on the basis of a Security Council invitation, as in previous cases. Since 2006, the Human Rights Council established a wide range of fact-finding missions with different mandates and purposes. Many of these bodies were conferred the mandate to investigate both HRL and IHL violations, which unfortunately often accompany one another. This trend surely stems from, and confirms, the increasing interplay — if not convergence — between these two sets of rules in situations of armed conflict. However, from the angle of conducting useful investigation for further criminal prosecutions of serious violations of IHL this is not necessarily a positive development. The focus on human rights violations and the involvement of human rights law experts in fact-finding missions investigating violations committed in the context of an armed conflict may lead to distortion with respect to the evaluation of the lawfulness of the conduct of military operations.[33]

One may also contend that in situations where an armed conflict has taken place or even more where there is an on-going conflict, the Security Council has the primary responsibility in maintaining international peace and security and should take the lead in addressing these situations. In fact, the Security Council possesses the most appropriate tools under Chapter VII of the UN Charter to undertake a variety of measures, both to address the responsibilities of states, other actors and individuals, including those stemming from violations of IHL. Fact-finding bodies established by the Security Council and reporting directly to it could indeed be more likely to gain access to the territory where alleged violations are occurring and to obtain states' cooperation. The Security Council, on the basis of the reports prepared by competent and independent bodies,[34] could then decide to adopt appropriate measures,

33 See Boutruche, *supra* note 7, at 3.

34 See B. Fassbender, 'The Security Council: Progress is Possible but Unlikely', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 52. The author points out, among other things, that: 'The Council should have at its disposal more information from independent sources, gathered and evaluated in the Secretariat, instead of being dependent on the basis of the work of their secret services.' *Ibid.*, at 59.

including measures to secure accountability of the perpetrators of serious crimes, as with the referral of the Darfur situation to the ICC.

The Human Rights Council may report or signal a situation to the Security Council which can subsequently take action — including a referral to the ICC or other measures — but an indirect process does not assist speediness and may even increase ambiguity around the possible ensuing measures and their objectives. Of course, the Security Council and the Human Rights Council may act simultaneously and independently in tackling a serious situation. The referral to the ICC of the Libyan situation in February 2011 was made only three days after the Human Rights Council had established a fact-finding mission to concerning alleged human rights violations in Libya. However, it is doubtful that a double and seemingly uncoordinated intervention marks a step forward towards effective and credible fact-finding.

On the positive side, bearing in mind the objective of subsequent criminal prosecutions of those responsible for crimes under international law, an early referral to the ICC may allow for the commencement of proper criminal investigation of on-going violations and may also hopefully play a deterrent role. However, urgency also places the Security Council in the position of taking decisions not based on directly collected information or evidence and it may undermine the credibility of the referral itself. An early referral to the ICC, in addition, cannot take into account the willingness or ability of the government retaining power and even less of any successor government — if the country is in the midst of a civil war — to prosecute crimes. It is also questionable whether a concomitant commission of inquiry established by the Human Rights Council[35] working simultaneously as ICC investigators, may be appropriate unless it is clearly established which body or organ undertakes which actions. Unless, in other words, there is a clear-cut separation of tasks among those different investigators involved — those working for the ICC prosecutor and those reporting to the Human Rights Council — and an organized system of cooperation among them. Otherwise the risk is run of a competition in securing accountability, instead of fruitful cooperation.

On a more general note, one may wonder why the shift towards fact-finding missions created by the Human Rights Council occurred and whether this represents a positive step overall. One of the reasons underlying this move surely lies in the growing interaction between HRL and IHL, as noted above, thereby leading the Human Rights Council to focus its attention on situations of armed conflict as well. This gradual shift may also be related to the purpose of putting pressure on states where serious IHL and human rights violations are occurring, while at the same time, involving those same states in taking responsibility to stop the violations and conduct national inquiries instead of

35 For example a Commission mandated, as it happened in the Libyan situation, to investigate 'all alleged violations of international human rights law in Libya, to establish the facts and circumstances of such violations and of the crimes perpetrated and, where possible, to identify those responsible, to make recommendations ... on accountability measures, all with a view to ensuring that those individuals responsible are held accountable'.

bringing cases to the international arena. Until present, it does not seem that there were encouraging results corroborating the validity of such an approach. But what is even more troubling is the fact that legal parameters to evaluate HRL or IHL violations are quite different and, more specifically, in a situation of armed conflict one may not really investigate human rights violations without taking into account a whole set of challenges deriving from IHL rules, which may even be more tricky when trying to ascertain violations of the rules on the conduct of hostilities.[36]

All these considerations should induce reflection on whether the Human Rights Council is the appropriate body to establish a fact-finding mission to investigate situations where serious IHL violations are on-going. Alternatively, whether a Security Council mandated commission would be a better tool to make a rapid preliminary assessment on the perpetration of serious crimes and provide the Security Council with all necessary information to decide on future steps to be taken, as it happened in the Darfur situation. A few other examples may help identifying other shortcomings of this recent trend and be useful to draw some useful lessons for the future.

A. One-Sided Mandates: The Telling Example of the Fact-Finding Commission in the Gaza Conflict

Some of the missions established by the Human Rights Council were, at least initially, attributed a mandate to investigate violations committed only by one of the parties to an armed conflict. This was the case with the much criticized commission led by Richard Goldstone which investigated the alleged violations committed by Israel during Operation Cast Lead in Gaza,[37] andt also of the earlier Commission of Inquiry in Lebanon.[38]

36 On this specific problem and on other challenges posed by the investigation of IHL rules, see F. Pocar, M. Pedrazzi, and M. Frulli (eds), *War Crimes and the Conduct of Hostilities: Challenges to Investigation and Adjudication* (Elgar Publishers, forthcoming, 2012).

37 The fact-finding mission was established by the Human Rights Council in January 2009 pursuant to Human Rights Council Res. S-9/1, 12 January 2009, § 14, to investigate 'all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression'. The chief of mission, Richard Goldstone, accepted to chair the Commission only after rebalancing the mandate. In the final report of the Commission, it is stated that the mandate was to investigate 'all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after'. See *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48, 25 September 2009 (hereinafter 'Goldstone Report'). For a comprehensive analysis of the Goldstone report and of its impact and consequences see C. Meloni and G. Tognoni (eds), *Is There a Court for Gaza?: A Test Bench for International Justice* (T.M.C. Asser Press, 2012).

38 The Commission of Inquiry on Lebanon was established in 2006 and it was given a three-fold mandate with respect to Israeli military action in Lebanon: (i) to investigate the systematic targeting and killings of civilians by Israel in Lebanon; (ii) to examine the types of weapons used

A mandate with a one-sided focus is obviously politically unbalanced and has serious negative consequences in terms of credibility and impartiality, which are key factors for a successful investigation, all the more so if it involves a legal assessment of certain facts and conduct. The tough and widespread criticism that literally overwhelmed the mission led by Goldstone — which also led him to partially recant — provides evidence of the misgivings of this approach.[39]

In addition, to mandate a commission to investigate the alleged violations committed by only one of the parties is particularly inappropriate when the violation of IHL rules pertaining to the conduct of hostilities has to be evaluated. The very nature of these rules often entails the necessity to assess both the attitudes of the attacker and of the defender and a variety of factors concerning both parties may play a crucial role in the correct application of the rules. A relevant example may clarify the picture. In order to ascertain whether a civilian object was justifiably targeted it ought to be verified whether it could be a legitimate military objective. If it was a legitimate target, then one should verify whether the attack was disproportionate or proportionate. In this case, a proper assessment requires taking into account the use that is made of the civilian object by the defender and not only the attitude of the attacker.[40]

In terms of impact on subsequent criminal prosecution of the alleged crimes, one-sided missions do not seem a successful option either. The report was extremely critical of the Israeli system of military justice and expressed serious doubts about Israel's willingness to investigate and prosecute crimes.[41] As a sequel to the Goldstone report, the Human Rights Council deemed it necessary to establish a committee of independent experts in IHL and HRL with the mandate to monitor the follow-up of the report in terms of criminal prosecutions.[42] The Committee found that there were many Israeli investigations, a minority

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by Israel and their conformity with international law; and (iii) to assess the extent and deadly impact of Israeli attacks on human life, property, critical infrastructure and the environment. See *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, § 7, available online at http://www.ohchr.org/english/bodies/hrcouncil/docs/specialsession/A.-HRC.3.2.pdf (visited 10 September 2012) See J. Stewart, 'The UN Commission of Inquiry in Lebanon: A Legal Appraisal', 5 *Journal of International Criminal Justice* (2007) 1039.

39 See criticisms form various sides available online at http://www.goldstonereport.org (visited 10 September 2012).

40 See Boutruche, *supra* note 7; and Stewart, *supra* note 38, at 1041.

41 Goldstone Report, at 506, § 1620, the Commission affirms, 'the failure of Israel to open prompt, independent and impartial criminal investigations even after six months have elapsed constitute a violation of its obligation to genuinely investigate allegations of war crimes.' *Ibid.*, at 508, § 1629, which states, 'there are serious doubts about the willingness of Israel to carry out genuine investigations in an impartial, independent, prompt and effective way' and 'the Israeli system presents inherently discriminatory features that have proven to make the pursuit of justice for Palestinian victims very difficult.'

42 The Committee was established by Human Rights Council Res. S-13/9, 14 April 2010, with the mandate '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

of which led to criminal investigations and only one to conviction.[43] It also found faults in investigations conducted by the de facto authorities in Gaza. The mandate of the Committee was renewed by the Human Rights Council and the Committee prepared a second report in 2011, albeit this report was drafted without gaining access to Israel, the West Bank and the Gaza strip.[44]

One may wonder whether in cases like this — where for political reasons a referral to the ICC is a remote hypothesis and the more concrete option is national prosecution — an unbalanced mandate may also potentially have bad effects on subsequent criminal prosecutions. It also ought to be observed that the Human Rights Council runs the risk of getting tangled up in fact-finding activities, becoming an end in themselves and not a means to achieve accountability.

B. Missions Without a Field: Is It Possible to Find Credible Evidence Without Getting Access to the Territory Where Violations of International Humanitarian Law Were Committed?

This last example is telling about results that may be achieved when there is an evident lack of cooperation by the local authorities and fact-finding activities must be carried out without getting access to the territory where alleged IHL violations and other serious crimes have been perpetrated. Another recent example highlighting the challenges of conducting fact-finding activities without getting access to the territory is the Commission of Inquiry on Syria, established by the Human Rights Council with a mandate to report on human rights violations.[45] IHL violations were not included in the initial mandate because the assumption was that violence had not reached the requisite level of

64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards'.

43 See *Report of the Committee of Independent Experts in International Humanitarian and Human Rights Laws 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, § 40, stating that: 'In total, Israel has launched more than 150 investigations into allegations of misconduct or violations of IHL during "Operation Cast Lead". As previously noted, this has led to 47 criminal investigations and 4 criminal indictments, one of which led to a conviction for the crime of looting. In addition, investigations have examined operational procedures and the use of certain munitions, such as white phosphorous.'

44 See Human Rights Council Res. S-15/6, 6 October 2010; and *Second Report of the Committee of Independent Experts in International Humanitarian and Human Rights Law Established Pursuant to Council Resolution 13/9*, UN Doc. A/HRC/16/24, 18 March 2011.

45 On 12 September 2011, the President of the Human Rights Council appointed three high-level experts as members of the Commission, namely, Paulo Pinheiro as the chairperson, Yakin Ertürk and Karen Koning AbuZayd, pursuant to Human Rights Council Res. S-17/1 of 22 August 2011, § 13, with the mandate to 'to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where

intensity; however, the total lack of cooperation by the state on which territory violence is on-going and denial of access and contact impeded the mission to make an assessment of the situation and to qualify it as an armed conflict.[46] The Commission was denied access to Syria and thus the Commission drafted the report with information gathered from outside the state.[47] It is self-evident that conducting fact-finding outside of the state concerned would be even more difficult if allegations of IHL violations were to be investigated.

In similar cases it seems virtually impossible to gather evidence that may be used for future criminal prosecution. On the other hand, one may contend that an inquiry may always serve, in a preliminary manner, to appraise the contextual elements of serious international crimes and to make a preliminary assessment on the willingness of the state to investigate and prosecute.

5. Concluding Remarks: 'The Truth is Rarely Pure and Never Simple'[48]

This brief overview of the impact of UN fact-finding missions on criminal prosecutions leaves a number of questions open and highlights the need for further analysis. The practice is variegated and it makes it difficult to offer general comments, but a few tentative remarks follow.

In the first place, from the perspective of gathering evidence for future criminal prosecutions, it seems highly advisable not to assign mandates combining together investigations about IHL and HRL violations, unless there are technical experts of both fields, acting on the basis of clear guidelines. There is surely an overlap between the different set of rules and in many cases such rules cannot be totally separated. However, in general terms, human rights

possible, to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable'.

46 The report states: 'The commission did not apply international humanitarian law for the purposes of the report and the period covered. International humanitarian law is applicable if the situation can be qualified as an armed conflict, which depends on the intensity of the violence and the level of organization of participating parties. *While the commission is gravely concerned that the violence in certain areas may have reached the requisite level of intensity, it was unable to verify that the Free Syrian Army (FSA), local groups identifying themselves as such or other anti-Government armed groups had reached the necessary level of organization.*' See, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/19/69, 22 February 2012, § 13 (emphasis added).

47 'The commission endeavored to reflect violations and abuses on all sides. The lack of access to the country, however, posed particular challenges for the documentation of abuses committed by anti-Government armed groups and opposition actors, given that most victims and witnesses of such abuses have remained in the country and the Government had not facilitated interviews with victims of armed group violence during the period under review. The opportunity to engage with communities and officials on the ground would also have allowed the commission to better appreciate the circumstances of human rights concerns and related human suffering.' *Ibid.*, § 7.

48 O. Wilde, *The Importance of Being Earnest* (1895), Act I.

fact-finding is mainly oriented towards ascertaining state liabilities, in placing pressure on states to end violations and also to prosecute those responsible at the national level (as a secondary effect). IHL fact-finding may be more directly oriented towards the further prosecution of war crimes and other serious crimes, like crimes against humanity and genocide, which may be committed in times of armed conflict. The most successful experiences — from the analytical perspective chosen here — are high-profile missions rapidly deployed and endowed, since the beginning, with a mandate oriented towards prosecution, such as the case of the Darfur Commission.

Moreover, it does not seem that the Human Rights Council is the appropriate body to establish fact-finding missions mandated to investigate IHL violations and to suggest possible means of prosecution. The Human Rights Council is essentially a state monitoring body, fulfilling an important role controlling states' activities, but may not be the most suitable body to further criminal accountability. On the contrary, missions created by the Security Council are more likely to obtain access to the territory of the state involved and directly report to an organ that may take a wide range of measures to foster prosecution. These may include measures reminding states of their obligation to prosecute the most serious crimes under international law and also measures creating criminal justice mechanisms or referring to existing mechanisms and body, for example, referrals to the ICC.

Finally, one of the most important lessons to be drawn from past experience of UN commissions of inquiry is the urgent necessity to organize a division of labour among the various bodies undertaking fact-finding activities, clarifying the goals that each is better suited to pursue. It is also urgent to draw up a precise and ready to use set of guidelines that could help prompt and effective deployment of fact-finding missions, to establish a roster of independent experts in various fields, to carefully draft the mandates and the objectives of these commissions and to establish a fruitful cooperation among various actors engaging in fact-finding and reporting activities over the same situation.[49]

49 In other words: 'What is here proposed is a conspicuous multiplication of these fact-finding commissions or bodies. This, however, is not enough. To ensure uniformity, professionalism, and celerity, as suggested above, the competent UN bodies should establish a general scheme for the establishment of such commission, granting them ample powers of investigation, and setting up a roster of independent experts, from which the Secretary-General and the High Commissioner for Human Rights could draw at any time a new fact-finding mission as required and a panel also rapidly constituted.' See, A. Cassese, 'Gathering Up the Main Threads', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 645, at 675.