Taking the (International) Rule of Law Seriously: Legality and legitimacy in United Nations \textit{ad hoc} commissions of inquiry

by

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A thesis submitted in conformity with the requirements for the degree of Doctor of Juridical Science
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Abstract

Contemporary ad hoc United Nations Commissions of Inquiry (UN COIs) operate during or in the aftermath of many of the world’s worst conflicts. Over the years they have met with mixed success, and a good deal of criticism, yet are thought to provide a vital and unique benefit. Today, that benefit is seen either as the promotion of accountability for criminal wrongdoing, where quasi-criminal inquiries investigate whether war crimes, crimes against humanity, or genocide has taken place; or, it is seen as laying the foundation for transitional justice reforms, whereby UN COIs map the social, political, legal and even economic landscape and provide “holistic” transitional justice recommendations. Yet despite these lofty goals and the perceived importance of UN COIs, there is very little research on UN COIs. That which does exist tends not to question their purposes or seriously interrogate their procedures; instead, it focuses on incremental measures to improve UN COIs’ processes and legal analyses. This dissertation seeks to provide the basis of a theoretical, principled approach to the creation and work of UN COIs, a normative platform upon which human rights monitoring methods can expand and a continuity of investigatory practice can develop. By treating UN COIs as legal bodies with legal obligations, this dissertation draws on
Fuller’s conception of legality and the theory of “interactional law-making” to question the very purposes for which UN COIs are seen to exist and the procedures by which they operate. It finds that neither the holistic transitional justice purpose nor the quasi-criminal purpose is legally or practically tenable. Instead, UN COIs should operate as post-conflict bodies, and delve deeply into a relatively narrow aspect of a systemic problem. A commitment to legality and interactional law-making can also offer a curative to the most salient criticisms of UN COI procedures by improving the credibility, reliability, and impartiality – the legitimacy – of their operations and how they are created.
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CHAPTER 1
INTRODUCTION

“The struggle against power is the struggle of memory against forgetting.”¹

1.1 Context of this Dissertation

In the past 30 years, the world has seen a massive proliferation of large-scale human rights fact-finding missions, particularly ad hoc United Nations (UN) Commissions of Inquiry (COIs).² Recently, the UN has turned to large-scale ad hoc COIs to investigate many of the most serious modern conflicts, including in the former Yugoslavia,³ Rwanda,⁴ Darfur,⁵ Gaza⁶ and elsewhere.⁷ International courts “delegate” some of their fact-finding duties to such COIs and rely on the names listed in COI reports or the evidence collected.⁸ Nation states rely on the information contained in

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such reports to issue travel bans on identified political or military leaders, freeze assets, or issue sanctions against the implicated parties. And though such inquiries have generally met with mixed success, they are nevertheless deemed vital to the accountability measures, transitional justice reforms, and the political and economic development of many countries in the aftermath of systemic human rights abuses. However, despite their perceived importance, there is very little comparative empirical research with respect to ad hoc UN COIs.

Over time, principles related to accountability, transparency, independence, impartiality and procedural fairness have slowly developed on an ad hoc basis to guide the UN human rights investigators in their work. However, “codifications” of such principles have been largely non-binding, little discussed, and thin on substance. Moreover, fact-finding principles have remained largely conceptually fragmented as between discrete types of human rights investigations; there is a distinct lack of cross-fertilization of ideas and principles between the various fora in which these

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9 Given the inability of most states to conduct independent fact-finding missions, such decisions will invariably be based at least in part on the reports of other organizations, foremost among them UN reports. See Halink, ibid. Halink notes that the International Court of Justice has, “attribute[d] greater weight to UN materials than to other secondary evidence such as NGO reports and press statements” at 26, and “virtually conclusive”, at 27, as compared to the evidence offered by both Parties.

10 For a call for greater study of UN COIs, see M Cherif Bassiouni, “Appraising UN Justice-Related Fact-Finding Missions” (2001) 5 Wash UJ L & Pol’y at 41 [Bassiouni, “Appraising UN Fact-Finding Missions”].


principles have their origins and the application of many UN human rights fact-finding principles to UN ad hoc COIs remains unclear.  

Perhaps more strikingly, the precise purpose that UN COIs are thought to achieve – their practical benefit – remains severely under-theorized. Though UN COIs are often criticized in the media or by nations investigated by such bodies, in both human rights practice and in the relevant academic literature the tendency is to support the institutions or tweak their processes on the margins rather than question their core tasks and purposes – what they are doing and how they are doing it.

The result is that in ad hoc UN COIs we have a very important UN fact-finding enterprise – the largest and most respected of its kind – producing significant reports that are relied upon to make major decisions that can affect the freedom of individuals, and which are operating in the aftermath of some of the worst crises of the time. And yet we also have very little comparative research on such UN COIs. In particular, we have almost no critical analysis of when and why they should operate, what purposes they can realistically achieve and how precisely they should operate in terms of their processes.

With this in mind, this dissertation seeks to be the first evaluation of the UN’s emerging “system” of monitoring and investigating the world’s most serious and salient human rights abuses through large-scale, ad hoc COIs, particularly as they operate during and in the aftermath of armed conflict. This dissertation seeks to provide the basis of a theoretical, principled approach to the creation and work of UN COIs, a normative platform upon which human rights monitoring methods can expand and a continuity of investigatory practice can develop.

I will demonstrate that today’s most important UN COIs must be analyzed as a system of response to mass atrocities – rather than as a series of ad hoc events, as they are generally viewed – that draws on distinctly legal principles and practices embedded in the law. Their purposes must be made to be more clear and precise, UN COIs must be given more time to operate, and they should neither investigate criminal matters nor should they be what will be called holistic transitional justice inquiries that attempt to speak to all or many of the elements of transitional justice. Instead, the

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13 See Bassiouni, “Appraising UN Fact-Finding Missions”, supra note 10 at 40-41, who notes that: “there is no standard operating procedure for fact-finding missions”.
starting point for UN COIs is that they should cater to their strengths while maintaining a commitment to legality and interactional law-making.

Empirically, the scope of this dissertation will be limited to the principles and operating procedures followed by arguably the most prominent and important of the UN’s ad hoc human rights COIs: (1) those undertaken at the behest of the UN Secretary-General, the UN Security Council or the UN Human Rights Council, the largest and most important international institutions dealing with human rights worldwide; (2) those that operate during or in the aftermath of conflict, generally accompanied by mass human rights abuses; (3) those not primarily focused on one individual, but on a more systemic problem or breach of international norms; (4) those that conduct or attempt to conduct on-site fact-finding missions; (5) those that are not part of a permanent UN process such as, for example, the permanent UN Special Rapporteurs, and, (6) those that issue reports and findings upon the completion of their work.

1.2 What is an ad hoc UN COI?

There is no one definition of UN COIs. Indeed, a major element of this dissertation will be merely to answer this question, to help to start to define what UN COIs are, in addition to what they should or should not do and how they should and should not act. However, some generalizations can be made. The mandate of UN COIs is determined by the constituting body, be it the UN Security Council, UN Secretary-General, or UN Human Rights Council, which will determine its scope and the temporal

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14 The strengths of UN COIs include: they are large, relatively well-funded, they are able to attract world-renowned experts to act as commissioners, they generally have a good deal of administrative support from their constituting UN body, and they can act on a flexible, ad hoc basis. They also arguably carry added credibility over other methods of fact-finding given their association with the UN and their extensive institutional support.
15 For a discussion of the Secretary-General’s power to initiate COIs, see B G Ramcharan, “Note and Comment: The Good Offices of the United Nations Secretary-General in the Field of Human Rights” (1982) 76 Am J Int’l L 130.
16 See Charter of the United Nations, 26 June 1945, Can TS 1945 No 7 [UN Charter], at Article 34, for example, gives the Security Council explicit authority to appoint COIs.
17 See Goldstone Report, supra note 6.
18 The UN has moved progressively toward a relatively robust system of human rights monitoring by appointing an increasing number of Special Procedures mandate-holders. There are currently 8 “theme” and 30 “country” Rapporteurs: see United Nations Office for the High Commissioner of Human Rights, online: ww2.ohchr.org/English/bodies/chr. See generally Ingrid Nifosi, The United Nations Special Procedures in the Field of Human Rights (Antwerpen: Intersentia, 2006); Oliver Hoehne, “Special Procedures and the Human Rights Council – A Need for Strategic Positioning” (February 2007) 4 Essex HR Revue 1.
limitations of the inquiry, meaning both how long it has to report its findings and the
time-period covered by its investigations. UN COIs are usually composed of three or so
commissioners who are asked by the UN body to investigate a problem, produce and
issue a report. UN COIs have been generally designed to conduct “human rights” fact-
finding “missions”, a process that includes, *inter alia*, travel to the territory of the
atrocities if possible and site visits, hearings, interviews, the collection of secondary
evidence, and forensic evaluations. Like other fact-finding bodies, UN COIs must
produce factual assertions connected to their findings in the form of a publicly available
report, which usually includes non-binding “recommendations”. In this way, they have
similarities to other fact-finding bodies within the UN or even those inquiries established
by nation states.

However, UN COIs tend to be larger and better resourced than other UN fact-
finders. And, while domestic investigative COIs, often also called Royal Commissions
in Commonwealth countries, can look very court-like, with the power to compel
evidence and testimony that is presented by an advocate in front of a panel of decision-
makers, UN processes tend to look more like traditional human rights fact-finding
missions in terms of their procedures. For example, UN COIs have not had the benefit
of having a “commission counsel” to present the evidence and facts to the
commissioners. Rather, the commissioners will play this role with research assistance
from UN staff. Commissioners will not have the power to compel evidence from
witnesses, governments or outside agencies operating in the jurisdiction of the
commission, and sometimes will not even have access to the relevant territory, a
problem common to international fact-finding. Witnesses may be asked to respond to
questions or testify in any number of formal or informal ways, often without the benefit
of a lawyer provided by the commission. Moreover, the commission may have hearings
in numerous places rather than operating from a single formal setting.

The implications and goals of such COIs can be wide-ranging and, again, are
not entirely clear, particularly with regard to how the mandate for a COI – what a COI
will do – is connected to its purpose – why it is doing what it is doing, and why a UN
COI is the best choice to accomplish that task. So for example the justification for resort
to UN COIs has increasingly been to fact-find so as to combat impunity, fight crime and
halt injustices; search for a “truth” regarding the causes and consequences of a conflict;
contribute to national and international peace and security; contribute to national
reconciliation processes; contribute to economic and social development and a
transition from conflict to peace; promote institutional reform and development; and,
encourage domestic or international action and disapprobation, when necessary. UN
COIs often are also intended to lay the foundation for follow-up reports and future fact-
finding missions. As we shall see, recently UN COIs seem to be intended to contribute
to all of these goals while they simultaneously recognize the impossibility of this task.

1.3 Structure of this Dissertation

Chapters two and three will trace the history of UN COIs from the first appearance of international COIs to their modern incarnation. This will offer an overview of the principles and purposes by which and for which UN COIs have operated. In particular, chapter two will look at the development of the first 40 years or so that led to UN COIs and then trace the experience developing UN COI practice until 1980. Chapter three will then discuss the factors and principles that have shaped contemporary ad hoc UN COIs and sketch these contemporary versions of UN COIs. I use the term “contemporary” here to denote a paradigm shift whereby UN human rights monitoring began in earnest – around 1980 – to delve into the internal politics of nation-states; sovereignty, in other words, began a relative decline and the UN human rights monitors, including eventually UN COIs, began to consider individual criminal responsibility, accountability by individuals and governments for international wrongs, and transitional justice inspired reform initiatives.

This historical overview is valuable not just to give a sense of how and when UN COIs have been successful and unsuccessful and where and when they have been criticized, but also for the mere fact that no such overview currently exists in the available literature on UN human rights fact-finding. It allows us to evaluate contemporary ad hoc UN COIs while seeing them in their social, cultural, institutional and historical perspective, which in turn will give a sense of why contemporary ad hoc UN COIs tend to operate as they do, where inconsistencies have been or might be, and what criticisms have been consistent across time and geography.

We will then move in chapters four and five to a discussion of the United Nations Fact Finding Mission on the Gaza Conflict, which this dissertation will refer to alternately as the Gaza COI when referring to the commission and its actions or
procedures as a body, or the Goldstone Report\textsuperscript{19} – so named after head-commissioner Justice Richard Goldstone – when referring to the contents of the report produced by the Gaza COI. The Gaza COI is a useful choice for a case study because it is largely representative of what contemporary UN COIs have done well as well as when and how they have been rightly criticized for falling short.

Indeed, the Gaza COI is arguably the paradigmatic case with respect to contemporary \emph{ad hoc} UN COIs. The Gaza COI had a similar mandate, criteria and result as other contemporary \emph{ad hoc} UN COIs. But it is also the ‘hard case’ in that it operated in the context of the Israel-Palestinian dispute and, as a result, garnered a lot of attention and criticism from all sides. As such, it makes the issues and controversies confronted by such investigations more salient than perhaps any contemporary UN COI. It is thus perhaps the best example of why it is necessary to look for emerging patterns of processes and principles amongst these UN inquiries, and what it means to produce a legal-factual report for both political and legal bodies based on a legal mandate that was extraordinarily influenced by political agendas and objectives.

Chapters six and seven will then draw on the historical overview and the Gaza COI case study to analyze what they tell us about what UN COIs should not do (chapter six) and where they might instead be of assistance (chapter seven). We will see that, in the result, UN COIs should neither be criminal nor quasi-criminal investigations. Nor should they operate as what this dissertation will call “holistic transitional justice inquiries”, meaning inquiries that try to speak to all or many of the multifarious elements of transitional justice. Chapter seven will also discuss the processes of UN COIs in relation to some of the most prominent criticisms seen through the history of UN COIs and exemplified in the Gaza COI.

Both chapters six and seven will draw upon Fuller’s conception of legality and Brunnée and Toope’s conception of “interactional law”. Through a focus on principles of legality and interactional law I will endeavour to discern whether, when and how it is possible for UN COIs to be effective in issuing reports that are legitimate, that is, that are deemed to be credible and reliable and are subsequently relied upon for follow-up action. By recognizing the common – and distinctly – legal norms upon which

\textsuperscript{19} The \textit{Goldstone Report, supra note 6, was officially called the Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict.}
investigations are undertaken and ensuring due process and procedural fairness in their mandates and working methods, my hope is that future UN COIs will be in a position to preemptively undermine some of the criticism and claims of bias that have often flowed from the release of their reports. Together, legality and interactional law provide us with a principled basis upon which to analyze what UN COIs do well, where they fall short, and how and where they might improve.

1.4 Why Legality: The distinctly legal purpose of UN COIs

A review of the history of UN Commissions of Inquiry and the Gaza COI in particular reveals that their effectiveness or usefulness either rests or falls on their ability to carry out fact-finding mandates with a high degree of credibility, reliability, impartiality and openness – in other words, with a high degree of “legitimacy”. Theoretically, because of the impartiality and independence of COIs, their factual findings and recommendations can be relied upon in a way that the findings, assertions, and recommendations of UN political organs cannot. The benefit of a UN COI derives from the fact that it is able to act, to a greater or lesser degree, “legally” in otherwise highly political contexts. In other words, the benefit of UN COIs has always been the ability to bring legal legitimacy to political conflicts. Seeing UN COIs as legal enterprises is thus the best method for evaluating how their operations and methodologies can be improved so as to improve their legitimacy.

Describing ad hoc UN COIs in this way – as legal enterprises – should not be a particularly controversial assertion although the processes and purposes of UN COIs tend to be analyzed from a practical rather than a legal perspective in the available literature. They are evaluated on the assumption that the purposes for which they operate are largely valid and the choice of processes that they employ is a question of fit and efficacy. But it is clear is that UN COIs are both created and operate in a legal environment; they apply law to legal questions using largely legal processes. Likewise, their findings tend to be based on international law, and interpretations thereof. And they claim certain characteristics associated with legal investigations – impartiality,

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independence, credibility and reliability. Finally, UN COI conclusions will inform other legal institutions, whether they are those of the Security Council or nation states through sanctions regimes, domestic courts or international criminal tribunals. Law, in other words, is inextricably interwoven into all aspects of the ad hoc UN COI process.

Interactional law theory explains how legality operates in the international arena. As articulated by Brunnée and Toope, “the greatest challenge facing international law” in general – which is equally true for UN COIs in particular – is: “to construct normative institutions while admitting and upholding the diversity of peoples in international society.” The international society in which UN COIs are established certainly lacks a “single political morality” – indeed, UN COIs are generally created in a highly contentious political environment. However, as Brunnée and Toope note, “Fuller explained law, and the rule of law, in a manner that did not require fundamental shared commitments to a single political morality, nor the existence of centralized political authority.” Interactional law takes this a step further and provides a clear explanation for how law-making is possible in highly political and even divisive contexts and how best to approach law-making in such situations in order to create a “fidelity” to the law. The theory does not require complete shared understandings about what the law should be, or how legal regimes should look; in some cases, a rather thin, procedural understanding will suffice. As a result, the highly political and often divisive environment in which UN COIs are often established provides a fertile testing ground for the possibilities and limits of interactional law and legality.

My assertion is that UN COIs are legal enterprises and, as such, are necessarily controlled from start-to-finish by the dictates of legality and interactional law-making – it is both for practical reasons and out of legal necessity that they are viewed in this way. Their purposes are not constrained merely by what we would like UN COIs to do, but by what they are capable of accomplishing given their legal and political constraints, constraints best addressed through interactional law. And their procedures are constrained not just by what is possible, or not merely by what is most efficacious or

22 Ibid at 21. And interactional law extends Fuller’s legality to offer “a constructivist recasting that allows for social and political diversity,” a diversity of the very type that is so prevalent in the halls of the UN. Ibid.
easiest for the fact-finders, but also by constraints found within the law itself, most saliently due process constraints.

1.5 A Brief Introduction to Fuller’s Legality

Much has already been written on Fuller’s conception of legality. Here I wish to offer no more than a broad overview of Fuller’s internal morality of law, specifically his eight desiderata of legality as expounded in *The Morality of Law*, such that it can be drawn and expanded upon when and where it proves relevant to the discussion of UN COI procedures in subsequent chapters, particularly chapters six and seven.

Fuller’s conception of legality establishes the “background conditions” against which moral, political and legal choices are to be made. In so doing he introduces eight desiderata of legality. My assertion is that these desiderata serve to offer a set of principles against which to judge the processes of UN COIs.

The first desideratum is the “generality” requirement, meaning that rules of some kind must exist. Second, rules must be promulgated and they must be given adequate publication. Here, Fuller explicitly mentions the importance of published rules for “administrative tribunals”, to which UN COIs might be compared. Third, laws should not be applied retroactively. Fourth, laws must be clear, a standard that represents, for Fuller, “one of the most essential ingredients of legality.” Clarity for Fuller of course means, in part, that “obscure and incoherent legislation can make legality unattainable....” But clarity does not mean that all rules must be completely

26 *Ibid* at 49-51.
27 *Ibid* at 50.
29 *Ibid* at 63.
30 *Ibid* at 63.
self-evident. Fuller’s conception of clarity leaves room for rules that require interpretation, or general principles – like the principle of impartiality – left to be imbued with common sense or reference to past practice: “[s]ometimes the best way to achieve clarity is to take advantage of, and to incorporate into the law, common sense standards of judgment that have grown up in the ordinary life lived outside legislative halls.”

For, as Fuller said, sometimes “[a] specious clarity can be more damaging than an honest open-ended vagueness.” The trick is to ensure that laws are coherent, while not oversimplifying the legal rules or principles. Fifth, laws should be non-contradictory in relation to one another. Sixth, laws should not require the impossible. Seventh, laws should be relatively constant through time. Eighth, there must be “congruence between official action [the law as administered] and the law.”

One’s deeds should be consistent with one’s words. For Fuller, congruence was the most complex of his eight desiderata. However, for our purposes what is important is that, according to Fuller, the idea of “congruence” between official action and a declared rule imports norms of “procedural” due process, including “the right to representation by counsel and the right of cross-examining adverse witnesses.” Fuller also maintained that congruence could be “destroyed or impaired” in myriad ways, including “inaccessibility of the law...bribery, prejudice, indifference....” The eight desiderata work in an integrated fashion, each interacting to uphold or undermine the broader enterprise of legality; as Fuller said, a shortcoming in one area might require another desideratum to compensate, for their interaction is “cumulative”.

Two final points are in order. First, for Fuller law is not a “one-way projection of authority originating with government and imposing itself on the citizen.” Rather, law is seen as operating in a horizontal relationship as between the governed and the

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31 Ibid at 64.
32 Ibid at 64.
33 Ibid at 65-70.
34 Ibid at 70-9.
36 Ibid at 81.
37 Ibid at 81.
38 Ibid.
39 See generally ibid at 91-94.
40 Ibid at 92.
41 Ibid at 207.
governing.\(^{42}\) For Fuller there is a particular understanding of reciprocity inherent in
legality that flows from this horizontal conception of law.\(^{43}\) This reciprocity requires all
levels of society to play a part in maintaining legality, from legislator to judge to
citizen:\(^{44}\) “the functioning of a legal system depends upon a cooperative effort – an
effective and responsible interaction – between law-giver and subject.”\(^{45}\) Fuller’s
legality and his eight desiderata play a role at all levels of the UN COI process, from the
process of establishing the UN COI’s mandate, to the choice of commissioners,
through to the fact-finding processes and the issuance of the ultimate report.

Second, for the purposes of UN COIs it is important to note that the principle of
transparency flows naturally from Fuller’s conception of legality,\(^{46}\) and in particular the
idea that there must be rules and that they should be promulgated and clear and
remain fairly consistent across time.\(^{47}\) People must know the law; it must be open and
clear for them to engage in it and respond to it.\(^{48}\) Likewise, Fuller’s “congruence”
requirement and in particular its requirement of “procedural due process” would be
meaningless without an understanding that law and its processes should be open and
fair.

It is inherent in Fuller’s conception of legality that humans, as autonomous
agents, are deserving of respect,\(^{49}\) and that in turn requires that we operate the legal
system in an open, transparent manner such that people can, as Fuller says, “judge of

\(^{42}\) According to Fuller, “a relatively stable reciprocity of expectations between lawgiver and subject is part of the
very idea of a functioning legal order.” \textit{Ibid} at 209.

\(^{43}\) This reciprocity extends to all eight principles of legality. See \textit{ibid} at 61: “This reciprocity, once made explicit,
can be extended to all eight of the principles of legality.”

\(^{44}\) Fuller maintained, for example, that: “With all its subtleties, the problem of interpretation occupies a sensitive,
central position in the internal morality of the law. It reveals as no other problem can, the cooperative nature of the
task of maintaining legality.” \textit{Ibid} at 91.

\(^{45}\) \textit{Ibid} at 219.

\(^{46}\) See \textit{ibid} at 157-9. Fuller stated, “[i]t is the virtue of a legal order conscientiously constructed and administered
that it exposes to public scrutiny the rules by which it acts.” \textit{Ibid} at 158.

\(^{47}\) Transparency has consistently been highly important for domestic Commonwealth COIs. See for Ed Ratushny,
\textit{The Conduct of Public Inquiries: Law, policy and practice} (Toronto: Irwin Law, 2009) at 18.

\(^{48}\) Fuller stated: “Every departure from the principles of the law’s inner morality is an affront to man’s dignity as a
responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is
impossible, is to convey to him your indifference to his powers of self-determination.” Fuller, \textit{The Morality of Law,
supra} note 25 at 162.

\(^{49}\) For a compelling discussion of Fuller’s commitment to human autonomy, see Brunnée and Toope, \textit{supra} note 21
at 29-33. See also Fox-Decent, \textit{supra} note 24.
its fairness”. If all people are to be treated with autonomy, as responsible agents with a hand in maintaining legality, then they must be given the tools to engage, and first and foremost that requires an open, transparent system that permits them to know the rules and judge of their fairness. Further, from a practical perspective – and Fuller was very much concerned with the practical aspects of law and legality – a legal system is more effective when it operates in a transparent manner in that, as Fuller stated, an individual “will answer more responsibly if he is compelled to articulate the principles on which he acts.”

For Fuller, transparency is seen as a good in itself, as something of inherent value that offers dignity to people by respecting their right to know. But it is also seen as instrumentally beneficial in that the outcomes that tend to flow from open, transparent practices are themselves morally good and useful.

1.6 The “Interactional” Approach to International Law

The interactional approach offered by Brunnée and Toope is a perspective of international legal obligation that, as noted, draws on Fuller’s conception of legality. The theory of interactional law starts from the presumption that actors are norm driven. Norms are shaped by the identity of actors, which in turn is influenced by “transparent and inclusive processes” – open, participatory dialogue, in other words. The theory extends Fuller’s argument by positing that legal structures promoting dialogue and social interaction can shape “shared understandings” and, in so doing, foster a sense obligation to comply with international legal norms. As Brunnée and Toope state, the “sense of obligation [that flows from interactional law] is contingent upon [Fuller’s criterion of] ‘congruence’” because “legal norms themselves must be broadly congruent with wider social practices.” The idea is that meaningful public participation in legal

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50 Fuller, *The Morality of Law* at 159.
51 *Ibid* at 159.
52 See Brunnée and Toope, supra note 21 especially at 20-55.
53 *Ibid* at 98. As they state, “a failure to allow for broader participation undermines the core idea of shared understandings in which all norms are rooted.” *Ibid* at 318.
54 See generally *ibid* at chapter 2, pages 56-86, 350-1. In this way, it is much like a “constructivist” theory of obligation, but interactional legal theory sees an additional role “in discerning the distinctive influence exerted by legal obligation.” See *ibid* at 56-63.
55 *Ibid* at 96.
processes is central both to the creation and the maintenance of shared understandings about law, and in turn to the level with which people feel “obligated” to comply with law.  

The interactional approach also argues that the greater the legitimacy of the legal process, the greater the potential to influence behaviour, reconstruct interests, and exert a sense of obligation on the actors: “the power of international law rests on a conscious sense of obligation rooted in a specific form of legal legitimacy.” And interactional law posits that, “a distinctive form of legitimacy” is “internal to interactional law.” Law has a distinct ability to promote a sense of obligation – a “fidelity” to the law – which is its ultimate strength. This again is where the interactional account relies on Fuller’s criteria of legality: it posits, as I do, that Fuller’s eight desiderata endow law and its processes with the necessary legitimacy to create a sense of obligation and, in so doing, help pull actors toward compliance. The final step – after shared understandings are created and legality is complied with – is the tough work of maintaining these understandings, of upholding the law.

The end result is that the “compliance pull of [international legal norms] will be stronger if the relevant norms meet the requirements of interactional law – congruence with shared understandings, adherence to criteria of legality, and enmeshment of the norms in a practice of legality.” The implications for UN COIs are clear: a UN COI whose creation is built on open dialogue and participation, whose purposes and practices are built and maintained through “shared understandings”, and whose processes are imbued with a Fullerian sense of legality is more likely to be seen as legitimate, and its report is more likely to be viewed as credible and reliable. Ultimately, such a UNC COI is in turn more likely to influence relevant actors and achieve the purposes for which it was created.

Let us now turn to the historical development of UN COIs and their processes in order to lay the foundation for where problems have arisen in the past and to discover

56 Brunnée and Toope actually go further than this in that participation is not just central or good practice, but required by legality: “an interactional theory of law opens up law-making to a diversity of participants, indeed requires it, because of the need for reciprocity in the construction of law.” Ibid at 45.
57 Ibid at 96; see generally chapter 33, pages 88-125.
58 Ibid at 28.
59 Ibid at 91, 96; see generally chapter 3, pages 88-125.
60 Ibid at 101; for a similar formulation see ibid at 120.
where legality and interactional law-making can be of service in improving their legitimacy.
CHAPTER 2
A HISTORY OF INTERNATIONAL COIs: PART I

“The difficulty about facts is that there are so many of them.” 61

2.1 Introduction

In this chapter, I will review how and why the concept of large-scale, ad hoc UN COIs first came about, what influences the idea of UN inquiries drew upon, what precisely ad hoc international COIs are and how they operate, as well as how such COIs have changed through the years. This chapter will be the first of two to offer a survey of the trends in ideas, rules, principles and policies that have guided UN human rights fact-finding toward the modern practice, discussed in detail in the following chapter, of using large-scale, ad hoc UN COIs to investigate human rights and humanitarian abuses, and their causes and consequences, in the wake of mass atrocities.

The benefit of this background is twofold. First, there is little academic literature available on the history of large-scale ad hoc UN COIs, particularly literature written in the last thirty-years. Thus, this chapter provides a novel insight into the history of the creation of UN COIs in relation to modern ad hoc UN COIs. Second, this approach will provide the background necessary to understand the influences on and precursors to modern ad hoc UN COIs; it will allow us to see what ideas have been maintained, and what have changed, and whether the more recent conception of UN COIs is cogent, whether it can draw on past experience, and whether it is clinging to antiquated notions.

2.2 Overview of the Structure of the Chapter

We will start in this chapter with what fact-finding looked like for the majority of the 20th Century – from 1899 to approximately 1979. In order to understand how we arrived at what UN COIs look like today, in the present chapter I will highlight the major influences on fact-finding and how changes in procedures have coincided with, and perhaps been shaped or influenced by, major human rights events. I will likewise highlight several attempts to guide, improve, or govern the work of COIs as seen by UN

resolutions and the work of various UN fact-finding commissions. In the next chapter I will then consider the events and ideas in the 1980s and early 1990s that influenced a change at that particular time in the historic approach to UN COIs, and then analyze what contemporary *ad hoc* UN COIs from this period have, in a very general sense, looked like in terms of how they were originally structured and governed.

The present chapter will proceed with a consideration of the Hague Conventions of 1899 and 1907, widely believed to be the first truly international attempts to institute commissions of inquiry, or fact-finding through the inquiry process.\(^{62}\) A brief review of the Bryan Treaties and inquiries under the League of Nations will follow because both are seen as the next examples (temporally speaking) of international fact-finding; the UN drew upon both of these examples, in addition to the Hague Conventions, in defining the purposes and approaches to commissions of inquiry. In order to locate the place of *ad hoc* COIs within the UN system, an overview of the legal structure of the UN Charter and where COIs fit into this structure will follow. The chapter will conclude with an evaluation of the practices and trends related to UN COIs up until around 1979, at which time the trends and practices began to focus more on human rights rather than territorial boundaries, for example, as perhaps the preeminent threats to international peace, security and development.

### 2.3 COIs Under the Hague Conventions of 1899 and 1907, the Bryan Treaties and the League of Nations

COIs date back hundreds of years,\(^{63}\) and international COIs at least over a hundred. Inter-national treaties provided for inquiries dating back at least to the early-to-mid 19\(^{th}\) Century.\(^{64}\) However, UN documents and historical treatises tracing such


\(^{63}\) Thomas Lockwood locates the first such “Commonwealth” commission as an investigation between 1080 and 1086, resulting in the Domeday Book. See Thomas J Lockwood, “A History of Royal Commissions” (1967) 5 Osgoode Hall LJ 172.

\(^{64}\) Mixed national COIs have long existed: see James Brown Scott, The Proceedings of the Hague Peace Conference: The Conference of 1899, Third Commission, 6\(^{th}\) meeting (19 July 1920) at 640. Inquiries as envisaged by certain treaties as between nations also have a long history, dating back at least to the Mainz Convention of 31
investigations – primarily written by UN fact-finders or inquiry commissioners – in international law generally treat the Hague Conventions in particular, and to a lesser extent the Bryan Treaties and the League of Nations, as the precursors to the UN system of fact-finding. As a result, we shall commence with a very brief overview of these systems in order to situate the UN system in historical perspective and give a sense of the experiences from which UN Charter negotiators and, at least, early UN fact-finders were generally drawing.

2.3.1 The 1899 Hague Convention

The first institutionalized international procedure for COIs is generally agreed to be the Hague Convention of 1899, which introduced the “independent international commission of inquiry.” Here, for the first time, a series of rules and understandings were drafted for the conduct of fact-finding missions. Under its auspices, fact-finding was to take place on an independent, impartial and “conscientious”, voluntary – all states involved had to agree – and ad hoc basis. Such fact-finding was intended only to settle questions of fact – and not questions of law – of an international nature,


65 See for example Report of the Secretary-General on methods of fact-finding, ibid at para 10, page 5. This is the preeminent study, as we shall see, of the purpose and actions of early fact-finding leading up to and under the UN. See also N Bar-Yaacov, The Handling of International Disputes by Means of Inquiry (London, New York, Toronto: Oxford University Press, 1974) at chapter 2; William I Shore, Fact-Finding in the Maintenance of International Peace (New York: Oceana Publications, 1970) Chapter II:A, at 12-18, especially at 12.

66 See Title III, Article IX of the 1899 Hague Convention, supra note 62, which stated: “In differences of an international nature involving neither honor nor vital interest and arising from a difference of opinion on points of fact, the Signatory Powers recommend that the parties who have not been able to come to an agreement by means of diplomacy, should as far as circumstances allow, institute an International Commission of Inquiry to facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation.” See also the 1907 Hague Convention, supra note 62 at Part II, “International Commissions of Inquiry”. See in particular Article 9, which states: “In disputes of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact, the contracting Powers deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an international commission of inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.”
questions involving neither the honour nor the vital interests of the relevant states.\textsuperscript{67} The conclusions reached by the commissions were non-binding on the parties.\textsuperscript{68}

As William Short has stated, “little can be gleaned as to [the] source of the idea of an international commission of inquiry.”\textsuperscript{69} However, while the source of the idea is not necessarily clear, it is clear that, as Nissim Bar-Yaacov has since stated: “[t]he promoters of the Hague institutions primarily had in mind the appointment of inquiry commissions in connection with border incidents, acts of sabotage or, perhaps, the persecution of minorities.”\textsuperscript{70} At the same time, it is probably safe to say that border incidents and acts of sabotage – or maritime disputes – were of primary import. Bar-Yaacov notes that the negotiating history revealed no intention that inquiry commissions should deal with disputes relating to a state’s treatment of its own citizens. The evidence is that the treatment by one state of the citizens of another state could not be the subject of an international inquiry. To the extent that the subject of internal policies was raised at the conference, express reservations were made to the effect that the commissions should not deal with such policies….\textsuperscript{71}

The fact that only state-to-state disputes were considered under the Hague Convention procedures supports this conclusion. It is clear from the text and negotiating history of the Hague Conventions that the conduct of such fact-finding was intended as a means of regulating state-to-state conflict in particular by promoting the pacific settlement of disputes.

In terms of the ways in which inquiries could assist with regulating state-to-state – primarily border or maritime – disputes, at the very least it was thought at the time that impartial fact-finding could form the foundation upon which a solution to a given dispute – seen as a factual disagreement – could arise. Once the facts relevant to the dispute were agreed upon, it was thought that it might be easier to recognize the strengths and weaknesses of each party’s position and come to a compromise, likely through arbitration or conciliation. Indeed, as originally introduced by the Russian Foreign Ministry at the Hague Conference, and explained by its principal legal advisor

\textsuperscript{67} See Report of the Secretary-General on methods of fact-finding, supra note 64 at para 11, page 5.
\textsuperscript{68} Ibid at para 11, page 5.
\textsuperscript{69} See Shore, supra note 65 at 13 citing Brown Scott, supra note 65 at 800.
\textsuperscript{70} Bar-Yaacov, supra note 65 at 5.
\textsuperscript{71} Ibid at 36-37.
at the time (Professor de Martens), inquiries were thought to be primarily of value as a preliminary effort before arbitration.\textsuperscript{72}

Disputes were seen as problems of fact. Article 14 of the 1899 Convention required that a commission limit itself to the investigation of the facts at hand, rather than also making a finding of responsibility (legal or otherwise). The thinking went that if you clarify the facts – resolve the factually dispute – you resolve the problem. Fact-finding was also completely voluntary under both the 1899 and 1907 Conventions, \textit{i.e.} that States party had to consent to the initiation of the procedure and were at liberty to either accept or reject investigation results.\textsuperscript{73}

But providing a factual foundation for a negotiated or arbitrated solution was not the only purpose of international inquiries. COI findings could also “act as a safety valve given to governments to enable excited and ill-informed public opinion to be held in check.”\textsuperscript{74} In other words, when the mere assertions of a nation were insufficiently persuasive, whether to another nation or a domestic political constituency, referral to an independent, impartial inquiry report could be eminently helpful. Seen from a positive perspective, it was thought that fact-finding could counter the spread of disinformation. This thinking, as we shall see, has not changed, and was (re)asserted, often as a novel concept, in the 1980s and 1990s.

Perhaps as a result of the voluntary nature of the agreement to enter into an investigation the inquiry procedure was rarely used under the Hague Convention.\textsuperscript{75} With the benefit of hindsight perhaps it is not surprising that governments did not more often voluntarily submit to “neutral” international COIs that might bring to light not just the strengths of their moral and legal arguments, but the defects as well. For conflicts between nations, even those that at first blush seem simple, are rarely in reality so; it tends to be the case that neither party to a serious conflict is without any fault, and sometimes the full story can serve to confuse simple narratives.

\textsuperscript{72} See Shore, \textit{supra} note 65.
\textsuperscript{73} Article 10 of the \textit{1907 Hague Convention, supra} note 62 states: “International commissions of inquiry are constituted by special agreement between the parties in dispute. The inquiry convention defines the facts to be examined; it determines the mode and time in which the commission is to be formed and the extent of the powers of the commissioners.”
\textsuperscript{74} Shore, \textit{supra} note 65 at 13 referring to Brown Scott, \textit{supra} note 64 at 641.
\textsuperscript{75} See Shore, \textit{ibid} at 2. Indeed, the seven COIs (one under the 1899 Convention and six under the 1907 Convention) that actually operated under the aegis of the Hague Conventions are all reviewed by Shore: see pages 15-18. See also \textit{Report of the Secretary-General on methods of fact-finding, supra} note 64 at paras 19-29.
In any event, in the limited practice of the COIs constituted under the Hague Convention, it is interesting to note that they generally did not restrict themselves strictly to fact-finding, as the Hague Convention Articles required. Rather, according to William Shore, the COIs “that were constituted and operated under the Hague Convention aegis attempted to define responsibility and assess damages....”\(^{76}\) As we shall see, COIs between 1990 and 2010 have followed and expanded on this tendency to define legal responsibility, make recommendations, etc., all the while increasingly “intervening” in the internal politics of the countries party to the dispute. Or perhaps as seen in a positive light, COIs have had an ever-increasing tendency to consider the internal institutional, political and social conditions in countries, breaking down the sovereignty barriers with a human rights hammer.\(^{77}\)

Finally, several objections to the idea of COIs – which were raised during negotiation of the Hague Convention – are worth noting as they remain salient today. One, presciently raised by the Balkan delegation was that COIs might be used as a pretext for intervention into the internal affairs of smaller states by the more powerful states.\(^{78}\) Another related concern that remains salient today, though it is hard to imagine it being openly expressed by a state at a conference, was essentially that COIs might actually work; that is, that a well-investigated COI might put moral pressure on a state to enter arbitration where otherwise it might not agree to such a procedure or, rather, might deem it inadvisable or contrary to its self-interest.\(^{79}\)

2.3.2 The 1907 Hague Convention

In 1907 the 1899 Hague Convention procedures for commissions of inquiry were updated with a new Hague Convention, the purpose of which was to improve upon the

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\(^{77}\) One of the concerns of states at the 1899 Hague Conference was indeed related to the interference by big or powerful states into the affairs of smaller, less powerful states.

\(^{78}\) Shore, *supra* note 65 at 14, referring to Brown Scott, *supra* note 64 at 781. It has been posited that Martens did not mention the Armenian inquiry (into Turkish-Armenian violence) in order to “prevent raising the suspicions of small states that the Russian proposal aimed at ensuring the institutionalization of intervention by the great powers in the internal affairs of small states. The Turkish example was still very fresh in the minds of the delegates from Eastern Europe.” See Bar-Yaacov, *supra* note 65 at 37-8.

\(^{79}\) Shore, *supra* note 65 at 15, referring to referring to James Brown Scott, *supra* note 64 at 626-37.
previous 1899 Convention. The 1965 *Report of the Secretary-General on Methods of Fact-Finding* notes that in order to improve upon the 1899 Hague Convention, “it was necessary to endow the institution of international commissions of inquiry with a set of rules of procedure which would make their use surer and more expeditious.”

So, the 1907 Convention, contrary to the 1899 Convention, contained various articles related specifically to inquiry procedures and methodologies (articles 17-36). Of note are the following procedures or principles: both parties must be heard, which included the right to submit a list of witnesses to be heard (Article 19); on-site visits were authorized, but only with the consent of the territorial state (Article 20); all investigations or site-visits had to take place “in the presence and counsel of the parties or after they have been duly summoned” (Article 21); the parties were required to provide the necessary information as requested by the commission and “to make use of the means at their disposal, under their municipal law, to insure the appearance of the witnesses or experts who are in their territory and have been summoned before the commission” (Article 23, which in other words gives, by proxy, the power to compel witnesses); the witnesses were to be heard “in the presence of the agents and counsel, and in the order fixed by the commission” (Article 25); questions shall be decided by majority of the commission (Article 30); neither the sitting of the commission nor the report was to be public except with the permission of the parties (Article 31); however the report of the commission was to be read at a public sitting, “the agents and counsel of the parties being present or duly summoned”.

Article 18 of the 1907 Hague Convention stated that a COI “shall…arrange all the formalities required for dealing with the evidence.” Likewise, Article 19 added that the parties to the dispute should provide relevant documents and a statement of facts. In other words, as to evidence it was up to the parties to furnish that necessary for the COI to complete its task, but it was up to the COI to collect the evidence and determine what of it should be deemed admissible, relevant and probative or in need of

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80 Bar-Yaacov, *supra* note 65 at 89.
82 While the Hague Convention of 1899 had 6 articles on fact-finding, the 1907 version increased to 28, most of which dealt with procedure.
corroboration. For the most part this tendency to leave such decisions completely in the hands of COIs has remained the case, as we shall see, at the UN.

2.3.3 The Bryan Treaties

Shortly after the conclusion of the Hague Conventions, another model of fact-finding was developed in what were called the “Bryan Treaties”, named after their American creator. Purportedly initiated without knowledge of the fact-finding provisions in the Hague Conventions, the Bryan Treaties were instead inspired by domestic American labour relations arbitration. The major difference between the Bryan Treaties and the Hague Convention provisions on fact-finding was the mandatory (and non-ad hoc) nature of the dispute resolution provisions in the Bryan Treaties between the United States and partner nations. The thinking was that it was precisely the type of exception built into the 1899 Hague Convention that would prevent countries from resorting to fact-finding and dispute resolution; that is, that nations would fear the revelation of facts that were contrary to their “honour” or “interests”, which in turn would prevent them from engaging in the process. To be effective as a method of pacific settlement of disputes, fact-finding would need to be mandatory and appointed in advance, though the commissions’ recommendations would not be binding.

However, the Treaties were not particularly effective. As William Shore noted, “[o]nly ten of the permanent commissions were ever constituted and of these none are in existence [as of 1970]. Nor were any of the commissions provided for by the Bryan Treaties ever called upon to investigate a dispute.” Still, the provisions of the Treaties became a source of inspiration for future fact-finding COIs in the international realm, particularly the League of Nations, and they contributed to the understanding that fact-finding and conciliation were and should be forever linked.

83 30 Treaties, each called the “Treaty For the Advancement of Peace”, were concluded between 1913 and 1914. The texts can be found online at: http://archive.org/stream/treatiesforadvan00unit/treatiesforadvan00unit_djvu.txt.
84 Shore, supra note 65 at 19.
85 Ibid at 19.
86 Ibid at 20.
87 Ibid at 19. See also ibid at 22.
88 Report of the Secretary-General on methods of fact finding, supra note 64 at para 82, page 13; para 81, page 13; para 5, page 5.
2.3.4 The League of Nations

Under the League of Nations, fact-finding continued to progress.\(^{89}\) COIs were seen as particularly important in terms of providing the necessary factual foundation that informed subsequent action taken by the League Council and Assembly.\(^{90}\) Under the League, fact-finding was also explicitly linked with conciliation of disputes.

The League built fact-finding into its institutional framework as a method of preserving international peace and security (Articles 11, 12, 15 and 17).\(^{91}\) There was an obligation under Articles 12 and 15 of the Covenant to submit disputes to the League Council or Assembly,\(^{92}\) except where the parties preferred to resort to judicial settlement or arbitration. Article 12 makes clear that “members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision or the report by the Council.” This provision was seen as fundamental in order to ensure that a “cooling-off” period took place.\(^{93}\) In other words, there was a mandated three months period after the dispute arose for nations to cool-off, during which time the relevant facts were established, a solution was suggested to the parties, and then the parties were required to go home and think about it. The thinking was, once the immediacy of the dispute was removed, reason would prevail over violence.

Under Article 15, parties were also allowed to submit their disputes to the Secretary-General, who would make the “necessary arrangements for a full

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89 See *ibid* at paras 82-103, pages 13-17.
90 Shore, *supra* note 65 at 22.
92 Shore, *supra* note 65 at 24. Shore cites two examples: the Lytton Committee (League of Nations Doc C663.M320. 1932 VII at page 6); and, the Chaco Commission (League of Nations Doc C154, M64, 1934 VII at page 7). Articles 5, 16 and 17 of the *Covenant of the League of Nations*, *supra* note 91 are also particularly relevant to inquiries.
93 Similar thinking was percolating during the negotiations of the Hague Conventions as well: see *Report of the Secretary-General on Methods of Fact-Finding, supra* note 64 at para 375, page 51, which observed: “provision should be made for the possibility of a commission have for its purpose, first and above all, the search for, and the publishing of, the truth as to the causes of the incident and as to the materiality of the facts. While such a commission was working to make its report, time was gained, spirits grew calmer and the conflict was no longer acute.” In other words, the thinking was that it provided for a cooling-off period whereby war could be avoided.
investigation and consideration thereof.”94 Article 15(4) stated that if the dispute was not settled, the Council “shall make and publish a report containing a statement of facts of the dispute and the recommendations which are deemed just and proper in regard thereto.”95

According to Edwin Brown Firmage, “[a]ll disputes handled under the Hague Conventions involved maritime instruments that did not affect the vital interests of the parties. The majority of the cases considered by the League of Nations concerned border disputes stemming from the disintegration of colonial empires.”96 At least in this way, under the League there was not a marked change from the practice under the Hague Conventions or, for that matter, the early years of UN COIs.

2.4 The United Nations System

Initially, ad hoc investigations at the UN were conducted under the auspices of the UN General Assembly,97 UN Security Council98 or the UN Secretary-General;99 it is only more recently that the Commission on Human Rights (now the Human Rights Council, as of 2006) has begun initiating an increasing number of COIs.100

94 Covenant of the League of Nations, supra note 91 at Article 15(1).
95 Ibid.
97 For a discussion of fact-finding practice at the UN General Assembly between 1945 and 1965, see Report of the Secretary-General on methods of fact-finding, supra note 64 at paras 149-239. See also Shore, supra note 65; Bar-Yaacov, supra note 65.
98 For an overview of some of the UN Security Council Commissions and Investigative Bodies, see: Repertoire of the Practice of the Security Council, Commission and Investigative Bodies, online: http://www.un.org/en/sc/repertoire/subsidiary_organs/commissions_and_investigations.shtml. For a review of Security Council action with regard to such commissions between 1947 and the early 1960, see also Report of the Secretary-General on methods of fact-finding, ibid at paras 240-312.
99 See Report of the Secretary-General on methods of fact-finding, ibid at 313-328. For a general overview of many such fact-finding missions prior to 1970, though one that largely corresponds with and draws upon the aforementioned UN Study, see Shore, supra note 65 at 50-69.
100 Though not the focus of this dissertation, these certainly do not represent the full range of fact-finding done under the auspices of the UN or affiliated bodies. Specialized fact-finding has also taken place throughout the history of the UN, for example by the International Labour Organization (ILO), UN Educational, Scientific and Cultural Organization (UNESCO), the UN Food and Agricultural Organization (FAO) and the World Health Organization (WHO). See generally Ramcharan, International Law and Fact-Finding, supra note 76 at 9-11; 16-7 dealing with the ILO; 18-9 dealing with UNESCO; and 19 dealing with the WHO. For a general discussion of human rights monitoring and enforcement under the ILO, see Lee Swepston, “The International Labour Organization’s System of Human Rights Protection, in Janusz Symonides, ed, Human Rights: International Protection, Monitoring, Enforcement (UNESCO Publishing, 2003) at chapter 2, 91-109; and, with regard to UNESCO see Karl Josef Parths and Klaus Hufner, “UNESCO Procedures for the Protection of Human Rights”, in Symonides, ibid at chapter 3, 111-130.
Not surprisingly, those that conceived of the UN Charter and how ad hoc COI fact-finding relating to international peace and security would take place, traced its roots to the Hague Conventions and drew on previous experience with international fact-finding, in particular that related to the League of Nations,\(^\text{101}\) as well as the various treaties outside the League that provided for conciliation,\(^\text{102}\) many of which relied on the rules and procedures drafted in the 1907 Hague Convention.\(^\text{103}\)

According to the UN's first major study of its own fact-finding system,

> ![Image: Fact-finding in the Hague Conventions and League of Nations](https://example.com/1907_hague_convention)

[i]n undertaking the settlement of disputes or the adjustment of conflicts, the Security Council or the General Assembly use the inquire [sic] procedure, as did the Council or the Assembly of the League of Nations, as a means of obtaining information and of helping them to find the suitable solution. The organs they establish for this purpose – generally ad hoc organs – are almost always sent to the spot to investigate and report. The Secretary-General too uses this procedure....\(^\text{104}\) [Emphasis added.]

Similarly, the Interim Committee of the UN General Assembly\(^\text{105}\) defined inquiry as “the establishment of the facts involved in a dispute and a clarification of the issues in order that their elucidation may contribute to the settlement of the dispute.”\(^\text{106}\) This is to say that under the UN Charter, fact-finding with regard to international peace and security was envisaged as obtaining information in order to find a solution to a dispute. As was historically the case, it was thought that the collection of timely and accurate information was imperative in order to lay the factual foundation for subsequent political decisions.

Further, it was thought that fact-finding would help those responsible for international peace and security in the task of both liaising between disputing parties as well as maintaining the peace as between them. According to the UN Report of the Secretary-General on Methods of Fact-Finding:

> ![Image: Report of the Secretary-General on Methods of Fact-Finding](https://example.com/1948_report)

the fact-finding bodies established by the United Nations have formed a part of the general machinery – in a very broad sense – of the peace-keeping system created under the

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101 See Report of the Secretary-General on methods of fact-finding, supra note 64. See also Shore, supra note 65 at 26.
103 See ibid at para 127, page 21.
104 Ibid at para 384, page 53.
105 Ramcharan describes the Interim Committee in the following terms: “in the early years of the United Nations, functioned between sessions of the General Assembly in order to make the facilities of the Assembly available in the field of international peace and security....” See Ramcharan, International Law and Fact-Finding, supra note 76 at 2.
106 See ibid at 2 citing JM Hyde, “Peaceful Settlement Studies in the Interim Committee” (October 1948) International Conciliation No 444 at 537.
While United Nations bodies have been most clearly successful when charged with a specific task relating, for example, to the investigation of a given range of incidents or to observing the implementation of the terms of a Security Council or General Assembly resolution, their role as a stabilizing fact in themselves, in situations potentially endangering the maintenance of international peace and security, should not be overlooked, nor the part which they have on occasions [sic] played in providing a means of liaison and communication between conflicting parties.\footnote{Report of the Secretary-General on methods of fact finding, supra note 64 at para 144, page 24.} [Emphasis added.]

In addition, it was thought that fact-finding could play a signalling function in that it allows nations or groups to signal to those involved in a dispute or conflict that the world is watching and taking the situation seriously.\footnote{So for example, in 1987 the UN Secretary-General stated: “When a potentially dangerous situation is identified, a fact-finding mission can be quickly dispatched both to gain a detailed knowledge of the problem and to signal to the parties the concern of the United Nations as a whole.” See Report of the Secretary-General on the Work of the Organization, UN Doc A/42/1 (1987) 4.}

Let us now look at how the UN Charter principles relevant to international peace and security have influenced fact-finding at the UN.\footnote{For a general discussion of the UN Charter framework as it applies to human rights, see: Klaus T Samson, “Human Rights Co-ordination within the UN System,” in Philip Alston, ed, The United Nations and Human Rights: A Critical Appraisal (New York: Oxford University Press, 1992) at chapter 16, 620 at 621-3 [Alston, A Critical Appraisal].}

### 2.4.1 The Conflicting Principles of the UN Charter Influencing UN Fact-Finding

UN Charter Article 1(3) states that one of the central purposes of the UN is: “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” Article 55 also proffers that the UN shall promote “universal respect for, and observance of, human rights and fundamental freedoms,” and Article 56 follows with the obligation on all Member States to “take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.” The UN is also responsible for maintaining international peace and security, however that be defined.\footnote{See UN Charter, supra note 16 at Article 1(1).}

These Articles are often seen as opposed by, or in conflict with, Article 2 of the UN Charter. Article 2(1) of the UN Charter sets the idea of sovereign equality of states as the Charter’s foundational principle. Article 2(7) of the Charter then contains the general prohibition on interference with the sovereignty of states: “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state…but this principle shall not
prejudice the application of enforcement measures under Chapter VII [of the UN Charter].” Particularly in the early years of the UN, Article 2(7) was raised to prevent nations from interfering in domestic affairs, but equally it seems that each time fact-finding is raised some state invariably references Article 2(7).  

The prohibition on interference with sovereign states has meant, particularly in the beginning of UN fact-finding practice, that without the consent of the territorial state being investigated, no on-the-spot investigations can take place. Of course, numerous “legal” exceptions exist to this general principle, and the debate about how to reconcile these oft-conflicting principles, particularly when massive human rights abuses are suspected, is ongoing. This brings us to the UN Security Council, which does have the power to authorize interference in domestic affairs.

2.4.2 The Special Responsibility of the UN Security Council and its Relation to Fact-Finding

At the time of drafting the relevant provisions of the UN Charter, the drafting parties recognized that:

in ordering an investigation, the Council has to consider whether the investigation – which may involve calling for reports, hearing witnesses, dispatching a commission of inquiry, or other means – might not further aggravate the situation. After investigation, the Council must determine whether the continuance of the situation or dispute would be likely to endanger international peace and security. If it so determines, the Council would be under obligation [sic] to take further steps…. [Emphasis added.]

First, it was recognized that fact-finding, or COIs, will not necessarily be the best course of action and can indeed exacerbate real or potential conflict. Second, fact-finding, at least that done by or for the Security Council, was clearly intended to provide the factual foundation for further action by the international community. In support of this assertion, it is said that Articles 36-40 of the UN Charter “imply that the Security

112 For a general discussion of the debate with regard to UN information gathering and the barriers of sovereignty, see A Walter Dorn, “Keeping Tabs on a Troubled World: UN Information-Gathering to Preserve Peace” (1996) 27(3) Security Dialogue 263.
Council must have available to it sufficient information upon which to base any course of action it may decide to undertake\(^\text{114}\) and, by implication, that fact-finding is an excellent way of discharging this duty and obtaining the necessary information upon which the Security Council can make a fair and informed decision.\(^\text{115}\) In other words, since the founding of the UN it has been understood that fact-finding by the Security Council will have further repercussions, should the facts support such further action. The facts uncovered will be relied upon to justify further, potentially punitive or correctional, action; and, the simple act of fact-finding has never been viewed as in itself the ultimate goal – \textit{i.e.}, it is not necessarily a good in itself, but instrumental to further action that might accomplish a task.

A number of other UN Charter Articles are relevant to Security Council fact-finding, including Articles 33, 34, 36 and 37.\(^\text{116}\) Article 33 was seen as the general provision dealing with Security Council creation of UN COIs.\(^\text{117}\) Article 33 states:

\begin{quote}
Shore, \textit{ibid} at 84. For an overview of the UN Charter as it relates to the Security Council and fact-finding, see Firmage, \textit{supra} note 96 at 434-7.

\end{quote}

\begin{quote}
115 For example with respect to sanctions, asset freezes or travel bans, or even authorizing legal military intervention.

\end{quote}

\begin{quote}
116 Though no longer of the same relevance as it once was during the Cold War, historically Article 29 was also of great importance to Security Council inquiries (as well as Articles 24, 25 and 27). Article 29 came to be of importance to the Security Council due to the now infamous use of vetoes at the Security Council during the Cold War. Article 29 came to be seen as an alternative “procedural” method of setting-up an “investigation”, which was not a “substantive” investigation as under Article 34 but rather merely a “procedure” for gathering facts (and not making decisions). In this way, the Security Council was able to constitute “organs” or “sub-committees” rather than “committees” – the substantive distinction being primarily a legal fiction necessitated by the exigencies of the cold war history and its propensity to produce vetoes to proposed Security Council action. The legal fiction was necessary because, where a decision was deemed “procedural” rather than “substantive”, Article 27(2) of the UN Charter applied, and it stated that on “procedural matters” an “affirmative vote of seven members” of the UN Security Council would suffice. On the other hand, Article 27(3) stated that non-procedural matters required “an affirmative vote of seven members including the concurring votes of the permanent members.” Thus, by rule, the Security Council had to argue it was making “procedural” decisions in the threat of the use of a veto by a permanent member of the UN Security Council.

So, for example, in the very first inquiry under the UN, the Security Council dealt with what it then called the Spanish Question. The Security Council in this case appointed a sub-committee “of five of its members…to examine the statements made before the Security Council concerning Spain, to receive further statements and documents, and to conduct such inquiries as it may deem necessary, and to report to the Security Council before the end of May. See UNSCOR, First Year, First Series, 49\textsuperscript{th} meeting, Supplement No 2, (29 April 1946), Annexes 3a and 3b, at 54-5, 244-5. Had a committee been appointed to investigate under Article 34 of the UN Charter, the Soviet Union could have and likely would have vetoed the resolution. So, instead the sub-committee was appointed under Article 29, which was argued to be a procedural matter and not subject to being vetoed. See Shore, \textit{supra} note 65 at 86-8.

\end{quote}

\begin{quote}
117 The \textit{Report of the Secretary-General on methods of fact-finding}, \textit{supra} note 64, links fact-finding directly with Article 33 of the UN Charter, and states that “as the procedure of inquiry evolved…it gave rise to the procedure of conciliation with which it is still usually linked.” See \textit{ibid} at para 5, page 5.

\end{quote}
1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.\textsuperscript{118} [Emphasis added.]

At first blush, Article 33 appears simply to extend the approach to thinking about fact-finding inquiries and dispute resolution in international law that was developed under the Hague Conventions. It is first and foremost left to the parties (nations) to handle their disputes in a manner they see fit; if this informal process should prove unfruitful, the Security Council may “call upon” (i.e. encourage) the states to resort to a number of enumerated pacific means of dispute settlement, including inquiry.

Clearly, the understanding of inquiries in this instance relates to disputes as between nations that, should they be exacerbated, threaten international peace and security. More specifically, however, Christian Tomuschat, writing in Bruno Simma’s authoritative treatise on the drafting of the UN Charter, has noted that:

\begin{quote}
[although Art. 33(1) does not explicitly require a dispute to have an international character, in contrast to Art. 2(3) [of the UN Charter], there can be no doubt that purely domestic disputes are to be excluded...On the other hand, it is evident that any dispute which endangers international peace and security extends beyond the purely domestic dimension.\textsuperscript{119}
\end{quote}

The latter sentence seems to reflect the interpretation of domestic human rights abuses taken by the Security Council; that is, at some unspecified point\textsuperscript{120} a domestic dispute may rise to the level of a threat to international peace and security and thus Security Council intervention can be justified.

Seen with the benefit of hindsight, the UN Charter’s greater innovation with respect to fact-finding is found in Article 34, which provides that should the parties fail to take sufficient initiative in resolving their dispute, the Security Council may essentially step-in and take affirmative steps to resolve the situation. Article 34 states: “The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the

\textsuperscript{118} UN Charter, supra note 16 at Article 33.


\textsuperscript{120} Tomuschat in \textit{ibid} states that, “danger to international peace and security must be interpreted in accordance with Arts. 24 and 39. Thus, the scope and meaning of Art. 33(1) depends to a great extent on the interpretation given to those two provisions in the practice of the SC.” See \textit{ibid} at 586, para 12.
continuance of the dispute or situation is likely to endanger the maintenance of
international peace and security.”

We have here for the first time the real possibility that a fact-finding inquiry might
be initiated by someone other than the parties to the dispute and that it might continue
without the consent or cooperation of one or both of the parties. This is made clear in
Articles 35(1) and 37 of the Charter. Article 35(1) provides: “Any Member of the United
Nations may bring any dispute, or any situation of the nature referred to in Article 34, to
the attention of the Security Council or of the General Assembly.”

121 In other words, virtually any nation in the world may now bring a dispute to the attention of the UN Security Council – or UN General Assembly – which can then take steps to “determine” whether its “continuance” is likely to “endanger international peace and security.”

Article 37 then provides:

1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.
2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

So, taken together any country may refer a dispute to the Security Council, which can then recommend any terms of settlement, or take action to determine whether the dispute might lead to a breach of international peace or security. As we saw, for the Security Council to make such a determination, it must have the relevant facts, and fact-finding by way of inquiry is one method to help the Council gather the necessary information. None of this action is, however, found under “Chapter VII” of the UN Charter, and therefore it cannot be coercive, i.e. it remains restricted, as we saw, by Article 2(7).

But Article 39 also allows the Security Council to order an investigation. So the UN Security Council itself is not limited to acquiring information under Article 34 but

121 Article 35(2) of the UN Charter, supra note 16, provides that a non-UN member might also bring a dispute to the attention of the UN Security Council or UN General Assembly if it is a party to the dispute: “A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.”
may, for example, request the Secretary-General to do so under the auspices of Article 98, his “good offices.”

Article 39, part of Chapter VII of the UN Charter – the Chapter which gives the Security Council its coercive or “mandatory” powers – states: “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” So, again it is clear that the Security Council is to determine the “existence of any threat to the peace” or “breach of the peace”. Once a threat to peace has been determined, the Security Council may order a COI or, for example, order the Secretary-General to establish a COI. Once an inquiry has completed its task and reported to the Security Council, the Security Council may then takes measures under its Chapter VII powers. Historically, such measures have included travel bans, asset freezes, and trade sanctions, as but some examples.

Moreover, the terms “international friction” in Article 34 or “likely to endanger the maintenance of international peace and security”, or “threat to the peace” in Article 39 are generally no longer interpreted to refer only to disputes as between two nations. Today, “threats to international peace and security”, particularly as envisaged under Article 39 of the UN Charter, might include internal disputes or armed conflicts.

In any event, the Security Council does not generally specify what Articles provide its authority for COIs, at least publicly. Indeed, many recent Security Council requests for investigations would not appear to fall under Article 33 or 34, but rather obscurely somewhere under Chapter VII as they tend to involve the use of Chapter VII powers. Nevertheless, it is arguably the case that two UN Charter innovations, the first being that COIs might operate without the consent of the relevant state party and the second being that they might operate where an internal armed conflict or domestic

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122 Simma, The Charter of the UN, supra note 119 at page 599, para 12.
123 Whether the same can be said for decisions made under Chapter VI of the Charter, which includes Articles 33-37, has been a matter of debate within the UN Security Council. See generally Shore, supra note 65 at 98-100.
124 Article 39 of the UN Charter, supra note 16, states: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”
125 Simma, The Charter of the UN, supra note 119 at Article 34, page 607, para 40.
human rights abuses has or is taking place, help to account for many of the modern successes in large-scale, ad hoc UN COIs. Alternative, as we shall see, these innovations have also seemingly exacerbated one large problem in inquiries with respect to the collection of information. When inquiries are imposed and cooperation of a relevant state is absent, access to territory or government documents can be fatally limited.

2.4.3 The Legal Justification for UN General Assembly Fact-Finding

Particularly due to the early use (or abuse) of the veto power within the Security Council, the General Assembly has had to resort on numerous occasions to investigations in the interest of maintaining peace and security, often interpreted broadly.126 This was particularly the case before the end of the Cold War. Authority for the General Assembly to conduct COIs is said to be found, implicitly, in Articles 10, 11, 13, 14 and 22 of the UN Charter.127

At the General Assembly’s second session, the United States proposed an “Interim Committee” of the General Assembly be established, the purpose of which was to assist the General Assembly in the discharge of its responsibilities related to international peace and security (Articles 11 and 35), and Articles 13 and 14.128 The Interim Committee was authorized to appoint COIs and conduct investigations by General Assembly Resolution III(II), para. 2(e).129 If the COI was to take place outside the UN Headquarters, the territorial state(s) would be required to consent.130 No action was taken, however, under the Interim Committee.

Due again to the use of the veto in the Security Council, and the Council’s ineffectiveness in early years, the UN General Assembly adopted the famous “Uniting

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126 For an overview of the UN Charter as it applies to the General Assembly, see Firmage, supra note 96 at 437-8.
127 See generally Shore, supra note 65 at 93.
128 See UNGA Res 111(II), UNGAOR, UN Doc A/AC/1/SR74 (13 November 1947), which established the interim Committee as a subsidiary organ of the General Assembly in accordance with Article 22 of the UN Charter. See generally Report of the Secretary-General on methods of fact-finding, supra note 64 at paras 153-5, page 25; Shore, supra note 65 at 93-4.
129 See UNGA Res 111(II), ibid; See also Report of the Secretary-General on methods of fact-finding, ibid at para 153, page 25. Two-thirds majority voting, of those present, was required for such tasks to be undertaken.
130 Ibid. See generally Shore, supra note 65 at 93-4.
for Peace” Resolution 377 (V). Most salient in this resolution for our purposes is paragraph 3, which establishes “a Peace Observation Commission...which could observe and report on the situation in any area where there exists international tension, the continuance of which is likely to endanger the maintenance of international peace and security.” The Commission would again be limited to situations where there existed an express “invitation or...consent of the State into whose territory the Commission would go.” The Commission was also given “discretion to appoint sub-commissions”, with a view toward inquiries. So, for example, UN General Assembly Resolution 508(B(VI) of 7 December 1951 established a Balkan Sub-Commission under the Peace Observation Commission, which led to military observers being stationed in Greece who reported on frontier incidents.

A commission was established in 1952 by the General Assembly to consider Apartheid South Africa. The terms of reference requested that a study be made of the “racial situation in the Union of South Africa in the light of the Purposes and Principles of the Charter, with due regard to the provision of Article 2, paragraph 7 [as well as articles 1(2)(3), 13, para. 16(b), articles 55(c), 56, and various resolutions on racial discrimination].” South Africa objected to the COI, arguing that fact-finding with respect to questions of internal national sovereignty violated Article 2(7) of the UN Charter.

In response, the COI noted in its report that the UN General Assembly, assisted by the commissions which it establishes and authorizes, is permitted by the Charter to undertake any studies and make any recommendations to Member States which it may deem necessary in connexion with the application and implementation of the principles to which the Member States have subscribed by signing the Charter. That universal right of study and

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131 *Uniting for Peace*, UNGA Res 377 (V), UNGAOR, Resolution A, Fifth Sess, Agenda Item 68 (3 November 1950) at para 1 resolves: “that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security...the General Assembly shall consider the matter immediately....” Available online at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/377(V)&Lang=E&Area=RESOLUTION
135 The Peace Observation Commission considered such reports until 1955, when the Balkan Sub-Commission was discontinued. See *Report of the Secretary-General on methods of fact-finding*, supra note 64 at para 159, page 27.
recommendation is absolutely incontestable with regard to general problems of human rights and particularly of those protecting against discrimination for reasons of race, sex, language or religion. The exercise of the functions and powers conferred on the Assembly and its subsidiary organs by the Charter does not constitute an intervention prohibited by Article 2(7) of the Charter. The Commission is convinced that this interpretation, which it believes to be legally correct and which has been confirmed by the invariable practice of the General Assembly, also serves the cause of peace and the legitimate aspirations of mankind. The study which it has carried out has enabled it to appreciate the serious dangers of a problem such as this, not only to the social equilibrium of the countries concerned, but also friendship and peace among nations. The Commission therefore considers that in such cases the Assembly is not merely exercising a right, but actually fulfilling a duty in using its functions and powers under the Charter.  

The final report held that the apartheid policy contradicted the UN Charter; it did indeed deal, in other words, with the internal politics of the state.

### 2.4.4 The Legal Justification for Fact-Finding by the Commission on Human Rights (now the Human Rights Council)

According to UN Charter Articles 61 and 62, the primary responsibility for the promotion of *human rights* falls to the General Assembly and, more particularly, the Economic and Social Council (ECOSOC) under the auspices of the General Assembly. A subsidiary organ of ECOSOC, the Commission on Human Rights (established in 1946 and became the Human Rights Council in 2006, and operates as a “functional commission” under Article 68 of the Charter) is responsible for ECOSOC’s substantive work. So, theoretically the substantive work of the General Assembly with regard to the promotion of human rights was to be conducted by the (now) Human Rights Council.

It was not always clear, however, that functional commissions within the UN, those assigned to discrete, functional tasks like human rights monitoring and enforcement, were entitled to constitute *ad hoc* COIs or other fact-finding missions, which were to undertake “concrete investigations.” As a result, Philip Alston has stated that: “Although the terms of reference adopted for the Commission in 1946 included a general mandate to address any human rights matter, it spend most of its

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139 Ibid at 118.
first 20 years engaged almost exclusively in standard-setting." This behaviour was called the Commission's "no power to act doctrine", whereby it justified its inaction by asserting that it lacked the power to act.

But things changed in 1967, when the ECOSOC resolution 1235 (XLII) was passed. Resolution 1235 (XLII) empowered the Commission on Human Rights to "make a thorough study of situations which reveal a consistent pattern of violations of human rights." Under this procedure, the Commission could review country-specific human rights situations and, where they deemed it appropriate, table draft resolutions in order to ensure that the Commission remained seized of the situation. They could of course also terminate consideration of the situation.

The Commission could also create special mechanisms to consider the matter. Indeed, the practice that developed post-1967 has been to authorize functional commissions such as the Human Rights Council to establish COIs so long as such undertakings are approved by its parent body. This has resulted in the creation of the UN Special Rapporteur system. However, it also allows for the appointment of a Special Representative or Independent Expert, who reports to the Commission or possibly to the General Assembly. Generally, their task is to gather information on

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144 For a good overview of the 1235 procedure see *ibid* at 155-73.
145 ESC Res 1235 (XLII), UN ESCOR, 42nd Sess, Supp No 1 UN Doc E/4393 (1967) at 17.
147
148 Note also that ECOSOC Resolution 1503 (XLVIII) instituted a procedure whereby the (then) Commission on Human Rights was given the power (or mandate) to constitute *ad hoc* COIs to investigate mass or flagrant violations of human rights (see ECOSOC Res 1503 (XLVIII) 48 U.N. ESCOR (No. 1A) at 8, U.N. Doc. E/4832/Add.1 (1970)). See also Ermacora, *supra* note 141 at chapter IV, page 86-7. However, such investigations would only take place if a sub-Commission within the Commission on Human Rights first received a “communication” (state complaint) about another state, noted a trend or “consistent pattern” of ongoing violations, and passed it up through the bureaucracy, where eventually the Commission might make the decision that an investigation should take place, but only with the “express consent of the State concerned.” No such COI was constituted. See Professor Roger S. Clark, “Legal Representation”, in Ramcharan, *International Law and Fact-Finding*, *supra* note 76 at chapter VI, page 117. See also Kedzia, *supra* note 146 at chapter 1, page 71.
150 See generally Kedzia, *ibid* at chapter 1, pages 66-7.
states’ implementation or conformity with international human rights norms. The Ad-hoc Working Group of Experts on Human Rights in Southern Africa, which was to investigate cases of torture and ill-treatment of prisoners taking place in Apartheid South Africa, was the first such procedure.  

In 1990, ECOSOC Resolution 1990/48 recognized the need for the Commission on Human Rights to react promptly to emergency situations, rather than in six week sessions once per year, as was generally the practice. As a result, the Commission was given the opportunity to hold “special sessions” in emergency situations, which at the beginning generally resulted in an ad hoc COI or a Special Rapporteur being appointed to look into a particular emergency situation. Eventually, Resolution 1990/48 led to the creation of COIs related to East Timor and the Palestinian situation, and investigations in the former Yugoslavia and Rwanda; in other words, the creation of this system led directly to the increased use of large-scale, ad hoc COIs to investigate serious human rights abuses within the UN system.

In 2006, when the Human Rights Council came into existence after a reform of the Commission on Human Rights, Article 10 of the General Assembly Resolution explicitly continued the special emergency session practice, though procedurally it now only requires the submission of a request for a special session by one member (or

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151 See Report of the Commission on Human Rights, 23rd sess (1967), ESCOR, 42nd sess (1967), Suppl 6. Philip Alston has stated that this Working Group ushered in a “new era” after the passing of the 1235 procedure. See Alston, A Critical Appraisal, supra note 109 at 156. For an overview of the inquiry, see Bar-Yaakov, supra note 65 at 276-83. However, one the most famous situations, because it was not a situation at the time with “strong international overtones – unlike Southern Africa or the Palestinian Occupied Territories” was the 1975 investigation of the Pinochet regime in Chile. See Jernow, supra note 149 at 789-90. See also Hoehne, supra note 18. See generally UNCHR Res 8 (XXI), CHROR, 58th Sess, Supp.No. 4, UN Doc E/CN.4/1179 (1975) at 66-7. See also Telegram from the Chairman of the UN Commission on Human Rights to the Government of Chile, Report of the Commission on Human Rights, 30th Sess, 56 UN ESCOR Supp (No 5) 56, UN Doc E/5464, E/CN.4/1154 (1974). The establishment of the COI took place later: see also Commission Res 8 (XXXI), Report of the Commission on Human Rights on its Thirty-First Session, 58 UN ESCOR Supp No. 4, UN Doc E/5635 (1975), see particularly at 66. In 1979 the Working Group was replaced by a Special Rapporteur, a post that continued until 1990 when a democratically elected government took power in Chile. See CHR Res 11 (XXXV), CHROR, Supp No 6, UN Doc E/CN.4/1347 (1979) at 115-117. The first thematic special procedure – as opposed to geographic Rapporteurs – that resulted (unintentionally) from Resolution 1235 was the Working Group on Enforced or Involuntary Disappearances, constituted in 1980.


153 So, in 1992 the first emergency sessions took place in 1992, where Special Rapporteurs were appointed to lead investigations into the former Yugoslavia; a Special Rapporteur was again appointed in 1994 to consider the situation in Rwanda. Such sessions could be convened provided a member (or members) of the Commission submitted a request that was ratified by a minimum of half the members.

154 See Kedzia, supra note 146 at chapter 1, page 17.
more) along with the endorsement of one third of the Council’s membership, as opposed to a minimum of one-half of the Commission’s membership.\textsuperscript{155}

2.4.5 The Legal Justification for UN Secretary-General Fact-Finding

The Secretary-General is today a central figure in the creation and implementation of large-scale, \textit{ad hoc} UN COIs.\textsuperscript{156} Though as with the Security Council the Secretary-General rarely explicitly notes the source of his powers to initiate a COI other documents have, over the years, noted that investigative powers stem from the Secretary-General’s “good offices”. Articles 98 and 99 of the UN Charter vest with the Secretary-General the powers relevant to his “good offices”. Article 99 states: “The Secretary-General may bring to the attention of the Security Council any matter which, in his opinion, may threaten the maintenance of international peace and security.”\textsuperscript{157}

Often the exercise of the powers of “good offices” will be accomplished through the designation of a special representative or representatives who may then lead an inquiry.\textsuperscript{158} The Security Council, General Assembly or (now) Human Rights Council may also request the Secretary-General to obtain the information necessary for the requesting body to make its decisions.

\textsuperscript{155} See UNGA Res A/RES/60/251, UNGAOR, 60\textsuperscript{th} Sess, Agenda Items 46 and 120 (3 April 2006), online: http://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf. Article 10 states: “Decides further that the Council shall meet regularly throughout the year and schedule no fewer than three sessions per year, including a main session, for a total duration of no less than ten weeks, \textit{and shall be able to hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council…..}” [Emphasis added.]


\textsuperscript{157} The powers to exercise “good offices” in order to conduct an inquiry or fact-finding are also sometimes claimed to stem from other sources. So, for example, the Secretary-General may receive a specific mandate, say from the Security Council or Human Rights Council, to inquire into certain human rights abuses. Alternatively, “the doctrine of inherent or implied competence has frequently been invoked as a basis for the exercise of good offices. Indeed, the practice is so extensive that it may be said that the competence of the Secretary-General has solidified into a rule of customary law within the United Nations.” See Ramcharan, \textit{Good Offices}, supra note 156 at 54.

\textsuperscript{158} See generally Ramcharan, \textit{ibid}. For a discussion of the Secretary-General’s exercise of his good offices in the early years of the UN (the 1940s-early 1960s) see Shore, \textit{supra} note 65 at 95-100.
2.5 Early Fact-Finding in the UN System: A synthesis of the practice and procedure from 1945-1979

The focus of this inquiry, as will be recalled, is on fact-finding by the Secretary-General, Security Council, the General Assembly and Human Rights Council (formerly Commission). And regardless of which of these four constituting organs we are speaking, UN fact-finding by way of commissions initially pertained primarily to a few broad issues including: border disputes; military observation; election-monitoring; in relation to non-self-governing nations, often in terms of their break-up, i.e. borders or self-determination or election monitoring; or to a more limited extent, at least until about 1975, human rights monitoring. Throughout the history of the UN, COIs have also been charged with investigating prominent political assassinations and their surrounding circumstances.

The mandates (or terms of reference) constituting such COIs have not always been as impartial or clear as one might hope; indeed, UN COI mandates have since the beginning occasionally suffered from bias, and other times from over-breadth.

159 In the early years, much fact-finding was also done by the Trusteeship council, which exercised a supervisory role over Trust Territories. See generally Ramcharan, *International Law and Fact-Finding, supra* note 76 at 13-4.

160 For the example of the observation mission in Yemen, see: *Report of the Secretary-General on methods of fact-finding, supra* note 64 at paras 307-312, pages 42-43.

161 See generally Shore, *supra* note 65 at 59.

162 As Frowein and Krisch have noted in Simma, *The Charter of the UN, supra* note 11, Article 39, page 724, para 19: “[a]lthough already at the San Francisco Conference some States had considered [violations of human rights and humanitarian law] as possible threats to the peace [under Chapter VII of the UN Charter], most commentators in the early years objected to this view. They invoked the internal character of the respective situations and the distribution of powers within the UN, which assigned the implementation of human rights to the GA and ECOSOC, but not to the SC.” At the same time, as was true in 1952 and 1962 with respect to Working Groups on South Africa, states also objected to the General Assembly dealing with “sovereign” matters internal to nations.

163 See for example the death of Mr. Lumumba and other Congolese leaders, UN General Assembly Resolution 1601 (XV) (15 April 1961) established the COI, and it’s report can be found at: UNSCOR, Sixteenth Year, Supplement for October, November and December 1961, UN Doc A/4964, S/4976 (11 November 1961). This was particularly interesting because the terms of reference asked the COI to ascertain the facts surrounding the circumstances preceding the death of the individuals “and to fix responsibility thereof”. (See UNSCOR, Sixteenth year, Supplement for January, February and March 1961, UN Docs S/4771 and Add. 1-3 (1961).) As a result, the COI expressed the hope that its investigation might lead to further investigations (criminal) and furnish the basis for future legal proceedings. See also the assassination of the Prime Minister of Burundi in 1961, UNGAOR, UNGA Res 1627 (XVI), 16th Session, UN Doc A/5086 (23 October 1961); the death of then-UN Secretary-General Dag Hammarskjold, UNGA Res 1628 (XVI), UNGAOR, 17th Sess, Annexes, agenda item 22, UN Doc A/6069 and Add. 1 (24 April 1962).

164 For a more thorough discussion of these problems in the early years, see for example Bar-Yaacov, *supra* note 65 at 292-293, who makes a similar argument. See also Bailey, *supra* note 61 at p. 261; Theodoor van Boven, “Fact-Finding in the Field of Human Rights” (1973) 3 Israeli YB on Human Rights 93 at 110.
So, for example, UN General Assembly Resolution 2443 (XXIII) of 1968 established the Special Committee to Investigate Israeli Practices Related Affecting the Human Rights of the Population of the Occupied Territories.\textsuperscript{165} The mandate was to “investigate Israeli practices affecting the human rights of the population of the occupied territories”.\textsuperscript{166} Although the operative paragraphs of the resolution merely “[d]ecides to establish [the Special Committee]” composed of three Member States, and gave instructions to the Secretary-General,\textsuperscript{167} it opened by “[e]xpress[ing] its grave concern at the violation of human rights in Arab territories occupied by Israel…”\textsuperscript{168} As a result, as has since become common with UN COIs, the impugned state – in this case Israel – argued that: “[t]he history of this matter has from the beginning been tainted with political bias and procedural irregularity.”\textsuperscript{169} Resolution 2443, that which established the Special Committee, was seen by Israel to be “unbalanced” and “discriminatory”.\textsuperscript{170} Moreover, Israel noted that it lacked “moral legitimacy” because, as a result of its focus and language, it only garnered a minority of votes, predominantly from Arab and pro-Arab states.\textsuperscript{171} Likewise, the composition of the Committee was denounced as biased: Representatives were appointed only from the states Ceylon, now Sri Lanka, who at the time had limited diplomatic relations with Israel and tended to vote in favour of the Arab block at the UN, Yugoslavia, who broke off diplomatic relations with Israel, and Somalia, who refused to recognize Israel as a State.\textsuperscript{172}

Such claims of bias were hardly novel with respect to UN COIs – and claims of bias were not always levelled against the COI by partisans to a particular dispute. As a prominent commentator on early UN COIs and fact-finding noted:

\begin{quote}
[t]he detached objectivity and balance that one customarily expects in a judicial enquiry is…not present when the composition of the fact-finding missions is examined. The members, although experts in their own right and drawn from the major political regions of the world have
\end{quote}

\begin{flushright}
\textsuperscript{165} UNGA Res 2443, UNGAOR (19 Dec 1968) \cite{UNGA Res 2443}. See also UNGA Res 2546 (XXIV), UNGAOR (11 December 1969).
\textsuperscript{166} See Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, UN Doc A/8089 (5 October 1970) at para 33 \cite{UN Doc A/8089}.
\textsuperscript{167} UNGA Res 2443, supra note 165 para 1.
\textsuperscript{168} Ibid at para (a).
\textsuperscript{169} See UN Doc A/8089, supra note 166 at para. 11.
\textsuperscript{170} Ibid at para 11.
\textsuperscript{171} Ibid.
\textsuperscript{172} See Bar-Yaakov, supra note 65 at 285.
\end{flushright}
been, generally, neither independent of their Governments nor impartial to the governments whose policies they investigated.\textsuperscript{173}

The result of the lack of impartiality or perceived impartiality of COI mandates or composition has consistently been to distract from the discussion of the substantive issues at hand and instead lead to vitriolic debates about politics and process. Such distractions can legitimately move the discussion away from the issue at hand as biased findings – or even those perceived to be biased – do not make for a good foundation for subsequent decision-making. Israel has noted, for example in response to the 1968 COI, that:

\begin{quote}
[i]f the United Nations desires to investigate the alleged ‘practices’ of a Member State, such a function can properly be exercised only under conditions that ensure complete objectivity, and the maintenance of quasi-judicial standards. United Nations fact-finding that does not satisfy such standards is a worthless exercise, that simply converts the Organization itself into a vehicle for propaganda and political warfare.\textsuperscript{175}
\end{quote}

Perhaps it is unfair to use the Israel-Palestine issue as an example of biased COIs, for it has certainly been a controversial and seemingly intractable problem in all respects, one perhaps unlike any other throughout the history of the UN. Nevertheless, the issue of bias continues to crop-up with respect to UN COIs.

Indeed, it has not just been a question of the language of the mandate and choice of commissioners that have attracted criticism and claims of bias. The language of COI reports has not always been as “detached” or consistent as many observers would like.\textsuperscript{176} Moreover, the choice of when and where to have COIs has likewise attracted similar claims.\textsuperscript{177} Undoubtedly, the context within which UN COIs operate has always been highly politicized, and the creation of such COIs is the result of high-level political decisions. As a result, it can be hard to determine whether a heavy focus on a particular dispute or nation/region is warranted – a particular country always at war

\textsuperscript{174} See also Ramcharan, International Law and Fact-Finding, supra note 76 at 8: “fact-finding in the field of human rights should normally follow a quasi-judicial approach. Ramcharan refers to an ILO report that likewise notes that ILO “commissions of inquiry are essentially of a judicial nature…. “, ibid at 8 referring to ILO Doc. GB.205/21/7, para 14.
\textsuperscript{175} UN Doc A/8089, supra note 166 at para 11.
\textsuperscript{176} Bailey, supra note 61 at 258 has noted that some UN reports, “were not in general dressed up in the restrained language of traditional diplomacy, and the reader cannot feel confident that a complete and balanced picture has been presented.”
\textsuperscript{177} For an analysis of this assertion, see van Boven, supra note 164 at 101-3.
might warrant the increased focus – or whether the heavy focus on a country or region is the result of discrimination.

With this in mind, it might come as little surprise that over the first twenty years at least there was a tendency to focus heavily on Africa, non-self-governing territories, and Israel-Palestine, though obviously African nations are also included as among the non-self-governing territories. However, the type of human right(s) violations considered, how such violations are viewed, as well as the focus of the corollary recommendations of UN COIs, has changed between the initial UN COI missions and now. So, initially the overwhelming focus was the threat of border or state-to-state disputes, rather than a concern with the internal human rights context of a nation, though this started to change as fact-finding at the UN progressed through the late 1960s and 1970s.

Regardless of their geographic or topical focus, COI reports generally publish their final reports, or make them available through the UN, and include recommendations that flow from the facts found, though this has not been universally the case. The COI recommendations could be quite extensive or minimal, but they tended to be state-centric. Even in the examples of “human rights fact-finding”, the idea of fact-finding was not to “adjudicate” or “condemn” or focus primarily on

178 Likely the first such commission came about by request of the United Kingdom on 2 April 1947 for a special session of the UN General Assembly so that a special committee could be arranged to consider the question of Palestine. See UN Doc A/286 (2 April 1947). At the special session, UNGA Res 106(S-1), UNGAOR, UN Doc A/307 (15 May 1947), online http://www.un.org/ga/search/view_doc.asp?symbol=A/310&Lang=E. At roughly the same time – 23 April 1948 – the Security Council had also created a Truce Commission for the dispute: see UNSC Res 48.S/747, UNSCOR (23 April 1948). At the conclusion of the 1948 war between Israel, Syria, Jordan (then Transjordan), Lebanon and Egypt, Mixed Armistice Commissions were also established to investigate various complaints arising out of the conflict. See also resolution adopted at the UN General Assembly special session requested to be convened by the Security Council, online: http://www.un.org/ga/search/view_doc.asp?symbol=A/555&Lang=E. See generally Report of the Secretary-General on methods of fact-finding, supra note 64 at paras 160-65, pages 27-28; Shore, supra note 65 at 57.

179 See van Boven, supra note 164 at 116: “It is no doubt true that the active and close concern of the United Nations for human rights and fundamental freedoms is almost exclusively concentrated on Southern Africa and the Middle East; the prevailing political climate in the United Nations is certainly the reason for this.” See also Bar-Yaacov, supra note 65 at 273, 275 and 292.

180 As we shall see, more recently mass human rights and humanitarian abuses have been the focus of UN COIs and their solutions have tended toward methods of holding individual perpetrators accountable and reforming judicial and security apparatuses.

181 See for example the Greek Frontiers Incident, which was “invited to make any proposals that it may deem wise for averting a repetition of border violations and disturbances.” Report of the Secretary-General on methods of fact-finding, supra note 64 at para 252, page 37.
individuals. Rather, the focus of COIs was state-to-state disputes in the first place, and the recommendations tended also to focus on state actions, whether those be to restore peace and security or state-level methods to improve human rights.

2.5.1 UN COI Rules of Procedure: The early years

In the early years of UN COIs, it tended to be the case that COIs adopted their own rules of procedure and research methodologies – they were neither dictated by COI mandates nor by binding documents on UN COIs – and such rules were rarely written or made public. Professor Ermacora, noted in 1968 that: “[l]acking such rules of procedure, ad hoc investigation committees resemble bodies occupied with gathering the materials which may be helpful to support some sort of prosecution of a sovereign State: that is to say, to support the preconceived assumptions of the organization as regards the facts.”

The results – and perception of the results – have tended to be better for those COIs that have written and followed relatively extensive rules of procedure. So, for example, the question of violations of human rights in Vietnam (as between the Diem government and its Buddhist communities) was brought to the attention of the General Assembly in 1963, which formed a COI to consider the situation. This particular COI has since been considered an “important precedent” because it “published the rules of procedure by which it operated,” but also because it dealt with the internal issue of

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182 See Ramcharan, International Law and Fact-Finding, supra note 76 at 6.
183 As a good example of the “systemic” recommendations offered by COIs, see the UN Special Committee on Palestine, Final Report, UN Doc A/364 (3 September 1947), online: http://unispal.un.org/unispal.nsf/0/07175de9fa2de563852568d3006e10f3. The recommendation (partition with economic union) was then adopted by an Ad Hoc Committee, which then recommended it to the UN General Assembly. The General Assembly subsequently adopted the Ad Hoc Committee’s report (or plan) by way of resolution 181(II), UNGAOR, UN Doc A/516 (25 November 1947). And, in so doing, the General Assembly formed another committee entitled the “United Nations Palestine Commission”, which was tasked with implementing the partition-with-economic-union recommendation (see Shore, supra note 65 at 58).
184 So for example, the sub-committee on the Spanish Question adopted its own rules of procedure. See Report of the Secretary-General on methods of fact-finding, supra note 64 at para 246, page 27. See also the 1947 Special Committee for Palestine, discussed in: ibid at para 154, pages 27-28.
185 This was true for the Greek Frontiers Incident. See ibid at para 255, page 37. See also KT Samson, “Procedural Law,” in Ramcharan, International Law and Fact-Finding, supra note 76 at 47.
186 Ermacora, supra note 141 at 205.
188 Bailey, supra note 61 at 264. For a brief discussion of these rules see Kaufman, supra note 111 at 753-5.
religious discrimination and was thus relatively unique – at this point – in UN COI history. But to the point about publishing its rules of procedure, it was not just that it published its rules, but that these rules were said to represent various emerging, de facto principles from the practice of ad hoc UN COIs – they were, relative even to the rules other UN COIs had written, fairly extensive. According to Thomas Franck, the rules of procedure adopted by the COI “continue[d] to be a useful guide” into the 1980s. And, according to professor Roger S. Clark, the rules of procedure “influenced the efforts in the Commission on Human Rights to draft model rules [Model Rules] of procedure for fact-finding Missions”.

Examples of the significant procedures drafted by the COI included the following: voting procedures were determined for the making of decisions, it insisted on striving for “impartiality at all times”, and it self-limited with regard to the scope of its mandate. The rules also spoke to the COIs methods of operation, particularly how it would collect information, that it was to conduct on-the-spot investigations, that it would receive petitions from individuals, groups and associations, and that hearings would take place in a private session where it would hear witnesses who had taken an oath to be truthful. With regard to witnesses, they were all asked to identify themselves. The purpose of the Mission was explained to them. They were told that they were considered to be under oath and that anything they said would be completely confidential. No Vietnamese officials were present during interviews with witnesses. The Mission considered only precise charges and not general expressions of political opinion.

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189 In rule 12 of its Rules of Procedure, which the commission adopted for itself, its Terms of Reference were formulated in the following terms: “The Mission is an ad hoc fact-finding body and has been established to ascertain the facts of the situation as regards the alleged violations of human rights by the Republic of Vietnam in its relations with the Buddhist community of that country.” See Report of the Secretary-General on methods of fact-finding, supra note 64 at para 236, page 36; Ramcharan, International Law and Fact-Finding, supra note 76 at 6 referring to rule 12 of its Rules of Procedure.
190 Kaufman, supra note 11 at 753.
192 See generally Frank and Fairley, ibid at 319; see also Ermacora, ibid at 122; Bailey, supra note 65 at 265.
193 Roger S Clark, “Legal Representation”, in Ramcharan, International Law and Fact-Finding, supra note 76 at 122.
195 Bailey, supra note 61 at 259.
However, despite the extensiveness of these rules and the fact that they were subsequently lauded internationally, for the most part ad hoc COIs continued thereafter to operate with ad hoc procedures – i.e. the rules and ideas enunciated by the Vietnamese COI were not formalized.\(^{197}\)

In the conduct of fact gathering, it was initially more common for UN COIs to rely exclusively or heavily on the facts provided by governments and international agencies,\(^{198}\) rather than to conduct extensive site-visits or on-the-spot investigations that included witness interviews, though witness and victim interviews, and in particular limited site-visits did certainly take place and are considered part of UN COI conduct. One reason for COIs to focus on government or third-party documents and assertions, in addition to dealing regularly with state-to-state disputes, was – and remains – the perpetual problem of gaining territorial access to conduct site visits when mandated.\(^{199}\) Nations have been loath to allow territorial access to commissions investigating their conduct, particularly where the conduct tends to involve “internal” practices as opposed to information regarding a dispute as between two nations brought about by a particular, singular event – like the sinking of a ship. This lack of territorial and documentary access has only reinforced a problem with regard to impartiality, as Thomas Franck and F. Scott Fairly noted in their 1980 review of UN COIs: “the states charged with human rights violations are not anxious to accommodate such an enterprise, and their noncooperation, in turn, reinforces the partiality of the investigation.”\(^{200}\)

\(^{197}\) See generally Frank and Fairley, supra note 191 at 753-5.

\(^{198}\) See the discussion of the sub-committee on the Spanish Question, Report of the Secretary-General on methods of fact-finding, supra note 64 at para 247, page 33; see also, Shore, supra note 65 at 50-1. With regard to the Question of Angola see Report of the Secretary-General on methods of fact-finding, ibid at para 212, page 33. For a copy of the report on Angola and the repression it faced at the hands of Portugal (its colonial master), see Report of the Sub-Committee on the Situation in Angola, UN Doc A/4978 (20 November 1961); and, UN Doc A/5286 (8 November 1962).

\(^{199}\) Bailey, supra note 61 at 260. Bailey (at 260) stated in 1972 that: “The first and obvious conclusion to be drawn from the experience of the United Nations so far is that states have been, are, and will continue to be, reluctant to admit UN observers to enquire into alleged breaches of human rights instruments, since every state considers that the treatment of the residents of territory which it administers is a matter of domestic jurisdiction.” He cites only two “exceptional” examples of the contrary: South West Africa in 1962 and South Vietnam in 1963. He goes on to note: “In the past, most UN investigations of alleged violations of human rights have had to be conducted without access to the territory where the rights were allegedly being violated.” Bailey, ibid at 261.

\(^{200}\) Frank and Fairley, supra note 191 at 318.
Once the investigation process is completed it is pretty clear that, normally, COIs will – or at least should – disclose the charges that they intend to level against governments.\textsuperscript{201} Though certainly an exception should be made for situations where witnesses need to be protected,\textsuperscript{202} neither consistent COI practice nor rules have analyzed how the balancing between the right to know about inculpatory charges and the need for witness protection has or should take place\textsuperscript{203} or upon what principles the analysis of such balancing should rest.

The systematic lack of rules of procedure as well as the inconsistencies in methodological approaches and the continued belief that fact-finding by way of inquiry was an important and effective method of maintaining international peace and security led to the first major UN (Secretary-General’s) \textit{Report of the Secretary-General on Methods of Fact-Finding}, which in turn influenced the writing of the UN’s first set of Model Rules for fact-finding.

\subsection*{2.5.2 The Report of the Secretary-General on Methods of Fact-Finding}

On 16 December 1963, the UN General Assembly issued Resolution 1967 (XVIII) on \textit{Questions of methods of fact-finding}, which provides a good deal of insight into the perceived purpose and benefit of large-scale, \textit{ad hoc} COIs operating within the UN system. In this resolution, the General Assembly first noted that: “in Article 33 of the Charter, inquiry is mentioned as one of the peaceful means by which the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall seek a solution.”\textsuperscript{204} Moreover, it stated:

\begin{quote}
\textit{Believing} that an important contribution to the peaceful settlement of disputes and to the prevention of such disputes could be made by providing for impartial fact-finding within the framework of international organizations and in bilateral and multilateral conventions…\textit{Taking into account} that, with regard to methods of fact-finding in international relations, a considerable practice is available to be studied for the purpose of the progressive development of such methods.\textsuperscript{205} [Emphasis in original.]
\end{quote}

\textsuperscript{201} For a more thorough analysis of this, see B Ramcharan, \textit{Evidence}, in Ramcharan, \textit{International Law and Fact-Finding, supra} note 76 at chapter 3, 73-4.

\textsuperscript{202} \textit{Ibid} at 74.

\textsuperscript{203} UN COIs do occasionally hold in camera hearings, however, in an attempt to balance the security needs of witnesses and the informational needs of the COI.


\textsuperscript{205} \textit{Ibid}. 
The resolution also invited Member States “to submit in writing…any views they may have” on the proposed study of UN fact-finding and requested “the Secretary-General to study the relevant aspects of the problem under consideration and to report on the results of such study to the General Assembly.…”

The subsequent (1965) Report of the Secretary-General on Methods of Fact-Finding contains an extensive history of international COIs from the Hague Conventions to the UN, and offers an overview of the practice at the UN. According to the Secretary-General’s Report, “[t]he subject of this study…is international inquiry as a peaceful means of settling disputes or adjusting situations.” The intention was to provide the background for an analysis of the adequacy of the UN machinery existing at that time for fact-finding and the pacific settlement of disputes.

However, the Report led directly to little in the way of substantive initiatives, with perhaps one exception. In 1962, the Netherlands first proposed centralizing the UN fact-finding system by instituting a standing, permanent organ for fact-finding activities. This proposal was considered, with some support, by the Secretary-General in his 1965 Report. As proposed to the Secretary-General, the standing body would consist of a panel of 15 members, from which a team would be chosen, and would be at the disposal of the UN and its specialized organs.

While some nations supported the Dutch proposal, many did not and in the result virtually nothing came of it, though the proposal continued to hold currency in some quarters. It was ultimately omitted as a proposal in the Secretary-General’s final Report. Thereafter, instead of one standing body, “a plethora of different fact-
finding strategies under the auspices of a variety of different bodies” have been devised.\textsuperscript{213} Flowing from the Secretary-General Report, and referring back to the Study, resolution 2329 (XXII) of 18 December 1967, the General Assembly did request the Secretary-General to prepare a Register of Experts and called on states to consider the use of fact-finding to settle their disputes. However, few panelists were ever registered, and in general this was not considered a useful initiative.

In the end, little was developed as a direct result of the Report – particularly as regards standing rules of procedure. However, the Report did serve to focus attention on UN fact-finding, and certainly promoted the use of COIs as a method to resolve disputes. In this way, even if subsequent events cannot be traced directly to the Secretary-General’s Report, it can be seen as a successful endeavour.

By the late 1960s, perhaps spurred by the Report’s review of UN fact-finding, academics and practitioners were clearly becoming aware of the general lack of rules of procedure by which UN COIs operated. As Stephen Kaufman said in 1968,

\textit{[t]he type of hearings envisaged by the founders of the Ad hoc Working Groups [both regarding Apartheid in South Africa, the first in 1952 and second in 1962] is enumerated in the hearings before the establishment of the first Ad hoc group [1952]. One of the members said “…that in so far as method of procedure was concerned, an analogy could be drawn between the Working Group and a court.” If an investigation is to be conducted along the lines of a judicial hearing, then all the procedural safeguards should be granted. This was not the case! Since the Republic of South Africa did not take part in the proceedings, there was no active defense to the allegations. No one cross-examined the witnesses; there was no one who could show contradictions in the evidence; and there was no one to object to the questions being asked of the witnesses.}\textsuperscript{214} Kaufman saw a need either for cross-examination, or for someone to act as “juge d’instruction,” as in the civil system, or at least to note in the case of the South African COI that many of the witnesses were intent on overthrowing the government.\textsuperscript{215} He notes that, should a nation fail to comply with the UN or cooperate with a COI, the UN should nevertheless “employ counsel for the state being investigated”, which would provide the necessary “impartiality” and a more thorough final report.\textsuperscript{216} One can see that by the late 1960s at least detailed rules of procedure were in demand and UN

\begin{footnotes}
\item[214] Kaufman, \textit{supra} note 111 at 759.
\item[215] \textit{Ibid} at 759-60.
\item[216] \textit{Ibid} at 763.
\end{footnotes}
COIs were being criticized based on their lack of conformity with fair rules and procedures.

Further, we can see that there is already a tension in terms of how “judicial” such COIs should look, how strictly they should abide by open, formal, legal rules of procedure. As we shall see, the concerns regarding the “judicial” nature of COIs becomes more prevalent and more acute beginning in the early 1990s.

In any event, starting in 1968 the UN itself commenced in earnest an attempt to remedy the situation with regard to how UN COIs should operate.

2.5.3 Model Rules of Procedure

The UN declared 1968 to be the “International Human Rights Year,” and organized a twentieth anniversary conference in Tehran that year. Conference participants recommended\(^217\) that “[m]odel rules of procedure for United Nations bodies dealing with violations of human rights” be written by the Commission on Human Rights.\(^218\) Professor Ermacora said that this was, at least in part, “a reaction to the failure of the Ad hoc Working Group on South Africa set up in 1967 to adopt formal rules of procedure.”\(^219\)

Numerous draft rules were authored and rejected\(^220\) before a consensus was reached.\(^221\) This draft was then recommended by the Commission on Human Rights to the ECOSOC of the UN, which, according to Thomas Franck, “gave it a form of endorsement by adopting a resolution that takes note of the working group’s reports

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\(^217\) The Conference recommended to the ECOSOC that it request the Commission on Human Rights to prepare the model rules. The Commission then asked the Secretary-General of the UN to prepare a preliminary draft. See UN Doc E/CN.4/1021, revised as E/CN.4/1021/Rev.1 (1970).


\(^219\) Ermacora, supra note 141 at 125. See also Kaufman, supra note 111.


and brings them to the attention of all organs and bodies within the United Nations system dealing with questions of human rights and fundamental freedoms.\footnote{Frank and Fairly, \textit{supra} note 191 at 320 citing Report of the Social Committee, UN Doc E/5514 (1974) at 24.}

However, the Model Rules contained in the report were not made mandatory and it was the report, and technically not the rules, that was adopted by the ECOSOC.\footnote{Frank and Fairly, \textit{ibid} at 320, referring in part to Commission on Human Rights, Report on its thirtieth session, 56 UN ESCOR, Supp (no. 5) 54, UN Doc E/5464-E/CN.4/1154 (1974) at 35.}

According to commentators, including Roger S. Clark, “[t]he efforts to draft model rules of procedure were largely a failure.”\footnote{Ermacora, \textit{supra} note 141 at 127.}

At the same time, the Model Rules did have an impact on \textit{ad hoc} UN COIs: several COIs otherwise without written rules of procedure claimed to adopt those of the Model Rules.\footnote{Frank and Fairly, \textit{supra} note 191 at 320.}

Thomas Franck offers a good overview of what the Model Rules offered: “that the chairman of each group is to be elected (rule 12), that decisions are to be made by a majority of members present and voting (rule 15), and that each \textit{ad hoc} group shall determine its own agenda (rule 11), place of meeting (rule 7), and whether to meet in open or closed session (rule 9).”\footnote{Frank and Fairly, \textit{ibid} at 320, referring in part to Commission on Human Rights, Report on its thirtieth session, 56 UN ESCOR, Supp (no. 5) 54, UN Doc E/5464-E/CN.4/1154 (1974) at 35.}

The rules also offered a right for the inclusion of dissenting opinions in reports,\footnote{Report of the Working Group under resolutions 14 (XXVII) and 15 (XXIX) of the Commission on Human Rights, UN Doc E/CN.4/1134 (1974), Annex, at rule 20(b).}

an interesting development given that, since this time, this has rarely occurred, at least with regard to large-scale UN COIs.

Nevertheless, the final draft of the Model Rules, unlike the Secretary-General's original version, did not offer a definitive statement about legal representation for parties, potential accused, or witnesses.\footnote{Ermacora, \textit{supra} note 141 at 126, and at fn 106 comparing the draft to the “final” version.}

Franck notes that “[f]or those concerned with credibility and due process in fact-finding, the model rules are not the answer.”\footnote{Frank and Fairly, \textit{supra} note 191 at 320.}

He notes in particular that the rules...fail to address most of the key questions. Who sets the mission’s itinerary? Does the group have the right to hear any witnesses it pleases, including those incarcerated? What
weight is to be given to hearsay evidence? May the mission conduct on-site inspections as of right? Is the accused state entitled to confront its accusers?  

Franck also notes that the Draft Model Rules failed to resolve a central tension in fact-finding between credibility and probity on the one hand and security of victims and witnesses on the other. So, for example, a COI that allows all witnesses and victims to be confronted by the accused – whether it is a state or individual – will, as in a criminal trial, surely increase the *prima facie* probity of the testimony and credibility of the final report. On the other hand, surely in many situations this will risk the security of the individual testifying, or have a chilling effect on witnesses’ willingness to testify before the COI. Courts often struggle with this dilemma, and in the context of criminal law usually have a number of rules and principles, depending on the forum, that allow them to navigate the dilemma. UN COIs have not similarly confronted this problem, even since Franck’s position was first asserted in 1980. Given the UN’s inability to draft with such precision, a related question is: can legislated rules alone capture the nuances necessary to ensure both credibility and probity as well as security of victims and witnesses?

Perhaps part of the dilemma has stemmed from the fact that UN COIs consistently asserted that they were not judicial or even quasi-judicial in nature. As Ramcharan asserted in 1982, this is because UN COIs tend to be inquisitorial rather than adversarial. We might see the difficulty in creating and implementing rules, then, in the following terms. UN COIs did not tend to see themselves as legal, but rather as administrative instruments created in a highly politicized environment to collect data in an effort to provide a non-judicial solution to a highly contextual problem – one that requires a certain freedom in terms of the operations of the fact-finders – all the while working in an effort to avoid military conflict.

At the same time, these *ad hoc* COIs tended to operate as if independence and impartiality from the political dispute was necessary; and, such COIs were legally constituted, often applying international law to the situation, and having often serious legal consequences. The result has been that sometimes witnesses were “cross-examined” by COIs, and other times not; sometimes COIs took steps to publicize their rules and methods of operation; other times they left themselves a certain *marge de

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manoeuvre by limiting the mandatory legal/procedural requirements they might face. The standard of proof for admitting evidence or making out a claim that UN COIs relied on tended to be “on the preponderance of evidence”, or some such wording that implies a standard short of the criminal standard of beyond a reasonable doubt. At the same time, the wording used in UN COI reports tended to imply that the COI had a higher level of confidence in its findings. As we shall see, this continues to be a practice with contemporary ad hoc UN COIs.

In the result, a combination of inconsistent practice, the failure to adopt binding rules or guidelines and to engage deeply and critically with what UN COIs do and how it should be done, have led commentators such as Professor Ermacora in his review of ad hoc COIs before 1980 to the view that,

[i]In general the evaluation of facts done by ad hoc bodies is poor, due to the composition of ad hoc fact-finding bodies, due to the non-judicial procedure often followed by those bodies, and due to the “non-party” system of these bodies. Ad hoc fact-finding bodies in general take note of the information submitted to them without really judging the veracity of the information and therefore the value of the information.  

2.6 Overview of the Broader Trends Affecting UN COIs: 1899-1979

In the early years of UN COIs, but also particularly during the Hague Conventions, there were legitimate disputes as to questions of fact. One state claimed that a ship was sunk in a particular way or that a frontier was breached. The opposing state had some other assertion, perhaps that it was not they who sunk the ship but a third party or rogue wave. The central facts giving rise to the discrete dispute, as between nations, were contested. If the objective facts could only be determined and laid before the parties, the basis for one or more claims would be undermined or buttressed, and the prospects for a solution would become clear. Nation ‘X’ did in fact sink the ship of nation ‘Y’, though it was under the mistaken assumption that it belonged to nation ‘Z’. Restitution should clearly flow to the aggrieved state – the facts

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231 In a review of international fact-finding more broadly, Ramcharan also finds that the burden of proof tends to be “on the preponderance of evidence”, or some such wording. See Ramcharan, Evidence, in Ramcharan, International Law and Fact-Finding, supra note 76 at chapter 3, page 78. With regard to the burden of proof, Ramcharan and has argued for the benefit of a “flexible” approach to the standard and burden of proof. See Ramcharan, ibid at 77-8.

232 Ermacora, supra note 141 at 90.

233 There was also seemingly a tendency to frame various disputes as “Questions” – the “Spanish Question”, for example. Perhaps, during this time, the act of framing every armed conflict as a geographically specific “Question” helped the UN view fact-finding as a reasonably responsive method of impartially observing the “Question” and providing its corollary “Solution”.


demand it – but a relatively low payment might be negotiated because there was no malicious intention on the part of nation ‘X’ (at least toward nation ‘Y’). This final agreement could be accomplished, on the basis of the facts laid before the parties, through conciliation or arbitration as between the states.

Comments submitted by the Government of Sweden in relation to the Report of the Secretary-General on Methods of Fact-Finding help to illustrate this point and, by extension, the purposes which COIs were thought to serve during this period covered by this chapter:

There are several reasons why impartial fact-finding is needed for the prevention and solution of disputes. Unless all the facts of a controversy are available and correctly, assessed, it is very unlikely that a rational solution can be found in any context. Ignorance of facts or a misunderstanding of them is likely to lead to misconceived solutions, if any at all...Another consideration is that controversies are sometimes accompanied and aggravated by an inflamed public opinion, which might be calmed by an authoritative and impartial establishment of facts.234

COIs also tended to be thought of, almost exclusively under the Hague Conventions and then to a lesser though still prevalent extent in the early years of the UN, as a method of intervention as between two nations while a dispute was festering but a conflict (armed or economic) had not yet come to pass. Whether or not this was always the reality, it was nevertheless the general perception. Thus, as we saw, a particular currency attributed to early COIs – from the time of the Hague Conventions to the UN – was their ability to promote a cooling-off period in order to avoid conflict.235 The COI operated after the relevant event, but before the conflict. As the use of COIs and fact-finding under the UN progressed, there was an increasing tendency for the COIs' investigations to take place contemporaneously with what might be defined as the ongoing central conflict – as was done with respect to two Working Groups sent to inquire about Apartheid South Africa236 or Chile under Pinochet in the 1970s for example.

234 Comments received from Governments of Member States, UN Doc A/5725/Add.2 (11 August 1954), Annex to Report of the Secretary-General on methods of fact-finding, supra note 64 at 70 [Comments on Report of the Secretary-General on methods of fact-finding].
235 So for example the Report of the Secretary-General on methods of fact-finding, ibid, at para 375, page 51, in reviewing the traditional purposes of fact-finding and why it remained salient at that time, stated that: “provision should be made for the possibility of a commission having for its purpose, first and above all, the search for, and the publishing of, the truth as to the causes of the incident and as to the materiality of the facts. While such a commission was working to make its report, time was gained, spirits grew calmer and the conflict no longer acute.”
236 See generally ibid at para 187, page 30.
Finally, the early experience of the UN with large-scale, ad hoc COIs evinces the need for a better understanding of the applicable rules, methods and principles related to fact-finding in order to ensure its independence, impartiality, and effectiveness. Both academics and the UN itself have recognized that UN COIs have fallen short in regard to the publication of rules, specificity of their mandates and content and interpretation of their rules of procedure. The Swedish Government forwarded the following comment to the Secretary-General in regard to his Report on Methods of Fact-Finding: “[e]vidently, the prospect of solving controversies, though always chiefly dependent upon the will of the parties to reach a solution, is also linked to the availability of suitable methods and procedures. If such do not exist, they should be devised; if they are antiquated, they should be brought up to date.”237 By the end of the 1970s we can safely say that suitable methods and procedures for UN COIs had not been developed, at least not in a comprehensive and mandatory fashion.

2.7 Conclusion

The history of COIs, their purposes and usages, has consistently demonstrated that they are intended to contribute to the maintenance of international peace and security. However, it is neither axiomatic that the formation and execution of the functions of a COI will lead inexorably to peace, nor is there any physical force inherent in the COI process that could coerce a peace as between warring parties. Instead, what has always been understood, at least to some degree, is that for peace to take hold without force, an understanding of the facts is needed as between the parties and potentially more broadly in the international community. The more objective and impartial the approaches to fact-finding are, the greater the likelihood that it can form the basis for negotiations for a lasting peace.

But the supposition that peace, or an agreed or negotiated settlement, can flow from the discovery of facts – even those impartially and independently discovered – rests upon a fragile assumption that states are reasonable. It treats the promotion of peace like a science. Once impartial (scientific) discovery takes place, the relevant facts become incontrovertible. The delineation of the relevant facts limits the range of

237 Comments on Report of the Secretary-General on methods of fact-finding, supra note 234 at 71.
possible solutions, in that it forces logical solutions to flow from a discrete number of
given facts. Logic and reason must then take hold, and a solution should become
apparent, one that is mediated and limited by the arguments available, given the
agreed upon facts of each particular case. The problem here is twofold. First, people or
nations have often blocked the fact-finding process; many facts are beyond the reach
of COIs because of a lack of territorial access and power to subpoena witnesses or
evidence. Further, nations have not always treated COIs as independent, impartial,
credible, or necessary, and indeed COIs have not always acted in an independent and
impartial manner. This has allowed the investigated nations to dispute the impartiality of
COI findings, thus undermining any future agreement over shared truths – or perhaps
shared mythologies – or impartial facts. Second, even once fact-finding takes place,
people are not always as rational as the COI assumption would hold. Pride and
prejudice continue to be factors, as do ancient beliefs and myths.

But this is not the whole story. Fact-finding does not fully depend on a scientific
understanding of human actions and reactions; it also rests on an understanding that
humans are communicative and can be reasonable. International fact-finding and COIs
have historically understood the collection of data by means of inquiry as being a
method of forming the basis for negotiation or conciliation of a lasting peace based on a
fair, that is, impartial understanding of the situation at hand. In other words, to a large
degree it is dialogue that has always been understood as the precursor to peace. COIs
are simply a method by which to start that dialogue, to bring parties together
subsequent to the release of investigative reports, to build a foundation upon which fair
talks can take place, which then allows the parties to discuss their positions and focus
on a range of possibly solutions. Fact-finding does not necessarily have to provide all of
the impartial facts necessary to lead inexorably to a solution. Instead, UN COIs may be
a justifiable endeavour even if they do no more than “narrow the range of permissible
lies”\(^\text{238}\), counter disinformation, and as was the secondary justification for COIs under
the Hague Conventions, hold “excited and ill-informed public [and we may add official]
opinion…in check.“ As a result, as we shall see, the purpose for UN COIs may again have to be revisited, even while methodological and procedural problems remain.

239 See Shore, supra note 65 at 13 referring to Brown Scott, supra note 64 at 641.)
CHAPTER 3
A HISTORY OF UN COIs: PART II

3.1 Introduction

In the past 30-years the world has seen a massive proliferation of human rights fact-finding missions and truth commissions particularly in the 1980s and early 1990s, followed shortly thereafter by a resurgence in and widespread use of large-scale ad hoc UN COIs starting in the early 1990s and accelerating through the 2000s.\(^{240}\) During this time period, a slew of new institutions for fact-finding were created within the UN, and a different form of fact-finding COI – one that evinces a slightly different set of purposes than those which preceded it – began to take shape.

In contrast to international COIs of the past, contemporary ad hoc UN COIs tend to focus on individual criminal responsibility, accountability, and transitional justice inspired legal, political and economic reform in the wake of mass human rights abuses. Such COIs attempt to “maintain international peace and security” by getting at the causes and consequences of major human rights abuses, with the goal providing the insight and policy-legal recommendations necessary to transform the situation and society either during or, most often, after a specific conflict. The goal or purpose of this undertaking seems to be to prevent a recurrence of violence and set the nation concerned on the path to development, the rule of law, democracy and peace. A tall order to be sure, but one with which contemporary ad hoc UN COIs have increasingly been tasked.

In this chapter, I will evaluate the fact-finding trends, as well as the international legal rules and guidelines that have developed from the 1980s on to influence contemporary ad hoc UN COIs and their work. This will be followed by an analysis of some of the formative contemporary ad hoc UN COIs, including when and how they have operated and for what ends; two such ad hoc COIs, one in the former Yugoslavia and the other in Darfur, Sudan, will receive extra attention because, to a large degree,

they changed the approach to UN COIs and the paradigms for thinking about what UN COIs can and should accomplish.

It must be said that the move toward such contemporary ad hoc UN COIs has been neither straightforward nor inevitable, but likewise it was perhaps not surprising, which is the reason for the focus in this dissertation on the history of UN COIs and the trends in human rights fact-finding. Neither any one specific trend nor set of rules seems to have led directly to the changes that such contemporary ad hoc UN COIs have undergone in the past 20-years. Yet certain trends in international law and diplomacy, experiences with past UN COIs and fact-finding institutions, and UN endeavours to formalize the largely informal system of UN COIs, have certainly paved the way for and created the type of thinking about human rights fact-finding that explains contemporary ad hoc UN COIs. By undertaking this survey of the field as it stands, I intend to lay the groundwork for the more in-depth case study to follow.

3.2 Trends in International Law in the 1980s Affecting UN Fact-Finding

A changing approach to human rights and fact-finding rose to prominence in the 1970s and became a trend in the 1980s. International human rights fact-finding, investigations, and claims against domestic governments were on the increase as they pertained to domestic abuses of international norms. For example, the mid-to-late 1970s and early 1980s saw the rise of investigations into state abuses by military juntas in Chile, Greece and Argentina, which led to large-scale, ad hoc “truth commissions”, exemplified perhaps most prominently by the Argentinian truth and reconciliation commission (TRC); the TRC’s final report, entitled Nunca Mas – meaning Never Again – was so popular it became a national bestseller.

Such largely domestic TRCs were increasingly seen as offering a potentially successful tool in the effort to move nations from conflict to peace, and from authoritarian rule to democracy; they have spawned a great deal of positive literature, and eventually at least contributed to the creation of a “new” field of “transitional justice” (to be discussed more with regard to trends in the 1990s).241 The Chilean TRC in 1991,

the South African TRC of 1994, and its success in the wake of the end of Apartheid, only solidified the place of large-scale fact-finding in the human rights movement, and spurred the movement forward, as did continuing success stories in Guatemala (truth commission), Sierra Leone (truth commission and hybrid international-domestic court), the former Yugoslavia (commission of inquiry and international criminal tribunal), and the list goes on in the 1990s and 2000s. ²⁴²

At the same time, the international community was also becoming more engaged in the politics and human rights situations in abusive states. Human rights Non-Governmental Organizations (NGOs) came into their own in the 1970s and 1980s. Some of the most prominent among these had for their mandate, at least in part, the consideration of international human rights through methods of fact-finding, in addition to the goal of holding perpetrators of governments accountable by the publication of information about abuses. In 1977 Amnesty International, for example, won the Nobel Peace prize, signaling the ascent of human rights NGOs. The Mission Statement of Human Rights Watch, formed in 1978 as Helsinki Watch, states:

Human Rights Watch is dedicated to protecting the human rights of people around the world. We stand with victims and activists to prevent discrimination, to uphold political freedom, to protect people from inhumane conduct in wartime, and to bring offenders to justice. We investigate and expose human rights violations and hold abusers accountable. We challenge governments and those who hold power to end abusive practices and respect international human rights law. We enlist the public and the international community to support the cause of human rights for all. ²⁴³ [Emphasis added.]

By 1980, the International Law Association had seen enough of an increase in NGO fact-finding that it had adopted draft minimum rules of procedure for human rights fact-finding. ²⁴⁴

The UN was increasingly a part of this process of promotion and proliferation of human rights fact-finding institutions, increasingly seeing it as tied to international

²⁴² In 2001, Priscilla Hayner first offered a review of TRCs over the previous 30-years or so: see Priscilla Hayner, Unspeakable Truths: Facing the Challenge of Truth Commissions (New York and London: Routledge, 2002). See also Freeman, supra note 240.
stability. The first “thematic” UN Special Procedure – as opposed to geographic Rapporteurs – was the UN’s standing Working Group on Enforced or Involuntary Disappearances, constituted in 1980.245 By 1982 the UN Secretary-General, in his annual report, was noting his preference to extend the breadth and systematic capacity of fact-finding, particularly in conflict areas.246 Since that time, the UN has seen a massive proliferation of regional and subject-matter specific human rights fact-finders, most of which occurred in the 1980s and early to mid-1990s, particularly after their endorsement at the World Conference on Human Rights.247 By 2010 there were 8 “country” and 30 “theme” Rapporteurs investigating particular human rights abuses or inquiring into the human rights practices of particular countries thought to be problematic.248

This proliferation of fact-finders has been a boon for “truth” and information gathering about human rights abuses worldwide, but it has also meant that conflicts have sometimes been examined in a fragmented fashion, where “disappearances” are considered by a separate body than the individual investigating allegations of torture. Human rights fact-finding, both within the UN and outside, was beginning to become what it is today, a prolific, seemingly omnipresent undertaking, but one constantly in need of improved coherence and dialogue as between the active parties. As one important book on international human rights noted, “fact-finding [within the UN] ‘system’ has grown up over a period of decades in a rather ad hoc, haphazard fashion. As a result, some of the basic questions about effective fact-finding have failed to receive the attention they deserve.”249 There was not only the concern that such a fragmented system, while evincing so many new and exciting possibilities, could undermine the ability of the UN to garner a “comprehensive” view of a particular situation, but according to Nigel Rodley (a former UN Special Rapporteur on Torture),

245 The Special Rapporteur on Summary and Arbitrary Executions was created in 1982, and in 1985 the Special Rapporteur on Torture was inaugurated.
247 See Kedzia, supra note 146 at chapter 1, page 49-50. For a good overview, see Hoehne, supra note 18.
249 Lillich et al, supra note 213 at 981.
more recently “governments have been complaining of the problems created by
duplication and overlapping of requests by the various mechanisms.”250

Given the “haphazard” growth of the “system”, as well as the fact that, as we have seen, rules governing the processes and working methods of UN fact-finders have been inconsistently applied and have not been formalized, there was a growing sentiment that reform of the system – and particularly a systemization of the rules and processes – was urgently needed. In examining UN fact-finding in the early years, Miller notes:

[...]the detached objectivity and balance that one customarily expects in a judicial enquiry is...not present when the composition of the fact-finding missions is examined. The members, although experts in their own right and drawn from the major political regions of the world have been, generally, neither independent of their Governments nor impartial to the governments whose policies they investigated.251

Miller’s complaint with regard to UN COIs was, as we saw, longstanding; indeed, it dated from the early 1970s. But little headway had been made in the interim period between the early 1970s and early 1980s, and Franck and others essentially repeated Miller’s complaint at that time.

By around the mid-1980s, however, efforts were underway to change – and to fix – the “system” by increasingly formalizing UN fact-finding processes through the creation of principles, rules and guidelines. But such rules tended to be very vague and often non-binding. Perhaps because of the concern of fragmentation and the difficulty in sharing information about fact-finding approaches and best-practices, such rules also tended to look like best-practice guidelines rather than authoritative declarations; these documents confronted the practical issues often faced by human rights fact-finders but did not consider the broader – largely legal – implications of what it meant for an ad hoc UN COI to claim individual responsibility for a human rights abuse – or later an international crime. This of course is not to say that there was not or is not an important place for formalized rules or non-binding guidelines, but only to say that they did not tend to include or be accompanied by interpretative guidelines, purposive understandings of UN COIs, or academic or legal analyses of what it means to

250 Rodley, supra note 111 at 192-3.
251 Miller, supra note 173 at 48.
undertake a large-scale COI and find individuals and states responsible for serious crimes.

3.3 Relevant Rules, Procedures and Guidelines Applicable to UN Fact-Finders

So it was in 1983 that the first reference to “[m]inimum standards of investigation” for UN Special Procedure mandate-holders was made by the newly appointed UN Special Rapporteur on extrajudicial executions. Other important UN instruments from this era include the UN General Assembly’s non-binding Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions of 1989, and eventually, in 2000, the UN General Assembly’s Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which together would become increasingly important and seen as the back-bone of a universal “system” of human rights fact-finding based on the “universal principles of independence, effectiveness, promptness and impartiality.”

Human rights fact-finding was becoming more specific, more focused, and more rule-oriented, but the number of documents and rules were also proliferating and becoming increasingly fragmented. Perhaps due to the proliferation of documents and fact-finders and the fragmentation of the system, by the early 1990s the focus of such rule making was turning back toward large-scale, compendious ad hoc UN COIs. Just as the proliferation of fact-finders, all pursuing different lines of human rights inquiry, had the unintended consequence of somewhat fragmenting the “system”, the proliferation of rules also had the effect of further fragmenting the system by generating a number of instruments applicable to various fact-finders. There was a need to return to the type of holistic, comprehensive approaches to fact-finding, which like TRCs were

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255 See Goldstone Report, supra note 6 page 390, para 1814, fn 1158. See also Human Rights Council, Report of the Committee of independent experts in international humanitarian and human rights laws to monitory 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 HRC Res 13/9, Doc A/HRC/15/50 (21 September 2010) at para 21, page 7, online: http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.50_AEV.pdf.
not fragmented into separate investigation depending on different notions of abuse. Perhaps more importantly, the proliferation of fact-finding initiatives from the 1980s were largely intended to operate either during a conflict or in its aftermath – the Special Rapporteur system for example. While this approach had its place, historically UN COIs were thought to operate by resolving disputes before conflict occurred through the collection of data upon which a solution could be based. With the large number of conflicts throughout the world, but largely in Africa and South America in the 1970s and 1980s, there was a place for such conflict prevention, if it could be made to work.

So it was in 1991 the UN General Assembly adopted – without a vote – the *Declaration on Fact-Finding by the United Nations in the Field of Maintenance of International Peace and Security*.\(^{256}\) The resolution had been initiated in 1988 by the General Assembly,\(^{257}\) and resulted from the work\(^{258}\) of the *Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization*.\(^{259}\)

According to Mr. Scharioth, representative from the sponsoring state of Germany, the reasoning behind the 1988 initiative was as follows:

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\(^{256}\) UNGA Res A/RES/46/59, UNGAOR (9 December 1991) (adopted without a vote) [Res A/RES/46/59]. Note that at least one commentator has claimed an influential connection between the approach to fact-finding as laid out in the 1907 Hague Convention and the Declaration. See Freeman, *supra* note 240 at 100-1.

\(^{257}\) The reasoning behind the initiative was expounded by the representative of the Federal Republic of Germany on in the sixth (legal) committee. See UNGAOR, 43rd Sess, Doc A/C.6/43/SR.15 (26 October 1988) at pages 14-6 [Scharioth Statement].

\(^{258}\) Numerous other documents preceded the 1991 Declaration and influenced its focus. For example, General Assembly Resolution 43/51 adopted the “Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten international Peace and Security and on the Role of the United Nations in this Field”. See UNGA Res A/RES/43/51, UNGAOR, Supp 33 (5 December 1988) (adopted without a vote) [Declaration on the Prevention and Removal of Disputes]. Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, UN Documents A/44/33 (1989) 7-32, A/45/33 (1990), 8-34, A/46/33 (1991) at para 14 [Report on the UN Charter and Strengthening the Role of the Organization], explicitly refers to this document as a precursor to its Report, which of course led to the 1991 Declaration. Article 12 of the Declaration on the Prevention and Removal of Disputes, *ibid*, states: “The Security Council should consider sending, at an early stage, fact-finding or good offices missions or establishing appropriate forms of United nations presence, including observers and peace-keeping operations, as a means of preventing the further deterioration of the dispute or situation in the areas concerned....” Moreover, Article 18 posits: “If a dispute or situation has been brought before it, the General Assembly should consider, including in its recommendations making more use of fact-finding capabilities, in accordance with Article 11 and subject to Article 12 of the Charter....” Article 22 similarly urges the UN Secretary-General to make good use of fact-finding. As always, this was subject to Article 2(7) of the UN Charter (by virtue of Article 25(2)).

\(^{259}\) See Report on the UN Charter and Strengthening the Role of the Organization, *ibid* at 7-11. The Special Committee is an organ of the UN General Assembly. Its findings were considered during three General Assembly Sessions, once each in 1989, 1990, and 1991 (*ibid*).
Consistent with Mr. Scharioth’s statement, the 1991 Declaration notes in its preambular paragraphs that detailed fact-finding is indispensable to the UN’s ability to maintain international peace and security and resolve certain conflicts.\footnote{Preambular paragraph 2 states: “the ability of the United Nations to maintain international peace and security depends to a large extent on its acquiring detailed knowledge about the factual circumstances of any dispute or situation, the continuance of which might threaten the maintenance of international peace and security….” See Res A/RES/46/59, supra note 7 at Annex. Preambular paragraph 3, \textit{ibid}, “recognizes” that “the full use and further improvement of the means for fact-finding of the United Nations could contribute to the strengthening of the role of the United Nations in the maintenance of international peace and security and promote the peaceful settlement of disputes, as well as the prevention and removal of threats to peace.”} In other words, large-scale \textit{ad hoc} UN COIs are just the tool to combine the new devotion to human rights fact-finding with the ability to prevent conflict, and not merely act in the wake of or during times of violence and civil unrest as so many fact-finding activities at the time were doing – and are doing.

The initiators of the 1991 Declaration also recognized the Secretary-General’s lament that,

\begin{quote}
[a]t present, the pool of material available to the Secretary-General consists of information provided by government representatives supplemented by the collection and analyses of published reports and comments. This is manifestly insufficient in cases where more than anticipatory diplomacy is required.\footnote{Preambular paragraph 3, \textit{ibid}, “recognizes” that “the full use and further improvement of the means for fact-finding of the United Nations could contribute to the strengthening of the role of the United Nations in the maintenance of international peace and security and promote the peaceful settlement of disputes, as well as the prevention and removal of threats to peace.”} 
\end{quote}

So, a return to the compendious sort of reporting done by \textit{ad hoc} UN COIs in the 1940s through 1970s was needed. The creators of the 1991 Declaration focused on the Secretary-General in particular in terms of discussing fact-finding options, and made an effort to enhance fact-finding capabilities of the UN in general and the Secretary-General specifically.\footnote{See Report of the Secretary-General on the Work of the Organization, 44\textsuperscript{th} Sess, Supp 1, UN Document A/44/1 (1989).}
What resulted was a Declaration on fact-finding that is structured in five parts: part I offers common principles for UN fact-finding; part II notes the prerequisites necessary for taking a decision to initiate a fact-finding mission; part III deals with the conduct of fact-finding missions; part IV discusses the use of other information gathering methods; and finally, part V proffers escape clauses. This is the first such document in the history of the UN, and for this reason alone it is worth a closer look.

The 1991 Declaration defined fact-finding for the UN in Article 2, as: “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.” The definition maintained the historic connection that was thought to exist between fact-finding in general – and UN COIs in particular – and the maintenance of international peace and security.

The 1991 Declaration also repeats the secondary purpose of COIs, first noted in the context of the justification for fact-finding under the 1899 Hague Convention; that is, the Declaration notes that such fact-finding missions can “signal” to the implicated nation the concern of the international community and its willingness to consider action against the state. Moreover, in repetition of the UN Charter’s framework with regard to the conflict between sovereignty and human rights, the 1991 Declaration notes that on-the-spot investigations require the consent of the implicated state “subject to the relevant provisions of the Charter of the United Nations.” In other words, while state consent is still needed to enter its territory, the Security Council might exercise its Chapter VII powers to require a nation to accept a fact-finding visit under threat of sanctions.

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264 See *ibid* at 107, discussing the five-part breakdown of the 1991 Declaration, at *Res A/RES/46/59, supra* note 256.

265 This observation is confirmed by Article 4, according to which a fact-finding mission should be initiated by the “competent organ of the United Nations” if the information needed to exercise its function in protecting international peace and security could not be satisfactorily obtained through existing means – including the “information-gathering capabilities of the Secretary-General” and, presumably, permanent fact-finding devices such as the Special Rapporteur system). See *Res A/RES/46/59, ibid.*

266 See *ibid* at Article 5.

267 See *ibid* at Article 6.

268 So for example Berg, *supra* note 263 at 108, who stated that: “Although there was general agreement that, as a rule, the consent of a receiving State is imperative…[t]here is indeed…one exception where the consent of a State
Article 7 seems to define the “competent organs of United Nations” to which the 1991 Declaration applies as the Security Council, the General Assembly as well as the Secretary-General, operating “in the context of their respective responsibilities for the maintenance of international peace and security in accordance with the Charter.” This would seem to preclude the Commission on Human Rights (now the Human Rights Council), though perhaps as an organ of the General Assembly the Human Rights Council might be brought within the general umbrella of the 1991 Declaration. In any event, following in a UN tradition of trying to create an “expert list” of possible fact-finding experts, it was recommended that in order to assist the aforementioned relevant UN organs with their responsibilities, the Secretary-General should “prepare and update lists of experts in various fields who would be available for fact-finding missions.”

To this point in the analysis of the 1991 Declaration, nothing new has been offered that was not essentially in place in 1945. However, certain Articles did speak to some of the problems we saw associated with post-1945 UN COI practice. For example, in recognition of the persistent problems with state cooperation with UN fact-finding missions, particularly in granting territorial access to large-scale ad hoc missions, the 1991 Declaration makes clear – though by using non-mandatory language – that states “should” give timely consideration to and should consent to receive fact-finding missions. In carrying out their missions, Article 3 of the Declaration provides that fact-finding endeavours must be “comprehensive, objective, impartial and timely.” Moreover, fact-finding reports are to be “limited to a presentation of findings of a factual nature” (section 17) – which sounds like the limitation in the Hague Conventions to findings of fact, but like the Hague Conventions can be substituted, and that is by a binding decision of the Security Council acting under Charter VII which the Members of the United Nations have agreed to accept and carry out.”

270 See ibid at Articles 19, 20 and 21.
271 See also ibid at Article 25.
has resulted in a number of COIs that have made legal findings and offered recommendations as well.\textsuperscript{272}

Like many other previous and future declarations on fact-finding, the “independence” of the fact-finding missions is viewed through the lens of the personal security of those conducting fact-finding missions. As a result, the Declaration provides in Article 23 that members of fact-finding missions shall be accorded “all immunities and facilities needed for discharging their mandate, in particular full confidentiality in their work and access to all relevant places and persons....” And, Article 24 provides that “members of fact-finding missions, as a minimum, enjoy the privileges and immunities accorded to experts on missions by the Convention on the Privileges and Immunities of the United Nations.”\textsuperscript{273} Independence was evidently still not associated with bias in terms of commissioners, their expressed personal views, background or even nationality.

Generally, when it comes to the rules of operating procedure elaborated in the 1991 Declaration, Thomas Franck’s critique of the state of UN fact-finding after the 1970 Model Rules remains salient. History was in some ways repeating itself. It will be remembered from the last chapter that Franck had argued that “[f]or those concerned with credibility and due process in fact-finding, the [1970] model rules are not the answer”,\textsuperscript{274} and the same was true of the 1991 Declaration.

In particular, under the 1991 Declaration, rules pertaining to \textit{ad hoc} UN COIs remained fairly blunt in that they give little guidance where guidance is most needed – in interpreting the mandate and purpose of the COI and the procedures that flow from that interpretation, in discerning the interpretative principles applicable to various rules, and in balancing competing interests or rules. So, for example, with regard to the hearing of witnesses, the conduct of hearings, and the admission of evidence, the 1991 Declaration notes only that, “[w]henever fact-finding includes hearings, appropriate rules of procedure should ensure their fairness.”\textsuperscript{275} No direction is given as to what considerations are relevant to “fairness”, to whom it applies, or how one might interpret

\textsuperscript{272} Axel Berg has noted in this regard that: “While policy recommendations should indeed be excluded, an evaluation of the findings will be hard to avoid.” See Berg, \textit{supra} note 263 at 111.

\textsuperscript{273} Res A/RES/46/59, \textit{supra} note 256 at Article 24.

\textsuperscript{274} Frank and Fairley, \textit{supra} note 191 at 320.

\textsuperscript{275} Res A/RES/46/59, \textit{supra} note 256 at Article 27.
such a requirement so as to give it practical meaning. With respect to the “right to response”, or the procedures related to the weighing of evidence, the Declaration proffers only that:

[The States directly concerned should be given an opportunity, at all stages of the fact-finding process, to express their views in respect of the facts the fact-finding mission has been entrusted to obtain. When the results of fact-finding are to be made public, the views expressed by the States directly concerned should, if they so wish, also be made public.]

Not only was the rule relating to the right to response non-binding by virtue of the fact that the Declaration was non-binding, but it was not even mandatory in its language – the term “should” was used rather than “must”. Finally, the Declaration states that fact-finders “have an obligation to act in strict conformity with their mandate and perform their task in an impartial way...They should keep the information acquired in discharging their mandate confidential even after the mission has fulfilled its task.”

In 1996 the UN commissioned a (non-binding) study that resulted in the Joinet Principles, so named after the UN’s former Special Rapporteur on the question of impunity who authored them. These were an influential set of principles subsequently used or referenced by a wide variety of human rights fact-finders. The Joinet Principles were then “updated” in 2005.

In the Revised Final Report of 1997, Joinet argued that there were four stages through which the need to fight impunity has passed. Interesting for our purposes are particularly stages three and four. According to the Joinet Report, the end of the Cold War was “marked by many processes of democratization” and, in the course of post-

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276 Ibid at Article 26.
277 Ibid at Article 25.
279 In 2004 the value of the Joinet Principles were affirmed by an influential study commissioned by the UN Secretary-General on the “best practices, including recommendations, to assist States in strengthening their domestic capacity to combat all aspects of impunity, taking into account the [Joinet Principles] and how they have been applied, reflecting recent developments and considering the issue of their future implementation....” See Diane Orentlicher, Promotion and Protection of Human Rights: Impunity, UN Doc E/CN.4/2004/88 (2004).
280 Orentlicher Principles, supra note 11.
conflict peace agreements “the question of impunity constantly cropped up between parties.”

The fourth stage was seen as the moment “when the international community realized the importance of combating impunity”. For our purposes, this explains the initial foray into using fact-finding as a method of ensuring accountability for international crimes and ending impunity – and also helps to explain the rise in the idea of transitional justice at this time.

The Joinet Report defined the scope of fact-finding, or what it called “extrajudicial commissions of inquiry” into human rights violations. In particular, it noted “two main aims” of such inquiries:

first, to dismantle the machinery which has allowed criminal behavior to become almost routine administrative practice, in order to ensure that such behavior does not recur; second, to preserve evidence for the courts, but also to establish that what oppressors often denounced as lies as a means of discrediting human rights advocates all too often fell short of the truth, and thus to rehabilitate those advocates.

In the Principles appended to the Joinet Report, Principle 5 offers its own “purpose” for such COIs: “extrajudicial commissions of inquiry shall have the task of establishing the facts so that the truth may be ascertained, and of preventing the disappearance of evidence.” It goes on to add, however, that: “[i]n order to restore the dignity of victims, families and human rights advocates, these investigations shall be conducted with the object of securing recognition of such parts of the truth as were formerly constantly denied.” Presumably then such COIs exercise their purpose – the collection of evidence to establish facts – in order to achieve their two main aims.

Though strictly defined as “extrajudicial” COIs, it was foreseen by the Joinet Principles that the evidence gathered by such bodies might later be put to use in the “administration of justice”. Indeed, the use of courts to combat impunity is central to the idea of extrajudicial inquiries according to the Joinet Principles. So, COIs were seen as “extrajudicial” in the sense that they operate before – as a precursor to – the court process. Such a statement is accurate so long as “judicial” is defined as a “court process”, but “extrajudicial” should not necessarily be equated with “extralegal”. This raises fairly obvious questions about how the collection of information can be made to

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281 See Joinet Principles, supra note 278 at Introduction, para 4.
282 See ibid at Introduction, para 5.
283 Joinet Principles, supra note 278 at Overall Presentation of the Set of Principles, para 19.
284 Ibid at para 20.
work for use in the later “administration of justice.” Can “extrajudicial” bodies collect evidence in a manner compatible with the due process requirements of law, and what would such processes look like? For whom are they collecting evidence, and how does this change the type of evidence collected and how it is collected? Will such COIs be seen as the investigative arm of courts, thus undermining their impartiality or perceived impartiality or their ability to collect evidence, perhaps because witnesses may be less likely to testify if the information will be released to courts?

The Joinet Report offers some answers to the above questions. These answers can be broken down into, and perhaps coincide with, the four main “aims” of the Joinet Principles, discussed below. First, with regard to guarantees of independence and impartiality, the Joinet Report states:

> extrajudicial commissions of inquiry should be established by law…Their members may not be subject to dismissal during their terms of office, and they must be protected by immunity…A wide range of opinions among commission members also makes for independence. The terms of reference must clearly state that the commissions are not intended to supplant the judicial system….  

In addition, Diane Orentlicher’s updated (2005) Principles offer that COIs, “shall be constituted in accordance with criteria making clear to the public the competence and impartiality of their members”, which speaks to the historic problem of perceived bias of UN COI commissioners.

Second, the Joinet Principles focus on “safeguards for witnesses and victims.” In this regard, the following passage is pertinent:

> [t]estimony should be taken from victims and witnesses testifying on their behalf only on a voluntary basis. As a safety precaution, anonymity may be permitted subject to the following reservations: it must be exceptional (except in the case of sexual abuse); the chairman and a member of the commission must be entitled to examine the grounds for the request of anonymity and, confidentially, ascertain the witness’ identity; and reference must be made in the report to the content of the testimony. Witnesses and victims must have psychological and social help available when they testify, especially if they have suffered torture or sexual abuse. They must be reimbursed the costs of giving testimony.

The third “main aim” of the Principles relates to “guarantees for persons implicated.” Here, the Joinet Report asserts: “[i]f the commission is permitted to divulge their names, the persons implicated must either have been given a hearing or at least

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285 Ibid at para 21. See also Principle 6, which requires that such COIs be “established by law”, and that those officials shall have security of tenure (ibid).
286 Orentlicher Principles, supra note 11 at Principle 7(a)
287 Joinet Principles, supra note 278 at para 22. See also ibid at Principle 9.
summoned to do so, or must be given the opportunity to exercise a right of reply in writing, the reply then being included in the file.”\textsuperscript{288}

And finally, with respect to the publicity of the commissions' reports the Principles offer: “[w]hile there may be reasons to keep the commissions' proceedings confidential, in part to avoid pressure on witnesses and ensure their safety, the commissions' reports should be published and publicized as widely as possible. Commission members must enjoy immunity from prosecution and defamation.”\textsuperscript{289} The Joinet Report also contemplates the preservation of archives relating to human rights violations, which is seen as central to the “right to know”.\textsuperscript{290}

Principles 5-12 deal with “extrajudicial commissions of inquiry” in particular, and in many ways address some of the issues we have seen with respect to biased mandates. Principle 7 deals with the “definition of the commissions’ terms of reference” and states immediately that, “[t]o avoid conflicts of jurisdiction, the commissions' terms of reference must be clearly defined....” Principle 7 also provides that COI mandates should have “at least" the following stipulations: that COIs investigations “shall relate to all persons cited in allegations of human rights violations”, including non-governmental groups;\textsuperscript{291} that COIs should consider all forms of human rights violations but “shall focus as a matter of priority on those violations which constitute serious crimes under international law, and shall pay particular attention to violations of the basic rights of women”,\textsuperscript{292} and, that COIs must “analyse and describe the State mechanisms of the violating system, and identify the victims and the administrations, agencies and private entities implicated by retracing their roles...”\textsuperscript{293} Finally, COI mandates are to require that COIs, “safeguard evidence for later use in the administration of justice.”\textsuperscript{294}

The Joinet Principles offer further examples of how to deal with some of the problems that have consistently arisen in past UN COIs, such as respecting the corroboration of evidence. If a COI is to ascribe personal responsibility for a human

\textsuperscript{288} Ibid at para 23.
\textsuperscript{289} Ibid at Introduction, para 24. See also ibid at Principle 12.
\textsuperscript{290} Ibid at para 25; see also ibid at Principles 13-7.
\textsuperscript{291} Ibid at Principle 7(d).
\textsuperscript{292} Ibid at Principle 7(e).
\textsuperscript{293} Ibid at Principle 7(e)(i).
\textsuperscript{294} Ibid at Principle 7(e)(ii).
rights violation, an attempt must be made to corroborate evidence “gathered by other sources.”\(^{295}\) The Joinet Principles also envisage a right to reply of the implicated person: he or she must be given “the opportunity to make a statement setting out his or her version of the facts or, within the time prescribed by the instrument establishing the Commission, to submit a document equivalent to a right of reply for inclusion in the file.”\(^{296}\)

The Joinet Principles explicitly require that COI mandates “shall include provisions calling for them to make recommendations on action to combat impunity in their final report.”\(^{297}\) They also state that the COI recommendations “shall contain proposals aimed” at establishing guilt, at encouraging legislatures to adopt measures to prevent a recurrence of violations, particularly with regard to police and the judicial system and the strengthening of democratic institutions, and reparations.\(^{298}\) More often than not UN COI reports do not recommend specific, contextual “proposals aimed at” such reforms, but rather merely re-list these particular Joinet Principles, \textit{i.e.} COI reports tend to merely assert that nations should establish guilt through criminal trials, establish a reparations program, vet the security forces, but they do not explain how this should be done or what such actions might look like.\(^{299}\)

The Joinet Principles generally prefer public access to COI archives of documents, though an exception exists where “publication might jeopardize the preservation or restoration of the rule of law.”\(^{300}\) Presumably, archives naming particular confidential informants would similarly be excluded, though no mention is made to this effect in the original Joinet Report or Principles. However, in Orentlicher’s 2005 update, Principle 8(f) states:

\[\text{[t]he terms of reference of commissions of inquiry should highlight the importance of preserving the commission’s archives. At the outset of their work, commissions should clarify}\]

\(^{295}\) \textit{Ibid} at Principle 8(a).

\(^{296}\) \textit{Ibid} at Principle 8(b).

\(^{297}\) \textit{Ibid} at Principle 11.

\(^{298}\) \textit{Ibid}.

\(^{299}\) Vetting is a fundamental idea in most conceptions of transitional justice, and is listed as one of the main arms of the International Centre for Transitional Justice in terms of what the Centre does, and what is needed in transitional experiences. Not surprisingly then it is almost always listed as a recommendation of modern UN COIs, and indeed Orentlicher’s Updated 2005 principles (\textit{Orentlicher Principles, supra} note 11 at Principle 26(a)) specifically state that with regard to reform of state institutions, vetting is required. The same might be said for disarmament (or disbandment), demobilization and reintegration programs. See \textit{Ibid} at Principle 37.

\(^{300}\) \textit{Joinet Principles, supra} note 278 at Principle 14.
the conditions that will govern access to their documents, including conditions aimed at preventing disclosure of confidential information while facilitating public access to their archives.\textsuperscript{301} [Emphasis added.]

However, no indication is given as to how this all-important balancing process might take place.

Principle 10 provides for “guarantees for victims and witnesses testifying on their behalf” and states that measures must be taken to ensure their safety and well-being, and, more particularly, “[i]nformation that might identify a witness who provided testimony pursuant to a promise of confidentiality [sic] must be protected from disclosure. Victims providing testimony and other witnesses should in any event be informed of rules that will govern disclosure of information provided by them to the commission….\textsuperscript{302}

Finally, the Principle 16 sets the following general rule:

[all] persons shall be entitled to know whether their name appears in the archives and, if it does, by virtue of their right to access, to challenge the validity of the information concerning them by exercising a right to reply. The document containing their own version shall be attached to the document being challenged.\textsuperscript{303}

Orentlicher’s updated Principle 17(b) – which is an update of Joinet Principle 16, above – states in part: “[a]ccess to the files of commissions of inquiry must be balanced against the legitimate expectations of confidentiality of victims and other witnesses testifying on their behalf….\textsuperscript{304}

Since around the time of the first draft of the Joinet Principles, a number of other UN documents have tackled COIs and fact-finding principles and procedures.\textsuperscript{305} So, for example, the UN’s 1995 Guidelines for the conduct of UN inquiries into massacres’ allegations purports to “provide a frame of reference and guidance for ad hoc investigations for which there are no or few specific guidelines or rules already in

\textsuperscript{301} Orentlicher Principles, supra note 11 at Principle 8(f).
\textsuperscript{302} Ibid at Principle 10(d).
\textsuperscript{303} Ibid at Principle 16(b).
\textsuperscript{304} There is one exception to this general rule where information “relates to top officials and established staff of those services, information relating to individuals which appears in intelligence service archives shall not by itself constitute incriminating evidence, unless it is corroborated by several other reliable sources.” Joinet Principles, supra note 278 at Principle 16(c).
place.” The 1995 Guidelines acknowledge that “certain provisions of the guidelines may not be appropriate in all cases” and that they “must be tailored to the mandate of each particular inquiry, as well as to its object and purpose.” The 1995 Guidelines unreasonably assume that “the Government or the authorities exercising jurisdiction or control over the area…will cooperate with the [UN] and grant it full access…” As we have seen, the history of UN COIs gives no indication that such an assumption will hold in the majority of cases.

Though largely procedural and descriptive in the nature, the 1995 Guidelines do also offer some substantive principles: a report should be issued and it should state whether there are – and allow for – dissenting opinions; commissions should be chosen based on their independence and impartiality, though no explanation is given as to the meaning of such terms, and that the final report is to describe the procedures and methods used in evaluating the relevant evidence.

The UN General Assembly also introduced “mandatory” regulations for certain experts on mission in 2002. Called the “Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission”, this document requires that such Experts act with “integrity”, which is to say “impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.” The Regulations also deal with independence (primarily financial), those related to avoiding bribes or corruption, compliance with local laws, and notes that such Experts are explicitly accountable to the UN.

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306 Guidelines for Inquiries into Allegations of Massacres, ibid at para 5.
307 Ibid.
308 Ibid at para 8.
309 Ibid at para 51.
310 Ibid at para 16.
311 Ibid at para 52.
313 Regulations Governing Experts on Mission, ibid at Regulation 2(a).
314 See for example ibid at Regulation 2(b), (e), (g), and (i).
315 Ibid at Regulation 2(j)
316 Ibid at Regulation 3: Accountability.
The development of virtually all of these rules and guidelines throughout the mid-1990s and early-to-mid-2000s is interesting for at least three reasons. First, it indicates that there was a real or perceived need for identifying the principles and best-practices used in the fragmented field of international human rights fact-finding; though it must be said that such rules and principles of fact-finding are often elaborated in increasingly fragmented ways as between documents, institutions and as pertains to various “types” of fact-finding. Second, in almost all such cases the principles or rules elaborated by such documents do not reflect “hard law” in the traditional sense, in that they are intended to be and are generally treated as guidelines rather than strict requirements. Perhaps this point was best summarized by M. Cherif Bassiouni, a UN fact-finder and prolific academic on the subject – as well as Chairman of the Yugoslav COI. In 2001 Bassiouni noted that:

[after fifty years, there is no standard operating procedure for fact-finding missions. Admittedly, any standard operating procedure needs to be tailored to the situation. But no manual exists to describe how an investigation should be conducted...Worst of all, there is no continuity...The results are usually poor or mediocre performance, except where particularly competent persons are appointed to these missions, and in these rare cases it is their entrepreneurial and other qualities that bring about the mission’s success...This situation also means that there is little consistency and predictability as to the methods and outcomes.]

Third, none of the documents elaborate a complex or nuanced understanding of how transparency, impartiality or independence, or other such principles are actually to be interpreted and applied when COIs or other fact-finders undertake the hard task of setting rules for themselves, interpreting their mandates, discerning how to value evidence, or weigh the costs and benefits of using particular evidence when witness safety is at risk. The principles of impartiality and independence, for example, are treated as technical problems by most UN rules or guidelines. So, independence and impartiality means that members of commissions should serve under “conditions ensuring their independence, in particular by the irremovability of their members for the duration of their terms of office.” Transparent sources of funding, sufficient material

317 More recently, the HRC Manual of Operations for Special Procedures, supra note 12 along with HRC Code of Conduct, supra note 12. Each of these documents also speaks of impartiality, independence, accountability, transparency, confidentiality and even of the right of states to respond to reports. Each seeks to hold human rights investigators to the standards of these principles. And neither is directed at – or binding on – commissioners of ad hoc UN COIs.
318 Bassiouni, Appraising UN Fact-Finding Missions, supra note 10 at 40-1.
319 Joinet Principles, supra note 278 at 10.
support are also listed as factors that guarantee independence and impartiality.\textsuperscript{320} Immunity from domestic prosecution while executing the functions required of commission members is consistently viewed as being a strong indicia of independence.\textsuperscript{321} But nowhere do any of these documents – or other documents or legal analyses – seem to deal with the complex relation between acting as a judge and jury on such commissions, and the issues of bias that may arise when academics, practitioners and other “eminent personalities” act on commissions; as we shall see with the Gaza COI, this is indeed a live issue.

This critique is not intended to proffer that the range of principles and practices discussed were not necessary or needed: clearly such undertakings were long overdue, and it is hard to argue with many (or perhaps most) of the Joinet Principles, for example. But at the same time it is to say that enumerating general principles is one thing, but interpreting and applying such principles is another thing entirely:

\textit{[f]act-finding methodology…is not resolved by attempts to craft objective criteria governing construction and execution of fact-finding missions…there are problems “on the ground,” which include such issues as the proper selection of representative and balanced testimony, keeping the time period covered relatively narrow, selecting an appropriate sample group, assuring privacy and confidentiality in interviews, and the corroboration of direct testimony.}\textsuperscript{322}

So what has the proliferation of non-specific, non-binding rules meant in practice? Before we begin the initial foray into contemporary \textit{ad hoc} UN COI practice, it is helpful to place the proliferation of such rules in the context of the other events – the trends in international law and the human rights fact-finding practice – of the 1990s and 2000s.

\subsection*{3.4 International Law and Diplomatic Trends Through the 1990s and Early 2000s}

As reflected in the rules applicable to UN human rights fact-finders and indeed the increasing number of different fact-finding bodies, fragmentation was increasingly becoming an issue of concern for the UN and international lawyers alike through the 1980s and particularly the 1990s. The idea was that international law was, at least institutionally, fragmenting from a perceived centralized position;\textsuperscript{323} the UN and indeed

\begin{itemize}
  \item \textsuperscript{320} See for example \textit{ibid.}
  \item \textsuperscript{321} \textit{ibid} at Principle 12.
  \item \textsuperscript{323} See generally Report of the Study Group of the International Law Commission, Marttii Koskenniemi,
international law was looking increasingly less like the coherent “system” that it was intended to be. Practitioners of international law were increasingly studying and then working in discrete and highly specific sub-fields of public and private international law. And it was increasingly recognized that such specialization and focus was not only advancing certain legal and humanitarian projects, but it might also have certain drawbacks. The problem is seen in the area of peace-building. In order to transition from conflict to peace, or authoritarian rule to democracy, a broad, comprehensive picture of the state of affairs, where the nation came from and where it was going, had to be drawn. Only then could a complex, contextual and integrated solution be provided. A fragmented approach to investigating the causes and consequences of conflict and suggesting solutions was unlikely to work.

Moreover, transitional justice was increasingly becoming a discrete academic field, as noted, but was also one that purported to offer an umbrella or holistic theory of justice. David Dyzenhaus has stated in this regard that: “what is novel [about transitional justice] is not the [various] inquiries [that make up the field of transitional justice], but the idea that together they make up parts of one compendious inquiry into something called transitional justice.”326 This need for “compendious inquiries” coincided with the emerging UN understanding of human rights and post-conflict transitions.

And just as the idea of transitional justice was emerging (or about to emerge), the UN General Assembly, in order to get a handle on the human rights fact-finding “system,” if one ever existed, in 1989 sought to rationalize and strengthen its human

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324 See Report of the Study Group of the International Law Commission, Martti Koskenniemi, International Law Commission, Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, Draft Conclusions of the Work of the Study Group, UNGAOR, 58th Sess., UN Doc A/CN.4/L.682/Add.1 (2006) at Article 1(1), which provides: “International law as a legal system. International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them.” [Emphasis in original.]


rights monitoring and enforcement capacity through another review process. According to the UN:

[In 1989 the General Assembly called for the convening of a world meeting that would review and assess progress made in the field of human rights since the adoption of the Universal Declaration of Human Rights, and identify obstacles and ways in which they might be overcome. The first global meeting on human rights had taken place in Teheran in 1968.327

The result was that, on 25 June 1993,

representatives of 171 States adopted by consensus the Vienna Declaration and Programme of Action of the World Conference on Human Rights, thus successfully closing the two-week World conference and presenting to the international community a common plan for the strengthening of human rights work around the world.328

This process led, inter alia, to the creation of the post of UN High Commissioner for Human Rights (Resolution 48/141), seen as one important development in the promotion of human rights and the rationalization of the system.329

Resolution 48/141 of 1993 stated in relevant part that it was “[a]ware that human rights are universal, indivisible, interdependent and interrelated….330 [Emphasis in original.] The result was thus to focus on improving and rationalizing the UN human rights system, by bringing it together and recognizing the connection between human rights and other areas of the UN’s work. In other words, rationalization and mainstreaming, coupled with improved methods of monitoring, were the way forward.331 This focus, and the incorporation of the idea of mainstreaming, is also seen with the Secretary-General’s “Programme of Change” of 1993 promoting the

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328 Ibid.
329 There remained, however, much debate and controversy about fact-finding at the time, particularly in the lead-up to the creation of the UN High Commissioner for Human Rights. For an overview, see Virgil Wiebe, “The Prevention of Civil War Through the Use of the Human Rights System” (1995) Note 27 NYU J Int’l L & Pol 409 at 453-6. Explicit authority for the UN High Commissioner for Human Rights to conduct fact-finding was dropped as part of the 1993 agreement, though implicit authority remained (and as we have seen, the Commission had resorted to fact-finding on various occasions). For a discussion of such implicit authority see ibid at 455-8. Of course, the High Commissioner could also request that another body, such as the Security Council or the Secretary-General (by way of “Good Offices”), conduct an ad hoc human rights fact-finding mission.
331 Ibid, creating the Commission on Human Rights, stated in this regard: “Determined to adapt, strengthen and streamline the existing mechanisms to promote and protect all human rights and fundamental freedoms while avoiding unnecessary duplication…Recognizing that the activities of the United Nations in the field of human rights should be rationalized and enhanced in order the strengthen the machinery in this field and to further the objectives of universal respect for observance of international human rights standards....”
“mainstreaming” of human rights. Mainstreaming meant recognizing the complex connections between rights and the other important work of the UN that was not primarily concerned with human rights, at least organizationally, including peace and security, social and economic development, and humanitarian affairs, and integrating rights analysis into the relevant structures of the UN.

In the context of these developments, it would seem quite natural to resort increasingly to large-scale fact-finding missions. Large-scale UN COIs were, in a way, about rationalization and mainstreaming: they provided holistic pictures of and recognized the connections between the legal, social, cultural and economic predicaments of nations where human rights abuses were occurring. Conceptually, the “rationalize and mainstream” approach also sounds a lot like the approach of transitional justice. Though transitional justice is now often stated to be an “approach”, there is really no single approach that defines the area. Rather, transitional justice is an amalgam of various ideas – criminal accountability, truth telling, reparations, institutional reform, etc. – that are all seen as important in order to address the myriad interconnected problems that exist in the aftermath of mass atrocity.

At this time, fact-finding and transitional justice concepts were also heavily influenced by concurrent processes and events taking place outside of the UN’s system of law and fact-finding. The collapse of the Soviet Union, the former Yugoslavia, and the Apartheid regime in South Africa were undoubtedly significant to the thinking at the time, as was the demise or perhaps failure of states like the Rwanda and Somalia and the violence taking place in those nations. Each of these situations required new and innovative methods of transitioning from war and/or authoritarian rule to democracy, peace and the rule of law.

So, putting this all together, the idea goes that one cannot successfully “transition” without a defragmented, contextual understanding of the broader historical, cultural, social, institutional landscape, and without a focus not just on human rights, but institutional capacity building, the rule of law, and other reforms necessary to bring Somalia or former Soviet satellite states – for example – into the world of democracy and peace. And UN COIs, like TRCs, are large, compendious undertakings capable of

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332 Kedzia, supra note 141 at chapter 1, page 30: “The High Commissioner for Human Rights is present in all four Executive Committees: Peace and Security, Social Affairs, Development, and Humanitarian Affairs.”
addressing and connecting various seemingly disparate elements to explain a conflict, its causes and consequences, and provide solutions.

But transitional justice was also modeled on and influenced by conceptions of justice and nation-building that had developed in the context of the name and shame campaigns, TRCs and domestic prosecutions of the junta leaders – particularly in South America – in the 1980s and 1990s. Around this period of time international human rights NGOs also continued to document atrocities and attempt to hold perpetrators accountable for their crimes, and they were increasingly expanding the scope of their investigations. So, in its continuing quest for justice and accountability, Human Rights Watch, for example, investigated violations of the laws of war for the first time during the Persian Gulf War in 1991. According to Human Rights Watch’s history of its activity: “‘[e]thnic cleansing’ and genocide in Rwanda and the Balkans prompted the need for both real-time reporting of atrocities and in-depth documentation of cases to press for international prosecutions, which became possible for the first time in the 1990s.” Transitional justice was thus founded on, or at least influenced by, ideas relating to individual criminal accountability for past wrongs, and also on targeted sanctions and the targeting of non-state actors, which flows from fact-finding initiatives documenting the justification for such coercive measures, in addition to ideas about reparations for past abuses, truth telling and memorialization projects, as well as institutional reform as a means of promoting human rights – including reform of the justice sector, government, police and security apparatuses.

However, for this move toward individual criminal responsibility to take place it was necessary for certain sovereign barriers to be broken down, particularly with regard to head of state immunity and the preeminence of sovereign equality. It will be remembered that, historically, it tended to be that states did not want COIs considering internal disputes. Moreover, the idea of sovereign equality of states ensured, for example under the Hague Conventions, that states maintained the right to preclude fact-finding from taking place and, even if the state acquiesced to an independent fact-

334 See ibid.
finding mission, it was free to disregard its findings. For individual criminal accountability to form a part of the purpose of UN COIs, prosecutions had to be possible, and for prosecutions to be possible, intrusions into the sovereignty of nations had to become generally accepted.

The early 1990s signaled a slight shift in international practice in regard to international prosecutions for crimes that took place domestically. As Zdzislaw Kedzia has noted, 

> [f]or many years, [the UN Security Council] refrained from specifically recognizing human rights as a determining factor in its considerations…The situation gradually changed in the 1990s. The human rights abuses have been recognized as one of the root causes of contemporary armed conflicts and, at the same time, the protection of human rights as one of essential [sic] elements of peace-making and peace-buildings. Tragedies of this period, such as those in Rwanda and in the Balkans with thousands of victims of the most serious violations of human rights, were not without influence on this process.

Perhaps it is not surprising that international criminal prosecutions in the 1990s became possible shortly after at least three trends had emerged: (1) the increase in the public availability of information about the extent and consequences of domestic atrocities, thanks largely to UN and NGO fact-finding, and to technology and the ability to watch wars and famines on television; (2) domestic attempts to prosecute and hold accountable those responsible for major conflicts in the 1980s and early 1990s; and, (3) the general trend toward viewing disputes from a holistic perspective – internal disputes were often about human rights, but human rights issues were increasingly viewed as being about development and international peace and security. It is also certainly the case that location mattered: it was easier to pierce the veil of sovereignty with regard to the former Yugoslavia, Rwanda, Burundi, or Sierra Leone, where large-scale COIs took place, than it would have been with regard to a permanent member of the Security Council.

In the result, changes in large-scale ad hoc UN COIs have reflected changes in the perception of the individual as object and subject in international law, and the increased focus on accountability and decreased resistance to piercing the sovereign

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336 The principle of sovereign equality was codified in Article IX of Title II of the first Hague Convention in 1899 (see 1899 Hague Convention, supra note 62). This provided that the role of fact-finding missions was limited to disputes “involving neither honor nor vital interest.” See also Article 9 of the 1907 Hague Convention, supra note 62. Sovereignty was equally the trump card with regard to Treaties providing for arbitration that were finalized prior to World War I. See Shore, supra note 65 at 7 citing M Habicht, Postwar Treaties for the Pacific Settlement of International Disputes (Cambridge: Harvard University Press, 1931) at 992.

337 Kedzia, supra note 146 at chapter 1, page 8.
veil. Perhaps the most salient example of this was the criminalization of the “most serious” international crimes – war crimes, crimes against humanity and as of 2010 the crime aggression – in what became, in 1998, the Rome Statute of the ICC.

But sovereignty has not entirely – or even mostly – been stripped away, and thus it continues to play a major role in terms of determining UN COI access to territory and the consequences of criminal behavior. The ICC might again be seen as a good example of this. On the one hand, the Rome Statute of the ICC universalizes certain crimes and is seen as the world criminal court. On the other hand, it is a treaty body, and nations are free to ratify it or not. Still, as we shall see with the case of Darfur, the Security Council may nevertheless refer a situation to the ICC, though even then there are hurdles.  

In addition to individual criminal accountability for serious international crimes, certain other ideas, perhaps better framed as ideals, also grew up with or out of the transitional justice movement. These ideas tended to buttress the need for fact-finding, and provide principled justification for human rights investigations. One such idea was the “right to truth.” The emergence of the right to truth in international legal discourse coincided with what was and is seen as the corollary duty to investigate and prosecute. Both concepts gained prominence initially with respect to enforced disappearances, and primarily in the inter-American system, and seemed to gain traction as fact-finding, UN COIs and TRCs all gained a prominent place in the international human rights system. Since that time, large-scale fact-finding, the principles of the right to truth and duty to prosecute, and transitional justice were and

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338 There are other methods as well by which the ICC may gain jurisdiction over a case or perpetrator.
341 Perhaps the most famous case came from the inter-American human rights system (Inter-American Court of Human Rights). See Velasquez-Rodriquez v Honduras, supra note 8. Here, the Court found that Article 1(1) of the American Convention on Human Rights required that serious human rights violations be investigated and punished. From this flowed the “right to truth”.
342 See in particular the Joinet Principles, supra note 278 at Principle 1. By 2005, Commission on Human Rights in the Right to Truth, CHROR, 61st Sess, Doc E/CN.4/RES/2005/66, recognized the importance of the right to truth, particularly in combating impunity (para 1) and welcomed the increased reliance on human rights fact-finding in this regard (paras 2, 3, 4).
are seen as interwoven and mutually reinforcing; the rise in one signals the rise in the others.

Truth telling had thus become a fixture in international law by the mid-1990s at the latest.\textsuperscript{343} Indeed, by 1997 Michael Scharf had called for a permanent international TRC to supplement the ever-increasing number of \textit{ad hoc}, national ones.\textsuperscript{344} As time passed, support for such fact-finding, truth telling bodies was only buttressed by the fact that some of the prominent national TRCs, including that in Argentina, had not only “led” to peace, or at least helped peace take what seemed to be a permanent hold, but also began to lead to accountability in the form of prosecutions of those responsible for the crimes described in the TRC reports. No longer were TRCs simply symbols of peace and the indomitability of truth; they became institutions at the forefront of the increasingly important drive for “accountability”.

But there was a problem with TRCs: it seems that they work best when there is local “buy-in”, that is, when they are contextually constituted, locally organized and supported, and the call for the TRC comes from a domestic movement. The literature has tended to suggest that the imposition of TRCs from afar does not lead to a successful result.\textsuperscript{345}

But, as we have seen with UN COIs, they tend to be called for by the UN or international community in situations where the relevant “state” apparatus governing the geographic territory where the abuses purportedly took place is unwilling to cooperate, often going so far as to limit access to the territory to the COI, either partially or fully. Even a permanent TRC could not effectively operate in the territories where UN COIs do most of their work. Fact-finding of a different sort, that is to say non-TRC fact-finding, thus continues to be as important as ever. And though the system of Special Rapporteurs continues to be an effective and necessary method of monitoring certain issues or states, sometimes a broader overview of all the complicated and enmeshed issues that societies face that contribute to conflict and mass abuses is necessary.

\textsuperscript{343} The UN General Assembly has also proclaimed 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims. See UNGA, Res A/RES/65/196, UNGAOR, 65th Sess, (3 March 2011).
\textsuperscript{344} Scharf, \textit{supra} note 7.
The late 1980s to at least mid-1990s also coincided with the increased tendency to see the exportation of law – and the rule of law – abroad as a good idea, perhaps again in no small part influenced by the crumbling of various states. Institutional and political stability was viewed as central to ensuring market stability, and democracy and the promotion of, in particular, civil and political rights, was viewed as the technical means to both promote such stability and, thus, assist with human and economic development. In tandem with the field of transitional justice, the world saw a growth in legal-technical responses to major social, political and economic problems. In the context of “needing” to provide technical governance and legal assistance to conflict and failing states, fact-finding was a fairly accessible – and well-known – method of helping to identify the institutional and political weaknesses and, perhaps, suggest solutions.

As a result, it is not surprising that this period coincided with an increased use of human rights fact-finding methods, and in particular the emergence of a renewed focus on the large-scale, \textit{ad hoc} UN COIs to investigate the largest, and thus most complex, atrocities. Because the problems related to national recovery and development were viewed by organizations like the UN as, at least in large part, legal-technical, the legal “human rights” response to atrocities was also not surprising.

And so this brings us to the contemporary \textit{ad hoc} UN COI. As early as 1993 UN COIs have focused on war crimes, crimes against humanity and genocide, and increasingly on institutional reform and other aspects related to transitional justice. In the context of the long history of human rights fact-finding at the UN, and in particular the inquiry “system” of monitoring and investigation, it is particularly this “type” of COI – that dealing with accountability and transitional justice – which I will now analyze and address.

Before moving on to a brief study of this first contemporary \textit{ad hoc} UN COI, it might also rightly be noted that there have previously been two internationally established COIs constituted to investigate war crimes and prepare for prosecutions

\footnote{See generally Thomas Carothers, ed, \textit{Promoting the Rule of Law Abroad: In search of knowledge} (Washington: Carnegie Endowment for International Peace, 2006).}
before international tribunals. The first was the 1919 Commission on the Responsibilities of the Authors of the War and Enforcement of Penalties for Violations of the Laws and Customs of War (1919 Commission), which came to nothing. The second was the 1943 United Nations War Crimes Commission (UNWCC), established at the end of the Second World War, which led to the Nuremberg and Tokyo Tribunal judgments.

The intention in the case of both COIs was to gather evidence to support the prosecution of those most responsible for the “atrocities conducted during the war,” though this only included those responsible for non-Allied atrocities. In any event, to quote M. Cherif Bassiouni, the Rapporteur for the Gathering and analysis of Facts for the COI as well as the Chairman of the Yugoslav COI: “[t]here is no reason to believe that the Security Council had these two antecedents in mind when it established the Commission of Experts.” Neither did the Darfur COI see them as a precursor to its work, and subsequent COIs have followed this path.

3.5 The Yugoslav War Crimes Commission of Experts

The 1992 Commission of Experts that investigated war crimes, crimes against humanity and genocide in the former Yugoslavia was, as stated, the third “war crimes” inquiry and the first of the contemporary COIs to focus primarily on serious international crimes, and individual accountability, in the aftermath of large-scale mass atrocities.

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349 United Nations here refers to the Allies in General, as the United Nations as an international organization was not established for approximately another two-years.
350 Bassiouni, “UN COI for Yugoslavia”, supra note 347 at 787.
351 Ibid at fn 3.
But, according to Bassiouni, the Yugoslav COI “[was] unique in the history of the United Nations and its accomplishments bring credit to the Organization.”

The COI’s mandate was elaborated in Security Council Resolution 780 of 6 October 1992, in which the Security Council,

\[\text{requests} \] the Secretary-General to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyse the information submitted pursuant to resolution 771 (1992) and the present resolution, together with such further information as the Commission of Experts may obtain through its own investigations…with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia. \[\text{Emphasis in original.} \] 

Bassiouni has noted that: “[w]hile the Commission of Experts was not originally set up in October 1992 with the specific view that it would be the first step in the establishment of an ad hoc war crimes tribunal, that prospect was nonetheless contemplated by several members of the Security Council.” \[\text{Resolution} \] 808 of 22 February 1993 decided to establish the ICTY.

The precise nature of the COI and its methods of collection of evidence were not particularly clear, at least from the mandate. Was the COI to collect evidence for the ICTY, which was sure to follow, or evidence to supplement the work of a tribunal, or was the tribunal a totally different process with a different purpose? Practically, these uncertainties played out in the determination of the working methods of the COI. What precisely did the Security Council mean when it used the term “evidence”, for example, and what implications did this have on the purpose and type of work conducted by the COI? Did “evidence” mean evidence of a general nature – of the type or nature that canvassed trends, particular areas of concern – the treatment of refugees or women for

\[\begin{align*}
353 & \text{Bassiouni, ibid at 803. See also Jernow, supra note 149 at 833.} \\
354 & \text{UN Security Council Res 780, UNSCOR, 47th Sess, UN Doc S/RES/780 (1992) at para. 2.} \\
355 & \text{Bassiouni, “UN COI for Yugoslavia”, supra note 347 at 790. Evidently, the United States wanted the term “War Crimes Commission” to form part of the Expert Commission’s title.} \\
357 & \text{Bassiouni, “UN COI for Yugoslavia”, supra note 347 at 791. UN Security Council Res 827, UNSCOR, UN Doc S/RES/827 (25 May 1993), established the ICTY and adopted the Tribunal’s statute.}
\end{align*}\]
example? Or, did the term evidence refer to prosecution-oriented evidence of the type gathered for criminal prosecutions?

It would seem that the latter – prosecution-oriented – understanding would require the COI to collect information with greater specificity and precision, and likely a greater attention to norms of due process in terms of the methods of collecting evidence and interacting with witnesses and the potential accused. As a result, under this understanding of the term evidence, the COI would either require more time and resources to investigate claims in conformity with some as-of-yet undefined notion of due process – as we have seen, no rules had yet been offered in this regard – or it would have to limit the number of incidents it investigated at the expense of offering a broad, comprehensive overview of the conflict and its repercussions as it might otherwise have done. This evidentiary quandary represented an either-or proposition that seemed to exist due in large part to the resource constraints that accompany UN fact-finding of all kinds.358

The COI appears to have chosen the route of collecting prosecution-oriented evidence.359 This means that the COI collected the type of evidence that it thought could be used for individual convictions in a court of law. And, in the end, it turned over to the ICTY prosecutor (on April 30, 1994) its database and all of the documents and other materials it had amassed.360 Some of the staff likewise moved from the COI to the Tribunal.361 This is to say that the COIs work in collecting evidence and investigating crimes, as Bassiouni has noted, at least “constituted the starting point for the Prosecutor of the [ICTY].”362 It has been said that not before this time did the “international community realize…the potential of an independent investigation as a separate mechanism of criminal justice.”363

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358 For a discussion of the constraints on the Yugoslav COI, see generally Bassiouni, “UN COI for Yugoslavia”, ibid at 790-1.
359 Ibid at 791.
360 According to Bassiouni: the database was established at DePaul University’s International Human Rights Law Institute and “relied on an average of thirty-two lawyers and law students, in the course of time, to input the data and prepare analyses and reports on different topics. By the time the database was transferred to the Office of the Prosecutor of the [ICTY], on April 30, 1994, it had received sixty-four thousand pages of documents submitted by governments, intergovernmental organizations, nongovernmental organizations and other sources.” See ibid at 795.
361 Ibid at 792.
362 Ibid at 795.
363 Rassi, supra note 8 at 222.
At the same time, the COI’s final Report stated that:

[i]t was not the Commission’s intention or part of its responsibility to prepare cases for criminal prosecution or to pronounce upon the guilt of individual persons. These are tasks for prosecutors and judges, who will form their own views after thorough investigation and deliberation, in accordance with the ‘rule of law’…It should also be emphasized that no allegation contained in the Annexes with respect to any individual is intended to constitute a finding of guilt or innocence of that person.  

Interestingly, the Report also noted that:

[m]indful of the Prosecutor's task and the exigencies of his work, the Chairman and the Prosecutor cooperated in reviewing these Annexes to make sure that they do not contain any information detrimental to the task of the Prosecutor. This is why many names, places and other relevant information have been deleted from the Annexes. But, this information is in the hands of the Prosecutor.

These seemingly contradictory statements about the purposes and approaches of the COI have not since been reconciled in the practice of subsequent contemporary ad hoc UN COIs. Contemporary ad hoc UN COIs continue to investigate individual criminal responsibility in the aftermath of mass atrocities, recommend that the international community resort to prosecutions as a form of accountability for the crimes, turn over evidence and the names of witnesses and perpetrators to prosecutors or publish them widely, condemn perpetrators for their role in the commission of international crimes without pronouncing them “guilty”, and sometimes thereafter work with courts. At the same time, contemporary ad hoc UN COIs, as in the case at hand, maintain the historic commitment to not being “judicial” inquiries. Moreover, such COIs continue to conduct investigations either during or after a conflict, yet maintain a primary purpose of preventing conflict or maintaining the peace.

As a result, it has become increasingly clear that some positive principles and ways of thinking about ad hoc rules of procedure are needed, and that this must relate to the purposes that contemporary ad hoc UN COIs actually fulfill. Even as there has consistently been debate about the need to formalize understandings and processes surrounding COIs, the turn to considerations of individual criminal responsibility has intensified the need.


\[365\] Ibid at para 14.
The Yugoslav COI did create rules of procedure, which it subsequently published and followed. So, for example, a majority of the members were required to concur for "any decision to be taken", though consensus was to be preferred. Meetings were to be held in private but could be held, with a majority of members, in public, and the mission was responsible for the safekeeping of its files which were to be transferred to the Secretary-General upon the completion of the COI's work. With respect to the disclosure of information, the rules stated: "[m]embers of the Commission shall exercise restraint in disclosing information. They shall refrain from taking a stand in public on any confidential question under discussion in the Commission. The Chairman will make information on the work of the Commission available to the extent he deems it appropriate." The rules also allowed the COI to hear from state representatives, witnesses or others at the COI's request. Finally, any commissioner wishing to “make a separate statement” and append this to the COI's Report was at liberty to do so.

In terms of its investigative methodology, the COI's work was fairly standard for contemporary ad hoc UN COIs. It conducted site visits, received information from governments and other sources, in particular NGOs such as Physicians for Human Rights, but also media reports. In some cases the COI relied entirely on governments to conduct fact-finding missions and provide the COI with relevant information or the expertise of NGO personnel to assist with various tasks, including mass-grave investigations. The COI worked particularly closely with the Special

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367 Ibid at Annex I, Article 2.2.
368 Ibid at Annex I, Article 9.
369 Ibid at Annex I, Article 2.
370 Ibid at Annex I, Article 6.
371 Ibid at Annex I, Article 3.
372 Ibid at Annex I, Articles 7, 8.
373 Ibid at Annex I, Article 10.3.
374 Bassiouni, “UN COI for Yugoslavia”, supra note 347 at 800-1.
375 Ibid at 794-5.
376 Ibid at 800.
Rapporteur on the Former Yugoslavia; Bassiouni has claimed that the staff of both the COI and the Rapporteur “were in daily contact.”

As to the information obtained from third parties, according to Bassiouni,

[n]either the Commission nor [DePaul University’s International Human Rights Law Institute, responsible for helping code and analyse data] verified the information that they received from the different sources identified above. However, in preparing reports and the annexes to the Final Report, the staff of IHRLI made an effort to verify the plausibility of the information, eliminate duplicates and check facts deriving from multiple sources.

Bassiouni concludes that this aforementioned “verification process validates the macroanalytical conclusion contained in the reports and annexes. However, each item of information cannot be advanced as having evidentiary reliability in criminal proceedings, at least according to common law rules of evidence.” This approach, and thinking, is likely true of most, if not all, of the evidence collected by contemporary ad hoc UN COIs. Nevertheless, as the Yugoslav COI pushed forward, there was an increased attempt to develop “investigative projects”, the purpose of which were “to confirm some of the information received from the various sources described above.” This is to say that some corroboration “projects” did take place.

As for the COI’s on-site investigations, a good deal of expertise accompanied the site-visit missions. For example, the COI conducted a mass-grave exhumation (of nineteen bodies), did a “radiological investigation”, and performed various other battlefield investigations. In general, such investigations require not just the skilled personnel able to perform exhumations, digs or radiological investigations, but also the time and resources to hire them and conduct the necessary work in a detailed, thorough and precise manner. As a result, individual governments often provided funding, which was in addition to UN contributions. Nevertheless, funding is always a

377 Ibid.
378 Ibid at 796.
379 Ibid at 796. See also Yugoslav COI Introduction, supra note 364 at para. 6: “With some exceptions, the information and allegations contained therein have not been verified. However, the cumulative nature of the information, as well as its corroboration from multiple sources evidences a degree of reliability, in the aggregate and in many individual cases. The recurrence of certain factual information from multiple or unrelated sources provides a basis for an inference of reliability and credibility. Viewed in its entirety, the combination of this information warrants the Commission's findings as to the general patterns and policies described in the Final Report and in the Annexes.”
380 Bassioumi, ibid at 796.
381 Ibid.
382 Ibid at 797.
problem with fact-finding missions, and the COI took a selective rather than scientific approach to determining what investigations it would undertake because “[i]t was not practicable to investigate exhaustively or otherwise attempt to verify every allegation of a violation. In its choice and method of conducting research projects or investigations, the Commission endeavoured, at all times, to be impartial and balanced.”

The Commission terminated its work on 30 April 1994. In its final Report, the COI, as was to become the norm, determined what law applied – the law of international armed conflict – and then went on to apply that law to the facts as it found them. In the result, a system of contemporary ad hoc COI fact-finding was borne.

3.6 The Birth of a “System” and the Darfur COI

Since the Yugoslav COI the Security Council, Secretary-General and increasingly the Human Rights Council have resorted to similar “types” of COIs, which broadly fall into three large, though perhaps unrefined, categories of COI. The first “type” is might be said to be a “system” of ad hoc Panels of Experts, established by

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383 Yugoslav COI, supra note 3 at page 11, para. 30.
384 See First Interim Report of the Yugoslav COI, supra note 356 at 13-14, paras. 37-45; 47-54. See also Yugoslav COI, supra note 3 at 24-27, paras 87-101 (on genocide); 204, paras. 72-86 (on crimes against humanity); 16-7, paras 55-60 (on command responsibility); 27-29, paras 102-9 (rape and other forms of sexual assault as crimes under international humanitarian law). For a good survey of the law, see Jordan Paust, “Applicability of International Criminal Laws to the Events in the Former Yugoslavia” (1994) 9 AM U J Int’l L & Pol’y 499.
385 See for example the Group of Experts for Cambodia, appointed by the Secretary-General, at the request of the UN General Assembly, in 1998. See Group of Experts, The Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, UN Doc S/1999/231, A/53/850 (16 march 1999). The mandate of the group was: “(a) To evaluate the existing evidence with a view to determining the nature of the crimes committed by Khmer Rouge leaders in the years from 1975 to 1979; (b) to assess, after consultation with the Governments concerned, the feasibility of bringing Khmer Rouge leaders to justice and their apprehension, detention and extradition or surrender to the criminal jurisdiction established; (c) To explore options for bringing to justice Khmer Rouge leaders before an international or national jurisdiction.” For an analysis, see Steven R Ratner, “The United nations Group of Experts for Cambodia” (1999) 93 AJIL 948.
386 In 2005 the Secretary-General was asked by the then Commission on Human Rights to produce a report surveying its recent practice with COIs. The report considered COIs in East Timor in 1999, Togo in 200, the Occupied Palestinian Territory in 2001, Cote d’Ivoire in April and June 2004, and the Darfur report, which will be discussed shortly. See Report of the Secretary-General, Promotion and Protection of Human Rights: Impunity, UN Doc E/CN.4/2006/89 (15 February 2006) [Secretary-General Report on Impunity].
387 This is not meant to preclude the fact that there are all sorts of other types of inquiry. To take but one known example from the UN system, see the oil-for-food scandal and resultant 2005 inquiry report from 2005 that accused some 2,200 companies from 40 countries of taking US $1.8 billion from the UN program aimed at easing civilian suffering resulting from harsh UN sanctions on Saddam Hussein’s Iraq: see Independent Inquiry Committee into the United Nations Oil-for-Food Programme, Report on the Manipulation of the Oil-for-Food Programme (27 October 2005), online: http://www.iic-offp.org/story27oct05.htm [UN Oil-for-Food Inquiry].
the Security Council, which operate much like very specific, small *ad hoc* UN COIs.\(^{388}\)

In general, they are mandated to investigate compliance with or violations of measures imposed on a government or body by the UN Security Council – in other words, to monitor sanctions regimes, including asset freezes, and travel bans or embargoes.\(^{389}\)

The second “type” broadly relates to investigations of significant political assassinations and the human rights abuses that almost invariably take place in their aftermath.\(^{390}\)

Such COIs might operate with or alongside other criminal initiatives, including hybrid domestic-international courts. Such COIs can be “prosecutorial investigations” in that they may be mandated to collect evidence to be used for prosecution, as was the case in the investigation into the assassination of Lebanese Prime Minister Rafik Hariri.\(^{391}\)

But it is the third “type” of *ad hoc* UN COI that and follows in the footsteps of the Yugoslav COI and on which this dissertation focuses. This type of COI is established to investigate the most serious crimes and human rights abuses found in international law that take place in the wake of the commission of mass human rights abuses, a new and ambitious approach for UN COIs. And with this new purpose, the rules of operation and due process for such COIs are much more important than in the past because of the serious consequences that can flow from them, which is clearly illustrated by the Darfur COI, where the consequences of the COI’s “criminal” findings were very grave. Let us thus turn to the Darfur COI and its procedures and findings.

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\(^{388}\) The first such Panel of Experts seems to have been set-up by the UNSC in 1995 to monitor the sanctions placed on Rwanda: see *Rwanda Panel of Experts*, UNSC Res 1013, UN Doc, UNCOR, S/RES/1013 (1995).


\(^{390}\) The first of which might be the preparatory fact-finding mission sent to Burundi on 21 October 1993 in the wake of the coup d’état and assassination of President Ndadaye. Its mandate was both to investigate the coup as well as the inter-ethnic massacres that followed. Its recommendations led to the UN International Commission of Inquiry for Burundi. For an overview see Romana Schweiger, “Late Justice for Burundi” (2006) 55 Int’l & Comp L Q 653. See also Rassi, *supra* note 8 at 228. Two well-known recent examples include: (1) the international Independent Investigation Commission, which investigated the causes and consequences of the assassination of Rafik Hariri, Prime Minister of Lebanon killed 14 February 2005 (see UN Doc S/RES/1595 (7 April 2005); (2) the assassination of Pakistani Prime Minister Mohtarma Benazir Bhutto on 27 December 2007 resulted in a request from the Government of Pakistan (in consultation with the Security Council) for the Secretary-General to appoint a COI (see Letter dated 2 February 2009 from the Secretary-General to the President of the Security Council, UNSC Doc S/2009/67 (3 February 2009); see also UN Secretary-General, *Report of the United Nations Commission of Inquiry into the facts and circumstances of the assassination of former Pakistani Prime Minister Mohtarma Benazir Bhutto*, online: http://www.un.org/News/dh/infocus/Pakistan/UN_Bhutto_Report_15April2010.pdf.

\(^{391}\) It is also required to offer technical assistance in the investigation of 15 other terrorist attacks since October 2005. See Rassi, *ibid* at 232.
3.6.1 The Darfur COI

On 25 January 2005 the UN Secretary-General established the International Commission of Inquiry on Darfur (Darfur COI) pursuant to Security Council request (Security Council Resolution 1564).\textsuperscript{392}

Paragraph 12 of the resolution requested the Secretary-General to establish the COI 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 \textit{to identify the perpetrators of such violations with a view to ensure that those responsible are held accountable}.\textsuperscript{393} [Emphasis added.] The Darfur COI reasonably concluded that recommendations regarding how such individuals should be held accountable fell within the purview of its mandate.\textsuperscript{394}

At the time of the COI, Philip Alston made note of the "litany of other [UN and NGO] inquiries and reports", which actually "serve[d] to highlight questions as to why yet another commission was needed, what particular contribution this one made, and what its relationship was with the other initiatives."\textsuperscript{395} In other words, he noted that the other fact-finding work in the region makes relevant the question of what value the Darfur COI might provide. In response, it can be said of the COI's work that the access of the Darfur COI to victims and the territory was unique, the breadth of the investigation was, by mandate, greater, the political commitment backing the COI was more robust, the focus was more particularly on serious international crimes and the legal issues surrounding them, the final report was more extensive, staff resources were generally better as compared to, say, that of Special Rapporteurs,\textsuperscript{396} and the

\textsuperscript{392} UNSC Res 1564, UNSCOR (2004). The Security Council was seized of the issue in Darfur, but had failed to act to intervene militarily despite numerous calls for such action, other than to endorse the deployment of a limited African Union Mission in Darfur (AMIS). It was no small secret that, at least in part, China’s energy interests in the Sudan, and thus its tacit support of President Bashir and the Sudanese government in Khartoum were in part responsible for Security Council intransigence. Africa as a continent also generally preferred African Union peacekeepers to UN peacekeepers, seeing it as a problem in its own backyard and thus one that Africa should deal with.

\textsuperscript{393} \textit{Ibid} at para 12.

\textsuperscript{394} See \textit{Darfur COI, supra} note 5 at para 10.

\textsuperscript{395} Philip Alston, \textit{“The Darfur Commission as a Model for Future Responses to Crisis Situations”} (2005) 3 Journal of International Criminal Justice 600 at 603 [Alston, \textit{“The Darfur Commission”}].

\textsuperscript{396} In 2006, the Report of the Secretary-General stated: “While the special procedures of the Commission on Human Rights play a crucial role in monitoring and following up on the human rights situation at the country level,
scope of consideration of the crisis was greater. But these are theoretical advantages of a COI in contrast to its alternatives, not benefits necessarily provided by the COI.

At the same time, another prominent human rights academic, William Schabas, observed that,

[[The investigative work conducted by the Commission of Inquiry might well have been undertaken by the Prosecutor of the International Criminal Court from the outset, in September 2004. Precious time was wasted establishing a commission of inquiry and debating its findings when this proved to be a totally unnecessary and superfluous step.]]

Beyond the obvious assertion that the COI was unnecessary and what was really important was criminal investigations and prosecutions, implicit in this statement is that the COI was really about criminal accountability and, in a manner, acted as a preliminary investigative arm of the ICC. At the time of the Darfur COI, there already existed widespread reporting regarding the extent of the atrocities taking place in Darfur. The question at the time of the establishment of the Darfur COI was more one of how legally to characterize the crimes so clearly taking place in Darfur than one of whether human rights abuses and mass killings were taking place. In particular, the debate centered on whether such killings as were taking place in Darfur could amount to “genocide” – numerous NGOs were reporting on the “genocide” at the time and was calling on countries to do the same as was, for example, the United States Senate, while other organizations such as Human Rights Watch were “merely” characterizing the abuses as war crimes and crimes against humanity.

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397 See Secretary-General Report on Impunity, supra note 386 at para 6.
398 See William A Schabas, “Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry’s Findings on Genocide” (2006) 27 Cardozo Law Review 4, 1703 at 1707. Though he did also say that this was “not to say that the work of the Commission [was] insignificant in a legal sense.” Ibid.
Indeed, Philip Alston has noted that what was particularly novel about the Darfur COI, even as compared to the Yugoslavia investigations, was “the explicit charge to the Darfur Commission to make a formal determination on the question of whether genocide had taken place and to identify the perpetrators of major violations.” According to a 2006 Secretary-General Report: “[t]his was the first time that an international commission of inquiry had been created with such a comprehensive mandate, including specific requests for formal determination [sic] of whether ‘genocide’ had occurred and for the identification of perpetrators.”

The COI conducted site visits to Sudan and met with government officials, members of armed forces and police, rebel and tribal leaders, victims, witnesses and internally displaced persons, NGOs and UN Representatives, but the report found that it could not determine whether genocide had in fact taken place – in particular as part of a government policy. However, the final report did find that crimes against humanity and war crimes had been committed. The COI also identified 51 suspects by name and recommended that the Security Council refer the situation in Darfur to the ICC, which was controversial at the time given that China opposed action against Sudan and the United States was in the midst of an international anti-ICC campaign.

In finding that war crimes and crimes against humanity had been committed, the COI report stated that,

[In order to identify perpetrators, the Commission decided that there must be ‘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 therefore makes an assessment of likely suspects, rather than a final judgment as to criminal guilt.][567] [Emphasis added.]

According to the COI report, the decision to seal a list of perpetrators was based on three primary grounds: “1) the importance of the principles of due process and respect for the rights of the suspects; 2) the fact that the Commission has not been vested with

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402 See Secretary-General Report on Impunity, supra note 396 at para 30.
403 See Darfur COI, supra note 5 at Executive Summary, page 2.
404 See ibid at paras 489-522.
405 See ibid at paras 523-564.
406 See ibid at para 569; see also paras 571-72 justifying why ICC referral was necessary.
407 Ibid at Summary, page 4.
investigative or prosecutorial powers; and 3) the vital need to ensure the protection of witnesses from possible harassment or intimidation.”

According to the COI report, in addition to handing the sealed list of perpetrators to the ICC prosecutor, the COI also handed “a very voluminous sealed file, containing all the evidentiary material collected by the Commission…to the High Commissioner for Human Rights. This file should be delivered to a competent Prosecutor.”

However, it was not made clear what precisely the rules or principles of due process were that applied to the COI and prevented it from “naming names” publicly, but allowed the COI to transfer these names to a court for prosecution. Apparently the COI agreed upon its own terms of reference, which are not available, at least in the public domain, and thus may or may not have included rules or principles of due process. According to the COI’s report, the COI did agree from the beginning to “discharge its mission in strict confidentiality…The Commission also agreed that its working methods should be devised to suit each of its different tasks.” The COI’s report also noted that: “[a]lthough clearly it is not a judicial body, in classifying the facts according to international criminal law, the Commission adopted an approach proper to a judicial body. It therefore collected all material necessary for such a legal analysis.”

In terms of the standard of proof, particularly as relates to the naming of perpetrators, the COI, 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.

How “a reliable body of material” actually differed from a prima facie case was not discussed or explained. In any event, in actually enunciating the purported crimes the COI seemed, at various points, to be asserting that violations had indeed occurred –

408 Ibid at Summary, page 5.
409 Ibid.
410 Ibid at para 12.
411 Ibid at para 13.
412 Ibid at para 14.
413 Ibid at para 15.
thus meeting a high standard of proof – but that the relative uncertainty lay with whether said violations attained the level of war crimes or crimes against humanity. In other words, the certainty of the COI, or the standard of proof met, was shifting depending on whether its findings related to facts or law: mass atrocities were definitely committed, but it was for a court to decide whether, as appeared likely, these human rights abuses amounted to serious international crimes. And sometimes, the certainty with which the COI’s report asserted the commission of serious international crimes appeared higher than a “reliable body of material” would suggest. So, for example, in its concluding section on factual and legal findings, the COI’s report says the following:

the Commission concludes that the Government of the Sudan and the Janjaweed are responsible for [a definitive statement] a number of violations of international human rights and humanitarian law. Some of these violations are very likely [though not definitive, this wording implies a certainty closer to a prima facie case than the enunciated standard of proof] to amount to war crimes, and given the systematic and widespread pattern of many of the violations, they would also amount to crimes against humanity.414 [Emphasis added.]

In order to respond effectively at the UN to the COI report, a compromise was reached at the Security Council whereby the United States and China – along with Algeria and Brazil – abstained in the vote on the subsequent UN Security Council Resolution 1593 (2005), which only several weeks after the issuance of the Darfur COI’s report referred the situation in Darfur to the ICC. The Security Council was thus able to “implement” the COI recommendation by deciding to “refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court”415 and in so doing it sent along a sealed list of high profile suspects for the ICC to review for prosecution.416 This was the first Security Council referral to the ICC. As a result, the ICC subsequently began investigating the “situation”, i.e. the abuses in Darfur.

After the release of the COI’s report on 25 January 2005, then UN Secretary-General Kofi Annan asserted that it was “one of the most important documents in the

414 Ibid at para 630. However, just pages later the Report states: “The Commission considers that there is a consistent and reliable body of material which tends to show that numerous murders of civilians not taking part in the hostilities were committed both by the Government of the Sudan and the Janjaweed.” Ibid at para 633.
416 The basis for the power to refer in Res 1593 is Chapter VII of the UN Charter and the SC’s assertion that the situation in Darfur constituted a threat to international peace and security. Article 13(b) of the Rome Statute of the ICC allows the court to take jurisdiction of a situation where “one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council action under Chapter VII of the Charter of the United Nations.”
recent history of the United Nations;\textsuperscript{417} and, the report has been called a “model” for future responses to conflict situations.\textsuperscript{418} In addition to leading to the indictment of accused criminals in Sudan, the COI’s report also paved the way for a UN Mission in Sudan (UNMIS) created by Security Council Resolution 1590 (24 March 2005), and a sanctions regime against Sudan created by Security Council Resolution 1591 (of 29 March 2005), which included travel bans and the freezing of personal assets on individuals impeding the peace process. On 28 April 2005, the African Union also greatly increased its deployed force in Darfur, and on 6 June 2005 the Prosecutor of the ICC officially decided to open an investigation. On 26 April 2006, the Security Council passed Security Council Resolution 1672, which – without trial – named the first four individuals to whom the sanctions – travel bans and asset freezes – would apply. Significantly, on 14 March 2008 the ICC issued an arrest warrant against Omar El-Bashir, the President and head of State of Sudan, on charges of war crimes and crimes against humanity, though he remains in power.

The Darfur COI made very serious legal findings, in addition to factual findings, though it was undoubtedly its mandate to do so. The COI also provided a list of recommendations that reached well into the policy realm – beyond the mere explication of the factual-legal context. The combination of the final report’s particular factual focus on individuals and international crimes, its legal findings and its extensive recommendations that had very serious political, national and individual consequences sets the Darfur COI apart from the original intention of international COIs to merely act as fact-finding bodies intended to resolve disputes as between states.

An evolution of sorts was taking place and it resulted in far more extensive and legalistic UN COIs.

\textbf{3.7 Conclusion}

While human rights fact-finding has progressed in some ways in a linear, planned fashion, improving on old methods and formalizing new rules in anticipation of future events, many of the processes and procedures have developed in parallel with or as a result of unanticipated developments in international law and international

\textsuperscript{417} UN Press Release SC/8313 (16 February 2005).
\textsuperscript{418} See Alston, “The Darfur Commission”, \textit{supra} note 395.
relations and this has contributed to the fragmentation of largely non-binding rules for UN COIs. A nuanced approach to analyzing contemporary *ad hoc* UN COIs, their purposes and their procedures is therefore needed, one that remains flexible when confronted with new developments, ideas and institutions as they arise and does not depend on a fragmented, non-binding system of rules.

New ideas trended through international law and diplomacy and international human rights during the 1980s and early 1990s. These ideas related to the belief that serious domestic human rights violations were a central concern to the international community and could assuredly affect international peace and security. The idea of “transitional justice” developed, along with a firm commitment to holding those guilty of individual crimes accountable for their actions. Truth commissions evinced the benefits of truth telling, of reckoning with the past, and of developing contextual yet holistic approaches to peace-building and democracy promotion; and, the UN likewise saw the need for mainstreaming human rights and drawing connections between human rights and security, development, and peace. As these trends and ideas developed through the 1980s and early 1990s, they were brought together with old ideas relating to the prevention of conflict and preservation of peace and security by means of investigative inquiries, ideas that stemmed from almost eighty years of practice in the international system.

The result was that *ad hoc* UN COIs continued to operate where there was a threat to international peace and security, though they did not act precisely as they did in the past. These newer *ad hoc* UN COIs tended to operate in what is openly acknowledged to be post-conflict – or even conflict – situations, though it might often be more accurate to describe them as operating in the down time between recurring conflicts. Today, at the point in time when *ad hoc* UN COIs hit the ground, early warning opportunities have long passed. At the same time, UN COIs were starting to integrate all of the human rights trends of the time into their work – they were searching for the truth, fighting accountability, making recommendations on how to lay the foundation for peace and most of all focusing on international criminal law and prosecutions. As we shall see with the Gaza case study, this history has laid the groundwork for even more growth in terms of the purposes and hopes of such large-scale *ad hoc* UN COIs, yet the criticisms of UN COIs and the shallowness of the rules that apply to them have remained constant.
CHAPTER 4
PUTTING THE GAZA COI CASE STUDY IN CONTEXT

4.1 Introduction

Before commencing the case study on the Gaza COI in the following chapter, it is helpful to place the Gaza COI in its proper context; this requires a discussion of two topics. First, in order to understand the Gaza COI and the strong negative reaction thereto, particularly by Israel, it is necessary to have a sense of the institutional context in which the Gaza COI was originally constituted, and this means analyzing the relationship between Israel and the institution that established the Gaza COI, the Human Rights Council, as well as the processes by which COIs are created at the Human Rights Council. Second, we have seen in the previous chapters that the type of conflicts to which UN COIs respond as well as what COIs are thought to achieve has changed through the years, particularly over the past twenty-five years. In this context, that is, one where the ends for which ad hoc UN COIs operate have evolved in response to the changing normative human rights and transitional justice landscapes, it is helpful to offer a concise break-down of the range of purposes for which UN COIs have recently or might today operate. A general analysis of the potential purposes of UN COIs can help us locate which of these purposes, if any, applied or were thought to apply specifically to the Gaza COI, and this in turn will be fundamental to analyzing the legal and methodological procedures of the Gaza COI in the following chapters, as this chapter will discuss.

Let us commence then with the first of these topics: the process of creating contemporary ad hoc UN COIs at the Human Rights Council as well as the relationship between the Human Rights Council and Israel.

4.2 Conflict within a Conflict: the Human Rights Council and its history with Israel

4.2.1 Why the Context Matters

I will focus on Israel’s experience with the Human Rights Council as an outsider trying to see things from the Israeli perspective. I offer this contextual overview – from this Israeli perspective – knowing how contentious it is to delve into any historical
analysis of the Israeli-Palestinian conflict, and with the hope that this very limited overview of one particular institution will not detract from the credibility of the substantive analysis which is to follow. I take this risk because it is important in the case at hand to understand how concerns of bias and legitimacy related to the institutions that create UN COIs – in this case the Human Rights Council – can greatly affect the perceived legitimacy of the COI itself. Legitimacy, even legal legitimacy, is about more than just the rules directly applied in a case at hand; as we shall see, the institutional and political environment in which rule-making and rule-applying bodies are created can also influence outcomes and speak to legitimacy. This is to say that just as interactional law theory suggests, law-making bodies – such as the Human Rights Council – are central to legitimacy and legality; to instantiate the rule of law, they too must exhibit a fidelity to the rule of law because, as we have seen, law is upheld “horizontally” by all actors. For even if a UN COI exhibits a strong fidelity to legality, when the body that establishes that COI lacks credibility, independence, or impartiality, then this can taint legality and thus the legitimacy of the COI itself. Moreover, if the creation of a UN COI cannot be rationally justified in the first place, the procedural integrity of the COI itself will matter little, for its conclusions and recommendations are unlikely to be respected.

An analysis of the institutional environment in which the Gaza COI operated, and particularly the acrimonious relationship between Israel and the Human Rights Council, provides us with the opportunity to see the particular ways in which UN COI establishing bodies – such as the Human Rights Council – can have an impact upon and be an impediment to the ultimate legitimacy of any COI report; but it also offers the necessary background in this particular case for analyzing a very common problem associated with UN COIs, which is the unwillingness of parties to conflicts to cooperate with inquiry proceedings.

Lessons learned from the Israeli-Palestinian experience with the Gaza COI are therefore more generalizable than one might think, at least in two respects. First, Israel, at least in part because of its history with the Human Rights Council, chose not to cooperate with the Gaza COI and not to allow the COI territorial access, a decision that greatly influenced the Gaza COI’s findings and methodologies, as a lack of cooperation almost always does for UN COIs. And, while Israel had its own unique reasons for not complying with the Gaza COI, the decision was of course reflective of how Israel in
particular and investigated nations in general, have historically reacted to UN COI processes. Second, bias or the perception thereof associated with a COI’s establishing body is often proffered by impugned states as one reason for their lack of cooperation with UN COIs. The Gaza COI offers an excellent example of this tendency to denounce the constituting process both because of the traction that Israel’s claims of bias against the Human Rights Council tend to garner, at least among certain powerful states, and because of the acutely acerbic political relationship that exists between Israel and the Human Rights Council. The environment within which the Gaza COI operates is, in other words, broadly representative of the general process of establishing and attacking UN COIs, though it might be called the “hard case” in that it is so politically fraught that solutions that might work here are likely to work nicely in less fraught situations as well.

With this in mind, we can begin the discussion of the creation of the Gaza COI.

4.2.2 A Political Process: How the UN Human Rights Council creates ad hoc COIs

Let us start with the general picture – the UN – and move to the specific – the creation of COIs at the Human Rights Council. The UN is made-up of 193 states; likewise its organs, whether the Security Council (15 states, 5 permanent member states with veto powers), General Assembly (all 193 states), and the Human Rights Council (47 states, elected in regional blocks) are composed, with different levels of representation, of states. UN COIs are established through various processes – reviewed in chapter two of this dissertation – whereby some of these states vote to create an inquiry. Though UN COIs can often appear to outsiders to be principled and humanitarian in focus, since they now generally respond to human rights and

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419 So, in 1992 Philip Alston was correct in noting that, “[n]either South Africa nor Israel have ever formally co-operated with the Commission’s [then Human Rights Council’s] investigative organs,” a trend which has continued at least as concerns Israel. See Alston, *A Critical Appraisal*, supra note 109 at chapter 5, page 171.
420 We saw this to be true in the historical overview of UN COIs in the previous chapters.
421 Indeed, in denouncing UN COI reports, states will almost always speak to real or perceived biases associated with the COI’s operation, which includes those procedures and institutions used to establish the COI.
422 The five permanent members are: the United States; China; the United Kingdom; France; Russia.
423 The Human Rights Council is split into 5 geographic blocks: 13 seats are given to Africa, 13 for Asia, 6 for Eastern Europe, 8 for Latin America and the Caribbean, and 7 for the Western Europe and Others group. States are elected by the General Assembly for terms of three years, and can serve a maximum of two consecutive terms. States can also be suspended for gross or consistent violations of human rights, though this requires a two-thirds majority vote of the General Assembly.
humanitarian violations in an effort to curb such abuses or promote accountability, they are nevertheless established based on the political interests and discretion of the international community or a proportion thereof.\(^{424}\)

Thus, geopolitics as much as or more so than humanitarian considerations can influence when and why a particular \textit{ad hoc} UN COI is established and another situation is left uninvestigated. The very benefit of \textit{ad hoc} UN COIs – their flexible ability to respond in a timely and contextually sensitive manner to matters of international interest as they arise – also means that there is no objective or legal procedure by which we can say that an inquiry must exist in one situation but not in another. Thus, whatever good intentions might exist in establishing an \textit{ad hoc} UN COI, it can nevertheless be criticized as resulting from a political – rather than legal – process, though whether this politicization is perceived as bad or whether it even matters in a particular context will be a matter of opinion.

Nevertheless, this process can mean that UN COIs can have a certain “path dependency” in that a particular UN organ or body identifies the conflict, frames the COI’s mandate, and controls the type of recommendations that flow from the COI. The recommendations of the COI will therefore necessarily relate directly to the geographic, economic and/or political interests of those that establish the COI. These interests might be legitimate humanitarian concerns, or an interest in shaming another country engaged in a dispute with those who established the inquiry, or an interest in galvanizing domestic political support by naming and shaming another country. This is to say that because such UN COIs are \textit{ad hoc} rather than systematic, they are always open to the claim that a particular UN COI is unwarranted, unfair, the result of a vendetta rather than a pronounced need for an inquiry, etc. And when \textit{ad hoc} UN COIs are disparaged in such a way, the criticism may be spurious, but it should not necessarily be dismissed out of hand – as the human rights community can tend to do – simply because UN COIs tend to serve a human rights function. As \textit{ad hoc} UN COIs continue to develop, it should be kept in mind that, as with domestic COIs, they can

\(^{424}\) See the previous chapter on the history of UN COIs. To reproduce one of the quotes used in that chapter, “it is quite clear that the mandate and the terms of reference of \textit{ad hoc} investigation committees of the United Nations often correspond to political needs of the relevant principal organ of the United Nations – although human rights problems existed in all the cases without any doubts.” Ermacora, \textit{supra} note 141 at chapter IV, page 88-9.
indeed be created for benevolent purposes or to elide, postpone or reframe a political issue.

The possibility that the ad hoc nature of a UN COI might delegitimize its subsequent operations and report – by making their creation seem biased, discretionary, or vendetta-driven – was brought into sharp focus with the Gaza COI. The Gaza COI and its mandate were established by the Human Rights Council at one of its “special sessions”. Special or emergency sessions were instituted as an amendment to the Human Rights Council’s procedures so that it could be more reactive to world events in that the Council could meet whenever an emergency human rights situation arose, rather than meeting intermittently at a pre-determined time each year. Calling a special session of the Human Rights Council requires that one or more country submit a request for it to be held, and then at least one-third of the Human Rights Council’s 47 states must support the submission.\(^{425}\)

At the Human Rights Council’s ninth special session, resolution S-9/1 called on the President of the Human Rights Council to establish the Gaza COI.\(^{426}\) Resolution S-9/1 was drafted by Cuba, Egypt (on behalf of the Arab and African Groups), and Pakistan (on behalf of the Organization of the Islamic Conference). Resolution S-9/1 was adopted by a vote of 33 to 1, with 13 abstentions. The vote was split regionally, as is often the case at the Human Rights Council, with only Canada having voted against the resolution (the United States was not, at the time, on the Human Rights Council, and Israel has never run for membership on the Council),\(^{427}\) while the 13 abstentions came primarily from European states,\(^{428}\) and the 33 votes in favour were cast primarily by Middle Eastern and African nations.\(^{429}\) After the special session was convened and

\(^{425}\) See UNGA Res A/RES/60/251, supra note 155. Article 10 states: “Decides further that the Council shall meet regularly throughout the year and schedule no fewer than three sessions per year, including a main session, for a total duration of no less than ten weeks, and shall be able to hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council…. [Emphasis added.]

\(^{426}\) HRC Res S-9/1, 9\(^{th}\) Special Sess, UN Doc A/HRC/S-9/L.1 (9 January 2009) [Res S-9/1]. See also Goldstone Report, supra note 6 at Part One: Methodology, page 37, para 131.

\(^{427}\) Israel was twice a member of the UN Commission on Human Rights, from 1957-1959, and from 1965-1970.

\(^{428}\) Bosnia and Herzegovina, Cameroon, France, Germany, Italy, Japan, the Netherlands, Republic of Korea, Slovakia, Slovenia, Switzerland, Ukraine, the United Kingdom of Great Britain and Northern Ireland.

\(^{429}\) These states were: Angola, Argentina, Azerbaijan, Bahrain, Bangladesh, Bolivia, Brazil, Burkina Faso, Chile, China, Cuba, Djibouti, Egypt, Gabon, Ghana, India, Indonesia, Jordan, Madagascar, Malaysia, Mauritius, Mexico, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, South Africa, Uruguay, Zambia.
resolution S-9/1 adopted by majority vote, the President of the Human Rights Council at the time finalized the establishment of the COI on 3 April 2009, and the secretariat of the UN Office for the High Commissioner for Human Rights followed the usual practice of providing logistical and other support.

The first concern with resolution S-9/1 was that the geographic split that was evident in the vote, as well as the Human Rights Council’s focus on Israel, was neither unusual at the UN nor, more poignantly, at the Human Rights Council. The UN has a long history of focusing disproportionately on Israel, or at least on the Israeli-Palestinian conflict, with primarily Middle Eastern and African nations forcing the issue. From the General Assembly to the UN’s various human rights reporting instruments, historically no conflict is or has been more scrutinized. And no UN organ or body has seen greater criticism in terms of its long-standing, disproportionate focus on Israel than the Commission on Human Rights, which became the Human Rights Council in March 2006.

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430 The President at the time was Martin Ihoeghian Uhomoibhi (Nigeria). Originally Mary Robinson and Goldstone refused to head the COI. Eventually, the President of the Human Rights Council was able to establish the COI after a meeting with Justice Goldstone and an agreed amendment to the mandate. In the Letter of Justice Goldstone to the Israeli Permanent Representative to the UN Human Rights Council, Ambassador Aharon Leshno-Yaar (8 April 2009) at Annex II to the Goldstone Report, supra note 6 [Goldstone letter to Israeli Ambassador], Goldstone stated: “I wished personally to assure you that prior to considering the invitation to lead the Mission, I satisfied myself that it would be given unbiased and even-handed terms of reference. In particular, it seemed to me that it was crucial, in order to assess the military actions conducted by Israel, and in particular to investigate the effects on Israeli citizens of the rocket attacks that emanated from Gaza…As a completely independent body, the Mission will now be determining its own terms of reference. I would hope that I could consult with the Government of Israel and take into account its views with regard to the terms of reference. Your advice in this regard would be much appreciated.” [Emphasis added.]

431 Likely the first such commission came about by request of the United Kingdom on 2 April 1947 for a special session of the UN General Assembly so that a special committee could be arranged to consider the question of Palestine. See UNGA Res A/286, UNGAOR, 1st Special Sess, UN Doc A/286 (2 April 1947). The Committee was constituted by the UNGA Res 106(S-1), UNGAOR, UN Doc A/307 (15 May 1947), online: http://www.un.org/ga/search/view_doc.asp?symbol=A/310&Lang=E. See also resolutions adopted at the UN General Assembly special session requested to be convened by the Security Council, online: http://www.un.org/ga/search/view_doc.asp?symbol=A/555&Lang=E. At roughly the same time – 23 April 1948 – the Security Council had also created a Truce Commission for the dispute: see UNSC Res 48.S/747, UNSCOR (23 April 1948). At the conclusion of the 1948 (commencing May 14th) war between Israel, Syria, Jordan (then Transjordan), Lebanon and Egypt, Mixed Armistice Commissions were also established to investigate various complaints arising out of the conflict. See generally Report of the Secretary-General on methods of fact finding, supra note 64 at paras 160-5, pages 27-8; see also ibid at at para 162, page 27; Shore, supra note 65 at 57. As another example, in 1968 the UN General Assembly Resolution established the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories; see UNGA Res 2334, supra note 165. At around the same time, the Commission on Human Rights set-up the Special Working Group of Experts to investigate Israeli practices in the occupied territories. See Commission on Human Rights, Res 6 (XXV), ESCOR (4 March 1969).
The documentation used to support the position that the Human Rights Council has focused disproportionately on Israel – and the statistics to back it up – vary only slightly from argument to argument, but seem indisputable. To take but one statistic, the Human Rights Council condemned Israel 26 times to only 6 for all other nations over its first three years of operation – a time when the ICC was conducting investigations into four countries, elections fraught with human rights abuses and corruption were taking place in Zimbabwe and elsewhere, and nations worldwide were involved in internal armed struggles and accused of atrocities. In addition, since its inception the Human Rights Council only has had one country permanently on its agenda: Israel.

Not surprisingly then, to Israel the political climate at the Human Rights Council was as important to evaluating the credibility of the Gaza COI and its subsequent report.
as anything. The Israeli government, in initially refusing to cooperate with the Gaza COI shortly after its establishment, noted the Human Rights Council’s “one-sided approach” to the Israeli-Palestinian conflict and expressed concern that the mandate, or at least the treatment of the report by the Human Rights Council, would result in biased actions against Israel.435 Similarly, the United States began its condemnation of the Goldstone Report with a reference to the history of the Human Rights Council in dealing disproportionately with Israel.436 The United States statement noted, inter alia, that between the creation of the Human Rights Council in 2006 and the issuance of the Goldstone Report, “[the Human Rights Council] ha[d] passed 20 resolutions on Israel, more than the number of resolutions for all 191 other UN members combined. The Council also ha[d] held 11 special sessions, 5 focused exclusively on Israel.”437 In calling for opposition to the Goldstone Report, the United States House of Representatives likewise noted the, “longstanding, historic bias at the United Nations against…Israel”.438 Even well after the Goldstone Report was completed, Goldstone himself, in his April 2011 “reconsideration” of the Goldstone Report, published in the Washington Post after the second Human Rights Council Committee of Independent Experts report was issued in follow-up to the Goldstone Report, stated: “I had hoped that our inquiry into all aspects of the Gaza conflict would begin a new era of even-handedness at the UN Human Rights Council, whose history of bias against Israel cannot be doubted.”439

4.2.3 Myriad Fact-Finding Inquiries: Both a solution and a problem?

It is not just the elevated focus on Israel, coupled with the view that this elevated focus is disproportionate given the Human Rights Council’s relative lack of attention to

437 See ibid. By 2010 the HRC had held thirteen special sessions, six focused on Israel.
438 United States House of Representatives, H Res 869 (3 November 2009) [United States House of Representatives, Res 869].
other serious situations involving human rights abuses, which has instilled in Israel its opposition to the Human Rights Council. The problem is also that past human rights fact-finding missions established by the Human Rights Council\(^{440}\) have often evinced some level of bias in their reports, mandates and/or procedures.\(^{441}\) Further, the fact that numerous fact-finders are almost always operating concurrently with respect to the Israeli-Palestinian conflict, many reporting directly to the Human Rights Council, while other conflicts go largely ignored can make the addition of an \textit{ad hoc} UN COI seem redundant, or at least perhaps not the best use of resources. Where numerous fact-finders are already operating concurrently, the unique benefit of adding a large-scale \textit{ad hoc} UN COI to the list of UN fact-finders operating with respect to the conflict must be made abundantly clear; unfortunately, such clarity has not always existed. It is a recurring theme of this dissertation that increased clarity as to the goals of UN COIs is needed, and the ability to differentiate large-scale \textit{ad hoc} UN COIs from other methods of fact-finding – and thus justify their establishment even where other fact-finders are operating – is another example of why such clarity is important.

A recent example of a Human Rights Council-established COI that focused on Israeli actions and arguably evinced (at least) some elements of bias is the \textit{Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1},\(^{442}\) which had a mandate to investigate the 33-day conflict in Lebanon involving Israel, which took place between 12 July and 14 August 2006. Resolution S-2/1 was

\begin{footnotes}
\footnotenumbers
\footnote{\textsuperscript{440} So for example there are numerous UN bodies with the specific task of investigating and remaining current with the situation in the Occupied Territories. An example is the \textit{Special Rapporteur on Palestine}, Richard Falk: see Commission on Human Rights, \textit{Question of the violation of human rights in the occupied Arab territories, including Palestine}, Res 1993/2, 49\textsuperscript{th} Sess (19 February 1993). Article 4 reads: “Decides to appoint a special rapporteur…” Falk’s mandate is to, “investigate Israel’s violations of the principles and bases of international law, international humanitarian law and the Geneva Convention” and to “report, with conclusions and recommendations, to the Commission on Human Rights….” See \textit{ibid} at Articles 4(a) and (c). Note again that the official mandate refers only to potential Israeli violations. For an example of a report by Falk – without making any claims as to its integrity or lack thereof, see an example considering the Gaza inquiry: Richard Falk, \textit{Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967}, HRC Res A/HRC/13/53 (15 January 2010).
\footnote{\textsuperscript{441} This is true generally of the resolutions passed by the Human Rights Council. So for example, \textit{Freedom House Report Card 2009-2010}, supra note 433 at 10, stated: “Israel remained the target of an inordinate number of condemnatory resolutions and special sessions. The country was the focus of three out of six condemnatory resolutions passed during the period of this report (and 22 out of 37 since the first session of the Council), the language of which was consistently one-sided, assigning sole responsibility to Israel for the violations of human rights in the occupied Palestinian territories. Israel was also the target of three of the four first special sessions called by the Council, and one of the two special sessions during this reporting period.” For an excellent historical discussion of Israel’s treatment by UN COIs, see Frank and Fairly, \textit{supra} note 191.
\footnote{\textsuperscript{442} UN Human Rights Council, 3\textsuperscript{rd} Sess, UN Doc A/HRC/3/2 (23 November 2006) \textit{[Lebanon COI]}.}}}


entitled, “The grave situation of human rights in Lebanon caused by Israeli military operations.”\textsuperscript{443} In addition to pre-determining causation, resolution S-2/1 pre-determined the COI’s outcome by, “[c]ondemning Israeli military operations in Lebanon, which constitute gross and systematic human rights violations of the Lebanese people”.\textsuperscript{444} The mandate of the 2006 Lebanon Report was also territorially limited to the state of Lebanon – thus precluding investigation of attacks within Israel – and limited\textit{ ratione personae}\textsuperscript{445} to actions by Israeli military personnel.\textsuperscript{446} It is worth noting that as with virtually all such resolutions at the Human Rights Council, the votes were split with the majority coming from one side of the Israeli-Palestinian divide and the minority coming from the other – there were 27 votes in favour (all countries from Africa, the Middle East/Asia or South America plus Mexico and Cuba), 11 against (including Canada and 10 European Nations) and 8 abstentions.\textsuperscript{447}

According to the Lebanon Report, while it was not for the COI to provide commentary on the “political-legal context of the adoption of resolution S-2/1, nor to make judgment on the content of its mandate”, the COI was nevertheless aware of the resultant shortfalls – for example that the Lebanon COI’s mandate, “does not allow for a full examination of all of the aspects of the conflict, nor does it permit consideration of the conduct of all parties,”\textsuperscript{448} and that, “any independent, impartial and objective investigation into a particular conduct during the course of hostilities must of necessity be with reference to all the belligerents involved.” The Lebanon Report noted, however, that to properly investigate the Israel Defence Forces it also had to investigate the

\textsuperscript{443} See \textit{bid} at Annex I.

\textsuperscript{444} In one of the various other condemnatory statements, the resolution also offered that it was “[o]utraged at the continuing senseless killings by Israel, with impunity, of children, women, the elderly and other civilians in Lebanon.” \textit{Ibid}.

\textsuperscript{445} Meaning limited in personal jurisdiction to only Israeli actions; put another way, jurisdictionally limited to investigating only Israeli actions.

\textsuperscript{446} \textit{Lebanon COI, supra} note 442 at page 2, para 5.

\textsuperscript{447} In particular, those voting in favour were: Algeria, Argentina, Azerbaijan, Bahrain, Bangladesh, Brazil, China, Cuba, Ecuador, India, Indonesia, Jordan, Malaysia, Mali, Mauritius, Mexico, Morocco, Pakistan, Peru, Russian Federation, Saudi Arabia, Senegal, South Africa, Sri Lanka, Tunisia, Uruguay, Zambia. Those who voted against were: Canada, Czech Republic, Finland, France, Germany, Japan, Netherlands, Poland, Romania, Ukraine, and the United Kingdom of Great Britain and Northern Ireland. And those that abstained from voting included: Cameroon, Gabon, Ghana, Guatemala, Nigeria, Philippines, Republic of Korea, and Switzerland. The United States was not on the Council at the time.

\textsuperscript{448} \textit{Lebanon COI, supra} note 442 at page 2, para 5.
“opponent”; nevertheless, given the “express limitations of its mandate,” the COI found that it was not able, “to construe [the mandate] as equally authorizing the investigation of the actions by Hezbollah in Israel.” To do otherwise, the Lebanon Report offered, “would exceed the Commission’s interpretative function and would be to usurp the Council’s powers.”

In addition to the various *ad hoc* Human Rights Council COIs over the years, since 1993 there has been a Special Rapporteur on Palestine, with a standing mandate to, “investigate Israel’s violations of the principles and bases of international law, international humanitarian law and the Geneva Convention” and to “report, with conclusions and recommendations, to the Commission on Human Rights [now HRC]…. Note again that the official mandate refers only to potential Israeli violations.

Moreover, there are numerous other Special Rapporteurs – who report to the Human Rights Council – conducting fact-finding missions that might touch on the conflict, and often do, including: the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living; the Working Group on Arbitrary Detention; the Special Rapporteur on the right to education; the Independent expert on the question of human rights and extreme poverty; the Special Rapporteur on the right to food; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation on human rights in the Palestinian territories occupied since 1967.

For another recent example of a UN HRC COI dealing with Israel, see *The Human Rights Inquiry Commission to Investigate Violations of Human Rights and Humanitarian Law in the Occupied Palestinian Territories after 28 September 2000, 57th Sess, UN Doc E/CN.4/2001/121* (16 March 2001), established pursuant to Commission on Human Rights Res S-5/1, ESCOR, 5th Special Sess, Supp 22 (19 October 2000), later endorsed by the Economic and Social Council decision 2000/311 (22 November 200). Like the Lebanon inquiry, the mandate presupposed violations by Israel, was restricted to violations committed by Israel. The Government of Israel did not cooperate with the COI. For an overview see: *Secretary-General Report on Impunity, supra* note 386 at paras 17-20.


See *Res 1993/2, ibid* at Articles 4(a) and (c).
rights defenders; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; and the Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation.

This list of Special Rapporteurs is of course in addition to the work done by the international community, and particular regional and international NGOs, who have produced reports not just on the Gaza incursion, but also on specific charges or incidents during the conflict, as well as covering the conflict more broadly. Thus, on the one hand Israel can contend that it is not as though there are not already a number of investigators considering the Israeli-Palestinian conflict from a variety of angles, making ad hoc COIs redundant or an unnecessary expenditure of resources, particularly given the relative lack of focus elsewhere and the need for improved human rights monitoring worldwide. On the other hand, there is no Rapporteur or investigator with a specific mandate to consider war crimes or crimes against humanity. Still, Israel can contend that a war crimes investigation could fall under the purview of the Special Rapporteur on Palestine, who is mandated to consider violations of international humanitarian law. The Special Rapporteur Richard Falk indeed produced a report on Operation Cast Lead, the Israeli government’s name for the 2008 incursion into Gaza, though Falk’s report is primarily a review of the Goldstone Report’s findings, and was produced with significantly fewer resources and facilities and less media attention than an ad hoc UN COI would have access to.

Further, the institutional situation – from the Israeli perspective – is exacerbated by the fact that UN COIs outside of the Human Rights Council have also considered the general situation in Israel and the Occupied Territories over the years; indeed, there have likely been more UN inquiries with a mandate to consider Israeli actions with

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455 In 2007, for example, the Special Rapporteur Martin Scheinin issued a report on Israel: see Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Mission to Israel, Including Visit to Occupied Palestinian Territory, Human Rights council, 6th session, UN Doc A/HRC/6/17/Add.4 (16 November 2007).

456 Indeed, no such individual or body exists in international law, which is sometimes used as a justification for ad hoc UN war crimes COIs. However, in 2011 the UN Human Rights Council did establish the office of the Special Rapporteur on Truth, Justice and Non-Recurrence, with a mandate to “deal with situations in which there have been gross violations of human rights and serious violations of international humanitarian law.” See United Nations Office of the High Commissioner for Human Rights, online: http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Index.aspx.

457 See Falk Inquiry, supra note 453.
regard to Palestinians than COIs focused on any other nation, and like some Human Rights Council COIs these have not always been viewed as demonstrating a strong commitment to impartiality. As but one example, in 1976 UNESCO adopted the terms of reference for a COI on the cultural and education aspects of the Israeli occupation, which in part “prejudged the project’s outcome by unqualifiedly ‘[c]ondemning as contrary to human rights and fundamental freedoms all violations, resulting from Israeli occupation, of the rights of the populations living in all the occupied Arab territories to national education and cultural life, and particularly the policy of systematic cultural assimilation.’” As a result, according to Thomas Franck, the UNESCO COI, “began with its terms of reference shrouded in a miasma of bias.” There have also been several very recent large-scale UN COIs that have been criticized for exhibiting various degrees of bias towards Israel; one example is the Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/10, on *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory* – note once again that, as with the Gaza and Lebanon COIs, the constituting document presupposes criminality and requires a myopic focus on Israeli actions.

### 4.2.4 Legitimacy and Israel’s Relationship to the Human Rights Council: Some tentative conclusions

This is all to say that the legitimacy of a UN COI report is not simply shaped by its mandate and operations, but also by the perceived legitimacy of its founding institution as well as the quality and perhaps quantity of those inquiries, mandates and transitional justice operations that came before it. Legitimacy and cooperation can be built or eroded over time, and must be instantiated by consistent practice that addresses precisely the reasonably substantiated concerns of the relevant constituents while at the same time managing not to pander to states that do not like, and will never like, being investigated.

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459 *Frank and Fairley, ibid* at 326. Note also that access to certain areas of Israel were limited, as we shall see is also the case in the Gaza COI. See *ibid* at 328.
460 General Assembly, 10th Emergency Sess, (1 August 2002).
461 As Brunnée and Toope have argued, “[i]nstitutions can ’represent frozen configurations of privilege and bias.’” See *supra* note 21 at 52.
So, in the case at hand, what might the relationship between Israel and the Human Rights Council have told us about a potential COI? Well, the most obvious is that today there is often a multiplicity of human rights fact-finders operating – to varying degrees – in relation to any conflict. Particularly in a situation such as the Israeli-Palestinian conflict where myriad fact-finders are present, it will be important to recognize what these fact-finders are doing and to what ends so as to avoid redundancies with an *ad hoc* COI. But it is not merely the avoidance of redundancies that is relevant here. Derek Jinks and Ryan Goodman have noted the tendency of human rights mechanisms to follow the logic of the additive fallacy – discussed further in chapter six – which states that “simultaneously employing more than one mechanism (or as many as possible) to achieve a desired end increases the probability of obtaining it.”\(^462\) While the additive effect of numerous simultaneously operating fact-finding bodies might increase the pressure on a country such as Israel to conform to the norms espoused by such bodies, it might also be the case that there are “negative potential interactions between the mechanisms.”\(^463\) The most important of these potential negative repercussions in the case at hand might be to delegitimize UN COIs in the eyes of a nation, here Israel, because the disproportionate focus on the conflict evinces a bias against the nation. The purpose for which an *ad hoc* COI is established should take into account what it might offer and achieve and how this fits into the broader human rights system. If an *ad hoc* COI is not able to provide anything unique as compared to other inquiries, then its establishment may do more harm than good. However, *ad hoc* UN COIs almost always garner more resources, media attention and scrutiny than other reports – compare for example the Gaza COI to Falk’s report on the conflict – so if galvanizing international attention toward a particular conflict is a central purpose of UN COIs, then theoretically they will often be of some service.

But the situation in which the Gaza COI was established also reveals that the question of when and how to constitute a COI is more complicated than determining whether, in the abstract, a large-scale inquiry might serve some unique purpose. The fact that Israel has historically failed to cooperate with Human Rights Council


\(^{463}\) Ibid at 3.
investigative actions of any kind – regardless of whether or not these decisions were justified – should have told the Human Rights Council from the beginning that the work of the Gaza COI would be limited in terms of territorial access as well as access to government witnesses and documents. Any mandate that would require for its completion territorial access would likely fall short of expectations. Moreover, given Israel’s history at the Human Rights Council, coupled with the fact that its concerns about the Council’s disproportionate focus on Israel are warranted at a general level and indeed consistently reinforced by a block of (primarily) Western States, then a Human Rights Council COI, its mandate and its operations would presumably have to evince the highest standards of due process and impartiality to be perceived as legitimate by Israel and/or its allies. Arguably, such perceived legitimacy and cooperation were impossible in the case at hand, at least as concerns Israel. Thus, a decision would have to be taken whether the Gaza COI or another similar COI required for its success that it be viewed as legitimate by Israel or its supporters. If it is important to the success of the COI, however success is defined, that the COI is viewed as legitimate or unbiased by Israel or other nations that have long sided with Israel in seeing the Human Rights Council as focusing disproportionately on Israel, then another UN organ such as the Security Council or Secretary-General would likely have been better placed to establish the COI, at least in terms of limiting the discussion about the perception of bias as applied to the establishment of the COI and ensuring that the focus remains primarily on the acts investigated.

At the same time, it should be evident that nothing in this chapter should be taken to mean that a particular Human Rights Council COI involving Israel is necessarily laden with bias, or that the Human Rights Council’s historical focus on Israel will necessarily undermine the legitimacy of all future COIs into the Israeli-Palestinian conflict. Rather, it should be seen that from the very outset Human Rights Council COIs will have some legitimacy concerns to overcome in relation to the Israeli-Palestinian conflict – the COI may have to overcompensate for these shortcomings elsewhere, perhaps in its operations – and that the relationship between Israel and the Human Rights Council might be frayed to the point that certain operational limitations should be expected, which in turn will limit not just what the COI can do, but what it can hope to achieve.
This brings us to our second topic, which considers what range of purposes UN COIs might pursue (the more specific question of what purpose UN COIs should and should not serve will be canvassed in more detail in chapters six and seven).

4.3 The Range of Purposes of Contemporary Ad Hoc UN COIs

Understanding what UN COIs can and might hope to achieve is necessary before a mandate for any specific COI is defined. The purpose for and subsequent mandate of the UN COI will determine the legal, temporal and geographic scope of the inquiry, and what fairness to the parties, impartiality and independence mean in the context of the particular UN COI. The operating procedures of any particular COI – how it weighs evidence and determines its standards of due process and procedural fairness, and the standard of proof by which it abides – will also be heavily influenced by the constraints within which the COI is operating and the purposes ascribed to the COI by its establishing body. This is to say that the purpose and goals of a COI will help define its operating procedures, and an analysis of the legally required operating procedures will help define the realistic goals and purposes of a UN COI. Moreover, the institutional and political context will also influence both the purpose of a COI – and what can realistically be achieved – as well as the methodology of the COI.

Purpose, context and rules and principles related to procedure (and due process) are all therefore inter-dependent. It follows that there can be no single purpose and set of goals for all ad hoc UN COIs, imposed without consideration of the political, legal and institutional context. The following discussion thus offers a general discussion of the range of possible purposes for UN COIs before asking what the purpose of the Gaza COI was.

Ad hoc UN COIs might be seen to exist along a “purposive continuum”. At one end of this continuum we might find the historical purpose associated with ad hoc COIs, which we saw came from the Hague Conventions: to provide the factual basis upon which a subsequent resolution to a conflict can take place as between two parties (usually states). This may or may not involve a report that includes legal findings, or perhaps recommendations. At the other end of the purposive continuum we might find a COI instantiated with all of the multifarious goals of transitional justice, a “holistic transitional justice inquiry”. The purposes of such an ad hoc UN COI would include, inter alia: promoting accountability for criminal wrongs; providing recommendations on
institutional and legal reforms and/or reparations programs; providing an historical narrative of the conflict upon which to build a shared collective memory or “truth” about the past; and, offering a forum for witnesses to air their grievances, express their views and wishes and discuss their experiences. As was seen in the previous chapters, human rights fact-finding in general, and UN COIs in particular, have slowly been moving in this direction, toward some sort of holistic transitional justice purpose. The Gaza COI, as we shall see, looks more like such a transitional justice COI than its predecessors, though the realization of this trend toward holistic inquiries might best be seen in the “Mapping Exercise” of the Democratic Republic of Congo (DRC), where the mandate was as follows:

> [t]he Mapping Team will assess the existing capacities within the national justice system to deal with such human rights violations that may be uncovered...Taking into account on-going efforts by the DRC authorities, as well as the international community’s support, the Mapping Team shall formulate a series of options aimed at assisting the government of the DRC in identifying appropriate transitional justice mechanisms to deal with the legacy of these violations, in terms of truth, justice, reparation and reform.

In between these two poles – between the historic purpose and a more comprehensive transitional justice purpose of the DRC Mapping Exercise – we might find a range of other approaches to COIs, including: quasi-criminal “prosecution-oriented” COIs such as the Darfur COI; highly informal historical inquiries; fact-finding inquiries intended to name and shame a particular country, or to illuminate patterns of concern or cases for other institutions that might wish to follow-up on the work of UN COIs; human rights inquiries to be used either as a tool, as in Darfur, to coerce

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464 Mark Osiel has posited that political trials into “administrative massacres” do not have to create a single truth or civil consensus, but rather that it can be useful or sufficient to provide an historical narrative leading to “civil dissensus”. The same argument might be applied to UN COIs. See Mark Osiel, Mass Atrocity, Collective Memory and the Law (New Brunswick, New Jersey: Transaction Publishers, 1999).


466 The DRC Mapping Exercise’s terms of reference were more detailed than those of many previous UN COIs, including the Gaza COI. Indeed, the mandate included not just a mission statement articulating what the COI was to consider – its constituted purpose – but a three page overview of the mandate and objectives of the COI, its composition and duration, the “essential requirements” of its methodology, and a paragraph on its reporting obligations. See DRC Mapping Exercise, ibid at 542-544.

467 Ibid at 542, paras 1.2-1.3. The report goes on to say that: “[o]ne of the major premises is that mapping remains a preliminary exercise that does not seek to gather evidence that would be admissible in court, but rather to ‘provide the basis for the formulation of initial hypotheses of investigation by giving a sense of the evidence.’” Ibid at 36, para 95. Elsewhere, the report stated that its aims were, “to assist the Congolese authorities and civil society in defining and implementing a strategy that will enable the many victims to obtain justice and thereby fight the widespread impunity. This should also enable the mobilisation of other international resources to address the principle challenges faced by the DRC with regard to justice and reconciliation.” Ibid at 35, para 91.
obstinate countries to take subsequent ameliorative action based on strong, impartial evidence of breaches of international law, or as the basis upon which a particular country or group can ground certain necessary claims in subsequent peace or self-determination negotiations; and various other hybrid inquiries that purport to achieve one or more of the goals of transitional justice and that might look more or less like some limited truth commission, prosecutorial investigation and/or policy-oriented COI.\textsuperscript{468}

In general, it can be said that the legal-procedural requirements placed on any COI will shift depending on where on the purposive continuum the COI falls. So, for example, to be perceived as legally legitimate, quasi-criminal investigations will have to maintain much higher degrees of due process than COIs established with the purpose of providing a broad, sweeping historical narrative of the conflict, its causes and consequences. Thus, depending on the purpose for which a COI is constituted, a different analysis with respect to legality and due process will take place. Defining the purpose – and recognizing the plausible purposes – of contemporary UN COIs thus becomes very important in analyzing how legality and due process should apply contextually to all of the various choices and problems that arise in the context of large-scale investigations.

At the same time, the purpose of a UN COI should also depend on considerations of legality and participation. For example, the historic tendency for states to preclude territorial visits, when repeated in the future, may diminish the ability of a UN COI to corroborate certain facts, perhaps related to individual criminal wrongdoing and particularly the intent of a party to commit a (specific intent) crime (such as murder or persecution as a crime against humanity). In such a situation, it will be difficult to conduct a quasi-criminal COI because such a COI will of necessity have stringent, criminal due process requirements that, as noted, may not be able to be met by a COI without territorial access. This conclusion requires a consideration of what is perceived as possible and what is likely to be allowed or not in order to first determine what a COI should do procedurally, and then what it can do generally; that is, its goals.

\textsuperscript{468} In primarily common law countries, policy-oriented COIs are established to examine a specific problem within society and offer a range of solutions for improving the nation’s procedures or institutions for coping with said problem.
or purposes in light of the existing political constraints. Of course, interactional law-making asserts that interests can be shaped by constructive engagement and thus, while one must keep in mind the likelihood of, for example, territorial access for site visits – as well as the historic reality that such access is not generally granted – early constructive engagement with the relevant parties might be able to shape what is perceived as legally, politically and procedurally possible in the context.

So where did the Gaza COI fall along the purposive continuum? The answer is not entirely clear, which is reflective of the fact that little discussion is currently taking place regarding what UN COIs do and why they do it.

Upon initial inspection, the mandate of the Gaza COI does seem fairly clear. In particular, the mandate stated that the Gaza COI 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.\textsuperscript{469}

It would seem at first blush that the Gaza COI’s mandate was much like that of the Darfur COI’s mandate, or the UN COI that took place in the former Yugoslavia; the mandate looked to be, at least to some extent, “prosecution-oriented” or at least focused on individual criminal responsibility and accountability. In particular, the focus was on serious violations of international human rights and humanitarian law that took place during an armed conflict with a defined beginning and end. It must be noted that the addition of the phrase “whether before, during, or after” in the mandate seems to extend the investigative timeframe to some unknown degree, though presumably the investigation of war crimes and crimes against humanity would be limited to those that took place during the armed conflict. As a result, the mandate’s unlimited temporal extension would apply only or primarily to the investigation of human rights abuses or the investigation of historic, contextual facts that were pertinent to the subsequent military conflict.

In any event, precisely what the Gaza COI was to achieve as an outcome to executing its task remained unclear, a fact that was exacerbated by the general lack of clarity as to what – or how many – goals should realistically be ascribed to UN COIs as an “institution”, and how it is that UN COIs are thought to promote the achievement of

\textsuperscript{469} Goldstone Report, supra note 6 at 13, para 1.
those goals. Was the Gaza COI to provide the foundation for subsequent prosecutorial investigations, or was it also to lay the foundation for peace negotiations, reconciliation between the peoples, to make recommendations on legal and political reforms, and/or to provide a history upon which a broad civil consensus (or dissensus)\textsuperscript{470} could be built?

In order to illuminate the specific purposes for which the Gaza COI was or might have been established, and the problems that the mandate caused despite its superficial clarity, we must go beyond the basic terms of its mandate. It is best to consider the Gaza COI’s mandate in light of its actions and findings and how these actions and findings related to the common (procedural) criticisms of the Gaza COI. Such an analysis can also shed further light on the interplay between the adopted rules, principles and purposes of UN COIs and how criticisms of the Goldstone Report resulted largely from a failure to address the meaning and consequences of this interplay in relation to legality.

We thus move now to a discussion of the Gaza COI, where it will be important to keep in mind the institutional context in which it was created as well as the possible spectrum of purposes for which it might have been created, as were discussed in this chapter. In the following case study, a particular emphasis will be placed on what the Gaza COI’s purposes seemed to be and the procedures it followed in attempting to execute its mandate.

\footnote{See Osiel, \textit{supra} note 464.}
CHAPTER 5
THE GAZA COI CASE STUDY

5.1 Introduction: Why the Gaza COI matters

The United Nations Fact Finding Mission on the Gaza Conflict was the prototypical contemporary, large-scale, \textit{ad hoc} UN COI. Established at the request of the UN Human Rights Council, the Gaza COI operated within the general context of an ongoing dispute between Israel and Palestinians. It was constituted in specific response to the 2008 Israeli military offensive into the Gaza Strip – called Operation Cast Lead by Israel – where the commission of war crimes and crimes against humanity was suspected to have taken place. The Gaza COI was, in other words, a “post-conflict” initiative, though a return to conflict was certainly possible. The initiative was intended to address human rights and humanitarian law abuses on a large scale by assigning responsibility for wrongs committed, just as the Darfur and Yugoslav COIs did before it, but it was also quite clearly intended to make recommendations to address the causes and consequences of the conflict. And the Gaza COI is more than just a typical contemporary \textit{ad hoc} UN COI not only because it can be seen to have extended the Darfur COI to take COIs more broadly into non-accountability aspects of transitional justice, but it is particularly salient as a case study because it offers the opportunity to illuminate virtually all of the issues raised as trends in the previous chapters with respect to such large-scale \textit{ad hoc} UN COIs. The Gaza COI was also the subject of all the typical criticism of UN COIs and such criticism was particularly pronounced even by the usual standards.

Commentators in the field of UN COIs have repeatedly focused their attention on certain specific and recurring problems with UN COIs, largely procedural in nature. UN COIs are generally criticized with regard to their lack of clarity of purpose, partiality, independence, and/or openness and transparency; moreover, these general concerns tend to manifest themselves in very particular ways. So UN COIs have consistently been criticized with regard to: their biased mandates (partiality); the clarity of their mandate and purpose (transparency and consistency/clarity); a disproportionate focus on a particular country, region or conflict (a lack of representative participation, partiality); the selection of biased commissioners (partiality and independence); inflammatory language used in reports (partiality) and shifting standards of proof.
(transparency of rules and operating procedures); a misguided or biased review of the facts (partiality); the lack of clarity in or promulgation of their rules and methods of operation (transparency); the quality of their evidence used to indict and the quality, quantity and use of corroborating evidence (fairness, partiality, transparency of processes and rules of evidence); and, their approach to balancing interests in protecting witnesses while also providing full and prompt disclosure of legal findings to individuals and/or states concerned. The last is a general due process issue but also one to do with the transparency and promulgation of working principles and approaches.

The Gaza COI provides perhaps the best – and most discussed – recent example of a contemporary ad hoc UN COI marred by powerful criticism related to each of these criticisms. This fact alone makes the Gaza COI worthy of consideration. But the benefit of studying the Gaza COI does not end there. The Gaza COI is also uniquely instructive because the COI was controversial and politically sensitive from the beginning in a way that few other inquiries could be – though, as we have seen, it is also generally representative of other UN COIs in that they all tend to operate in relation to politically sensitive disputes that are generally among the most important to the international community at the relevant time. In the end, the Gaza COI’s final report – the Goldstone Report – was not accepted by Israel, the lone state subject to investigation, and also suffered from a lack of support from other pertinent nations worldwide, such as the United States and European Union (representing the respective European states). Because of the controversy surrounding the Gaza COI, it is perhaps the best example of what it means to produce a legal-factual report for both political and legal bodies based on a legal mandate that was influenced by political agendas and objectives, as we saw in the previous chapter.

Moreover, the Gaza COI is particularly interesting as compared with other contemporary ad hoc UN COIs for the fact that it focused on human rights laws – including social and economic rights – to a greater extent than was done in Darfur or the former Yugoslavia, for example, which both focused primarily on international criminal and humanitarian law. This broader focus as compared to its immediate predecessors meant that social and economic rights, and the context in which those rights were evaluated, played an important role both in the final report’s analysis and in the subsequent evaluation of the Goldstone Report. As a result, the Gaza COI provides
an interesting opportunity to discuss what role a broad range of human rights should play in UN COIs’ analysis of post-conflict situations, and as a corollary what purpose(s) UN COIs should play in addressing mass atrocities and helping to promote peace.

5.2 Chapter Overview

This chapter’s case study of the Gaza COI will proceed in the following manner. First, an overview of the establishment of the Gaza COI and the issuance of the Goldstone Report will be provided, followed by a brief discussion of the response to the report by Israel, Palestinian Authorities, and Hamas. Second, this chapter will briefly discuss the bias of the Gaza COI’s original mandate. Third, this chapter will review the choice of commissioners and, in particular, the controversial decision not to dismiss Professor Chinkin for bias or the perception thereof. Fourth, this chapter will discuss the purposes and goals of the Gaza COI, a topic which will influence – and be influenced by – the discussion and analysis of each of the subsequent sections in this chapter. In order to illuminate the goals and purposes established for the Gaza COI in particular and the problems associated with not strictly defining the COI’s broader purposes and goals – as exemplified by relevant criticisms of the Goldstone Report – this case study will consider the temporal, geographic and legal scope of the Gaza COI. In analyzing the scope of the inquiry, particular emphasis will be placed on the Goldstone Report’s focus on economic and social rights and how the Gaza COI chose which incidents to investigate. Finally, this chapter will conclude with an analysis of three due process issues: the standard of proof adopted by the Gaza COI; the methods and rules that it adopted as they relate to the gathering and corroboration of evidence; and, address questions surrounding witness interrogations as well as the protection of witnesses and “naming names”.

Before continuing with the introduction of the Goldstone Report it is worth noting that international controversy also surrounded the Goldstone Report with respect to its purportedly biased legal findings, and in particular its treatment of international humanitarian and criminal law. Nevertheless, this case study will focus on the “procedural elements” of the inquiry as outlined above, as opposed to examining the

veracity of the Gaza COI’s doctrinal interpretations of international human rights, humanitarian and criminal laws.

5.3 The Goldstone Report: History and context

As most now know, a conflict has existed in the Middle East since at least 1947 – almost a year before Israel declared independence as a state on 15 May 1948 – that is centered on Israel and the Palestinian Occupied Territories. A recapitulation of the causes and consequences of the Israeli-Palestinian/Arab conflict is well beyond the scope of this chapter.\(^{472}\) Suffice it to say that as of about November 2008 yet another nominal truce, this one having existed since June 2008 between Israel and Hamas – the elected political power in the Gaza Strip at the time – had come to a *de facto* end after a series of rockets being launched from Gaza into Israel, incursions by Israel into Gaza territory, and the solidifying of an Israeli blockade that was supposed to be eased by the terms of the truce, including on goods – and people – entering and leaving the Gaza Strip.

By 27 December 2008, Israel had unilaterally decided that the conflict had escalated to the point where, from its perspective, in order to exercise its right to defend its civilian population against terrorism and the firing of rockets from Gaza territory into Israel, a large-scale military intervention was necessary – though the military campaign itself had been prepared in advance of that date.\(^{473}\) War was once again upon the region; between 27 December 2008 and 17 January 2009 Israel conducted “Operation Cast Lead” – its codename for the military intervention – against


\(^{473}\) For an article arguing why Israel did not have to “break the truce” and intervene militarily in order to protect its civilian population, see Henry Stieigman, “Discrediting Goldstone, Delegitimating Israel”, in Adam Horowitz, Lizzy Ratner, and Philip Weiss, eds, *The Goldstone Report: The Legacy of the Landmark Investigation of the Gaza Conflict* (New York: National Books, 2011) at 390. Stieigman asserts: Hamas “offered to extend the truce, but on condition that Israel end its blockade. Israel refused. It could have met its obligation to protect its citizens by agreeing to ease the blockade, but it didn’t even try. It cannot be said, therefore, that Israel launched its assault to protect its citizens from rockets. It did so to protect the continuation of its strangulation of Gaza’s population.” For an explanation of Israel’s reasons for the intervention, see for example Rory McCarthy, “Our goals are near, says Israeli PM as Gaza fighting intensifies”, *The Guardian* (11 January 2009) [McCarthy, “Our goals are near”]; Rory McCarthy, “Israel criticized after “shocking” discovery of exhausted children, the Guardian”, *The Guardian* (8 January 2009); Clancy Chassay, “Cut to pieces: the Palestinian family drinking tea in their courtyard”, *The Guardian*, (23 March 2009). The Guardian subsequently maintained an online section devoted to its investigations of claims of abuse and criminality: see the Guardian’s “war crimes investigation” page online: http://www.guardian.co.uk/world/series/gaza-war-crimes-investigation.
Hamas and the Gaza Strip. Media coverage of the conflict was intense, and in particular the military conduct of the parties evoked strong negative reactions internationally. During the conflict Hamas – at the time not only the elected political party in Gaza but also a terrorist group according to the European Union, United States, and Canada – was criticized in the international press for sending rockets into Israeli towns, targeting civilians or at the very least failing to differentiate between civilians and combatants, and for dressing in civilian clothing while launching attacks from populated areas. Reports of an Israeli bombing of a UN school and attacks on civilians who were waving white flags, the use of civilians as human shields, the targeting of civilian infrastructure, as well as the use of white phosphorous on civilians resulted in criticism of Israel.

Those outside of Israel/Gaza were deeply divided as to what had really happened and whether it was justified or legal under the laws of war. This factual uncertainty played a major role in the international debate on how or whether the international community should respond to the conflict; in the end, though ad hoc UN COIs have increasingly become a reflexive response to military conflict and undoubtedly the highly political nature of the dispute between Israel and Palestinians made it almost inevitable that Israeli military activity would result in a call at the Human Rights Council for some sort of inquiry – as was discussed in the last chapter – the conflicting accounts of what transpired and the seriousness of the allegations resulted

474 See for example Human Rights Watch, “Rockets from Gaza: Harm to Civilians from Palestinian Armed Groups’ Rocket Attacks” (6 August 2009), online: www.hrw.org/en/reports/2009/08/06/rockets-gaza-0.
475 Azmi Keshawi, Martin Fletcher and Sheera Frenkel, “Gaza’s tunnels, traps and martyrs: the Hamas strategy to defeat Israel”, The Times (12 January 2009). Political violence was also seen as prevalent with respect to Hamas. See generally Human Rights Watch, “Under Cover of War: Hamas Political Violence in Gaza” (19 April 2009), online: www.hrw.org/en/reports/2009/04/19/under-cover-war?.
479 Ibid.
480 Human Rights Watch, “Rain of Fire”, supra note 476.
481 See for example Rory McCarthy, “Our goals are near”, supra note 473.
in the perceived need for an independent, impartial inquiry into the conflict. Thus, resolution S-9/1 was brought forward by the Human Rights Council on 12 January 2009 to consider, “the grave violations of human rights in the Occupied Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip.”

The wording of this initial resolution created the first problem for the Gaza COI that would subsequently be established: the resolution presupposed the “grave violations” of human rights and focused on Israeli actions without reference to Hamas. The original mandate similarly presupposed the outcome. It stated that the Human Rights Council was:

> to dispatch an urgent, independent fact-finding mission, to be appointed by the President of the Council, 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, and calls upon Israel not to obstruct the process of investigation and to fully cooperate with the mission....

Clearly the mandate was one-sided as it focused only on violations by the “aggressor” Israel. As a result, first Mary Robinson, former UN High Commissioner for Human Rights, and then Justice Goldstone rejected the mandate and offers to head the Gaza COI. Israel continues to present the mandate of the Gaza COI as biased because it treats this formulation as the “formal mandate” of the COI, despite the subsequent amendment to the mandate at the request of the eventual chief commissioner, Justice Richard Goldstone (as discussed below).

In an open letter presented to Secretary-General Ban Ki-moon, published in newspapers and on Amnesty International’s website in March of 2009, sixteen experienced investigators and judges called for him to open a full investigation into the alleged abuses. Specifically, the letter called for “a prompt, independent and

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482 For example, Israel denied the use of white phosphorus in inhabited areas and the bombing of the UN school, while Hamas denied the use of human shields.
483 Goldstone Report, supra note 6 at Part One: Methodology, page 37, para 131.
484 Res S-9/1, supra note 426.
487 See Amnesty International, “Gaza investigators call for war crimes inquiry” (16 March 2009). Those signing the letter included Justice Goldstone, Hina Jilani, Desmond Travers – each of the eventual COI – as well as notables such as Alex Boraine, Archbishop Desmond Tutu, Mary Robinson, William A Schabas, and Antonio Cassese.
impartial investigation” of serious violations of international humanitarian law (committed by all parties), which would provide recommendations on the appropriateness of prosecution of those responsible for gross violations of international law.\textsuperscript{488} Eventually, after a meeting with Goldstone and an agreed amendment to the mandate,\textsuperscript{489} the President of the Human Rights Council was able to negotiate the passing of a resolution establishing the Gaza COI on 3 April 2009. The understanding was that the mandate would thereafter read that the COI 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.\textsuperscript{490} [Emphasis added.]

Formally, however, the mandate was never amended by way of a subsequent Human Rights Council resolution. So, while the above wording made its way into the Gaza COI’s final report, and was taken to be the applicable mandate by the commissioners, resolution S-9/1 technically stands as the UN document calling for the establishment of the inquiry, and herein lies the foundation for the claims of bias with regard to the “formal mandate” of the Gaza COI.

While the Israeli presence in Gaza formally ended on 18 January 2009, it was not until 4 May 2009 that the Gaza COI first convened in Geneva.\textsuperscript{491} Given the delay, the Gaza COI, “agreed to be bound by a short time frame (about three months) to complete its work and report to the Council at the earliest opportunity.”\textsuperscript{492} As has become standard practice for such UN COIs, a secretariat providing logistical and

\textsuperscript{488} Ibid.

\textsuperscript{489} In a letter to the Israeli Ambassador to the Human Rights Council, \textit{Goldstone letter to Israeli Ambassador, supra} note 430, Goldstone stated: “I wished personally to assure you that prior to considering the invitation to lead the Mission, I satisfied myself that it would be given unbiased and even-handed terms of reference. In particular, it seemed to me that it was crucial, in order to assess the military actions conducted by Israel, and in particular to investigate the effects on Israeli citizens of the rocket attacks that emanated from Gaza…As a completely independent body, the Mission will now be determining its own terms of reference. I would hope that I could consult with the Government of Israel and take into account its views with regard to the terms of reference. Your advice in this regard would be much appreciated.”

\textsuperscript{490} \textit{Goldstone Report, supra} note 6 at 13, para 1. See also \textit{Goldstone letter to Israeli Ambassador, ibid}, where Goldstone reiterated his intention to proceed “independently and impartially”.

\textsuperscript{491} \textit{Ibid} at 13, para 5.

\textsuperscript{492} \textit{Goldstone Report, supra} note 6 at 37, para 134. To give a sense for how short a time-frame this is, contrast to the two to three years that many truth commissions are given to investigate and report, or even longer for an international court to prosecute but one case.
research support was established by the Office of the United Nations High Commissioner for Human Rights (OHCHR)\textsuperscript{493} to aid the work of the commissioners.

The 452-page Goldstone Report produced by the Gaza COI, entitled \textit{Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict}, was released on 25 September 2009.\textsuperscript{494}

With respect to Operation Cast Lead, the Goldstone Report found that between 1387 and 1417 Palestinians were killed during the twenty-two day military operation,\textsuperscript{495} though Gaza authorities reported 1444 fatalities and the Government of Israel reported 1166 lives lost.\textsuperscript{496} The Government of Israel indicated that there were also four Israeli fatalities in southern Israel – three civilians and one soldier – killed by rocket and mortar attacks, and an additional nine Israeli soldiers killed during the fighting, four of whom were killed by friendly fire.\textsuperscript{497}

Of the Goldstone Report’s twenty-one chapters on substantive violations of international law (excluding the Goldstone Report’s analysis of the subsequent judicial responses by all parties), sixteen deal with Israeli actions, four with abuses by “Palestinian armed groups”, and one with allegations against the Palestinian Authority. The Goldstone Report concluded that serious violations of international human rights and humanitarian law were committed by Israel and by Palestinian armed groups; actions by both sides were found to amount to war crimes and, in a very few instances, possibly to crimes against humanity. For its part, Israel was found, \textit{inter alia}, to have: intentionally targeted civilians and civilian objects, in some cases with the intention of spreading terror among the civilian population; committed grave breaches of the Fourth Geneva Convention, including wilful killing, and extensive destruction of property not justified by military necessity; violated the right of Gaza’s population to maintain an adequate standard of living, which includes access to adequate and safe food, water and housing; denied freedom of movement to Palestinians living in the Gaza Strip and West Bank, denied the right to enter and leave their own territory, and limited their access to an effective remedy, which it was said could amount to persecution, a crime

\begin{flushright}
\textsuperscript{493}Ibid at 3, para 3.
\textsuperscript{494}Ibid.
\textsuperscript{495}Ibid at 17, para 30.
\textsuperscript{496}Ibid.
\textsuperscript{497}Ibid at 17, paras 30-1.
\end{flushright}
against humanity. The core violations stemmed from investigations into thirty-six incidents.\footnote{498}

Palestinian armed groups were said to have committed indiscriminate attacks against Israeli citizens and violated the principle of distinction as between civilians and combatants by virtue of launching rocket and mortar attacks into civilian areas; this was said to amount to war crimes and possibly a crime against humanity. Palestinian armed groups were also criticized for failing to distinguish themselves consistently from the civilian population in an adequate manner and for having unnecessarily exposed civilians to danger by launching mortar and rocket attacks from sites close to civilian buildings. However, in neither case was there sufficient information for the Goldstone Report to claim a violation of international law. Moreover, no evidence was uncovered with regard to the use by Palestinian armed groups of civilians as human shields, or with respect to the armed groups’ use of hospitals or ambulances for combat purposes.

The Goldstone Report found that neither side to the conflict carried out credible investigations into alleged criminal violations committed during the 22-day offensive and, in addition to recommending that the Goldstone Report be made available to the UN Security Council, it was recommended that a committee of experts be established to monitor domestic proceedings related to violations of international human rights and humanitarian law and report back on any investigations carried out domestically. Referral to the ICC or national courts on the basis of universal jurisdiction over the prosecution of crimes was recommended should the parties fail to carry out credible investigations and prosecutions.

After its release in September 2009, the Human Rights Council subsequently endorsed the Goldstone Report on 16 October 2009, in a resolution which also condemned Israel but made no mention of Hamas or Palestinian armed groups:\footnote{499}

\footnote{498} As is evident, these core incidents related primarily to allegations of indiscriminate or disproportionate Israeli attacks on civilians. However, there are certainly other claims made, including in relation to the repression of dissent in Israel (\textit{ibid} at Chapter XXV) and abusive detentions (\textit{ibid} at Chapters XIV, XV and XXI).

\footnote{499} Press Release, United Nations, “Human Rights Council Endorses Recommendations in Report of Fact-Finding Mission Led by Justice Goldstone and Calls for their Implementation” (16 October 2009). See HRC Res A/HRC/S-12/L.1, 12\textsuperscript{th} Special Sess (14 October 2009). This endorsement took place after some significant procedural and political wrangling. The resolution to endorse the Goldstone Report was initially delayed on 2 October 2009 when the Palestinian delegation dropped its support for the Goldstone Report, purportedly under heavy political from, \textit{inter alia}, the United States. See Rory McCarthy, “UN delays action on Gaza war report”, \textit{The Guardian} (2 October 2009). However, on 11 October 2009, President of the Palestinian Authority, Mahmoud Abbas, called on
Deeply concerned at the actions by Israel undermining the sanctity and inviolability of religious sites in the Occupied Palestinian Territory including East Jerusalem...(1) Strongly condemns all policies and measures taken by Israel, the occupying Power, including those limiting access of Palestinians to their properties and holy sites particularly in Occupied East Jerusalem, on the basis of national origin, religion, sex, age or any other discriminatory ground, which are in grave violation of the Palestinian People's civil, political, economic, social and cultural rights....

Not surprisingly, no Western nations voted in favour of the resolution. Nevertheless, the Human Rights Council requested periodic updates on the “implementation” of the Goldstone Report’s recommendations, and recommended that the UN General Assembly consider the findings and recommendations.

The UN General Assembly adopted a non-binding resolution both endorsing the Goldstone Report and calling for credible follow-up investigations, in spite of the protests of both Israel and the United States. The General Assembly also requested the UN Secretary-General to send the Goldstone Report to the Security Council for its consideration. Further, the United Nations High Commissioner for Human Rights said she concurred with the recommendations of the Goldstone Report and, in particular, supported its plea for “urgent action to counter impunity.” Similarly, UN Secretary-General Ban Ki-Moon urged credible and immediate follow-up investigations by both the Human Rights Council to hold a special session to debate the Goldstone Report, which was then held on 15 November 2009.

A/HRC/RES/S-12/L.1, ibid.

The final vote was 25 in favour, 5 opposed, with 11 abstentions. Five nations also declined to vote by being absent, including the United Kingdom and France. Ibid.


See first UNGA Res GA/10883, UNGAOR, 64th General Assembly Plenary (5 November 2009). The vote was 114 in favour, 18 against, with 44 abstentions. The majority of supporters of the resolution were “developing” countries. Canada’s speaker “said his delegation had voted against the resolution because it was concerned about the imbalanced nature of the Goldstone Report…” In addition to Canada, Australia, the Czech Republic, Germany, Hungary, Israel, Italy, the Netherlands, Poland, Slovakia, and the United States, among others, voted against the resolutions. Notable abstentions included Denmark, Austria, Japan, New Zealand, Norway, Republic of Korea, Russian Federation, Spain, Sweden and the United Kingdom. See also UNGA Res GA/10917, UNGAOR, 64th General Assembly Plenary (26 February 2010), requesting an update on the steps taken to implement the Goldstone Report.

sides of the dispute, as did the United States, British and French representatives to the UN.\textsuperscript{505}

Given the political and legal backdrop to the Goldstone Report, and the controversial nature of the issues at hand, it is perhaps not surprising that the release of the report evoked strong, often emotional, reactions worldwide. Virtually all aspects of the Goldstone Report, from the choice of commissioners, to the scope of the inquiry, to the legal and factual findings, have been criticized, some more sympathetic than others.\textsuperscript{506} In addition to newspapers, bloggers and academics, NGOs and governments also weighed in on the merits and demerits of the Goldstone Report, including Amnesty International,\textsuperscript{507} Human Rights Watch,\textsuperscript{508} the United States House of Representatives\textsuperscript{509} and State Department,\textsuperscript{510} and the European Parliament.\textsuperscript{511}

\begin{itemize}
\item See “Allies Push Israel for Gaza Probe”, BBC News (15 October 2009), online: http://news.bbc.co.uk/2/hi/middle_east/8308367.stm.
\item One critique generally viewed as particularly thoughtful was Moshe Halbertal, “The Goldstone Illusion: What the UN report gets wrong about Gaza – and War”, The New Republic (6 November 2009), online: www.tnr.com/print/article/world/the-goldstone-illusion [Halbertal, TNR, “The Goldstone Illusion”]. Alan Dershowitz, a persistent critic of the Human Rights Council and those who criticize Israel, stated that the Goldstone Report: “is much worse than most of its detractors (and supporters) believe. It is far more accusatory of Israel, far less balanced in its criticism of Hamas, far less honest in its evaluation of the evidence, far less responsible in drawing its conclusions, far more biased against Israeli than Palestinian witnesses, and far more willing to draw adverse inferences of intentionality from Israeli conduct and statements than from comparable Palestinian conduct and statements.” See Dershowitz, “The Case Against the Goldstone Report: A Study in Evidentiary Bias”, Harvard Public Law Working Paper No. 10-26, at 1, online: http://ssrn.com/abstract=1542897.
\item Amnesty International supported the Goldstone Report’s findings and argued that the UN should ensure that its recommendations are implemented because they offered, “the best hope for justice and accountability.” See Amnesty International, “UN Must Ensure Goldstone Inquiry Recommendations are Implemented” (15 September 2009). Amnesty International further noted that, “[t]he report’s findings are consistent with those of Amnesty International’s own field investigation into the 22-day conflict....” Ibid.
\item United States House of Representatives, Res 869, supra note 438.
\item Despite being divided, with many European Union (EU) countries voting against the UN General Assembly and Human Rights Council resolutions on the Goldstone Report, outside the UN context the EU parliament nevertheless
5.3.1 Follow-up Reactions to the Goldstone Report: Israel, Hamas and the Palestinian Authority

From the beginning, Israel refused to cooperate with the Gaza COI or allow it to access Israeli territory, claiming in justification that the “grossly politicized” Human Rights Council resolution constituting the Gaza COI was biased and one-sided. Israel noted that the original resolution (S-9/1) determined, “at the outset that Israel has perpetrated grave violations of human rights” and implied that Israel, “deliberately targeted civilians and medical facilities, and systematically destroyed the cultural heritage of the Palestinian people.” The Israeli government’s concern was that the legal basis of the Gaza COI, regardless of Goldstone’s assurances about using a revised understanding of its terms, was biased.

In a pre-emptive move against the Goldstone Report, in July 2009 Israel released its own 157-page report entitled, “The Operation in Gaza: Factual and Legal Aspects,” which covered many of the controversial incidents, the applicable legal framework, and offered its own context for Operation Cast Lead. It found that the operation was, “a necessary and a proportionate response to Hamas’ attacks” directed solely against military objectives. Israel also prepared an initial 32-point response to the Goldstone Report on 24 September 2009. This response claimed that the Gaza COI was, “instigated as part of a political campaign, and itself represents a political assault directed against Israel...” It also asserted that the Goldstone Report “repeatedly adopts evidentiary double standards, attributing credibility to every anti-Israel allegation, and invariably dismissing evidence that indicates any wrongdoing by


512 Letter of Ambassador Aharon Leshno Yaar, supra note 435.

513 Ibid.

514 The State of Israel, Israel Ministry of Foreign Affairs, The Operation in Gaza: Factual and Legal Aspects (July 2009). See also The State of Israel, Israel Ministry of Foreign Affairs, FAQ: The Operation in Gaza – Factual and Legal Aspects (16 August 2009).

515 The Operation in Gaza: Factual and Legal Aspects, ibid at page 1.

516 Initial Israeli Response to COI, supra note 486.

517 Ibid at 1, para 1.
Moreover, it posited that the Goldstone Report was, “highly judicial in nature, reaching conclusive judicial determinations of guilt” and, “goes far beyond its mandate as a fact-finding mission, making legal and judicial determinations of criminal wrongdoing, even in the absence of crucial information.”

Israel’s updated response came in the form of a report delivered to the UN in January of 2010, where it focused primarily on its follow-up investigations and claimed that 150 incidents had been or were being investigated, 36 of which were referred for criminal investigation. It revealed only one criminal conviction of an Israeli soldier in relation to the war, for stealing a credit card from a Palestinian home. The soldier was jailed for seven and a half months. Israel also chose to review four incidents covered by the Goldstone Report and has maintained a governmental website dedicated to responding to the Goldstone Report and updating Israeli governmental responses and other subsequent actions.

Subsequent to Israel’s report of January, 2010, Israel continued to investigate its actions. But on 10 April 2010 Human Rights Watch issued a report stating that investigations by both Israel and Hamas since the issuance of the Goldstone Report

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518 Ibid at 2, para 4.
519 Ibid at 17, para 23.
520 Ibid at 2, para 5.
521 The State of Israel, Israel Ministry of Foreign Affairs, Gaza Operation Investigations: An Update (29 January 2010) [Israeli Investigations Update].
had fallen “far” short of international legal standards.\textsuperscript{526} Shortly thereafter, on 19 July 2010 Israel’s government issued a second response to the Goldstone Report (its third report overall), focusing on the follow-up actions of the government and military, some of which had come after the issuance of the Human Rights Watch Report.\textsuperscript{527} But in a report to the Human Rights Council in September of 2010, a UN “Committee of Independent Experts” created to monitor any follow-up investigations\textsuperscript{528}—headed by eminent international jurist Christian Tomuschat—responded to all three Israeli reports. The Committee of Independent Experts report found that Israel had failed to investigate credibly at least some of the crimes committed during the Gaza offensive, though the report did note a number of positive procedural developments implemented by Israel—such as the establishment of a “humanitarian officer” for all fighting battalions—that have come about in response to the Goldstone Report.\textsuperscript{529} It should be noted that the Committee of Independent Experts relied on publicly available information—primarily the three Israeli reports issued in response to the Goldstone Report—because the government of Israel was unwilling to cooperate with the Committee. This lack of cooperation led the Human Rights Council Committee to find that its bases of information [on Israeli investigations] are insufficient for a definitive assessment. Consequently, the Committee is not in a position to establish whether the investigations carried out by Israel met international standards of independence, impartiality, thoroughness, effectiveness and promptness.\textsuperscript{530}


\textsuperscript{528} See Follow-up to the report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict, HRC Res A/HRC/RES/13/9, 13\textsuperscript{th} Sess (14 April 2010), at article 9: “Decides, in the context of the follow-up to the report of the Independent International Fact-Finding Mission, to establish a 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...” [Emphasis in original.]

\textsuperscript{529} Report of the Committee of independent experts in international humanitarian and human rights laws to monitory 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, HRC Res A/HRC/15/50, 15\textsuperscript{th} Sess, (21 September 2010), online: http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.50_AEV.pdf, at 12-3, paras 42-3 [Report of the Committee of independent experts]. The report also noted examples of “serious attempt[s] on the part of Israeli investigators to explain what happened...” Ibid at 13, para 46.

\textsuperscript{530} See ibid at 13-5, paras 44-50.
At the same time, the Committee of Independent Experts report found that it appeared that Israel had failed to investigate credibly at least several incidents, and that Israel had focused on only a relatively few low-ranking officials, ignoring those responsible for planning the war; the report stated and that the impartiality of the investigative processes could be put into question as a result.\footnote{See \textit{ibid}.}

The Committee of Independent Experts’ mandate was renewed subsequent to the September 2010 report, and new commissioners were appointed.\footnote{See HRC Res 15/6, 15\textsuperscript{th} Sess, UN Doc A/HRC/RES/15/6 (6 October 2010). New commissioners were appointed because the previous commissioners had other obligations that prevented them from continuing in the position.} The second Committee of Independent Experts report was issued on 18 March 2011.\footnote{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/16/21 (18 March 2011), Advance Unedited Version \cite{Second_Report_of_the_Committee_of_independent_experts}.} This time, the report noted that Israel had, “dedicated significant resources to investigate over 400 allegations of operations misconduct in Gaza reported by the [Goldstone Report] and others,”\footnote{\textit{Ibid} at 21, para 77.} including 52 criminal investigations.\footnote{\textit{Ibid} at 6, para 24.} The report noted that much was left to be done in terms of continued investigations, and that investigations had proceeded at a very slow pace, which could undermine investigated efforts, but that “[g]iven the scale of this undertaking, it is unsurprising that in 2011, much remains to be accomplished.”\footnote{\textit{Ibid} at 21, para 77.} However, it was again reiterated that, “there is no indication that Israel has opened investigations into the actions of those who designed, planned, ordered and oversaw Operation Cast Lead.”\footnote{\textit{Ibid} at 22, para 79.} Moreover, it was clear that not all incidents mentioned in the Goldstone Report had been investigated – or sufficiently and transparently investigated – and that the number of criminal convictions remained very low.

According to an op-ed by Goldstone in the Washington Post, and various media responses at the time, this second Committee of Independent Experts report caused Goldstone to “reconsider” his report,\footnote{Goldstone Recantation, supra note 439.} a development which was accompanied by
Israel seeking the retraction of the Goldstone Report at the UN. What Goldstone actually said was that, had Israel cooperated with the Gaza COI and provided him with the information that it had since made available in internal investigations and prosecutions, some of that evidence “probably would have influenced our findings about intentionality and war crimes.” Goldstone’s assertion seemed to apply only to a reconsideration of one incident (of the thirty-six investigated) that spoke in part to one broad charge levelled against Israel by the Goldstone Report – the charge that Israel had a high level plan to target intentionally civilians – although he seemed to imply that as a general matter he no longer believed that Israel had a high-level plan to target civilians. His basis for such an about-face was ambiguous. The three other Gaza COI commissioners, in contrast, made clear that they did not share his view and that subsequent revelations had changed little.

In contrast to Israel, Hamas initially saw the Goldstone Report as, in large part, a vindication of its position, though it continued to deny the charges against it and has exhibited little interest in investigating alleged wrongdoings that took place during the war or holding those responsible accountable for their actions. Hamas did come out with a report in response to the Goldstone Report, though they did not initially submit it

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539 See: “Israel seeks retraction of damaging UN report”, The Globe and Mail (3 April, 2011). See also “Judge Goldstone to visit Israel, says minister: Richard Goldstone has accepted invitation to Israel and agreed to try to nullify UN report on Gaza conflict, says interior minister”, The Guardian (5 April 2011).
540 Goldstone Recantation, supra note 439. Goldstone seemed to be speaking in particular about one notorious case where he found that Israel appeared to intentionally target civilians, though he seemed to generalize at times by stating that there was not an intentional policy of targeting civilians in general. In his “recanting” of this, he stated: “While the investigations published by the Israeli military and recognized in the UN committee’s report have established the validity of some incidents that we investigated in cases involving individual soldiers, they also indicate that civilians were not intentionally targeted as a matter of policy.” He then uses as the example the shelling of the al-Simouni home.
543 See Ezzedeen Al-Qassam Brigades, UN Report Clear Proof of Israel’s War Crimes (16 September 2009), online: www.gassam.ps/news-1840-UN_report_clear_proofs_of_Israels_war_crimes.html. Hamas initially rejected some of the findings – those related to its actions, of course – but evidently determined it was better to promote world-wide acceptance of the Goldstone Report.
to the UN, and rejected the Goldstone Report’s charges of war crimes. The Human Rights Watch Report on the post-Gaza invasion investigations of Israel and Hamas found once again that Hamas made no credible attempts to investigate and/or prosecute, as did the first of the Committee of Independent Experts reports – which noted that two “investigative” reports had been submitted to the Committee, though one was not really an investigation at all. The second Committee of Independent Experts report noted some “efforts” had been taken with respect to criminal investigations into human rights violations, though no investigations had commenced into the launching of rockets and mortars into Israeli territory.

The Palestinian Authorities in the West Bank set-up a high-level, four-member commission to investigate the Goldstone Report’s findings. The first Committee of Independent Experts report also reviewed the Palestinian Authorities’ high-level commission’s report and found, “that the [Palestinian Authority’s] Independent Investigation Commission undertook independent and impartial investigations in a comprehensive manner that squarely addressed the allegations in the [Goldstone] report.” However, the same Human Rights Council Committee of Independent Experts report also noted that, “it is unclear to what extent [the Palestinian Authority’s Independent Investigation Commission’s] report will lead to criminal investigations and prosecutions” and that, “investigations are only the first step to achieving

545 See Human Rights Watch, “Turning a Blind Eye”, supra note 526. The report stated: “In Gaza, Hamas has taken no meaningful steps to investigate and punish those who violated the laws of war. After rejecting criticism of its conduct during the war, Hamas established a commission headed by the Gaza Minister of Justice to look at the allegations in the Goldstone report. In January 2010 it released the commission’s findings that Hamas’s armed wing…and other Palestinian armed groups had fired rockets only at Israeli military targets, and civilian casualties from those attacks were mistakes, due to the weapons’ technological limitations. The claim ignores the fact that the rockets fired into Israel that did not land in open terrain mostly struck in civilian populated areas…far from any legitimate military target…." Ibid at 6.
548 See Report of the Committee of independent experts, supra note 529 at 19, para 70.
549 See ibid at 20, para 73.
accountability…and that the prosecution of perpetrators…should follow promptly.”

The second Committee of Independent Experts report detailed a number of subsequent institutional advancements – including the creation of a Constitutional Court, the transfer of cases from military to civilian jurisdiction and the appointment of a General Prosecutor to conduct investigations. However, the Committee of Independent Experts report again noted that the, “criminal accountability mechanisms have not yet been duly activated in relation to any of the allegations of serious violations in the [Goldstone Report].”

Let us now delve a little more deeply into some of the criticisms of the Gaza COI, proceeding in general in the temporal order in which such criticisms were raised.

5.4 The Original Mandate was Biased – and Remained in Effect

As noted, the original mandate for what was to become the Gaza COI was undoubtedly one-sided as against Israel. The mandate focused only on Israeli actions, and presupposed their criminality. Goldstone managed to change the language and the focus of the inquiry to ensure that all sides would be investigated, but criticism remained that the “official” mandate was biased. Goldstone and his fellow commissioners clearly were governed, at least in practice, by the updated mandate and viewed it as the Gaza COI’s legally constituting instrument. But Israel managed to bring the credibility of the mandate – and thus the credibility of the Goldstone Report and its findings – into question by focusing on the original, biased mandate rather than the revised version. The United States House of Representatives apparently concurred with Israel’s assessment and, in a non-binding resolution, noted inter alia that Gaza COI’s original mandate was biased and asserted that this original mandate remained applicable to the Gaza COI, having never formally been overturned by a subsequent Human Rights Council resolution.

For Israel and the United States House of Representatives, the argument that the mandate was biased could be added to a laundry list of other procedural concerns – many much more legitimate – that were then used in combination to impugn the

550 See ibid at 20, para 75.
551 Second Report of the Committee of independent experts, supra note 533 at 23, para 87.
552 United States House of Representatives, Res 869, supra note 438.
credibility of the Goldstone Report’s findings. At least some of the subsequent debate was therefore redirected from an analysis of human rights abuses to a discussion of the biased mandate.

But Israel’s reaction was not merely a spurious attempt to distract from the substance of the Goldstone Report by disingenuously locating bias in the very foundation of the inquiry. Rather, Israel's reaction to the original (biased) mandate should be seen in context. This context was discussed in chapter four, and includes the specific complaints as regards the Commission on Human Rights, and now the Human Rights Council, long viewed as focusing disproportionately on Israel, as well as the perception of those reports, COI’s and fact-finding missions that came before the Gaza COI. So, based on its history with the Human Rights Council and its COIs, for Israel it came as no surprise that the intention behind calling for an inquiry – as instantiated by the original mandate – was to criticize Israel in particular. Whatever subsequent actions were taken would have to overcome the fact that history seemed to be repeating itself and, once again, Israel was the focus of condemnation and inquiry where other parties to the conflict – namely Hamas – were not named. Given such a history, and the clear intention of the Human Rights Council in calling for the inquiry to perpetuate the history, little independence or impartiality could be expected from Israel’s perspective. According to Israel, the legitimacy – in this case the impartiality and independence of the Gaza COI – could not but be compromised, and changing the wording of the mandate did not change the intention of Human Rights Council members who called for the inquiry.

Of course, Goldstone was neither a representative of a member-state of the Human Rights Council that called for the inquiry, nor was he responsible for the original mandate – indeed, he condemned it. So the counter-argument goes that Goldstone, and the other members of the Gaza COI, were not tainted by this institutional bias. The impartiality of the commissioners as well as their independence from the “tainted” Human Rights Council was therefore vital to ensuring the legitimacy of the report.

In this regard, the Gaza COI had difficulties from the beginning because it was not so clear that the other members of the Gaza COI were indeed untainted by the perception of bias – the very thing that the Gaza COI relied upon to prove its independence from the original mandate.
5.5 Impartiality, Bias and the Gaza COI’s Commissioners

As has historically been the case with UN COIs, criticisms of the Goldstone Report related to its findings and in particular to the reliability, credibility and impartiality of the Goldstone Report as reflected by its operating principles and procedures. And of course it bears repeating that these working principles and procedures depend on, and are inter-connected with, the purpose ultimately assigned to a UN COI.

One of the first concerns raised with regard to the Gaza COI related to the extent to which it should be viewed as a legal undertaking: to what extent did the Gaza COI have a legal-judicial purpose and follow legal procedures as a result? Now, the disputed – and shifting interpretations of – the legality of the Gaza COI caused several further problems, but the first related to bias as it pertained to the commissioners; thus, we shall commence with an analysis of impartiality as it pertains to the commissioners.

Like many other COIs, both domestic and international, the Gaza COI was led by a strong personality with an extensive background in the relevant areas of law, in this case international law and human rights. Justice Richard Goldstone was appointed lead commissioner of the Gaza COI by the President of the Human Rights Council. Goldstone was chosen for good reason: he is a former judge of the Constitutional Court of South Africa; he chaired the Goldstone Commission into the illegal activities of the apartheid state; he is a former chief prosecutor at the ICTY; and, Justice Goldstone is a professor of law.

Three other members were appointed to the Gaza COI, including Ms. Hina Jilani, Colonel Desmond Travers, and Professor Christine Chinkin, whose addition was particularly controversial. Christine Chinkin is a professor of international law and has had previous experience as a member of the UN Human Rights Council’s high-level fact-finding mission to Beit Hanoun (2008). She was thus considered an expert in international law, fact-finding, and someone with experience in the region.

553 At the time, she was an Advocate of the Supreme Court of Pakistan, and had formerly been a Special Representative of the Secretary-General on the situation of human rights defenders. She was also a member of the International Commission of Inquiry on Darfur in 2004.
554 Colonel Travers is a former Officer in Ireland’s Defense Forces as well as a member of the Board of Directors of the Institute for International Criminal Investigations. See generally Goldstone Report, supra note 6 at 13, para 2; and 37, para 132.
However, while a professor of international law at the London School of Economics and before the Gaza COI had started work, she was a signatory to a public letter on the Gaza conflict. The letter was also signed by over two dozen prominent academics and stated that, “the rocket attacks on Israel by Hamas do not amount to an armed attack entitling Israel to rely on self-defense.”\textsuperscript{556} The title of the public letter has also drawn criticism: “Israel’s Bombardment of Gaza is Not Self-Defense – It’s a War Crime.”\textsuperscript{557} The letter posited that, “the blockade of humanitarian relief, the destruction of civilian infrastructure, and preventing access to basic necessities such as food and fuel, are prima facie war crimes.”\textsuperscript{558} As a result of this letter numerous commentators including the Government of Israel and the United States House of Representatives\textsuperscript{559} questioned professor Chinkin’s impartiality as a commissioner.\textsuperscript{560} Rarely is it noted, however, that the letter also condemns, “the firing of rockets by Hamas into Israel and suicide bombings which are also contrary to international humanitarian law and are war crimes”, though perhaps the fact that professor Chinkin seemed to have predetermined criminality on both sides, as opposed to only with respect to one party, is a non sequitur in that the concern, seen in its best light, was really with respect to Chinkin having predetermined criminality; whether she had prejudged one or both sides was of lesser significance.

In any event, it has been argued that her appointment created a suspicion of bias. As a result there were several requests that she recuse herself from the Gaza COI, including a formal petition by UN Watch – a pro-Israeli NGO – to Justice Goldstone that she be disqualified.\textsuperscript{561} Arguably a judge on a domestic COI would have been disqualified in similar circumstances. In rejecting the petition to disqualify Professor Chinkin, Goldstone stated that bias did not apply as it would in a court or administrative law setting because the Gaza COI was neither “judicial” nor even “quasi-

\textsuperscript{557} Ibid.
\textsuperscript{558} Ibid.
\textsuperscript{559} United States House of Representatives, \textit{Res 869}, supra note 438.
\textsuperscript{560} See \textit{Letter of Ambassador Aharon Leshno-Yaar}, supra note 435. See also \textit{Initial Israeli Response to COI}, supra note 486 at 5-6, para 17.
\textsuperscript{561} See UN Watch, “Request to Disqualify Prof. Christine Chinkin from UN Fact Finding Mission on the Gaza Conflict” (20 August 2009).
judicial” in nature: “[o]urs wasn’t an investigation, it was a fact-finding mission…We made that clear…If this was a court of law, there would have been nothing proven.”

Goldstone recommended that independent criminal investigations and, if necessary, prosecutions be undertaken either by the parties to the conflict, the ICC, or by way of the exercise of universal jurisdiction because he viewed the COI as a fact-finding mission, and not a criminal or legal undertaking. This is to say that he saw his role as purely investigatory, whereby the issues are brought into the public domain and the legal and criminal work is left to be accomplished by courts of law. Subsequent to the Gaza COI, Goldstone has described the purpose of UN COIs as offering a “roadmap” for future prosecutors – and presumably others – to use as help in deciding on what incidents or types of offences might usefully be investigated. Under this understanding, it would seem that criminal courts could not rely on the Goldstone Report’s findings. In this regard, Alan Dershowitz has stated that, “[i]f [Chinkin’s] bias would have been a ground for judicial disqualification, then surely her conclusions should not be credited by quasi-judicial bodies, such as the International Criminal Court, the Human Rights Council, and other governmental and non-governmental bodies.”

However, Goldstone’s assertion in rejecting the petition to disqualify Chinkin that the Gaza COI was non-judicial in nature seems difficult to reconcile with his other


563 Gal Beckerman, ibid.

564 Goldstone has asserted since the report that: “Some have charged that the process we followed did not live up to judicial standards. To be clear: Our mission was in no way a judicial or even quasi-judicial proceeding. We did not investigate criminal conduct on the part of any individual in Israel, Gaza or the West Bank.” Goldstone Recantation, supra 439.

565 Goldstone subsequently addressed the purpose of large-scale UN COIs, such as that in Gaza, in an interview: “When he began working [as chief prosecutor of the ICTY], Goldstone was presented with a report commissioned by the U.N. Security Council based on what he said was a fact-finding mission similar to…Gaza. ‘We couldn’t use that report as evidence at all,’ Goldstone said. ‘But it was a useful roadmap for our investigators, for me as chief prosecutor, to decide where we should investigate. And that’s the purpose of this sort of report.’” [Emphasis added]. See Gal Beckerman, supra note 562.

566 Ibid.

567 Dershowitz, supra note 506 at 5.
assertion that the Gaza COI itself was – and had to be – impartial and independent.  

In reviewing Israel’s duty to investigate allegations of serious violations of international law, the Goldstone Report explicitly stated that inquiries were required to observe, “the universal principles of independence, effectiveness, promptness and impartially (sic).” Elsewhere in the Goldstone Report, it was made clear that the Gaza COI was itself bound by what was called “international investigative standards developed by the UN.” But it is unclear what independence and impartiality might mean – and how these principles should be interpreted – if legal or quasi-legal standards are removed from the equation so that, for example, the appearance of bias does not affect the COI’s independence or impartiality. As the first follow-up to the Goldstone Report by the Human Rights Council Committee of Independent Experts stated with regard to its review of the investigations into their own conduct during the 22-day conflict by Israel and Hamas:

impartiality refers to the question of whether an investigator is or is likely to be biased. The [UN] Human Rights Committee has stated that “judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties”. Similar considerations apply to investigators.

In any event, it is a choice whether or not we view such COIs as legal responses to mass atrocities or rather to view them as simply something akin to a human rights fact-finding mission of the sort that a NGO might conduct. The latter approach would support Goldstone’s assertion that the Gaza COI was neither judicial nor quasi-judicial, in that he seems to assert that no or very limited formal legal rules apply, at least as concerns issues of bias or the choice of commissioners. However, law is inextricably linked to COI processes: ad hoc UN COIs are legally constituted, conduct inquiries akin

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569 Goldstone Report, supra note 6 at 390, para 1814.

570 Ibid at 42, para 158. See also ibid at 43, para 161: “The methods adopted to gather and verify information and reach conclusions were for the most part guided by best practice methodology in the context of United Nations investigations.”

571 Goldstone later reiterated his assertion that the Gaza COI was not to live up to judicial standards: “Some have charged that the process we followed did not live up to judicial standards. To be clear: Our mission was in no way a judicial or even quasi-judicial proceeding.” See Goldstone Recantation, supra note 439.

572 See Report of the Committee of independent experts, supra note 529 at 8, para 23.
to COIs in domestic settings, apply interpretations of international laws, and their findings undoubtedly result in legal consequences, often after being used by legal bodies – such as courts – to found legal actions.

In the circumstances it is hard to see how impartiality and independence can be both required by “universal principles” and not subject to either a judicial (legal) or quasi-judicial interpretation. The effectiveness and legitimacy of UN COIs depend on their ability to produce impartial, independent reports for political bodies that could not likely do so themselves. Legality must necessarily play a role in the interpretation of independence and impartiality in this case, particularly with respect to issues of real or perceived bias.

A review of the perceptions of UN COI commissioners, reports, academic commentators as well as the ever-increasing set of applicable rules and guidelines has consistently demonstrated that the legitimacy of UN COIs is inexorably linked to their ability to complete their fact-finding task not just in a thorough fashion, but in an open, impartial, reliable and independent manner. Theoretically, because of the impartiality and independence of UN COIs, their factual findings and recommendations can be relied upon in a way that the findings, assertions, and recommendations of UN political organs cannot. Regardless of whether or not a particular UN COI perceives itself to be “extra-“ or “quasi-judicial”, or something else entirely, and regardless of a particular purpose ascribed to a UN COI, its benefits derive from the fact that it is able to act, to a greater or lesser degree, “legally”, even in otherwise highly political contexts. In other words, the benefit of UN COIs has always been the ability to bring legal legitimacy to political conflicts.

In order to gain insight into what constitutes prejudice in the circumstances, questions of bias must be confronted directly and not dismissed as inapplicable. Commissioners must participate in the legal process and make transparent decisions based on clear interpretations of what the law requires of a UN COI with a mandate to investigate serious abuses of international human rights and humanitarian law. Decisions must be viewed as fair and impartial in the context. The COI cannot have it
both ways. It cannot on the one hand promote criminal accountability\textsuperscript{573} by claiming the same legitimacy, reliability and credibility that domestic COIs generally claim due to their commitment to the principles of legality, and on the other hand act non-judicially and avoid these tricky legal and procedural processes and principles, in favour of those utilized by some other non-legal fact-finding missions (NGOs for example).\textsuperscript{574} It is insufficient to simply dismiss claims of bias when the perception of bias is at issue. When the issue is raised, some legal analysis is required before a commissioner who has made her views known and taken a public position on a particular issue of direct relevance to the COI is determined to be suitable or unsuitable for the post of commissioner. The often outraged response to professor Chinkin’s appointment as a commissioner to the Gaza COI demonstrates that perhaps the more polarized the conflict confronted by UN COIs, the greater the necessity for fidelity to the legal principles of independence and impartiality. In the circumstances, a commitment to legality would likely have required the recusal of professor Chinkin from the Gaza COI.

However, legality also requires independence, and in the case of UN COIs it is important that commissioners not be subject to arbitrary dismissal. Rules as to discharging a commissioner are necessary, easy to promulgate, and there are numerous options available. For example, though the ideal would be for a commissioner to recuse herself in such a situation, the dismissal of a commissioner on unanimous vote of the other commissioners might be a possible option.

In terms of determining with precision what is required in terms of impartiality and independence, it must be remembered that reference to the mandate, the purpose and goals of the UN COI will be necessary in order to determine what specifically is required by the principles of legality. This does not mean that the mandate and purpose have to be so specific as to speak to the issue of bias; such a specific mandate could

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\textsuperscript{573} The Goldstone Report ends with: “[t]he Mission is of the view that the prosecution of persons responsible for serious violations of international humanitarian law would contribute to ending such violations, to the protection of civilians and to the restoration and maintenance of peace.” See \textit{Goldstone Report, supra} note 6 at 422, para 1966. Goldstone himself has since repeated that this was the primary purpose of the COI: see Richard Goldstone, “Justice in Gaza”, \textit{New York Times} (17 September 2009), online: www.nytimes.com/2009/09/17/opinion/17goldstone.html.

\textsuperscript{574} Perhaps here it is worth noting that in this statement there is no intention to denigrate the work of many excellent NGOs and their important fact-finding endeavours. Indeed, many good NGOs will adopt legal or quasi-legal standards with respect to impartiality in order to ensure the legitimacy and reliability of their reports. For without credibility, neither NGO nor UN inquiries are of much value – except perhaps as unreliable political tools. Thus, though I distinguish here between NGO COIs and UN COIs, there is no reason why an NGO COI could not be seen as legalistic, nor is there any reason why it will or should not exhibit a fidelity to legality.
be impractical and unwarranted. But it does mean that the applicable law must be clear and accessible so that interpretations of what constitutes prejudice and independence can be reasonably determined and, if necessary, criticized. In other words, had the Gaza COI’s mandate been clearer with respect to the goals of the Gaza COI and how those goals might be achieved by a COI – had it demonstrated a greater commitment to legality – we would have a better understanding of what standards for impartiality and independence were appropriate in the context. To reiterate a recurring theme in this dissertation, in general it might be said that the more formal and criminal the investigation, the higher the standards with respect to due process of law and impartiality.

5.6 **Scope and Purpose of the Gaza COI**

The indeterminacy of the Gaza COI’s mandate given the general lack of clarity with regard to what *ad hoc* UN COIs do is revealed, in part, by analyzing the scope of the Gaza COI’s investigations. Two questions arise as to the scope of the inquiry. First, what is the temporal and geographic scope of the investigation? Second, what is the legal scope of the inquiry? Each of these questions is discussed, in turn, below.

5.6.1 **Temporal and Geographic Scope of the Gaza COI**

The Human Rights Council failed to circumscribe strictly the temporal and geographic confines of the Gaza COI in its mandate. It was thus left to the Gaza COI’s commissioners to determine the scope of the inquiry. This created a pair of problems. First, the Gaza COI invited claims of bias by *broadening the scope* of its investigation beyond the twenty-two day conflict and offering its perception of the relevant history to the conflict. In so doing the Gaza COI opened itself to claims that it harboured historical biases, which could be said to permeate the Goldstone Report and influence its subsequent legal analysis. In this way, some of the substantive legal

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575 Truth Commissions, or even international courts, generally circumscribe the timeline that is to be considered. 576 Moshe Halbertal, for example, has stated with respect to the historical review conducted by the Goldstone Report: “[t]he honest reader of these sections cannot avoid the impression that their objective is to prepare a general indictment of Israel as a predatory state that is geared toward violating human rights all the time. It will naturally follow from such a premise that the Gaza operation was yet another instance of Israel’s general wicked behaviour. These long sections are the weakest, the most biased, and the most outrageous in this long document. They are nothing if not political.” See: Moshe Halbertal, “The Goldstone Illusion,” in Adam Horowitz, Lizzy Ratner, and
and factual analysis of the Gaza COI was side-tracked by discussions of the Goldstone Report’s arguably less relevant and less important historical narrative. Second, the Gaza COI could be seen as biased for narrowing the scope of the investigation by focusing only on select incidents it deemed as representative of patterns of abuse. By failing to investigate all incidents during the twenty-two day conflict, particularly some of those thought by Israel to be highly relevant to the conflict, the Gaza COI also opened itself to claims of bias. I will discuss the second problem in the next section.

In justifying the inclusion of an historical narrative to lead-off the Goldstone Report, the report argued that “[a] review of the historical, political and military developments between the Six-Day War in 1967 and the announcement of the “period of calm”...in June 2008, and of Israeli policies towards the Occupied Palestinian Territory is necessary to consider and understand the events that fall more directly within the scope of the Mission’s mandate.” The Goldstone Report’s subsequent historical analysis might generally be broken into three important sections found in chapters II and III. First, chapter II, part A, of the Goldstone Report provided about six pages on the history of the conflict between Israel and Palestine, dating back to the Six-Day War of June 1967 when the West Bank, which included East Jerusalem, as well as the Gaza Strip were first captured by Israel. However, it is not clear how precisely much of this historical narrative is directly relevant – and necessary – to understanding “the events that fall more directly within the scope of the...mandate”, which presumably includes


Goldstone Report, supra note 6 at 46, para 176. See generally ibid at 46-52, paras 177-97.

Although there are certainly other chapters in the Goldstone Report that provide historical background, these other chapters tend to be issue-centric in that they are focused on the relationship between specific policies or issues, such as the Israeli blockade of the Gaza Strip, and the subsequent military activity, rather than on offering a more broad, general historical contextualization of the conflict. Foremost among these other sections might be chapter XVII on “The Impact of the Blockade and of the Military Operations on the People of Gaza and their Human Rights.” See ibid at 258-84, paras 1217-1335. See also chapter V on the “The Blockade: Introduction and Overview”, ibid. Such issue-based historical narratives will be discussed in greater detail later in this dissertation under the heading Legal Scope: The inclusion of economic and social rights as applicable international law? For now it is sufficient to note that, in general, these issue specific resorts to history provide more of the type of information and context that is necessary to understand the scope of the alleged human rights abuses found in the Goldstone Report than the broader historical contextualization offers.

See ibid at 46-52, paras 177-97.
the military activities that took place during Operation Cast Lead and led to the charges of war crimes, crimes against humanity and serious human rights violations. For example, the Goldstone Report deigns to note little of the events between 1967 and 1977, other than the fact that “‘[m]ilitary orders’ were used to rule the civil affairs of the Palestinian population” in the West Bank and Gaza Strip during this time, and that all of Jerusalem was annexed to the capital of Israel in 1980, an action condemned by the UN.\(^ {580}\) This essentially brings us to 1977 when, as the Goldstone Report notes, the Likud Party was elected in Israel and the expropriation of Palestinian land was accelerated through the development of settlements, which led to “growing tension and violence.”\(^ {581}\)

Temporally, the next event mentioned is the 1987 Palestinian intifada, which was neither contextualized nor explained other than to say that it was “forcefully repressed by the Israeli security forces but lasted until 1993...”\(^ {582}\) The “Oslo Accords” are also briefly discussed, though little history or context is provided before it is mentioned that “[a] second popular uprising erupted in September 2000, after the then opposition leader Ariel Sharon conducted a controversial visit to the Temple Mount/al-Haram al-Sharif in Jerusalem. This second intifada set off an unprecedented cycle of violence.”\(^ {583}\) The Goldstone Report’s discussion of the violence that followed the second intifada is the first time in the historical review that one gets a sense for what it was like to live in the region at the time, or how much animosity and death had become a part of day-to-day life. Even then, most relevant context is expressed simply by noting the number of deaths either caused by suicide bombings or military conflict.\(^ {584}\) Otherwise, in the 2000s the Goldstone Report simply notes several major newsworthy issues, such as the construction of the “separation Wall”,\(^ {585}\) and the 2002 “road map to peace” proposed by the United States, European Union, Russia and the UN.\(^ {586}\) In fact, pre-2004, most of the information provided by the Goldstone is piecemeal, highly

\(^{580}\) See *ibid* at 46, para 177.
\(^{581}\) *Ibid* at 46, para 178.
\(^{582}\) *Ibid* at 46, para 178.
\(^{583}\) *Ibid* at 47, para 180.
\(^{584}\) *Ibid* at 47-8, paras 181-3.
\(^{585}\) *Ibid* at 48, para 185.
\(^{586}\) *Ibid* at 49, para 186.
selective, and provides little context or detailed analysis that would help the uninitiated to the dispute better understand the conflict in any meaningful way.

This does change slightly when the Goldstone Report commences with its discussion of the “disengagement plan”, which took place in 2004 and provided for the “unilateral removal from the Gaza Strip of Israeli security forces...”, though Israel maintained its control over borders, telecommunications, water, electricity, and several other aspects of day-to-day life.\textsuperscript{587} Hamas is then mentioned for the first time,\textsuperscript{588} though subsequent violence against Israel is associated with other groups like the al-Qassam Brigades or Israel as against Hamas; note is made of Israel’s imposition of economic sanctions on the Hamas-led Palestinian Authority, but no mention is made of why Israel thought this necessary. Rather, the general focus of the report’s discussion of the period between 2004 and about 2006 seems to be on Hamas’ split from the Palestinian Authority and Fatah and its subsequent democratic election. Finally, this section concludes with the Goldstone Report mentioning several “Israeli military operations in Gaza and the West Bank,” which occurred in the 2000s before Operation Cast Lead,\textsuperscript{589} and then detailing the post-2006 violence between Israel and “Palestinian militants,” reverting again to a form that basically lists several events and the number of deaths.

Second, in chapter II, part B, the Goldstone Report offered an historical overview of Israel’s, “pattern of policies and conduct relevant to the Occupied Palestinian Territory”,\textsuperscript{590} and a discussion of the “relevant political and administrative structures in the Gaza Strip and West Bank” as well as Israel, which contributed to the conflict.\textsuperscript{591} This section focused primarily on the settlements – and the separation Wall – built by Israel, the demolition of Palestinian homes and the evacuation of Palestinians to accomplish this task, the Israeli policy of “closure”, which closes off certain areas and restricts the movement of goods and people, and finally various Israeli laws that treat

\textsuperscript{587} \textit{Ibid} at 49, para 187.
\textsuperscript{588} \textit{Ibid} at 49, para 188.
\textsuperscript{589} \textit{Ibid} at 51, paras 193-4.
\textsuperscript{590} See \textit{ibid}, Part One: Methodology, Context and Applicable Law, II. Context, B. Overview of Israel’s pattern of policies and conduct relevant to the Occupied Palestinian Territory, and links between the situation in Gaza and in the West Bank, at 52-8, paras 198-209.
\textsuperscript{591} See \textit{ibid} at 59-61, paras 210-22.
differently Palestinians and “persons of Jewish race or descendency” – and provide benefits to the latter people.\(^{592}\)

Third, chapter III of the Goldstone Report considered the events occurring between the “ceasefire” of 19 June 2008 and the commencement of military operations on 27 December 2008, including a discussion of the right to self-determination, and various human rights, humanitarian and international criminal laws as they apply to the law of occupation.\(^{593}\) Though there are a few hints of how the movement of goods and services into Gaza were restricted during this period, and the economic and humanitarian impact this had, much of chapter III is nevertheless concerned with documenting the various violent acts perpetrated by all parties after the ceasefire, and the number killed by this violence; lists of events and the numbers killed replaces historical or contextual analysis.

A resort in these sections of the Goldstone Report to a consideration of all of these facts that took place before the 27 December 2008 date – articulated by the Gaza COI’s mandate as the day the hostilities commenced – was bound to be a controversial exercise. Moshe Halbertal, in offering a thoughtful critique of the Goldstone Report, has argued:

> [t]he commission should not have dealt with the context leading to the war; it should have concentrated on its mandate, which concerned only the Gaza operation. By setting its findings about the Gaza war in a greatly distorted description of the larger historical context, it makes it difficult for Israelis – even of the left, where I include myself – to take its findings seriously.\(^{594}\)

The historical context to which Halbertal is referring, as well as the causes and instigations of the conflict between Israel and Palestinians, has been in dispute since at least 1947. Historical overviews by their nature tend to provide ideal terrain for locating partiality, particularly where the incentive exists for one or all of the subjects of the historical overview to find bias wherever it might exist. But the problem was not merely that the historical overview could be controverted. The problem, according to Halbertal, was that the articulation of any perceived historical inaccuracies could taint the whole of the Goldstone Report with bias and thus affect the credibility of all of its findings, including with respect to findings of specific breaches of international law.

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\(^{592}\) *Ibid* at 57, para 206.

\(^{593}\) See *ibid* at 62-81, paras 223-310.

In offering the historical overview, certain choices were made in terms of what period to use as the commencement of the story, and what events to focus on. One can be sympathetic to the commissioners here in terms of the choices made. The Goldstone Report began its historical review with the Six Day war of 1967, which makes sense as a starting point given that the war marked the time when the Gaza Strip and West Bank, the geographical foci of the investigation, came under Israeli authority.

But the "relationship" did not necessarily begin at this time. One could have gone back to 1947 or to the 1949 Armistice demarcation where the "Green Line" was drawn between Israel and the Gaza Strip, administered until 1967 by Egypt, and the West Bank, administered during that same period by Jordan. By one account, the events that took place after the 2005 Israeli withdrawal from the Gaza Strip represent all the history that is "necessary" to understand the political and legal backdrop to Operation Cast Lead: “Operation Cast Lead cannot be understood, either legally or politically, in a historical vacuum. Thus, Section III [of the article] will sketch the necessary backdrop to the recent fighting, beginning with Israel’s 2005 withdrawal of troops and settlers from the Gaza Strip….” [Emphasis added.]

Note also that both the Goldstone Report and the above account strongly assert the need for an historical review in order to understand the legal context, but do not directly justify this assertion – historical reviews of conflicts have become such an entrenched part of modern human rights fact-finding and the transitional justice movement that it is no longer necessary to justify resort to them. But this presumption should not stand. The assertion that an historical inquiry is necessary in order to understand the legal context of any conflict is contingent upon further largely unstated presumptions, including with respect to what precise legal context one is analyzing. For example, it is hard to see how an historical context dating back 40-years is necessary to determine whether the use of white phosphorus around a school during Operation Cast Lead amounted to a war crime; here, the context of the deployment of

595 George E Bisharat, Timothy Crawley, Sara Elturk, Carey James, Rose Mishaan, Akila Radhakrishnan, Anna Sanders, “Israel’s Invasion of Gaza in International Law” (Winter 2009) 38 Denv J Int’l L & Pol’y 41 at 45.

596 Remember that in chapter 3 the move in international human rights fact-finding toward a transitional justice “approach” was noted throughout the 1980s, ‘90s and 2000s, and that transitional justice approaches have long centered on truth telling and historical inquiries.
the weapon could be a consideration, but surely whether or not the use of white phosphorus in that context amounts to a war crime does not depend on the historic process of establishing settlements in the West Bank, or indeed on anything beyond the timeframe of the twenty-two day conflict.\textsuperscript{597}

In terms of the specific problems that resulted from the broad historicizing undertaken in the Goldstone Report, the choice of which historical events to include and exclude led to a great deal of controversy and criticism. For example, the Goldstone Report’s focus on the annexation of Jerusalem and the establishment of settlements in the 1970s and 1980s was not met with any focus on the formation of the Palestine Liberation Organization.\textsuperscript{598} Indeed, the PLO was first mentioned as the leaders of a “widespread popular uprising – the intifada” which was “forcefully repressed by the Israeli security forces”, while the settlements were described as having “continued unabated to this day.”\textsuperscript{599} It is worth noting here, however, that the Goldstone Report did make special note of the fact that according to Israel, “154 suicide bomb attacks against Israel civilians and military personnel took place between 1993 and 2007”\textsuperscript{600} and that, “[t]he firing of rockets and mortars from Gaza into Israel began in 2001” with Israel reporting that “as many as 3,455 rockets and 3,742 mortar shells were fired into Israel from Gaza until mid-June 2008.”\textsuperscript{601}

\textsuperscript{597} This is not to say that the historical context is not relevant in the case of the Gaza COI or any other UN COI – indeed, this dissertation has argued just the opposite insofar as it has stated that a robust consideration of the relevant institutional and political context is imperative – only that the extent of its relevance and what time-frame is relevant are contextual decisions to be made contingent on other factors. The relevance of any history must be maintained by reference to what precisely that history is legally and politically relevant to demonstrating. Thus, the extent of the historical inquiry will necessarily depend on at least: (1) the extent to which the inquiry is about providing political, as opposed to legal, context in order to, for example, understand the broader dispute and potential solutions thereto; and, (2) the determination made as to the scope of the applicable law – meaning that if the COI is limited to considerations of war crimes then historical context may play a smaller role, while a COI that considers the purported breach of social and economic rights may need to resort to some greater degree to historical context in order to situate those breaches.

\textsuperscript{598} Goldstone Report, supra note 6 at 46, paras 177-8.

\textsuperscript{599} Ibid at 46, para 178.

\textsuperscript{600} Ibid at 47, para 182.

\textsuperscript{601} Ibid at 48, para. 183. The language used in such historical narratives can also be used to support claims of bias. For example, the Goldstone Report refers to the construction of the “Wall” starting in June 2002 (see ibid at 48, para 185, and 54-6, paras 201-3), which the Israelis prefer to call a barrier or fence. At the same time, there is no discussion of the controversy surrounding the purposes and actions of Hamas. As Halbertal notes, “[i]n the supposed context that the report analyzes, there is no mention of Hamas’s role and its ideology as reflected in its extraordinary charter, which calls for the destruction of Israel and the genocidal killing of Jews.” Moshe Halbertal, “The Goldstone Illusion,” supra note 576 at 355.
Perhaps more damning from the Israeli perspective is chapter II, part B on “Israel’s pattern of policies and conduct relevant to the Occupied Palestinian Territory”, which goes into detail about Israel’s breach of the Geneva Conventions, particularly as concerns the Occupied Territory, its building of settlements and destruction of Palestinian-owned edifices, and on the policy of “closure” described as “closures of entire areas and restrictions on the movement for goods and people on the basis of alleged security threats to Israel.” No equivalent section on the Palestinian Liberation Organization (PLO), Fatah, Hamas or Palestinian Authority “policies and conduct relevant to the situation in Gaza [or in Israel]” is included in the Goldstone Report. Yet to Israel, years of terrorist conduct and “asymmetrical warfare” are certainly relevant to the evaluation of, for example, Hamas’ denials to the Gaza COI that it engaged in various forms of non-traditional and criminal methods of warfare during the twenty-two day conflict.

Of course, this being history, it might also be said that the historical review benefitted Israel in some ways by omitting certain salient discussions. For example, Henry Stiegman has argued that central to the lead-up to the conflict, and the Israeli justification for Operation Cast Lead that a military incursion was necessary to stop Hamas rockets and protect Israeli citizens, was the fact that after an initial breach of the ceasefire, Hamas:

offered to extend the truce, but on condition that Israel end its blockade. Israel refused. It could have met its obligation to protect its citizens by agreeing to ease the blockade, but it didn’t even try. It cannot be said, therefore, that Israel launched its assault to protect its citizens from rockets.

It should also be noted that a relatively brief historical inquiry was sufficient to attract a high level of criticism. In the context of the Goldstone Report as a whole, the historical inquiry was highly circumscribed and, as is evident from the above overview of the relevant historical sections, did not purport to be comprehensive. Under twenty pages were primarily devoted to an historical overview and for the most part it was

602 See Goldstone Report, supra note 6 at 52, para 198, and 57, para 206.
603 Ibid at 52-3, paras 198-9.
604 Ibid at 53, para 200.
605 Ibid at 56, para 204.
circumscribed to the recent past because the commissioners decided, “to focus primarily on events, actions or circumstances occurring since 19 June 2008, when a ceasefire was agreed between the Government of Israel and Hamas.” 607

On the one hand, it seems that due to the indeterminacy of the mandate and what precisely UN COIs were to do and achieve, decisions were taken by the commissioners as to the contents of the report that left them, and thus their findings and recommendations, open to claims of bias given the extraordinarily heightened politics and controversy that surrounds the history of the region. On the other hand, perhaps the commissioners and the Goldstone Report would have been subject to such scrutiny and controversy regardless of the mandate; certainly it was the case that a relatively short historical review resulted in a great deal of controversy. Either way, it is pertinent to ask whether this level of historicizing is in fact necessary for a UN COI such as this one and to what extent historical reviews can or do contribute to controversy and detract from COIs’ fact-finding. 608

For its part, after offering an historical background to the conflict, the Gaza COI noted that its mandate was not primarily historical but, to repeat, was “to focus primarily on events, actions or circumstances that had occurred since 19 June 2008, when a ceasefire was agreed between the Government of Israel and Hamas.” 609 If this is accurate and the Gaza COI was not about a transitional justice-inspired search for some broader, historical truth, then it would seem that the commissioners unnecessarily exposed themselves and the Goldstone Report to conflict and allegations of bias, detracting from their legal work and findings. The commissioners were directly implicated in the purported bias not only because they provided the historical overview but also because they thought it necessary to provide such an overview in the first place. Had the mandate required the historical chapter, at least the commissioners could have claimed that it was not up to them whether or not they considered the controversial history. In future inquiries, if such historical background is necessary, perhaps it is better explicitly wrestle with this issue at the outset and to

607 Goldstone Report, supra note 6 at 14, para 12; 41, para 153; 62, para 223.
608 A distinction might be drawn here between a war crimes COI and a truth commission. For a discussion of the distinction between COIs and truth commissions, see Hayner, supra note 242 and Freeman, supra note 240.
609 Goldstone Report, supra note 6 at 14, para 12; 41, para 153; 62, para 223.
specify the temporal scope of the inquiry clearly and openly in the mandate so that the commissioners – the arbiters of fact and law – are not associated with the (“biased”) decisions related to broadening and narrowing the temporal scope of the investigation. Once again, a greater commitment to Fuller’s desiderata of legality could have helped the Gaza COI.

The appropriateness of the approach taken by the Gaza COI depends on one’s understanding of the general purposes of such large-scale COIs and of what specific purpose(s) the Gaza COI might realistically be able to achieve, which of course will also influence what legal violations are to be considered, which in turn will also influence the scope of the inquiry. As we saw in chapters two and three on the history of UN COIs, such a discussion has not taken place with respect to contemporary UN COIs. Publicly, as represented by NGO and media reports from the time around Operation Cast Lead, the primary main-stream concern regarding the conflict was about the conduct of the parties during this conflict, with the larger ongoing conflict looming in the background. While it may have been that the military actions were seen as the final straw, as the culmination of a long series of events that produced the need for a consideration of the modern policies and practices of all parties starting at some prescribed period decades ago, it is unclear that such historicizing is what was wanted or needed from the large-scale Gaza COI. It is even more unclear that the Gaza COI, constituted as it was without the involvement of the parties, was capable of effectively undertaking such an historical task. The Goldstone Report admitted this limitation when it noted that it focused primarily on post-19 June 2008 events, despite the “broad mandate”, because “while the Gaza events must be seen in the context of the overall conflict and situation in the Occupied Palestinian Territory, in view of the limited time and resources available, it would be beyond its abilities to focus on conduct or actions that took place long before the military operation of December-January.”

Moreover, as was noted, the geographic scope of the Gaza COI was also left open to interpretation. As a result, the Gaza COI did not limit itself to an investigation of the Gaza Strip, but considered that its mandate required that it extend its inquiry

610 Ibid at 41, para 153. Further, the COI also took “into consideration matters occurring after the end of military operations that constitute continuing human rights and international humanitarian law violations related to or as a consequence of the military operations, up to 31 July 2009”. See ibid at Methodology, 14, para 12; 41 para 153.
beyond Gaza to, “include restrictions on human rights and fundamental freedoms related to the strategies and actions of Israel in the context of its military operations.” According to the Goldstone Report, “[d]evelopments in Gaza and the West Bank are closely interrelated [and] an analysis of both is necessary to reach an informed understanding of and to report on issues within the Mission’s mandate.” Specifically, the Gaza COI considered as relevant the Israeli strategies related to the West Bank (including east Jerusalem), which included detention of Palestinians in Israeli prisons, violations of the right to free movement, and restrictions on freedom of assembly and expression by the Palestinian authority. A more precise mandate would have assured greater clarity with respect to the scope of the investigation and whether it was to include the West Bank, which is geographically separated from the Gaza Strip by Israel and which was not invaded militarily during the December 2008 – January 2009 incursion.

Geographically expanding the scope of the inquiry brings into question whether the Gaza COI process was only or primarily about the twenty-two day military offensive and the crimes committed during that time – whether it was about accountability and ending impunity in the context of military conflict – or whether the Gaza COI was part of a larger transitional justice-inspired project to contextualize and historicize the situation and elaborate a more comprehensive picture of both the historical conflict and the breaches of international human rights and humanitarian law. Either way, the approach taken by the Gaza COI and the international community led to further Israeli disengagement from and consternation towards the Gaza COI and, perhaps, the Middle East peace process. In this way, whatever its goals, the Goldstone Report

611 Ibid at 292, para 1373.
612 Ibid at 292, para 1374.
613 One important purpose of truth commissions is to create a shared sense of history, community and belonging, to provide a history that can be relied upon as a source for understanding and for confronting problems that are better understood in their historical context. A corollary to this objective is to create a shared (though potentially disputed) understanding of the history that has plagued the nation or region and offer a cathartic outlet for the dispute, which flows from knowing the truth and dealing with the past, which it is said allows the nation to move productively toward its future. Arguable, the political and social circumstances that obtain in the Middle East at this time are not conducive to accomplishing such an objective. In any event, it was unclear that this was indeed the objective.
614 As was noted, Israel did not grant access to the West Bank. See for example Goldstone Report, supra note 6 at 293, para 1376.
did not seem to lay the factual foundation for a negotiated settlement between the parties as the Hague Conventions might have expected such a COI to do.

5.6.2 Scope of Inquiry: Choice of incidents during the conflict

The Goldstone Report considered relevant incidents “committed in the context of the…military operations”, which required consideration of “restrictions on human rights and fundamental freedoms relating to Israel's strategies and actions….”

While the Goldstone Report did “not purport to be exhaustive in documenting the very high number of relevant incidents that occurred in the period covered by the Mission’s mandate…the Mission consider[ed] that the report [was] illustrative of the main patterns of violations.”

The Goldstone Report did not, however, describe how the incidents reviewed by it were determined to be “illustrative” of a broader pattern of conduct, or how it chose as between incidents of a similar “type”. Further, the Goldstone Report did not explain how it ensured that the incidents that it chose to investigate that otherwise seemed to be illustrative of a general pattern of behaviour would also be generalizable or representative in terms of the ultimate legal findings – i.e. in terms of whether or not a criminal wrong was likely committed. So, for example, while two incidents might look similar – they both involve an attack on a hospital, for example – one incident may have resulted by accident while the other resulted from a criminal intent to harm civilians. As between these two incidents, that chosen for study might be “illustrative” of the other in terms of appearances, but the criminal findings cannot necessarily be generalized from one to the other. For the purposes of a UN COI it is necessary that the incidents chosen not only fit a pattern of behaviour, but also are likely to offer generalizable findings – and it is not clear if or how this was done in the Goldstone Report. To offer a comparison, Human Rights Watch generally notes in its reports how the incidents it

615 Ibid at 14, para 14.
616 Goldstone et al, supra note 568 at 127.
617 So, for example, the Goldstone Report notes that the “Israeli Government alleges that ‘Hamas abused the protection accorded to places of worship, making a practice of storing weapons in mosques’”. But then the report only notes the investigation of one Mosque, investigated seemingly because it was attacked by Israel, and notes that “the Mission was not able to investigate the allegation of the use of mosques generally by Palestinian groups for forming weapons.” No explanation is given as to why one of the most serious and prevalent of Israeli accusations was not further investigated. See ibid at 117, para 465.
investigates came to its attention and how they were subsequently chosen, and it did this with respect to its investigations into Operation Cast Lead.\textsuperscript{618}

As a result of the uncertainty surrounding how the Gaza COI chose the incidents to investigate that it did, hard-line critics such as Dershowitz were able reasonably to ask why the use of the Shifa hospital, which Israel contends served as a main base of Hamas’ military operations, was not investigated as a possible war crime while investigations took place regarding other hospitals.\textsuperscript{619} Or how the Gaza COI was unable to conclude whether mosques were used for military purposes when it only investigated one mosque alleged by Israel to be used by Hamas for such purposes?\textsuperscript{620} The criticism is enhanced by the fact that, unlike the Goldstone Report, Human Rights Watch did find that “[d]uring the IDF offensive in Gaza, Hamas and other Palestinian armed groups used civilian structures to engage Israeli forces and to store arms, according to news reports, video and photographic evidence. They also booby-trapped and dug tunnels under civilian structures.”\textsuperscript{621} In other words, the Goldstone Report’s selectivity may have caused it to come to a finding contrary to that of Human Rights Watch, which did find evidence that Hamas used civilian infrastructure to store weapons.

It appears that the hospitals and mosques investigated were selected by the Gaza COI because they were bombed by Israel. As such, the Gaza COI could “double up” by investigating incidents where allegedly crimes were committed by both sides. However, this does not explain why other mosques or hospitals claimed by Israel to hold Palestinian arms or armed combatants were not also investigated. Thus, the Gaza COI’s approach to choosing which incidents to investigate combined with its failure to explain transparently how this process took place gave Israel ammunition to condemn the Goldstone Report for its “political” – \textit{i.e.} its biased and/or arbitrary – selection of incidents,\textsuperscript{622} and to come to a conclusion that is contrary to the preponderance of evidence from other sources – like news reports and Human Rights Watch findings.

\textsuperscript{618} Human Rights Watch, “Rain of Fire”, \textit{supra} note 476 at 6.  
\textsuperscript{619} Dershowitz, \textit{supra} note 506 at 39.  
\textsuperscript{620} \textit{Ibid} citing the \textit{Goldstone Report}, \textit{supra} note 6 at para 465.  
\textsuperscript{622} See for example \textit{Initial Israeli Response to COI}, \textit{supra} note 486 at 6-7, para 18.
Israel’s concern here is that the Gaza COI seemed to be making the type of discretionary decisions commonly associated with the administrative state, in this case where decisions are based on what would be the most efficacious approach to investigating, as opposed to approaching its decision-making in a manner ordinarily associated with law or legality, i.e. where the decision-makers act with reference to clear, transparent rules and/or principles with the intention of offering a fair, impartial and fully reasoned legal solution. Israel’s argument supposes that discretionary decisions are necessarily political and thus rely on the biases of the decision-makers (commissioners); to Israel, in the context of a war crimes inquiry, the exercise of such discretion without reference to rules or offering justificatory explanations for its actions undermines the legitimacy of the Gaza COI’s process and the quality of its findings.

Moreover, such criticisms speak to the useful purpose that UN COIs might play. Given the short time-frame allotted to the Gaza COI to complete its mission – and indeed to most UN COIs to complete their missions – as well as the mandate requiring the “urgent dispatch” of the Gaza COI and most other UN COIs, some selection will be necessary in terms of including analysis of some incidents and excluding others. Presumably this explains why the Gaza COI investigated incidents that might speak to legal wrongs committed by both sides in the case of the hospital and mosque investigations. The time and resources do not exist to investigate all allegations of abuse in such situations and thus UN COIs cannot, in similar situations, hope to offer a comprehensive historical overview of a conflict or displace other transitional justice tools that might offer a greater opportunity for witnesses and victims to tell their stories.

Acknowledging the need to choose between incidents and that the effort was made to provide a picture of the pattern of abuses that occurred is a good first step toward ensuring a fair, transparent process; but providing the precise thinking behind the choosing of incidents makes the process more open, easier to understand and, as a consequence, arguably less “political” in appearance. It might also be said that the process of debating rules – in this case with respect to the selection of incidents – leads to better outcomes. For an open debate and articulation of the rules or methods of operation requires an engagement with the standards and the available alternatives that tends to require that reasoned argument determine the chosen standard.
5.6.3 Overview of the Legal Scope: The applicable international law

When discussing the purpose of UN COIs, we must also engage in a discussion of what the substance of the report should focus on, and what issues should be engaged. So, for example, the Darfur or former Yugoslavia inquiries’ substantive focus was primarily incidents relating to crimes against humanity and to a lesser degree genocide. The approach taken in Darfur and the former Yugoslavia was seen in those contexts as the best way to achieve accountability and contribute to the end of the conflicts. The Goldstone Report took a much broader approach, and focused more heavily on human rights law with a specific emphasis on social and economic rights. I will now briefly outline the substantive legal framework adopted by the Gaza COI before turning to a more detailed discussion of the Goldstone Report’s dealings with social and economic rights.

The Goldstone Report’s findings were explicitly both factual and legal. The factual findings included the historical back-drop and events that took place after the ceasefire in the lead-up to Operation Cast Lead, as discussed, but also those more specific facts necessary to support its legal findings.

In terms of the legal scope of the Goldstone Report, the Gaza COI interpreted its mandate as requiring it: “to consider any actions by all parties that might have constituted violations of international human rights law or international humanitarian law. The mandate also required it to review related actions in the entire Occupied Palestinian Territory and Israel.” The Gaza COI viewed the “normative framework” in which it was operating as “general international law, the Charter of the United Nations, international humanitarian law, international human rights law and international criminal law.”

The Goldstone Report found that, “[a]ll parties to the armed conflict are bound by relevant rules of IHL [international humanitarian law], whether of conventional or customary character.” It further found that “Gaza remains occupied by Israel”, in terms of being a legally occupied territory, and therefore the, “provisions of the Fourth

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623 See Goldstone Report, supra note 6 at Part C: “Facts investigated by the Mission, factual and legal findings.”
624 Ibid at 14, para 11; 41, para 152.
625 Ibid at 14, para 15; 41, para 155.
626 Ibid at 72, para 270. See also ibid at 80, para 304.
Geneva Convention...apply at all relevant times with regard to the obligations of Israel towards the population of the Gaza Strip." After making these findings, the Goldstone Report then said that, “the international community continues to regard [Israel] as the occupying Power”, and cited as authority both Security Council resolution 1860 (2009) and Human Rights Council resolution S-9/1 – the very resolution that created the Gaza COI and gave it its mandate. Several other sources of international humanitarian law were found to apply, including, for example, Article 3 common to the four Geneva Conventions of 1949, and article 75 of Additional Protocol I to the Geneva Conventions of 1949.

The Goldstone Report also stated that it, “regards the rules and definitions of international criminal law as crucial to the fulfillment of its mandate to look at all violations of IHL and IHRL [international human rights law] by all parties to the conflict.” Once again the Goldstone Report looked to both treaties and customary international law, and included analyses of war crimes, crimes against humanity and genocide, but also torture and enforced disappearances. As it did with respect to international humanitarian law, the Goldstone Report sourced international criminal law to the four Geneva Conventions of 1949, but also to the Rome Statute of the ICC, and the statutes of the ICTY and the International Criminal Tribunal for Rwanda (ICTR), respectively.

Finally, with respect to international human rights law, the Gaza COI looked to several treaties ratified by Israel, including the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention against Torture and Other Cruel, Inhuman or

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627 Ibid at 73, para 276.  
628 Ibid at 74, para 277.  
629 See ibid at 74, fn 162.  
630 Ibid at 75, para 283.  
631 Ibid at 75, para 284.  
632 Ibid at 76, para 286.  
633 Ibid at 76, para 287.  
634 Ibid at 76, paras 288-9  
635 Ibid at 77, para 290-2.  
636 Ibid at 77, para 293.
Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Goldstone Report found that such “human rights treaties continue to apply in situations of armed conflict”, so long as they are, “not modified or set aside by IHL.” The Goldstone Report also relied on the International Court of Justice Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory for precedential support for various legal assertions. Moreover, the Goldstone Report found that Israeli human rights obligations continued to apply in the Occupied Territories and that the Gaza authorities also had an obligation to respect international human rights law.

5.6.4 Legal Scope: The inclusion of economic and social rights as applicable international law?

In terms of the Goldstone Report’s substantive legal scope, perhaps the most interesting development was its focus on social and economic rights, which, as noted, was a more pronounced and detailed analysis than many or most of the contemporary ad hoc UN COIs have conducted. For example, chapter XIII of the Goldstone Report dealt with, “attacks on the foundations of civilian life in Gaza: Destruction of industrial infrastructure, food production, water installations, sewage treatment plants and housing.” It focused in particular on military attacks on the construction and food industries and on water installations, where wells, water-treatment plants and sewage pipes had been struck and badly damaged. Chapter XIII, Part E, of the Goldstone Report also offered an, “[a]nalysis of the pattern of widespread destruction

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637 Ibid at 77, para 294.
638 Ibid at 78, para 295.
639 Ibid at 78, para 296.
640 Ibid at 78, para 295. See also ibid at “Legal Consequences”, para 106.
641 Ibid at 79-80, paras 300-4.
642 Ibid at 80, paras 305-7.
643 See ibid at Chapter XIII, parts A and B on the “destruction of el-Bader flour mill” and the “destruction of the Sawafeary chicken farms”, respectively; see also Chapter XIII, Part E, Section 2 on the “destruction of the remaining food industry”.
644 See ibid at Chapter XIII, part C, and Part E, Section 4 on “Destruction of water installations.”
645 Ibid at 217, para 1023.
of economic and infrastructural targets, including a discussion of the deliberate destruction of the only cement-packaging plant in the Gaza Strip, which had an added impact on the lives of civilians given the extensive destruction of housing – and the centrality of the cement factory to the rebuilding of houses. Chapter XIII concluded, inter alia, that Israeli military actions “to target industrial sites and water installations” had been part of a “deliberate and systematic policy” and that various military actions had violated the right to adequate food, found in Article 11 of the ICCPR and the CEDAW; it found further that, “as a result of its actions to destroy food and water supplies and infrastructure”, Israel had breached these two conventions (ICCPR and CEDAW) as well as Article 11 of the ICESCR (the right to adequate food) and Article 147 of the Fourth Geneva Convention as well as article 54(2) of Additional Protocol 1.

Other chapters in the Goldstone Report also touched on the social and economic situation in Gaza. Chapter V of the Goldstone Report provided a general historical “introduction and overview” of the “blockade” on the Gaza Strip – beginning in February 2006 – in order to provide the necessary contextual background to understand the military operations:

[The military operations of 28 December to 19 January 2009 and their impact cannot be fully evaluated without taking account of the context and the prevailing living conditions at the time they began. In material respects, the military hostilities were a culmination of the long process of economic and political isolation imposed on the Gaza Strip by Israel, which is generally described as a blocked.

The Goldstone Report further refined its definition of a blockade as follows: the “blockade comprises measures such as the closure of border crossings, sometimes

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646 Ibid at Chapter XIII, part E.
647 Ibid at 215-6, paras 1012-7. The destruction of the cement-packaging plant is seen as particularly significant given the chapter’s previous findings related to the targeting of both food production and, especially, of civilian housing, which was found to violate the principle of distinction (as between civilians and combatants). See ibid at 214, para 1005. The destruction of civilian housing was also found to violate Article 11 of the ICESCR on the right to an adequate standard of living and housing. See ibid at 214, para 1007.
648 Ibid at 217, para 1026.
649 Ibid at 203, para 941.
650 Ibid at 210, para 987.
651 Ibid at 82, para 312.
652 Ibid at 82, para 311.
completely for a number of days, for people, goods and services, and for the provision of fuel and electricity.”

Chapter V concluded that the blockade had, “severe effects on trade and general business activity, agriculture and industry…” as well as health, education – both of which are affected by the movement of fuel into the Gaza Strip from Israel – and offshore fishing activities.

The Goldstone Report proffered that “[t]he quantities of goods allowed into the Gaza Strip have not only been insufficient to meet local demands, they also exclude several items essential for the manufacturing of goods and the processing of food products, as well as many other goods that are needed.”

Consequently, the Goldstone Report found that, “[t]otal and partial [border] closures…significantly contributed to an emergency situation that became a full-fledged humanitarian crisis after the military operation…”

Perhaps as befits an introduction and overview, the sole legal commentary in chapter V stated that Israel was “duty-bound under the Fourth Geneva Convention and to the full extent of the means available to it to ensure the supply of foodstuff, medical and hospital items…without qualification”, no reference was made to human rights or, more specifically, to the ICESCR.

Follow-up to chapter V came much later in the Goldstone Report, where a more detailed analysis of the blockade was offered in chapter XVII, entitled, “The Impact of the Blockade and of the Military Operations on the people of Gaza and Their Human Rights.” The Goldstone Report commenced this chapter with three paragraphs on the, “negative effects that the severe restrictions on the movement of goods and people from and to the Gaza strip had caused to the full enjoyment of a range of social, economic and civil rights…. “

Chapter XVII talked of, “living under foreign occupation for decades and enduring the restrictions and other effects of the policies implemented

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653 Ibid at 82, para 313.
654 Ibid at 82, para 313.
655 Ibid at 83, para 316.
656 Ibid at 84, para 322.
657 Ibid at 85, para 326.
658 See ibid at 258-84, paras.1217-1335.
659 Ibid at 259, para 1217.
Further, it again focused on problems now sewn into the fabric of the social and economic conditions in Gaza:

The blockade restricted or denied entry to a range of items and energy necessary for the economy to function. These included fuel and industrial diesel for the Gaza power plant to produce enough electricity for factories and businesses to function and for agricultural activities to continue on a regular basis. The net result was a stalled economy, with many businesses, factories and farms either closed or operating at reduced capacity.661

The effect of the blockade on day-to-day life was also considered662 including consideration of food security,663 residential housing,664 water and sanitation,665 education,666 and the economy and employment,667 etc.

The environment, obviously crucial to life, health, food, agriculture, and living conditions as the region moves forward, and thus intrinsically connected to various fundamental human rights, was not similarly scrutinized.668 The Goldstone Report noted that it had, “received comments and concerns...relating to threatened environmental damage by reason of munitions or debris from munitions.”669 However, the Goldstone Report “was unable to further investigate these concerns”, though it mentioned an ongoing study by the United Nations Environmental Programme in the Gaza Strip.670 The decision not to pursue an investigation in regard to environmental degradation is particularly odd given that under the section on physical and mental health, which followed that on the environment, most of the concerns raised were a result of environmental pollutants, including sewage in the water,671 asbestos found in the rubble, and weapons used in combat that contained chemical pollutants.672

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660 Ibid at 259, para 1218.
661 Ibid at 259, para 1220.
662 Ibid at 260-1, paras 1223-6.
663 Ibid at 263-4, para 1236-41.
664 See for example ibid at 264, para 1242.
665 Ibid at 265-6, paras 1246-49.
666 Ibid at 270-1, paras 1268-74.
667 Ibid at 259-62, paras 1220-33.
668 The Goldstone Report found, for example, that, “[t]he creation of [a] buffer zone [in Northern Gaza] has forced the relocation of a number of factories from this area closer to Gaza City, causing serious environmental concerns and potential health hazards for the population.” See ibid at 82, para 313.
669 Ibid at 266, para 1250.
670 Ibid at 266, para 1251.
671 Ibid at 268, para 1257.
672 Ibid at 268, para 1258.
Unlike chapter V, Chapter XVII of the Goldstone Report made legal findings, in particular with reference to the breach of various rights caused by the imposition of the blockade:

The Mission considers that the closure of or the restrictions imposed on border crossings by Israel in the immediate period before the military operations subjected the local population to extreme hardship and deprivations that are inconsistent with their protected status. The restrictions on the entry of foodstuffs, medical supplies, agricultural and industrial input, including industrial fuel...have resulted in widespread poverty, increased dependence on food and other assistance, increased unemployment and economic paralysis. The Mission can conclude only that Israel has and continues to violate its obligations as an occupying Power under the Fourth Geneva Convention.\textsuperscript{673}

In its legal findings the Goldstone Report made reference to, and in some cases found breaches of, various human rights norms – including social and economic rights, as opposed to humanitarian or criminal law breaches – that were implicated by the blockade.\textsuperscript{674}

Analyses such as those conducted by the Goldstone Report with respect to abuses of social and economic rights can – and did – require resort to an historical contextualization of the dispute that extended the inquiry's analysis beyond the discrete scope of the relevant military conflict.\textsuperscript{675} Historical context was necessary in particular because the blockade was seen by the Gaza COI to have exacerbated the effect of the military conflict for the people of the Gaza Strip: the military conflict and the blockade combined to result in “unprecedented long-term damage to both the people and their development and recovery prospects.”\textsuperscript{676} In other words, in order to understand the critical human rights and humanitarian situation after the twenty-two day conflict, an analysis of the blockade was necessary.\textsuperscript{677} For example, the bombing of a cement factory might not seem consequential – even given the targeting of housing and infrastructure – until it is seen that the importation of cement into the Gaza Strip was

\textsuperscript{673} Ibid at 277-8, para 1305.
\textsuperscript{674} See for example \textit{ibid} at 277, paras 1302-3; page 278, para 1307; page 280, para 1319; page 281, paras 1321, 1323-5; 282, para 1326-7.
\textsuperscript{675} For example, the Goldstone Report’s conclusions (chapter XXX) noted that, “[p]rior to the military operation, the Gaza economy had been depleted, the health sector beleaguered, the population had been made dependent on humanitarian assistance for survival and the conduct of daily life…The dignity of the people of Gaza had been severely eroded.” [Emphasis added.] \textit{Ibid} at 405, para 1878.
\textsuperscript{676} \textit{Ibid} at 405, para 1878.
\textsuperscript{677} In \textit{ibid} at Chapter V on the blockade, the Goldstone Report proffered: “[t]otal and partial [border] closures have significantly contributed to an emergency situation that became a full-fledged humanitarian crisis after the military operation.” See 84, para 322.
otherwise banned by the blockade, which combined with the bombing of housing and infrastructure made rebuilding surely very difficult. At this point, the bombing of the cement factory might be seen in a different light, to inflict greater hardship, and potentially to implicate various human rights concerns, including breaches of the right to adequate housing.

On the one hand, as we have seen, historical contextualization can be controversial in the context of UN COIs that are also in the process of making technical criminal-legal findings; to conduct such an historical inquiry can serve to detract from the legal and factual analysis related to individual criminal responsibility, for example. So, though seemingly necessary in the case at hand, depending on how the historical narrative is approached – and how far it reaches in scope – such contextualization can serve either to legitimize or, perhaps of more concern, delegitimize COI reports, or perhaps act in both ways depending on the audience. And given the speed at which UN COI reports are produced, and the limited funding available to them, historical analyses are not necessarily what they do well. If ad hoc UN war crimes COIs are about investigating “the most serious international crimes,” seen as those taking place only during armed conflict and that targets bodily integrity (murder, rape, genocide), then the broadening of the temporal or substantive scope to include economic and social rights might undermine this process.

On the other hand, the historical analysis directly relevant to the Goldstone Report’s discussion of social and economic rights went back only to 2006 and for the most part dealt with the six months leading up to the military conflict as well as the military actions that took place during Operation Cast-Lead. A relatively brief and circumscribed history was all that was necessary, at least so as to support the relevant legal findings.

678 News reports from July 2010 – after the “flotilla incident” where Turkish citizens were killed while sailing a flotilla to Gaza to break and protest the blockade – indicated that international pressure helped lead Israel to ease some aspects of its blockade. For example, “materials such as steel, cement, certain fertilisers and chemicals” were allowed in. See “Israel confirms easing of Gaza Blockade”, BBC News (5 July 2010), online: http://news.bbc.co.uk/2/hi/world/middle_east/10513004.stm.

679 It can also serve to direct scarce resources towards a broader institutional and structural analysis of the conflict and away from forensic and other highly specific analyses related to the investigation of individual crimes at international law, and by possibly infecting individual criminal findings with the taint of bias that some might associate with determinative historical findings of “fact”.

Moreover, if the Goldstone Report hoped to be an impetus for change and reform, not just with regard to how the region responds to recurrent military conflict, but to the state of interminable social, political and economic conflict, it would seem that the root causes of the conflict, as well as a direct discussion of the long-term social and economic implications would be crucial. For presumable the economic and social situation is the priority in the long-run; and surely it forms a critical element of the perpetuation of the conflict and the animosity at least from the Palestinian perspective, as recognized by the Goldstone Report in its analysis of the blockade. If the goal of UN COIs is long-term peace and stability, as opposed to merely the promotion of a relatively thin notion of accountability for crimes against humanity, then the substantive broadening of the mandate may have been justified.

But whether or not the substantive broadening of the mandate was justified depends not just on a consideration of the most important perceived causes of the conflict but on whether the UN COI is best placed to address these causes, or whether it has some other task. This demands that we ask whether the purpose of UN COIs reasonably include the robust consideration of social and economic rights, or mobility rights, or environmental degradation, as perpetuators of conflict? Might a discussion of these topics be more than an impractical aspiration, but fundamental for peace and security and capable of discussion within the context of a large-scale, *ad hoc* fact-finding inquiry? The Gaza COI might be seen as a tentative step in the direction of seeing conflict and its causes in an even more holistic transitional justice light – in answering ‘yes’ to the two aforementioned questions – though not quite to the point of recognizing that environmental degradation can be inextricably linked to human rights, security, peace and development. Regardless, if the Goldstone Report can be seen as a tentative step toward an increasingly more robust understanding of the causes and consequences of conflict, this could represent a very interesting development in terms of defining the purposes of *ad hoc* UN COIs and moving back away from the more specific war crimes inquiries – or at least as another option in terms of the potential purpose for a UN COI. Such a move might also offer an initial step toward reframing the traditional conception of the “most serious” international wrongs away from, first, international humanitarian and criminal law as seen as visible and immediate harm to bodily integrity, and second, the promotion of civil and political rights, and towards an acknowledgement that addressing the social and economic – and perhaps even
environmental – context that often underpins and exacerbates conflict and oppression also plays a central role in preventing conflict and promoting transitions to peace and justice.

The move toward a more robust understanding of human rights that fundamentally underpin large-scale conflicts could offer other important and related advantages. Let me offer an example. UN COIs are often seen as the first step in the process of holding perpetrators criminally accountable for their actions; they are a stepping stone for further action. The Darfur COI thus focused primarily on criminal wrongs related to international humanitarian law, as has been noted. In Darfur, this narrow focus may have been sufficient, or sufficiently addressed the major causes of the conflict, or all that was politically possible at the time. But perhaps contemporary UN COIs could rather build on the general historic conception of UN COIs as building blocks for a lasting peace. Perhaps some UN COIs can help promote peace and progressive reform via the promotion of systemic reforms that correct social, economic, political and/or environmental wrongs.

With this in mind, a UN COI might very well consider the economic and social rights, if the breach of such rights is of major concern to the perpetuation of the conflict and can be credibly and reliably investigated and reported on.

5.7 Due Process Considerations in Relation to the Goldstone Report

Fundamental to whether any UN COI’s report is viewed as legitimate – as impartial, credible and reliable – is how it deals with issues of due process. The following discussion will thus note several further salient due process issues that emerge from the Goldstone Report and criticisms thereof.

5.7.1 Evidence-Gathering and Corroboration of Evidence

The Gaza COI viewed its approach to information-gathering as “inclusive” and based on “international investigative standards developed by the United Nations.” These methods of information gathering included:

680 Goldstone Report, supra note 6 at 15, para 18.
(a) a review of reports from different sources; (b) interviews with victims, witnesses and other persons having relevant information; (c) site visits to specific locations in Gaza where incidents had occurred; (d) the analysis of video and photographic images, including satellite imagery; (e) the review of medical reports about injuries to victims; (f) the forensic analysis of weapons and ammunition remnants collected at incident sites; (g) meetings with a variety of interlocutors; (h) invitations to provide information relating to the Mission’s investigation requirements; (i) the wide circulation of a public call for written submissions; (j) public hearings in Gaza and in Geneva.

Three “field visits” were conducted between the end of May and beginning of July 2009, two to the Gaza Strip and one to Amman. These visits included investigations of thirty-six “incident sites” in the Gaza Strip. In addition, several members of the Gaza COI’s secretariat staff were present in Gaza during that same time-frame in order to conduct further “field investigations”. A total of 188 individual interviews were conducted, primarily in person though where this was not possible it was accomplished by telephone. The Gaza COI also met with a number of civil society organizations, including women’s organizations, NGOs, bar associations, military analysts, journalists, UN representatives, the Head of the United Nations Board of Inquiry into incidents in Gaza, and diplomatic representatives.

A “call for submissions” was also sent to, “all interested persons and organizations” and “notes verbales” sent to, “all United Nations organs and bodies and Member States of the United Nations.” The two public hearings held by the Gaza COI took place over two days, respectively, in Geneva in June and July 2009.

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681 Ibid at 42, para 158. See also 43, para 161: “The methods adopted to gather and verify information and reach conclusions were for the most part guided by best practice methodology developed in the context of United Nations investigations.
682 Ibid at 15, para 18.
683 Ibid at 15, para 21; 38, para 139; 42, para 159(b).
684 Ibid at 13, para 5, and 37, paras 133, 139.
685 Ibid at 15, para 19; 42, para 159(b).
686 Ibid at 42, para 159(b).
687 For a complete list see ibid at 38, para 137.
688 Ibid at 13, para 6; 38, para 140.
689 Ibid at 38, para 140.
690 Ibid at 13, para 7 and 39, para 141.
The Gaza COI reviewed over 300 reports, submissions and other documents, 30 videos and 1,200 photographs.\textsuperscript{691}

The Goldstone Report noted that the purpose of the public hearings, “was to enable victims, witnesses and experts from all sides to the conflict to speak directly to as many people as possible in the region as well as in the international community.”\textsuperscript{692} The hearings were broadcast live, and priority was given to victims and other “affected” communities.\textsuperscript{693} The content of the hearings included the discovery of facts in addition to, “legal and military matters.”\textsuperscript{694}

In terms of the Goldstone Report itself, in theory primary – otherwise termed “first-hand” or “direct” – evidence was given priority to establish the findings: “[i]n establishing its findings, the Mission sought to rely primarily and whenever possible on information it gathered first-hand.”\textsuperscript{695} Secondary evidence gathered by those other than the Gaza COI team, information including media and interest group reports and affidavits, was used in the Goldstone Report, in theory at least, “primarily as corroboration.”\textsuperscript{696}

Accessing primary evidence was often difficult for the Gaza COI. As has been noted, Israel did not cooperate with the Gaza COI\textsuperscript{697} and, “[b]y refusing to cooperate with the Mission, the Government of Israel prevented it from meeting Israeli Government officials, but also from travelling to Israel to meet Israeli victims and to the West Bank to meet Palestinian Authority representatives and Palestinian victims.”\textsuperscript{698} In consequence, “denial of access to Israel and the West Bank resulted in the decision to hold hearings of participants from Israel and the West Bank in Geneva.”\textsuperscript{699} The Palestinian Authority and the Permanent Observer Mission of Palestine to the United

\textsuperscript{691} Ibid at 15, para 19; 43, para 160. The 300-plus reports amounted to over 10,000 pages according to the goldstone Report.
\textsuperscript{692} Ibid at 15, para 22.
\textsuperscript{693} Ibid.
\textsuperscript{694} Ibid.
\textsuperscript{695} Goldstone et al, supra note 568 at 128.
\textsuperscript{696} Goldstone Report, supra note 6 at 15, para 23; 44, para 168.
\textsuperscript{697} Ibid at 13, para 8; 15, para 20.
\textsuperscript{698} Ibid at 15, para 20.
\textsuperscript{699} Ibid at 15, para 22.
Nations did offer cooperation and support, and access to the Gaza Strip was granted by Egypt. Still, representatives of the implicated Palestinian armed groups were not agreeable to meeting.

The Gaza COI submitted “comprehensive lists of questions to the Government of Israel, the Palestinian Authority and the Gaza authorities in advance of completing its analysis and findings”, but did not receive a reply from Israel. No note is made of whether an opportunity to respond to the Gaza COI’s specific findings was given to the parties before the final version of the Goldstone Report was released to the public.

Thus, despite the extensive research undertaken by the Gaza COI and its attempts to access the relevant information and speak to the interests of a variety of interested groups by way of interviews or site inspections, there was nevertheless an issue with respect to access to information, particularly with respect to that information which might have been provided at the state level and more specifically by Israel. As we saw in the previous chapters, this lack of cooperation and thus access to information is a common problem associated with UN COIs and human rights fact-finding missions more generally.

Despite the fact that Israel chose not to participate or make its people available for interviews or its territory available for inspection, one criticism of the Goldstone Report was that: “[t]he testimonies in the Goldstone Report are Palestinian testimonies…This commission that describes its mission as fact-finding treats the missing Israeli testimonies as if they are Israel’s problem, rather than a methodological and empirical shortcoming in the report itself.” As Sydney D. Bailey noted with regard to the totality of the first 25-years of UN human rights fact-finding: “[t]he vicious circle is familiar. UN bodies are not granted facilities for impartial fact-finding. As a consequence, their reports are one-sided. The one-sided nature of UN reports is then given as a reason for denying UN bodies the facilities for performing the tasks...
entrusted to them."

Thirty-five years after Bailey first noted this "vicious circle", it appears that it continues to go round. When UN COIs are not granted territorial access, their reports will necessarily be less comprehensive. In consequence, at the very least the nation that has refused territorial access will attempt to impugn the credibility and reliability of the report. Depending on what the UN COI is attempting to prove, the uncooperative state might even have a point, though of course the uncooperative nation contributed to the situation.

In any event, in regard to the information it was able to receive, the Goldstone Report asserted that its "final conclusions on the reliability of the information received were based on its own assessment of the credibility and reliability of the witnesses it met" in addition to, "verifying the sources and methodology used in the reports and documents" received, and "cross-referencing" received information. In evaluating the probity and reliability of the evidence, the Gaza COI considered, "the demeanour of witnesses, the plausibility of their accounts and the consistency of these accounts with the circumstances observed by it and with other testimonies." It also attempted, insofar as possible, "to speak with the authors of the documents in order to ascertain the methodologies used and to clarify any doubts or problems."

This approach raises long-standing and in many ways still unanswered questions regarding what COIs should or could use as corroborating material, and how much verification or cross-referencing is necessary. The Goldstone Report did not go far in shedding light on how the corroboration and verification of information received by UN COIs was properly and effectively achieved. Instead, the Goldstone Report simply noted that, "the reports [secondary material] it reviewed and to which it refers are credible and based on sound methodologies." What makes a sound methodology, however, is not explicated to allow others to scrutinize the veracity of this claim. Virtually all of the reports and NGO or press-produced secondary sources

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706 Bailey, supra note 61 at 266.
707 Goldstone Report, supra note 6 at 15, para 24.
708 Ibid at 45, para 170.
709 Ibid at 45, para 170.
710 Ibid at 293, para 1378.
mentioned in the Goldstone Report were found by it to be fully credible and reliable. Astonishingly the Goldstone Report also found the same of everyone it interviewed as a witness and included in the final report. Thus, one might reasonably ask whether the Gaza COI only selected the reliable reports and witnesses for inclusion and whether it was leaving out information that it found to be unreliable, or rather whether it was leaving out reports that offered assertions contrary to the Goldstone Report’s findings?

Moreover, many – perhaps most – of the statistics and documentation in the Goldstone Report are cited to only one source, either a report or an interview with a witness. And, though the Goldstone Report asserted that secondary materials were used primarily to corroborate primary evidence, chapter VII, for example, is one of several chapters that rely on a great variety of the secondary materials to substantiate findings of fact, usually in the absence of direct evidence. These secondary materials came from other UN bodies, such as the Office for the Coordination of Humanitarian Affairs, as well as from the Israeli humanitarian NGO B’Tselem and various press releases, though some information also came from other NGO reports and sources. In the chapters on the West Bank (chapters XX-XXIII) most factual assertions that were supported by secondary materials referred to only one external report, or possibly, in fewer circumstances, two; rarely were more than two sources cited to substantiate a factual assertion, and generally multiple sources meant reference to multiple press stories, i.e. to multiple unverified secondary sources. This is of course explained by the fact that the Gaza COI was not able to visit the West Bank. But, again, one must then question whether it was worth extending the geographic scope of the Gaza COI if it lessened the quality and veracity of the findings and allowed the Goldstone Report’s detractors to question the evidentiary standards of the findings based, at least in part, on its peripheral review of events in the West Bank.

711 The one exception being that the Palestinian armed groups’ websites were found unreliable in that they exaggerated the commission of their own crimes or their “successes” as against Israel. In other words, the exception is not a third party report, but a finding that one of the parties to the dispute was unreliable in its admissions that it had committed a crime. See ibid at 115, para 458.
712 See as but one example: ibid at 101-2, footnotes 257-64.
713 Chapter VIII of the Goldstone Report also relied on secondary sources to a greater extent than elsewhere in the report because it could not find first-hand witnesses to interview in many cases. See ibid at 112, para 141.
Human Rights Watch generally looks for three independent witnesses to corroborate its findings of fact.\(^{714}\) The UN’s DRC Mapping Exercise required at least two independent sources to corroborate each of the over 600 violent incidents listed, at least one being a primary source.\(^{715}\) The DRC’s report stated: “[i]ncidents not corroborated by a second independent source have not been included in this report, even in cases where the information came from a reliable source. Such incidents are, however, recorded in the database.”\(^{716}\) In contrast, it is unclear what level of corroboration was required by the Gaza COI, both in terms of how much corroboration, and if it mattered whether it was primary evidence like witness testimony or a secondary report (the quality of corroboration). This is not to say that further corroboration was required to make the information in the Goldstone Report reliable, or that it was practically possible to maintain a higher standard, simply that the Goldstone Report did not consistently make clear its standards for verifying the reliability of evidence received.

In general these concerns represent a broader problem than just that exhibited by the Gaza COI’s practices. There is a need in the academic literature for a discussion of what is possible, typical or ideal in terms of human rights fact-finding in such circumstances. For example, Diane Orentlicher notes that, “[t]ypically…careful NGOs do not cite press accounts unless their research staff have reason to credit the report.”\(^{717}\) It would seem then that UN COIs should follow a similar rule, or at least engage with why or why not such a rule was followed. Other relevant questions were not even posed by the Goldstone Report, let alone answered directly or implicitly, including: is there a necessary difference between UN reports and other reports in terms of credibility? And, should the UN COI be prepared to defend a report upon which it relies should questions arise, or should it take the proactive step of identifying in its report why secondary materials explicitly relied upon by the COI were found to be

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\(^{714}\) See for example Human Rights Watch, “Rain of Fire”, \textit{supra} note 476 at 6.

\(^{715}\) The DRC’s report states: “each reported incident had to be corroborated by at least one independent source in addition to the primary source in order to confirm its authenticity.” See \textit{DRC Mapping Exercise, supra} note 7 at 44, para 117. See also \textit{ibid} at 6, para 10. Further, the Panel of Experts in Angola required direct evidence were it to name a responsible political official of wrongdoing (violation of sanctions) and corroborating evidence by at least two sources for it to be deemed credible. See Ricart, \textit{supra} note 389 at 4.

\(^{716}\) \textit{DRC Mapping Exercise, ibid} at 41, para 106

credible? Answers to these questions would not only help assess the credibility of future reports, but also possibly help determine the scope of the inquiry.

Such questions are particularly salient in the context of large-scale UN COI reports because such reports are widely circulated and read in the halls of international power. If foreign offices or other international bodies are using UN COI reports to support sanctions regimes or initiate possible criminal investigations, it should be asked to what extent these foreign offices or other bodies are relying on the commissioners of UN COI reports to have already verified the secondary materials used to substantiate findings. If foreign offices are taking the UN COI reports at face value, and not offering further scrutiny into their findings or the sources supporting their findings, this is an opportunity either to inform foreign offices that they should be giving greater scrutiny to secondary materials used to found UN COI conclusions, or the UN COI reports themselves should be explaining why in particular the secondary materials used to make findings or corroborate evidence are credible and reliable.

The tendency in the Goldstone Report was to assert that the various sources of evidence that it relied upon were “credible and reliable” without fully explaining what these terms might mean or how they were to be contextually interpreted. Yet these UN standards are not consistently identified, or at least not pinpointed. Moreover, little discussion or argument is available extrapolating how rules and principles found in these UN standards – rules and standards that we have seen to be imprecise and fragmented – were interpreted in the context at hand to make determinations regarding the inclusion or exclusion of evidence.

Finally, the Goldstone Report failed to explain several other issues with respect to the integrity of the evidence used to substantiate its findings, including: did the process of verifying forensic or other evidence involve scientific testing that might be scrutinized? How many commissioners had to concur to come to a legal finding? And, were records kept of the processes used and information gathered? Answers to such questions are necessary before one can get a good handle on the reliability and credibility of a UN COI report.

5.7.2 Language, Precision and the Standard of Proof

While no formal standard of proof was identified by the Goldstone Report, and the informational verification and cross-referencing processes were not explained, the
Gaza COI did explain that it did not “pretend to reach the standard of proof applicable in criminal trials” and that, instead, the aforementioned processes of verification and cross-examination were used to establish a “sufficient” level of credibility and reliability. Remember that the Darfur COI came up with the standard of “reasonable suspicion”, which is now often used by UN COIs including, recently, the 2010 DRC COI Mapping Exercise and the 2011 Syrian COI. Interestingly, Gaza COI commissioner Hina Jilani was also a commissioner on the Darfur COI, but has not explained why she consented to two different standards at the two COIs.

The phrase “reasonable suspicion” as used by the Darfur COI has at least two advantages over “sufficiently credible and reliable”. First, because “reasonable suspicion” now has a history of use in UN COIs, it can be more readily understood and interpreted by reference to past practice. It is understood as a term of art employed by UN COIs to signal a tentative finding of fact. Second, the Darfur COI’s approach to the standard of proof is qualified by the term “suspicion”, which is necessarily tentative. In contrast, a “sufficient” level of reliability and credibility raises several questions, including what it is sufficient for, and how one knows when evidence has become “sufficiently” credible and reliable. Moreover, the Goldstone Report did not clarify any of the shortcomings inherent in the terminology employed. As a result, the lack of specificity as to what constitutes “sufficient” in the Goldstone Report, and the lack of subsequent engagement with how the term was being interpreted, could be seen as problematic, particularly given the fact that the Gaza COI purported to make legal findings on international human rights and more specifically humanitarian and criminal law, and that it recommended criminal investigations.

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718 Goldstone Report, supra note 6 at 15, para 25; 45, para 172. Goldstone has also “emphasized that his conclusion that war crimes had been committed was always intended as conditional.” Beckerman, supra note 562.
719 Ibid. See also Goldstone Report, ibid at 45, para 171.
720 Note also that it may be seen to be taken from NATO military parlance. This has its advantages and disadvantages, but it suggests that military personnel – often associated with UN war crimes COIs at various levels and to various degrees – not only understand the standard of proof, at least at some level, but also do not relate it to a criminal standard as used by courts of law.
721 See Syria COI, supra note 7 at 4, para 5. See generally Darfur COI, supra note 413 and accompanying text. The actual language for the standard of proof was: “person may reasonably be suspected of being involved in.....” Ibid.
722 In this way it raises the question: When did the available evidence become sufficient to prove the case? When it was sufficient!
Also problematic is the fact that although the Goldstone Report claimed that it did not use a “beyond a reasonable doubt” standard of proof, the language of the Goldstone Report often tells a different story: “[i]n many cases…acts entailing individual criminal responsibility have been committed. In all of these cases the Mission has found that there is sufficient information to establish the objective elements of the crimes in question.”[723] [Emphasis added.] The Goldstone Report’s tendency to imply that its findings were definitive was particularly true with respect to its recapitulation of its legal findings, found in the concluding chapter XXX.724 To take but one example: “the [Israeli] operations were in furtherance of an overall policy aimed at punishing the Gaza population for its resilience and for its apparent support for Hamas, and possibly with the intent of forcing a change in such support. The Mission considers this position to be firmly based in fact….725 [Emphasis added.] The Report of an Expert Meeting on the Gaza COI, organized by Chatham House, noted that had the Goldstone Report’s conclusions been, “presented as prima facie findings rather than final conclusions, the Report would have been stronger.”726

The language of the Goldstone Report muddies the standard of proof in other ways. With respect to many purported crimes by Hamas, the Gaza COI made no hard findings. Even on the most evident of Hamas’ alleged crimes, the Goldstone Report often used language such as “were” Hamas to, for example, launch rockets and mortars at the population of southern Israel, this action “would” constitute a war crime as a failure to distinguish between military targets and civilians.727 This has caused some confusion as some commentators have noted that Israel was found to “have”

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[723] Goldstone Report, supra note 6 at 15, para 25; 45, para 172. See also: “[s]tatements by political and military leaders prior to and during the military operations in Gaza leave little doubt that disproportionate destruction and violence against civilians were part of a deliberate policy.” Ibid at 258, para 1215. As but one example, the mens rea of recklessness was met in regard to the Israeli shelling of the UNRWA field office due to the fact that shelling continued after the Israeli forces were made aware of the existence of the compound, the hazardous (explosive material) contained in it. See ibid at 140-1, para 594. The mens rea was not associated with any particular individual.

[724] See for example ibid at 413, para 1919; 414, paras 1921, 1922, 1923; 415, paras 1927, 1928, 1929; 416, para 1930.

[725] Ibid at 408, para 1884.


[727] Goldstone Report, supra note 6 at 123, para 496.
committed certain crimes, whereas Hamas “would” be responsible.\textsuperscript{728} The difference, generally, is the findings of fact upon which the legal analyses are based. With respect to many purported crimes by Hamas, the Gaza COI was unable to make a factual determination as to intent and thus had to speculate regarding the law. The same was not generally true with respect to Israel.\textsuperscript{729} Moreover, there are certainly instances where the Goldstone Report found that, “Israel would be responsible under international law” for acts that were actually found to have happened.\textsuperscript{730} However, the previous quote above is obscured in the Goldstone Report by the fact that a paragraph later, the Goldstone Report states that, “the direct targeting and arbitrary killing of Palestinian civilians is a violation by the Israeli armed forces of the right to life as provided in article 6 of the International Covenant on Civil and Political Rights.”\textsuperscript{731}

It is also the case that unequivocal language was generally used with respect to purported Israeli violations,\textsuperscript{732} and equivocations were generally used when describing Hamas’ purported violations. The Report of an Expert Meeting on Gaza organized by Chatham House said that: “[t]he criticisms of Hamas in the Report are tentative, for example in relation to the protection of civilians, while the language employed regarding alleged Israeli violations is stronger and more condemnatory.”\textsuperscript{733}

\textsuperscript{728} Note that the Gaza COI did find Hamas responsible for further breaches of international law. For example, with respect to its targeting of Fatah affiliates, the Goldstone Report states that Hamas committed “serious violations of human rights”, in particular with respect to article 3 (right to life, liberty and security of the person), article 5 (freedom from torture and cruel, inhuman or degrading treatment or punishment), article 9 (no one shall be subjected to arbitrary arrest or detention), articles 10 and 11 (right to fair and impartial legal proceedings), and article 19 (regarding freedom of opinion and expression) of the Universal Declaration of Human Rights. See \textit{ibid} at 291-2, para 1372.

\textsuperscript{729} Why this was the case is another question. This of course created its own set of problems. It has been asserted that intent was regularly imputed to Israeli operations, but was not similarly – and under similar circumstances – imputed to Palestinian actions. More shall be offered on this argument below.

\textsuperscript{730} \textit{Goldstone Report, supra} note 6 at 183, para 814. See also \textit{ibid} at 183, para 815; 249, paras 1173, 1174, 1175. Both the equivocal and certain are used in a particularly confusing manner in para 1175: “the Mission considers that the severe beatings, constant humiliating and degrading treatment and detention in foul conditions allegedly suffered by individuals in the Gaza Strip…would constitute torture, and a grave breach under article 147 of the Fourth Geneva Convention…Such violations also constitute war crimes.” [Emphasis added.]

\textsuperscript{731} \textit{Ibid} at 183, para 816. There are numerous examples of such contradictions throughout the Goldstone Report, including sometimes in the same paragraph. See for example page 345, para 1587. In one convoluted paragraph, it was said that ill-treatment during arrest and detention by Hamas, “raise[d] concerns and warrant[ed] proper investigation”, while arrests and detentions of political affiliations were “legally unacceptable” and “would violate the right not to be arbitrarily detained”. [Emphasis added.] \textit{Ibid} at 345, para 1587.

\textsuperscript{732} See \textit{ibid} at 141, para 595.

\textsuperscript{733} \textit{Chatham House Report, supra} note 726 at 13.
The problem was that it was not always clear why there was a difference in tenor as between the findings, or why some facts seemed to support strong findings and others tentative conclusions. As an example, the findings of legal violations against Israel in chapter IX on the Israeli obligations to protect civilians are based on the same type of press reports and other secondary reports as various other findings with respect to Hamas in chapter VIII on Hamas’ obligations to protect civilians where the Gaza COI was unable to come to a legal conclusion.\textsuperscript{734} So, one might reasonably ask why the language is more equivocal in chapter VIII (Hamas) than chapter IX (Israel) when analyzing the same legal obligation (the protection of civilians) with resort to similar second-hand accounts.\textsuperscript{735} This harkens back to the discussion on corroboration of evidence in the Goldstone Report: what was it about the secondary reports, or the crimes, or the findings of fact that allowed the Gaza COI to make determinative conclusions in some chapters based primarily on secondary material, but not, for example, in section VIII with respect to Hamas?\textsuperscript{736}

A further example relates to the Goldstone Report’s imputation of criminal intent as it pertained to certain actors, particularly Israeli actors who were said by the Goldstone Report to be intentionally “targeting” civilians as a matter of high-level policy. In the Goldstone Report, the \textit{mens rea} of intention is generally spoken of in unequivocally certain terms, at least as concerns Israel.\textsuperscript{737} For example: “[t]he Mission

\begin{itemize}
  \item \textsuperscript{734} In similar wording to the sections on Israel, where first-hand accounts were difficult to gather, in Chapter VIII the Goldstone Report states: “To gather first-hand information on the matter, the Mission requested a meeting with representatives of armed groups. However, the groups were not agreeable to such a meeting. \textit{The Mission, consequently, had little option but to rely upon indirect sources to a greater extent than for other parts of its investigation.”} [Emphasis added.] Goldstone Report, supra note 6 at 112, para 441.
  \item \textsuperscript{735} See \textit{id.} at 114, paras 449-52. See particularly para 452: “In view of the information communicated to it and the material it was able to review, the Mission believes that there are indications that Palestinian armed groups launched rockets from urban areas. In those instances in which Palestinian armed groups did indeed fire rockets or mortars from urban areas the question remains whether this was done with the specific intent of shielding the combatants from counter-attack. The Mission has not been able to obtain any direct evidence on this question; nor do reports from other observers provide a clear answer.” [Emphasis added.] The Goldstone Report then cites the International Crisis Group as finding from separate interviews that the intent was there and was not there, respectively (see para 453). Why the Goldstone Report did not indicate that sometimes the intent seemed present and others not, is not addressed. Of course, to make out the crime, one instance of intent is sufficient.
  \item \textsuperscript{736} See for example \textit{id.} at 344, para 1581: “[r]eports that the Palestinian Authority interfered with the work of journalists and the media give rise to the concern that the right to freedom of opinion and expression has been interfered with”. [Emphasis added.]
  \item \textsuperscript{737} See \textit{id.} at 195, para; 894; 99, para 389; 175, para 778; and, see conclusions at, for example, 407, para 1890: “[T]he outcome and modalities] were also to a large degree aimed at destroying or incapacitating civilian property and the means of subsistence of the civilian population.” And at para 1891: “It is clear from evidence gathered by the Mission that the destruction of food supply installations, water sanitation systems, concrete factories and
finds that the attack on the abd al-Dayem family condolence tents constitutes an intentional attack against the civilian population and civilian objects, willful killing and the willful infliction of suffering.”  

Moreover, in some cases intention is drawn purely from the circumstances of the case at hand: “[t]he fact that [Muhammad Hekmat Abu Halima and Matar Abu Halima] were hit in the chest and the abdomen, respectively, indicates that the intention was to kill them.”  

As but another example, the Gaza COI found that an Israeli attack on a Palestinian prison was intentional because Israel stated that 99% of its strikes were accurate and Israel did not offer an alternative explanation as to why the complex was bombed.

This last example in particular is reminiscent of a criticism of the Goldstone Report that we saw earlier, which asserted that the Goldstone Report did not treat the absence of Israeli testimony as a methodological shortcoming of the Goldstone Report itself. Rather, at least with respect to the intentional targeting of civilians, the Goldstone Report treated the lack of Israeli cooperation as at worst leading to a reverse onus situation whereby it was incumbent on Israel to justify its military actions lest they necessarily be found both intentional and to amount to international crimes, or at best as giving rise to a shifting burden of proof whereby once facts were found by the report – say with respect to the bombing of a house – the burden then shifted to Israel to justify its actions. The absence of Israeli cooperation and testimony – or in the alternative at least a commission-appointed advocate for Israel – meant that,

residential houses was the result of a deliberate and systematic policy by the Israeli armed forces.”  

Compare this with the mens rea of recklessness, which is often accompanied by equivocating language such as “it appears.” There are some cases, however, where the certainty of the language appears higher: see ibid at 140-1, para 594; 186, para 838; 306, para 1433. For example: “The Mission finds that the Israeli armed forces were systematically reckless in determining to use white phosphorous in built-up areas and in particular in and around areas of particular importance to civilian health and safety.”  

The result that seems to be implied is that if fighting takes place in a city – which it usually does today – then any bombing in that city will be a crime so long as the bombing party does not offer an explanation. In modern warfare, this is tantamount to saying that so long as one does not participate in a UN COI, one will be found guilty of war crimes.

Unlike judges in common law systems, UN COI commissioners have not traditionally had the assistance of prosecution and defence attorneys – though such attorneys are often present to aid commissioners in domestic common law COIs. UN COI commissioners are therefore responsible for making the case, which includes acting as prosecution, defence and judge.
whether by shifting burden or reverse onus, invariably there would be no defence offered. The Gaza COI then had two options: (1) it could make a presumptive finding against Israel, treating Israel as responsible for not mounting a defence; or, (2) it could treat the absence of evidence as to intention as a methodological shortcoming of the Goldstone Report and make tentative findings of fact that “might” or “could” rather than “do” amount to war crimes and crimes against humanity for intentionally targeting civilians. In either case, it would be incumbent on the Gaza COI to gather enough circumstantial and other evidence so as to be reasonably justified in generalizing from specific incidents to broader claims about high-level, intentional policy, i.e. that crimes took place on such a widespread and systematic scale that they could not but have been the result of an intentional, high-level policy.

As we have just seen, the latter approach was generally not followed, and to a degree it came back to haunt the Gaza COI in one instance. In particular, the problem with approach (1) was laid bare by Goldstone’s controversial “recantation” or, in his words, “reconsideration” of the Goldstone Report, in which he claimed that, had he had the information available to him that Israel made public subsequent to the publication of the Goldstone Report, certain findings of the Goldstone Report would likely have been influenced, particularly with respect to the policy of intentionally targeting civilians (chapter XI). This was taken by some to be an admission that the Goldstone Report was erroneous in its findings, at least as concerns the intentional targeting of civilians by Israel. Now, it is unclear that this is even what Goldstone was suggesting, though the larger point is that there need not even have been a debate had

742 Though before continuing it should be noted that this was not always the case; at times, the Gaza COI did indeed resort to option (2) above. In other words, the Goldstone Report did at times treat the lack of information and territorial access as a methodological shortcoming. As but one example, with respect to the death of Muhammad Hajji, killed in his living room by errant fire during the military invasion, the Goldstone Report stated: “[o]n the basis of the information before it, the Mission can neither make a statement as to what type of weapon killed him, nor as to whether he was the intended target of a direct attack. The circumstances of his death suggest, however, that he was killed by fire from the Israeli armed forces while at home in a room with his children.” [Emphasis added.] Goldstone Report, supra note 6 at 170, para 753. However, more than anything the fact that the Goldstone Report sometimes opted for option (2) highlighted the extent to which it did not always do so. Moreover, resort to option (2) demonstrated that it is possible in such reports to offer a nuanced discussion of the mens rea of intent that manages to be sufficiently condemnatory while not offering generalized conclusions that reached beyond what the available evidence would suggest.

743 His strongest statement was: “If I had known then what I know now, the Goldstone Report would have been a different document.” See Goldstone Recantation, supra note 439.
the language in the Goldstone Report been more tentative – had it consistently chosen the second approach, above.

Let us discuss Goldstone’s reconsideration in slightly more detail in order to illustrate this point. The Goldstone Report investigated, “11 incidents in which serious allegations of direct attacks with lethal outcome were made against civilians” and found that, “[t]here appears to have been no justifiable military objective pursued in any of them.”\(^{744}\) [Emphasis added.] The Goldstone Report went on to say “that, on the basis of the facts it was able to ascertain, in none of the cases reviewed were there any grounds which could have reasonably induced the Israeli armed forces to assume that the civilians attacked were in fact taking a direct part in the hostilities….”\(^{745}\) [Emphasis added.] As a result, the Goldstone Report found that, “the Israeli armed forces have violated the prohibition under customary international law…that the civilian population as such will not be the object of attacks.”\(^{746}\) [Emphasis added.] A high standard of proof appears to have been met here in finding that there existed an intention to target civilians, though on the facts presented in the Goldstone Report there is little direct evidence of a high-level intention to target civilians and there are certainly instances where it appears that civilians were intentionally not targeted. The Goldstone Report’s case seems to rest on circumstantial evidence in eleven isolated cases coupled with a lack of evidence demonstrating that what took place was not intentional – a clear instantiation of the first approach.

Goldstone’s reconsideration of the finding that Israel intentionally targeted civilians then cited only one of the eleven incidents investigated by the Gaza COI, that of the bombing of the al-Samouni family. The al-Samouni neighbourhood of South Gaza (Zeytoun) – given its name by its primary inhabitants, the al-Samouni family – saw shooting on the night of 3-4 January 2009, though witnesses denied seeing Palestinian fighters in the area.\(^{747}\) By 4 January many members of the extended al-

\(^{744}\) Goldstone Report, supra note 6 at 159, para 705.
\(^{745}\) Ibid at 182, para 811.
\(^{746}\) Ibid at 182, para 812. In a slightly less clear finding shortly thereafter, the Goldstone Report states: “From the facts ascertained, the Mission finds that the conduct of the Israeli armed forces in these cases would constitute grave breaches of the Fourth Geneva Convention in respect of wilful killings and wilfully causing great suffering to protected persons and as such give rise to individual criminal responsibility.” [Emphasis added.] See page 183, para 816.
\(^{747}\) Ibid at 160, para 708.
Samouni family had been told by Israeli soldiers to gather in the home of Wa-el; several attempts to evacuate the family members were made on 4 January, including by the International Committee of the Red Cross, but no such efforts were successful.\(^748\) On the morning of 5 January, five members of the family exited the house to gather firewood, where they saw Israeli soldiers stationed on the roofs of nearby homes. At that time, a “projectile struck next to the five men”, killing two. Within five minutes, “two or three more projectiles had struck the house directly.”\(^749\) Wa-el and another member of the extended family, Saleh al-Samouni told a Gaza COI public hearing that the missiles were launched from Apache helicopters.\(^750\) According to the Goldstone Report, twenty-one members of the al-Simouni family were killed by the missile strikes; nineteen other members of the family were also injured in the incident.\(^751\) The home of Wa-el al-Samouni, a mosque and most other homes in the area were eventually demolished.\(^752\) The Goldstone Report also made the following factual finding in supporting its conclusion that this was a deliberate attack against civilians:

> the fact that a first projectile struck next to the five men soon after they had left the house (at a time at which there was no combat in the area) and two or three projectiles struck the house after the survivors had retreated into the house, indicates that the weaponry used allowed a high degree of precision with a short response time and that the five men and then the house were the intended targets of the attack.\(^753\)

In his reconsideration, Goldstone stated that the information that subsequently came to light through Israeli internal investigations and “recognized in the U.N. [second Independent] committee’s report…indicate[d] that civilians were not intentionally targeted as a matter of policy”, though the second Committee of Independent Experts report recognized no such thing: the report did imply that the al-Samouni bombing was the result of a mistaken interpretation of a drone image,\(^754\) as Goldstone specifically claimed in his reconsideration, but the report also “reiterate[d] the conclusion of its previous report that there is no indication that Israel has opened investigations into the

\(^{748}\) Ibid at 162-3, paras 717-22.

\(^{749}\) Ibid at 161, para 714.

\(^{750}\) Ibid at 161, para 714.

\(^{751}\) See ibid at 159-66, paras 706-35; see specifically 162, para 715.

\(^{752}\) Ibid at 163, para 722.

\(^{753}\) Ibid at 163, para 730.

\(^{754}\) Second Report of the Committee of independent experts, supra note 533 at 8, para 27.
actions of those who designed, planned, ordered and oversaw Operation Cast Lead.\textsuperscript{755}

Had the Goldstone Report – and perhaps Goldstone’s reconsideration – been clearer in explaining its standard of proof and subsequently had it better engaged with the standard of proof and used more tentative language, its findings would have been more precise and compelling and less amenable to attack. For example, the Goldstone Report could have used tentative language such that “should” an Israeli court or another criminal court investigate these incidents it “would” be incumbent upon Israel to explain how these events were not a result of intent, recklessness or negligence, lest it be found guilty of attacking civilians. Had it consistently used tentative language and consistently made clear that each finding was not final then the evidence which Goldstone later claimed to be exculpatory would not have made any difference to the correctness of the Goldstone Report.\textsuperscript{756} In other words, the Goldstone Report would nevertheless have been correct in asserting the need to investigate the relevant incidents, and that it was possible that they might amount to crimes. In such a situation, no reconsideration would have been necessary.\textsuperscript{757}

Human Rights Watch reports\textsuperscript{758} and both of the reports by the Human Rights Council Committees of Independent Experts repeatedly used equivocal language when discussing conclusions that were influenced by the dearth of available information caused by a lack of Israeli cooperation. Such language was consistently maintained both in the substantive analyses and conclusions of the reports, in contrast to the Goldstone Report.

\textsuperscript{755} \textit{Ibid} at 22, para 79.

\textsuperscript{756} It must be said that Goldstone’s reading of the Human Rights Council Committee of Independent Experts report finds exculpatory evidence in this regard that is otherwise hard to see. Put another way, it is hard to find evidence of an intentional high-level policy to target civilians based on the facts found in the Goldstone Report. At the same time, it is likewise hard to find evidence that there was not an intentional policy in the Committee of Independent Experts report reviewing subsequent Israeli investigations.

\textsuperscript{757} In part, this seems to be what the other three Gaza COI commissioners were asserting in their response to Goldstone’s reconsideration. See \textit{Statement by members of UN Mission on Gaza war, supra} note 542, which stated: “[t]he mission and the report are part of a truth-seeking process that could lead to effective judicial processes. Like all reports of similar missions of the UN, it provided the basis for parties to conduct investigations for gathering of evidence, as required by international law, and, if so warranted, prosecution of individuals who ordered, planned or carried out international crimes.”

\textsuperscript{758} See for example Human Rights Watch, “White Flag Deaths”, \textit{supra} note 477.
This is all to say that it is important for UN COIs to be particularly vigilant with respect to criminal intent. *Mens rea* attaches to a specific person (or persons): an individual person forms the requisite *mens rea*, be it recklessness, negligence or intent. Without consideration of a person’s purpose, circumstances, and individual action, it is difficult to see how a *mens rea* can be found to exist with any high degree of certainty – and it is important that the language and standard of proof of the UN COI report reflect this fact. When intention is found with certainty, or the appearance thereof, then the finding can be proven wrong with certainty, which Goldstone seems to have admitted happened in one case.759 The credibility of the report was therefore perhaps affected in the case at hand.

Human Rights Watch highlights another problem with regard to the Goldstone Report’s findings regarding Israel’s purportedly intentional high-level policy to target civilians:

In his [Washington Post] article, Goldstone backed away from a particularly controversial charge in the report – the allegation that Israel had an apparent high-level policy to target civilians. He now says that information from Israeli investigations indicates “that civilians were not intentionally targeted as a matter of policy.” Goldstone was right to make that amendment. Human Rights Watch also investigated some of the cases in which Israeli troops fired at and killed Palestinian civilians...Deeply troubling as these cases were, they were too isolated for us to conclude that the misconduct of individual soldiers reflected a wider policy decision to target civilians.”760 [Emphasis added.]

This statement speaks to the tendency in the Goldstone Report to make or appear to make general conclusions as to policy – and on the *mens rea* of intent – based on the investigation of “isolated” or specific events without explaining how such incidents are generalizable or reflect a broader pattern or policy, as was discussed earlier in the chapter under the heading: *Scope of Inquiry: Choice of incidents during the conflict*. If an incident appears to evince an intention to target civilians, then that would also appear to be an isolated crime. But that isolated crime does not necessarily speak to whether a general, high-level policy to target civilians existed; further justification or documentation is needed, and this justification should also include an explanation of situations that might tend to demonstrate the absence of a high-level policy. Goldstone seemed to make a similar mistake in generalizing from a specific incident in his

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759 Again, from the publicly available information at the time of Goldstone’s reconsideration, the result is not so clear.

760 Kenneth Roth, “Gaza: the stain remains on Israel’s war record: Richard Goldstone’s partial retraction of his own report doesn’t excuse the conduct of Israel’s war in Gaza”, *The Guardian* (Tuesday, 5 April 2011).
reconsideration. If the al-Simouni case was proven to be the result of “an Israeli commander’s erroneous interpretation of a drone image”, as Goldstone’s reconsideration claims and the second Committee of Independent Experts report seems to support, and not the result of a high-level policy, this still does not speak to the other ten cases investigated by the Goldstone Report or disprove, more generally, that there existed a high-level policy to target civilians.

But none of this is to claim that the Goldstone Report was biased or, as a whole, a poor report. It is simply to note that the implications for UN COIs regarding standard of proof and the consistency and precision of the language used with respect to crimes are not simply legal, relating to an objective legal standard or legal discussions of bias, but also political and social whereby the legitimacy and credibility of the report depends on the perceived impartiality of its work. The language used by such UN COI reports and the precision and consistency of the language very much matters; and other important examples exist in the Goldstone Report to drive home this point.

One such interesting and particularly stark example of the Goldstone Report's inconsistency in its language and applicable standard of proof is exposed with respect to crimes against humanity as analyzed in the Goldstone Report. For example, with regard to the crime of persecution as it relates to the Israeli blockade of goods into the Gaza Strip, the Goldstone Report concludes: “[f]rom the facts available to it, the Mission is of the view that some of the actions of the Government of Israel might justify a competent court finding that crimes against humanity have been committed.” [Emphasis added.] Interestingly, the Gaza COI is very precise in its language here and intentionally equivocates in its finding. It is not that persecution has been committed, or has on the facts found been committed, or even that the Gaza COI believes on the facts the crime has been committed, variants of the usual nomenclature used throughout the Goldstone Report. Rather, here the facts might justify another body coming to a legal conclusion. We must ask what the difference is between might and the usual finding, which is simply that a violation occurred. Is there less certainty here, or is it the complexity of the charge that led to the greater equivocation?

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761 Second Report of the Committee of independent experts, supra note 533 at 8, para 8.
762 Goldstone Report, supra note 6 at 284, para 1335.
Arguably, the Gaza COI was reluctant to take a strong position on the crime of persecution because the finding relates in this rare case specifically to a crime against humanity as opposed to a war crime or human rights violation, though it is not immediately clear why this distinction would lead to a difference in language or legal certainty. The Goldstone Report’s equivocation is on the legal side, not the factual side of things. So if the facts are equally conclusive as between crimes, why the need to equivocate with regard to the law as it relates to crimes against humanity and not war crimes? Whatever the reason, the Goldstone Report consistently equivocates with regard to the few purported crimes against humanity, unlike the majority of the time where it is unequivocal with regard to its findings that war crimes have been committed.

It is also interesting that, in this case and for the only time in the Goldstone Report, the report equivocates with respect to whether a “court” would make out the legal elements of the crime. But a court did not have to come to a conclusion on the crime of persecution, not yet at least. Rather, the Goldstone Report did, and it refused to do so. The Goldstone Report seems to be particularly hesitant here about coming to a legal conclusion, instead making it clear that this is a decision for a court to make, and the outcome is as of yet undecided. But again, nowhere else does the Goldstone Report explicitly refer to a court in this way, or make note of the fact that all legal decisions are tentative and ultimately for courts to decide upon. This is the only reminder in the substantive chapters of the Goldstone Report that a court has not yet rendered a verdict.

Compounding the problem with respect to the standard of proof is the fact that many chapters in the Goldstone Report have different sections for a “factual analysis”, a “legal analysis”, and finally the “conclusions”. The “conclusions” are generally where conclusions are drawn about legal violations in relation to the factual analysis, as tends to be the case in common law court judgments. The legal analysis would them seemingly be where one would find an analysis of the applicable law, perhaps how it is or could be applied. However, rarely is a comprehensive analysis of the law offered, or anything approaching this standard. The Chatham House Report of an Expert Meeting

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763 See also, for example, ibid at 366, para 1691: “From the facts available, the Mission finds that the rocket and mortars attacks, launched by Palestinian armed groups in Gaza, have caused terror in the affected communities of southern Israel and in Israel as a whole…This indicates the commission of an indiscriminate attack on the civilian population of southern Israel, a war crime, and may amount to crimes against humanity.” [Emphasis added.]
on the Goldstone Report, mentioned above, has argued that because the rules of international humanitarian law are difficult to interpret from the facts,

[a] commission should tease out these legal issues and should make its view clear on the interpretation it favours. The Goldstone Report does not set out in detail its interpretation of the law in order to determine which facts are relevant to determine whether a target is legitimate or not. It did not need to express a definite view in the way that a court should, but merely needed to record that different interpretations exist on a given point, and indicate the facts which would be relevant to a tribunal. 

A good example is the Goldstone Report’s chapter on rocket and mortar attacks on Israel (XXIV). The legal analysis and conclusions section offers no conclusions and amounts essentially to a page of noting the applicable law without an analysis of how that law is to be interpreted. For example, as is common throughout the document, the Goldstone Report notes that the duty to protect and respect civilians forms part of customary international law, though it neither sources this legal conclusion nor explicates what “protect and respect” might mean in the specific context. 

The subsequent “findings” section (this is the only chapter with a “findings” section) notes the facts that amount to breaches of international law, though the facts are not explicitly associated with any specific legal requirements found in international law documents. In other words, the “findings” are somehow different than “conclusions”, but do no more than implicitly draw upon the legal analysis rather than explicitly tie the facts to provisions of law. 

Associating the findings with specifically breached provisions in international human rights and humanitarian law, and sourcing the interpretations of these provisions, would not only be useful; it would go a long way to helping third parties fully understand and debate the Goldstone Report’s findings (and the credibility of the legal findings).

A perfunctory review of the law, while potentially in keeping with the practice of many fact-finding missions, does not conduce to the requirements of legality in the context of UN COIs. Clarity and reasoned justifications are necessary; those implicated

764 Chatham House Report, supra note 726.
765 Goldstone Report, supra note 6 at 364, para 1683. Another example is the Goldstone Report’s reference to the prohibition of indiscriminate attacks in Article 51(4) of Additional Protocol I to the Geneva Conventions, without a corresponding explanation of what indiscriminate might mean in the context, and how it can and has been interpreted in international law. Ibid.
766 One salient exception to this proposition is the section of the Report on Accountability and Judicial Remedies. See for examples ibid at 388-90.
767 Note that the conclusions do no better in amalgamating the legal and factual findings with the relevant provisions of international law: see ibid at 419, para 1950.
by the findings are, as autonomous agents, deserving of open, detailed explanations of how the legal findings were made, how the law was applied and what facts were relied upon to finalize the decision. But it is also true that the report will be better, its reasoning strong, with a more comprehensive review of the law in relation to the facts.

5.7.3 Naming Names: Individual criminal responsibility, witness protection, and the balancing of due process rights

In the context of his study on truth commissions and procedural fairness, Mark Freeman has noted that "[o]ne of the greatest dangers in naming names is the possibility of attributing responsibility to an innocent person...."\(^{768}\) Like some truth commissions, UN COIs no longer deal exclusively with state responsibility; as we have seen, individuals are today implicated by UN COIs in individual crimes. In order to protect against attributing responsibility to an innocent person – given that whatever UN COIs are, they are not criminal courts – the Gaza COI chose not to name potential perpetrators:

[the Mission fully appreciates the importance of the presumption of innocence: the findings in the report do not subvert the operation of that principle. 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.\(^{769}\)]

First of all, it is difficult to reconcile the fact that the Goldstone Report, on the one hand, did not purport to identify individual criminal liability or name individual perpetrators, but on the other hand was able to find with a high degree of certainty the requisite *mens rea* for specific intent crimes, which again must attach to an individual perpetrator.\(^ {770}\) Moreover, although the Goldstone Report did not go so far as to name potential perpetrators, its conclusions left little doubt, at least in certain cases, as to who was individually responsible: "[w]hatever violations of international humanitarian and human rights law may have been committed, the systematic and deliberate nature of the activities described in this report leave the Mission in no doubt that responsibility lies in the first place with those who designed, planned, ordered and oversaw the

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\(^{768}\) Freeman, *supra* note 240 at 280.

\(^{769}\) Goldstone et al, *supra* note 568 at 128.

\(^{770}\) See for example *Goldstone Report, supra* note 6 at 146, para 627; 413, para 1919, where it found intent to strike the al-Quds hospital, thus violating Articles 18 and 19 of the Fourth Geneva Convention. See also *ibid* at 193, paras 882-3.
operations.”  It would take little effort to find the names of the leaders – “those who designed, planned, ordered and oversaw the operations” – of the Gaza offensive in the Israeli army, perhaps as little as a Google search or a discrete question to a colleague in the halls of the UN. And, not only does the above finding of responsibility effectively identify at least those “most responsible” at the apex of the military hierarchy, it also applies a beyond a reasonable doubt – or “no doubt” – standard of proof to its findings of responsibility.

If it is the case that at least some individuals are effectively implicated in the Goldstone Report’s findings, the following question arises: how or does this change the UN COI’s approach with respect to various due process rights pertaining to implicated individuals? If individuals are indeed implicated, Goldstone can no longer assert that the Goldstone Report should not have been expected to live up to judicial or quasi-judicial standards with respect to proceedings because the Gaza COI, “did not investigate criminal conduct on the part of any individual in Israel, Gaza or the West Bank.” Clearly the Goldstone Report made findings on individual criminal responsibility – that is what war crimes and crimes against humanity are, they are findings of individual wrongdoing and do not exist in the abstract unconnected to any individual. The only argument Goldstone is left with is that, though the Goldstone Report did investigate individual criminal wrongs, it did not explicitly identify the individuals. But if individuals are indeed implicated and identifiable, then this response falls away as well.

In general, the more serious the allegations, the higher the standard of proof required and the more serious the legal and personal consequences. So, when adverse findings of fact and law are made by UN COIs as against states, it is now generally understood that those states are to be given the opportunity to respond to the accusations made against them, even if they choose not to exercise this right. The

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771 *Ibid* at 408, para 1895.
772 As but one example, the New York Times reported: “General Benayahu [of the Israeli army – its spokesman at the time] recently revealed that he traveled to London in 2010 under an assumed identity because of fear of attracting anti-Israel protests outside his hotel and of being arrested for alleged war crimes.” Ethan Bronner and Isabel Kershner, “Israel Grapples with Retraction on UN Report”, *New York Times* (3 April 2011).
773 The whole statement went as follows: “Some have charged that the process we followed did not live up to judicial standards. To be clear: Our mission was in no way a judicial or even quasi-judicial proceeding. We did not investigate criminal conduct on the part of any individual in Israel, Gaza or the West Bank.” See *Goldstone Recantation*, supra note 439.
Goldstone Report was no exception in that it offered the opportunity to all the parties to read its findings, answer questions that arose, and respond to its findings in writing. Likewise, if individuals are now implicated in what are indeed individual criminal wrongs, then the full right to response should at least be offered to them as well as to the state government, something that will be discussed in greater detail in chapter seven; this conclusion would of course extend to the leadership of other non-state entities implicated in criminal wrongdoing as well.

Due process in this instance is not necessarily just about the right to respond to general accusations, or to the UN COI report and its general findings, but also whether the right should exist for those implicated to challenge – and perhaps cross-examine – witnesses testifying against them. In other words, due process as understood here is not necessarily just about the right to respond to the report once it is completed, but also to engage in the COI process by responding to and countering the evidence upon which the final report will draw in founding its more general conclusions.

With respect to the Gaza COI, for example, Associated Press media reports indicated that, “Hamas security often accompanied [Goldstone’s] team during their five-day trip to Gaza…, raising questions about the ability of witnesses to freely describe the militant group’s actions.”\textsuperscript{774} Israel has also formally made this claim.\textsuperscript{775} Goldstone has denied the fact that Hamas affiliates served on his security team,\textsuperscript{776} though undoubtedly in such a context a security team would have been needed and it has perhaps rightly been questioned how Goldstone would know the affiliation of those constituting the security team.\textsuperscript{777} Indeed, the Goldstone Report repeatedly noted that some witnesses, “were generally reluctant to speak to the Mission about the activity of Palestinian armed groups in their neighbourhoods.”\textsuperscript{778} Granting a right to individual accused – or to a commission or accused-appointed representative – to cross-examine such witnesses could have either clarified the situation – and absolved the security

\textsuperscript{775} \textit{Israeli Initial Response to COI}, supra note 486 at 6, para 17.
\textsuperscript{776} \textit{Goldstone Letter to Israeli Ambassador}, supra note 430.
\textsuperscript{777} This fact scenario raises a further question with respect to witness confidentiality and safety: Did the security detail see the secret witnesses and might this raise a concern for the witnesses’ safety despite the fact that they were not named in the final report?
\textsuperscript{778} \textit{Goldstone Report}, supra note 6 at 115, para 455.
team members of affiliation with Hamas – or, perhaps, shed light on the problem so that the Gaza COI could resolve it, or speak to it publicly during the hearings, rather than having to address the accusation after proceedings had been completed. Israel or an accused would only have to participate “informally” or “unofficial” in this case or, perhaps, much of the “defence” work could be accomplished by the special representative simply by amalgamating the complaints of partisan groups and persons outside of Israel in an attempt to respond to a greater number of potential complaints.

As but one example taken at random from the Goldstone Report, in one case the report found Mr. Majdi Abd Rabbo “credible and reliable” as a witness with respect to his story on the Israeli use of Palestinians as human shields. In support of its finding, the Goldstone Report noted that Mr. Majdi Abd Rabbo had “told the story of his experience…to several NGOs, to several journalists and to the Mission without any material inconsistencies. There are some minor inconsistencies, which are not, in the opinion of the Mission, sufficiently weighty to cast doubt on [his] general reliability…” Without dismissing the possibility that the Gaza COI is correct as to the issue of witness credibility, or that the above was a reasonable finding, one must nevertheless ask whether we are comfortable with such a finding – given its consequences for individuals in terms of possible stigma, asset freezes, travel bans, etc. – being made without an opportunity to cross-examine the witness on those purportedly immaterial inconsistencies.

Of course, the due process rights of an individual implicated – in the case at hand with respect to the opportunity to confront a witness – will have to be weighed against other interests at stake, particularly with respect to witness protection. The Gaza COI decided – though without offering a justification or reference to a particular rule – that witness protection required it to, generally, conduct interviews with relevant persons, particularly victims and witnesses, in private in order to, “ensure both the

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779 Ibid at 228, para 1090.
780 Ibid at 228, para 1091.
781 In this regard, the Gaza COI, “called for the protections that are required under the Declaration on Human Rights Defenders, to be accorded to all who gave testimony at the public hearings.” See ibid at 40, para 146. The Gaza COI also claimed to be “guided by” the resolution 2005/9 of the UN Commission on Human Rights, which “urges Governments to refrain from all acts of intimidation or reprisal against (a) those who seek to cooperate or have cooperated with representatives of United Nations human rights bodies, or who have provided testimony or information to them.” See ibid at 40, para 146.
safety and privacy of the interviewees and the integrity of the information provided. The Gaza COI noted that, “in keeping with normal practice for this type of report,” it often did not publish the names of victims, witnesses and other sources in order to protect the safety and privacy of individuals. Instead, “codes” were used in lieu of names. This was not the case for those who publically testified or who “explicitly agreed to be named.”

For those who publically testified, the testimony from the Geneva-based hearings was all webcast and televised because the witnesses had so consented. Such publicity of proceedings is good for transparency, but led to questions about whether Palestinians would testify against Hamas for fear of reprisal, either against themselves or family members in the Occupied Territories. For example, when interviewing witnesses did the commissioners consistently ask whether they were affiliated with (or were) Hamas operatives? The web streaming of interviews would seem to indicate that the Gaza COI did not do so. One can once again see here the need to balance two competing interests: first, is there a threat to the witness and how can this be minimized?; and second, how do we ensure that witnesses who do testify are adequately scrutinized, perhaps in order to determine whether witnesses who

782 Ibid at 42, para 159(b). Human Rights Watch similarly conducts its interviews privately and individually, wherever possible. See Human Rights Watch, “Rain of Fire”, supra note 476 at 6. These concerns about witness safety are certainly not innocuous. In at least one case, the Gaza COI became aware of a Palestinian who gave testimony before the Gaza COI was detailed by Israeli security forces. The Commission wrote the Permanent Representative of Israel in Geneva to express its concern that the detention may have been related to the individual’s testimony. Israel maintained that the detention was unrelated, and the individual was released on bail. See Goldstone Report, supra note 6 at 40, para 147. Another witness expressed concern for personal safety, while several others received anonymous phone calls related to their participation. It should be noted that the concern from the outset should not be limited to Palestinian witnesses testifying against Israel, as there was the concern that some threats originated from Palestinian “armed groups”. See ibid at 40, para 148. Still other Palestinians declined to appear or asked for the non-disclosure of their names for fear of reprisal. See ibid. See also ibid at 111-2, para 440; 336, para 1552.

783 I would assert that, in the context, “this type of report” refers more broadly to human rights fact-finding reports. The problem with conflating all such reports is that, as a result, international human rights principles and practices get conflated with criminal law practices and treated as though there is not a difference.

784 Goldstone Report, supra note 6 at 42, para 159(b).

785 Ibid.

786 See Gaza COI homepage, online: http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/factfindingmission.htm.

787 See Dershowitz, supra note 506 at 5. See also Initial Israeli Response to COI, supra note 486 at 5-6, para 17. See further the United States House of Representatives, which asserted Hamas’ ability to “shape the findings of the investigation…by selecting and pre-screening some of the witnesses and intimidating others”. See United States House of Representatives, Res 869, supra note 438.
publicly testified had a very good reason not to fear reprisal, for example because they were members of an armed group?

One necessary and helpful way to resolve the complexity of balancing the rights of accused to confront witnesses and respond to accusations against them with witness protection is through the lens of what the internal morality of law might require. Legality requires that laws not demand the impossible. As such, if cross-examinations of all witnesses are simply impossible due to time constraints or threats to witnesses, they should not be required; though, as noted, witness interrogation is not all-or-nothing affair and other “in between” options are available depending on the circumstances. And this is equally true with respect to the protection of witnesses. Witnesses do not either have to testify publicly via a live internet broadcast or under the veil of complete secrecy, as seemed to take place in the Gaza COI. Witnesses might be cross-examined from behind a barrier, where the commissioners can view their facial reactions and make determinations of credibility but where, nevertheless, the witnesses remain physically unidentifiable to the rest of those present at the hearing. Regardless of how such issues are dealt with in the future, it is important that they begin to be addressed directly by UN COIs, that due process be taken seriously at all stages of the inquiry, and that it be recognized that if ad hoc UN COIs are indeed to be the large-scale alternative to the UN’s myriad other fact-finding procedures, then such increased scale will in some instances be met with increased formality, such as introducing more stringent cross-examination requirements to public hearings to ensure an equality of arms. All the while, the introduction of such procedures must continue to respect the rights and safety of others, most prominently witnesses, and this balancing act should be engaged with both publicly at hearings and in UN COI reports in order to explain and justify the results.

5.8 Conclusion

Operating in the context of a highly controversial and politicized dispute, the Gaza COI was subjected to harsh criticism but also lauded for completing a difficult task. While the criticism and praise may have been heightened given the highly political context of the dispute, the targets for criticism were fairly typical in the context of UN COIs. In particular, the Gaza COI was criticized for: being the product of the Human Rights Council, an institution with a history of focusing disproportionately on Israel and,
arguably, establishing biased inquiries; its biased mandate and commissioner(s); its indeterminate mandate as exemplified by the mandate’s failure to circumscribe strictly the temporal, geographic and legal scope of the inquiry; its failure to articulate the method utilized to determine which incidents to investigate; its methods of gathering and corroborating evidence and its failure to articulate transparently the rules that governed this process; and for various due process issues including the definitiveness of its conclusions and language particularly pertaining to Israel, the seemingly inconsistent application of its (vague) standard of proof, and its approach to witness interrogations. As we saw, many of these issues can be addressed simply by learning from past mistakes and taking care to be precise in language, engage with problems and justify the decisions taken.

However, by seeing the issues discussed in this chapter through the lens of legality and interactional law, I believe a broader set of conclusions and recommendations can be drawn from the Gaza COI case study. But before bringing legality to bear on the Gaza COI case study in chapter seven, some conclusions can first be drawn at this time with regard to the purposes of UN COIs. It might be said that the Gaza COI maintained the contemporary focus on international criminal wrongdoing – in line with the Yugoslav and Darfur COIs. But it also went beyond these inquiries to consider social and economic factors and rights while providing an historical overview of the conflict. In other words, it further expanded UN COIs into the realm of other elements of transitional justice.

Further, it is unsurprising that the parties generally viewed as democratic – Israel and the Palestinian Authority – followed-up with limited investigations, whereas Hamas – though elected and thus nominally democratic in that thin sense of the concept – did not. Though the sample size is too small to make determinative statements, historically it has been true that non-democratic regimes do not credibly investigate themselves and few parties to a conflict – regardless of their democratic tendencies – will ever conduct independent investigations to the extent that a neutral third party might wish for. As Goldstone stated some two years after the release of his report, “[a]t minimum I hoped that in the face of a clear finding that its members were committing serious war crimes, Hamas would curtail its attacks. Sadly, that has not been the case…In the end,
asking Hamas to investigate may have been a mistaken enterprise.” 788 In other words, the Goldstone Report neither prevented the recurrence of violence as between Hamas and Israel – and it also did not change the social, economic or political situation with respect to the building of settlements and the blockade – nor did it lead to comprehensive investigations – or anything close thereto – and prosecutions and accountability. 789

With this in mind, let us now turn to what the purpose of contemporary UN COIs seems to be, what they can realistically hope to achieve, and whether they should continue along the path that they are on.

788 Goldstone Recantation, supra note 439.
789 On 18 January 2012, the Israeli Human Rights organization B’Tselem issued a report stating that, “[t]here years after operation Cast Lead, the Israeli military’s argument against independent investigation of its conduct during Operation Cast Lead has proven to be hollow. The military has completely failed to investigate itself, regarding both policy choices and the conduct of the forces in the field in particular cases.” It went on: “There has never been a serious investigation into the suspicions raised by B’Tselem and additional Israeli, Palestinian and international organizations regarding breaches of international humanitarian law by the military during the operation…The investigations that were opened did not to B’Tselem’s knowledge, address the responsibility of high-ranking commanders, but rather focused on the conduct of individual soldiers.” See B’Tselem, “Three Years since Operation Cast Lead: Israeli military utterly failed to investigate itself” (18 January 2012), online: www.btselem.org/gaza_strip/20120118_3_years_after_cast_lead.
CHAPTER 6
THE PURPOSE OF ‘CONTEMPORARY’ AD HOC UN COIs

6.1 Introduction

We have seen that various advantages are associated with the structure of ad hoc UN COIs in contrast to many of the currently available fact-finding alternatives: it tends to be more flexible, bigger, better resourced; it is able to collect and collate more data and provide more information in the report; it is viewed as more credible and reliable; and, it attracts more international attention.790 As a mechanism for identifying a road-map to structural reform of legal, political and other public institutions, COIs have demonstrated both in domestic cases and internationally that they can be very useful.791 At their best, COIs can also perform an educative function, allowing for public deliberation and learning with respect to what happened, why, and how it can be remedied in the future.792

For UN COIs, the question is not whether they can sometimes be of benefit in a general sense; for all of the above reasons, there is reason for hope for UN COIs. However, there remains the question as to when – for what purposes and in what situations – they can best be put to use in order to take advantage of their structural benefits. And the question of what large-scale ad hoc UN COIs should do – what types of problems and conflicts they might focus on – and how they should go about

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790 For a comparison between the Darfur COI and the international fact-finding alternatives, see generally Alston, “The Darfur Commission”, supra note 347 at 604-5.

791 As we have seen, in the international domain the ad hoc COI model has been used in a multiplicity of situations to fulfill a variety of different purposes over the years, from providing a cooling-off period and mediating a conflict between nations as foreseen by the Hague Conventions, to playing an educative function in terms of informing a domestic or international audience of what is or has transpired, to making detailed factual and legal findings and corresponding recommendations on institutional reform based on well-researched, detailed information. Such legal and factual findings can then be used by the international community to signal its disapprobation with a particular nation’s actions, as well as to indicate the expected outcomes to the resolution of a problem – i.e., to signal to the investigated party (or parties) those outcomes that the international community deems appropriate. In turn, COI reports might influence third parties – generally other states or courts – to impose individual criminal punishments or other individual or state sanctions. Given the scope and flexibility of UN COIs, one can see why, in the right circumstances, it is increasingly preferred by the UN to many of the available fact-finding alternatives.

792 See SGM Grange, “How Should Lawyers and the Legal Profession Adapt?” in AP Gross, I Christie, & JA Yogis, eds, Commissions of Inquiry (Toronto: Carswell, 1990) 151-8. Through the process of interviewing witnesses and debating publicly the events inquired into, the COI can also serve a pedagogic and community-building purpose. It might also be said that it allows the airing of grievances and an associated catharsis.
completing their tasks is rarely discussed; their particular purposes and methodologies are treated as a practical matter to be determined by practitioners as the need arises.

UN COIs are, after all, ad hoc institutions, so there is a certain logic to analyzing UN COIs on a case-by-case basis rather than analyzing them as part of a larger, UN-wide system. Nevertheless, UN COIs can be understood as a systemic form of response to conflict situations. Though each UN COI has its own peculiarities there also tends to be a great deal of uniformity in terms of what type of situation they respond to – armed conflict in particular, where mass abuses or serious international crimes are suspected. There is also a great deal of uniformity as between UN COIs in terms of how they respond, what their procedures look like in a general sense, what obstacles to overcome (a lack of territorial access and participation from the implicated parties, for example), what their reports look like, and even what the contemporary ad hoc UN COI reports tend to focus on and recommend. Indeed, it should by now be fairly clear that UN COIs form part of the UN’s standard transitional justice response tool-kit for mass atrocities in much the same way that the permanent Special Rapporteur system is now a distinct system for human rights monitoring. As a result, their ad hoc nature does not preclude a general discussion of what COIs as an institution of the UN should do, even if the answer will always depend in part on the particular context in which a COI operates.

Having considered in previous chapters the purposes for which UN COIs have historically been created as well as the general methodologies and shortcomings of such COIs, the big questions that flow from the Gaza COI case study in the previous chapter are: (1) what can and should today’s UN COIs do?; and, (2) how and when should they go about establishing their mandate and accomplishing their tasks? In an attempt to answer the first question, this chapter will analyze what UN COIs should not do, and in particular assert that what contemporary ad hoc UN COIs have been doing should not be continued. In the following chapter I will then offer some suggestions for what contemporary ad hoc UN COIs might do as well as offer some answers to the second question.

As discussed in previous chapters, there is a reciprocal relationship between what UN COIs do and how they do it. What a COI’s purpose is will obviously influence its procedures and methodologies. What a COI hopes to accomplish will also influence
how “legal” the processes will have to be. At the same time, what a COI is capable of doing – the processes and procedures by which it operates – will clearly influence what it can and cannot hope ultimately to accomplish. Thus, the discussion in this chapter of the goals for which UN COIs cannot operate will necessarily consider how they operate. In particular, in order to discuss the purposes of UN COIs, this chapter will have to consider at a general level what their procedures can and should be and what they are capable of accomplishing. By ordering the discussion in this way we can narrow the permissible range of goals for which contemporary UN COIs should operate, then proceed in the following chapter to discuss some more specific examples of when and how UN COIs might legitimately operate and the processes that would be necessary to make their goals achievable.

This chapter will proceed by first introducing some general considerations for how the purposes for UN COIs should be defined and circumscribed; it will offer a broad description of what the real benefit of UN COIs and how these structural benefits influence the purposes for which they should operate. Second, I will argue that UN COIs should be careful to avoid a duplication of tasks with pre-existing bodies. Third, this chapter will discuss the two most prevalent general purposes assigned to contemporary ad hoc UN COIs – robust transitional justice investigations and quasi-criminal investigations – and conclude that both options represent purposes for which formal, large-scale UN COIs are not ideally suited. All of this analysis will be informed by looking at some recent UN war crimes COIs – those subsequent to the Gaza COI – and will also draw from the experience of some domestic examples, particularly Canada’s experience with domestic COIs.

In chapters three and four we saw that legality can contribute to the legitimacy of UN COI findings, but what legality means in any particular context will depend on the purpose for which the COI is acting.

Though there are certainly several reasons why the UN and domestic context in which COIs operate are different, there is a wealth of experience with COIs as an investigative technique and no doubt some of this can offer lessons for the relatively young international system. As but one example, it is well known that the first two lines of attack after a COI is established in Canada are: (1) to attack the terms of reference, probably with respect to the partiality of the wording and the failure to address certain crucial issues; (2) to attack the commissioners as being unfit or inappropriate to the task. See for example Ratushny, supra note 47 at 134 and 164-73. We saw that these two lines of attack coincide with the international experience to date, and in particular with the experience of the Gaza COI. With this in mind, there is no excuse not to have interrogated both the choice of commissioners and wording of the mandate – from the very beginning – in order to ensure that there were no valid criticisms available to those who would attack the COI.

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6.2 A Reminder of the Real Benefits of UN COIs

Over the past hundred years, large-scale, international ad hoc COIs have been established for many different purposes but, broadly speaking, the general tendency has been to establish them in relation to armed conflict or the threat thereof with the goal of preventing the repetition or outbreak of hostilities. Today’s UN COIs are established for a multitude of modern goals that have been added to the original purpose bit by bit in an ad hoc, rather than a strategic, fashion. The ultimate purpose might be said to be the same as it was in the past – namely to promote peace. But what the international society perceives as necessary to create a lasting peace has become more complex. Today, it is generally thought that for lasting peace to take hold the institutional groundwork must be laid for a stable, democratic, rights-respecting nation. It is not just about avoiding conflict in the short-term or ensuring stability in the absence of rights and the rule of law. Promoting accountability for criminal wrongdoing has become a central goal of UN COIs as has institutional reform with the goal of promoting democracy, the rule of law and peace, rather than just peace; generally, the goals of today’s UN COIs have come to coincide in large part with the traditional taxonomy for transitional justice.

Moreover, today UN COIs operate during or between conflict, where widespread atrocities are thought to be taking or to have taken place. In the past this has not always been the case; often COIs were thought to offer a “cooling-off period” in order to avoid the onset of armed conflict, or to monitor a potential conflict situation or ceasefire agreement with the hopes of providing early warning of an outbreak of hostilities. Given this shift in what UN COIs do, how they do it, when they do it, and what they respond to, it is time to take a step back and look at what today’s UN COIs should and should not attempt to accomplish in situations of real or perceived armed conflict.

Before narrowing down the range of possible purposes for UN COIs in the next section, let us start with a brief reminder of what UN COIs do well, that is, what the benefits of a UN COI are thought to be and why one would be established. As we have seen, in general the benefit of a COI is that it is a large, flexible, well-financed body led by leading experts in the relevant field that is given the time and support to conduct extensive, in depth research. This can perhaps be broken down into three discrete advantages that UN COIs have over many other current approaches to international fact-finding. First, UN COIs are relatively larger and better resourced than most of the
currently available alternatives. Second, UN COIs are *ad hoc* institutions and as such can be very flexible in terms of when, why and how they respond to crisis situations.\(^{795}\) It follows that we should keep in mind that not all UN COIs have to look or act the same. Third, regardless of the other benefits of UN COIs, their major benefit is derived from their ability to produce reliable and credible reports, *i.e.* from the legal legitimacy that flows from a certain commitment to legality.

This final point requires a little more elaboration. In their ground-breaking work on international human rights instruments, Goodman and Jinks discuss how human rights mechanisms can be developed so as to influence individual behaviour: “Four mechanisms of social influence are identified...as crucial to modeling the domestic political consequences of the human rights regime: coercion; incentivization; persuasion/learning; and capacity building.”\(^{796}\) In the words of Goodman and Jinks, “these [four] mechanisms might work directly on governmental officials or they might work indirectly by mobilizing other relevant actors to influence government officials.”\(^{797}\)

In effect, UN COIs operate through only one of these mechanisms: persuasion/learning.\(^{798}\) UN COIs’ social influence comes from the persuasiveness of their findings and recommendations and their ability to influence the actions of either those involved in the conflict or in convincing other relevant actors to act in response to conflict and atrocity.\(^{799}\) As chapter one argued, Fuller shows that a particular kind of persuasiveness and credibility obtains when a legal process – in this case the UN COI process – demonstrates a commitment to legality. Thus, given that UN COIs are legal

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\(^{795}\) The Gaza COI case study demonstrated how important context is to the determination of what a particular UN COI should be doing and what purpose it should be serving.

\(^{796}\) Goodman and Jinks, *supra* note 462 at 2.

\(^{797}\) Ibid at 2.

\(^{798}\) It might be said that UN COIs also have a certain coercive power. However, UN COIs make recommendations rather than imposing sanctions or duties; they then depend on another body or institution to act coercively, or to offer incentives for compliance, etc.

\(^{799}\) As will be discussed further in the following chapter, it is not just the UN COI’s *reports* that must be persuasive. As we have seen, for a report’s arguments to be viewed as persuasive the reports must rely on thorough, credible, reliable and impartial accounting of facts; the institution responsible for the fact-finding – usually the COI – and the institution creating the fact-finding body – the Human Rights Council in the case of the Gaza COI – must themselves be viewed as impartial, or at least as impartial and fair in the matter contested. In other words, UN COIs are dependent for their success on their legal legitimacy – what I have called their legality or conformity to the inner morality of law and interactional law making. One might also note that other factors will ultimately contribute to the “persuasiveness” of a rule or rule-making or applying body. See for example Thomas Frank’s discussion of legitimacy in international law in, *The Power of Legitimacy Among Nations* (New York, Oxford: Oxford University Press, 1990) (Frank, *The Power of Legitimacy Among Nations*).
bodies to begin with – they are created by law, apply law, and have legal implications – guaranteeing legal legitimacy is the best way to ensure a persuasive report of the sort required for a UN COI to be successful.\textsuperscript{800} Not surprisingly then, as we have seen both in the historical review of UN COIs and the Gaza case study, all \textit{ad hoc} UN COIs ultimately rely for their success on their legal legitimacy, their ability to provide independent, impartial reports that make persuasive – \textit{i.e.} credible and reliable – factual and sometimes legal claims.\textsuperscript{801}

\textbf{6.3 Avoid a Duplication of Tasks with Pre-existing Bodies: Or, how not to throw the kitchen-sink at a problem}

Those establishing \textit{ad hoc} UN COIs should be wary of reproducing what Goodman and Jinks have called the "kitchen-sink approach" to human rights promotion, as first mentioned in chapter four.\textsuperscript{802} That is, where "[a]dvocates call for almost every conceivable form of pressure and inducement to be exploited in dealing with human rights violators without contemplating negative interactions between mechanisms that undergird those multiple tactics."\textsuperscript{803} In other words, just because we have numerous types of fact-finders, monitoring missions, and other bodies at our disposal does not mean that they should all necessarily be tasked with responding to every conflict. According to Goodman and Jinks, the danger is that "combining mechanisms will, under certain conditions, reduce the overall social effect to levels below what any individual mechanism could have achieved in isolation."\textsuperscript{804}

\textsuperscript{800} The following is an example of why legal legitimacy can be so important to the acceptance of and perhaps compliance with UN COIs. To make a persuasive case for its cause, interested parties – including victims, witnesses, civilians, and resistance groups – will have to rely on facts that must demonstrate that they were or are being wronged. A legal analysis as related to these facts is often a powerful tool to demonstrate the "wrongness" of what has taken place. UN COIs undertake just this investigative task and legal analysis. And a factual investigation followed by legal analysis is, clearly, also the precise task that societies have long relied on law to accomplish in a reliable, credible way. For it is self-evident that proving facts and making corollary findings is something that the law has long done relatively well. And Fuller shows that it does this well in particular when it maintains a commitment to its inner morality.

\textsuperscript{801} For as we have seen, upon establishment of a UN COI and/or certainly upon the release of a report, states implicated generally attack any aspect of the COI generally associated with its legitimacy, from being established by a biased body, to lacking independence or impartiality, to assertions that their methodologies lacked reliability and credibility.

\textsuperscript{802} Goodman and Jinks, \textit{supra} note 462 at 3.

\textsuperscript{803} \textit{Ibid} at 3-4.

\textsuperscript{804} \textit{Ibid} at 3.
In the case study of the Gaza COI we saw at least two potential examples of how a kitchen-sink approach to human rights promotion can actually undermine the efforts of human rights workers. The first example was that numerous, largely redundant fact-finding bodies tasked with investigating similar wrongs will be seen as just that, redundant. In effect, this redundancy both decreases the attention paid to each report and increases the likelihood that each is seen individually as a waste of time or money and as representing nothing more than an empty threat, even if this is not the case with at least some of the investigative bodies. The second example was more detrimental to the Gaza COI’s success: a disproportionate focus by a political body on a particular conflict – the Human Rights Council’s focus on the Gaza conflict – can undermine the credibility of the legal or administrative body they establish to focus on that same conflict – here the Gaza COI itself – by making that administrative-legal body look partial by association. This, in turn, can delegitimize the UN COI’s report because the UN COI is associated with the partial establishing body that is focused disproportionately on one conflict or issue. The credibility and reliability of the UN COI is therefore harmed by its association with its establishing body, thus negating the greatest benefit of the UN COI.

6.4 Confounding the Purpose: What the purpose of UN COIs should not be

Keeping in mind what UN COIs bring to the table in terms of their benefits and attributes – their size, expertise and resources, their flexibility, and the persuasiveness of their reports – we can now start to discuss what they have been doing to see how effective they have been. In particular, we can start to narrow the range of proper purposes for which UN COIs can and/or should operate. The intention is to dispense with certain purposes that UN COIs should not pursue, not to determine precisely what all ad hoc UN COIs should do. For as flexible, ad hoc bodies, there is no one purpose for which they should necessarily operate.

Though those who establish UN COIs have not always been clear in terms of what they hope they can achieve, it now appears that the current contemporary

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805 So UN COIs will need to consider, for example, what other fact-finding bodies are already operating, what the relationship between the COI and the country (or countries) being investigated is likely to be, and whether territorial access, access to government documents or witnesses, or any sort of cooperation is likely, etc. This argument was made in further detail in chapter four of this dissertation.
tendency is either to: (1) treat UN COIs as quasi-criminal investigations like the Darfur and Yugoslav COIs, looking first and foremost into the commission of war crimes and crimes against humanity;\(^{806}\) or, (2) treat UN COIs as a sort of transitional justice panacea wherein many or all of the primary goals of transitional justice\(^{807}\) are addressed through a single fact-finding mechanism like the Gaza COI and so many since then – e.g. a history of the conflict is given to provide the relevant society with a narrative and truth, crimes are investigated and accountability and reparations demanded, reform of institutions is considered, the social and economic situation – and possibly social and economic rights – is considered, and so on.\(^{808}\) Contemporary *ad hoc* UN COIs seem to treat these two purposes as though they represented the natural purposes of the COI process itself, as if the COI process demanded that at least one and perhaps both of these be the necessary purpose(s) of all contemporary UN COIs.\(^{809}\)

With respect to *ad hoc* UN COIs this tendency is not merely problematic because it presumes two general purposes for all UN COIs, thus limiting the thinking.

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\(^{806}\) Here we have the COIs instituted in the wake of the Arab Spring uprisings in the summer of 2011, including COIs into government human rights violations and protestor repression in Tunisia, Libya (Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, HRC, 17\(^{th}\) Sess, UN Doc A/HRC/17/44 (1 June 2011), online: http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44_AUV.pdf) [Libya COI]; and the *Syria COI*, supra note 7.

\(^{807}\) We will see that vague recommendations from many UN COIs adopt a ‘transitional justice approach’ by recommending the same general list of ‘solutions’. The ICTJ offers the “basic approaches” to transitional justice (in international law) as: criminal prosecutions (which invariably includes reference to international, hybrid and domestic prosecutions), truth commissions (and “truth seeking”), reparations programs, gender justice, security system reform and memorialization projects. See http://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf. See further the definition of transitional justice offered by *The Encyclopedia of Genocide and Crimes Against Humanity*, supra note 335.

\(^{808}\) See for example the *DRC Mapping Exercise*, supra note 7.

\(^{809}\) One way to view this tendency continually to reproduce these contemporary UN war crime COIs is by considering what psychologists call the “Einstellung Effect.” The Einstellung Effect refers to the idea that instead of contextually analyzing problems on their own terms, humans have a tendency to see – or indeed to try and solve – problems based on pre-existing solutions that have worked in the past in relation to what we tend to see as paradigmatic cases. So purported war crimes are consistently brought back to the paradigmatic (contemporary) cases of Yugoslavia and Rwanda; solutions therefore follow directly from those implemented in those cases. Superficially, the contexts in which UN COIs tend to operate look similar – conflict has taken place, human rights abuses have taken place, and it is suspected or known that international crimes were committed. Likewise, the consequences of such conflicts look perpetually familiar. So, the natural human tendency will be to repeat the same “paradigmatic” solutions to these seemingly similar problems as was applied to the previous “paradigmatic” situations. Transitional justice in general is probably particular guilty of this tendency or “effect”. In particular, the transitional justice tendency is to see all conflicts or transitions as contextual, yet nevertheless to provide the same laundry list of solutions and recommendations for virtually all transitions; the precise list of solutions might change, but the general idea remains the same.
about a whole range of alternative investigations that might be useful. It is also the case that the pursuit by UN COIs of either of these two general purposes is itself intrinsically problematic.  

Let us begin with a discussion of the problems associated with the second of these two UN COI purposes: what we have called in previous chapters the holistic transitional justice approach.

6.4.1 First: The problems with the holistic transitional justice purpose for UN COIs

We have seen that large-scale, international ad hoc COIs have tended to be established in relation to armed conflict. The ultimate purpose of such COIs has generally been either to pre-empt armed conflict by providing a factual foundation for dispute settlement, or more recently to respond to conflict with the goal of promoting reconciliation and accountability and preventing a repetition of violence. While the ultimate purpose of most contemporary UN ad hoc COIs remains largely the same, the manner in which these COIs go about responding to conflict and what they focus their fact-finding efforts on has changed. Today, UN COIs generally fact-find with respect to a multitude of issues all thought to be instrumental to reforming institutions and producing lasting stability in a nation or region. In particular, the focus of contemporary UN COIs has shifted from providing the factual foundation for dispute resolution as between two parties, to the Darfur model where accountability was privileged, to the Gaza model which incorporated to a greater extent the pursuit of each of the tasks associated with the standard transitional justice taxonomy, including: fighting impunity and promoting accountability through the promotion of criminal trials; promoting civil, political and to a more limited extent social and economic rights; institutional reform, primarily in the security, justice and political sectors; economic  

810 It is not simply that that a fog exists over the purposes of UN COIs such that they are undertaking their inquiries with conflicting purposes, it is that the explicit policy of the UN seems confused: the COIs should have “comprehensive mandates”, which as discussed makes their work near impossible, while the focus clearly remains on “combating impunity” for the most serious breaches of international human rights and humanitarian law. 811 See Secretary-General Report on Impunity, supra note 386 at 3: “As demonstrated in this report, recent international commissions of inquiry have been established with comprehensive mandates, including specific requests for complex legal determinations and identification of perpetrators.” [Emphasis added.] See also Report of the UN Secretary-General to the Security Council, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Situations, UN Doc S/2011/634 (12 October 2011) at para 25, online: http://www.un.org/ga/search/view_doc.asp?symbol=S/2011/634 [2011 Secretary-General Report on the Rule of Law and Transitional Justice].
reform; building reparations programs; promoting peace; ending or avoiding conflict; offering a history of the conflict in pursuit of the right to truth; promoting economic development; encouraging demobilization, disarmament and reintegration of combatants into society; as well as the promotion of gender and racial equality, and so on.

This pursuit of a holistic transitional justice strategy by ad hoc UN COIs should not be continued for several reasons. First, UN COIs that attempt to address all or virtually all of the tasks associated with the standard transitional justice taxonomy tend to run into the problem that conflicting procedures are required to pursue various transitional justice tasks. Procedurally, not all tasks can necessarily be performed in tandem by the same body, even when they would otherwise superficially seem to be complementary or to be in pursuit of the same goal. And, not only can such an approach lead to procedural conflicts, making the process more cumbersome if not impossible for the COI, but pursuing such procedurally contradictory tasks runs the risk of undermining the credibility of the COI’s procedures and thus its findings. Second, the holistic transitional justice inquiry represents too unfocused a strategy for one mechanism to undertake and still provide actionable insight. The result of holistic transitional justice inquiries is often a thin investigation related to many of the transitional justice goals with the corollary being that the COI recommendations provide little actionable insight as a result of the lack of specificity and focus. Moreover, when virtually all the goals associated with transitional justice are expected to be addressed by a UN COI, the UN COI often loses sight of the broader picture or ultimate purpose of the post-conflict inquiry – that generally being to encourage peace and reconciliation. So UN COI reports can read as though the goal was to check off the standard list of transitional justice cures to conflict situations rather than using the ideas developed by the transitional justice field as a way to focus the report on the most pressing issues, given what the UN COI can reasonably accomplish. Let us examine in turn these two claims a little more closely, first through a review of the Gaza case study and then a brief review of the DRC Mapping Exercise, which as first mentioned in chapter four of this dissertation built on the Gaza COI and truly incorporated the holistic transitional justice approach.
The first claim is merely that it can be damaging to try and do more with one mechanism than that mechanism is capable of doing. According to Fuller, legality and the purpose of a legal endeavour operate in a reciprocal relationship. In the words of Robert S. Summers, Fuller thought that the processes and forms of socio-legal ordering have a certain inner integrity that needs to be studied and understood. If this integrity is not grasped – if social architects merely assume that the institutional means at hand is infinitely pliable and can be bent to just any purpose – then that means is sure to be misused. For example, when adjudication is bent to serve the ends of negotiation and mediation, misuse often results.

We saw Fuller’s concern instantiated in several instances in the Gaza case study; indeed, this concern can be seen in many if not most contemporary ad hoc UN COIs.

We saw in the Gaza example that a mere six pages of historical overview in the Gaza COI also led to a disproportionate amount of criticism that attached to the Human Rights Council, the Goldstone Report and the commissioners. The credibility of the Gaza COI was undermined by claims of bias that resulted from its attempts to do something – that being to contextualize the dispute with reference to its relevant history – that it could never hope to properly accomplish given its other transitional justice obligations and, in any event, was never the primary goal of establishing a COI. Had the Gaza COI focused on its task of fact-finding with respect to the violations that occurred during the military intervention, or promoting a lasting peace settlement, its findings and methodology would have been harder to criticize. When UN COIs are given limited time, access and resources and simultaneously required to offer historical overviews of complex situations, interrogate systems of government, military, police and justice and recommend reform, as well as investigate patterns of individual criminal and state criminal behaviour, the inevitable result is that neither the broader transitional justice narrative and recommendations nor the individual criminal findings are detailed in a particularly thorough manner.

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812 As Philip Alston has said in this regard, “those States Members of the Commission [on Human Rights] which are serious about improving the 1235-related procedures [COI procedures, it will be remembered] must acknowledge that the same mandate cannot effectively serve a diversity of undefined purposes.” Alston, A Critical Appraisal, supra note 109 at chapter 5, page 169.

Moreover, the Gaza COI set one standard of proof for all of its evidence – a “sufficient level” of credibility and reliability. But the standard of proof for historical findings, for example, is different from the criminal or even civil standard of proof, as is the type of evidence necessary to prove historical fact as opposed to individual criminal responsibility for an act. We thus saw confusion about what evidence was to be admitted in the report, which incidents were to be investigated and why, how much and what type evidence was required to support a finding of fact, etc. And as we saw, interpreting the standard of proof – what “sufficient” meant and how it was applied – was a confusing endeavour. Had the UN COI tried to mitigate the above concern by adopting different standards of proof for each of the discrete endeavours it undertook, it undoubtedly would have led to even more confusion; if one standard of proof is confusing, surely one body employing multiple standards in the same report with respect to the same conflict is more confusing. So, for example, it appears to be the case that the processes of collecting evidence in a manner consistent with criminal law standards are inapposite to those processes and standards necessary to get a proper overview of a conflict situation in order to determine, with some specificity, the necessary institutional reforms. In other words, not all of the goals of transitional justice can necessarily be adequately investigated by one body in one report.

Pursuing these multiple transitional justice purposes through one mechanism produces not only procedural problems of the type just mentioned, but also opens up that mechanism to blanket criticisms regarding its operations as a whole based on failures in only one area. The more a COI attempts to accomplish, the greater the chances of error that will, invariably, undermine the credibility of the whole enterprise. Thus, procedural or factual irregularities that occur in the pursuit of a COI’s secondary purposes can undermine all of the procedures and findings of the COI. For example, whereas the focus of a report might be first and foremost on human rights abuses, by offering a historical recapitulation of years of conflict – as was done in the Gaza COI – a COI can open itself to criticism of bias with respect to all of its findings, not just its historical findings. In general we can see from the Gaza experience that the public focus on a COI report can thus be diverted away from the primary goal(s) of the COI – say the promotion and protection of human rights – to secondary considerations, such as the Gaza COI’s engagement with the history of the broader Israeli-Palestinian conflict. In such a situation, the UN COI can be left defending its findings and
procedures associated with the historical endeavour, rather than focusing on its findings on recent human rights abuses and, one hopes, possible solutions thereto. It would be better in that case to limit transitional justice’s tendency to require an historical narrative of a conflict in favour of a more thorough focus on the primary goals of the COI.

The second concern mentioned at the outset of this section – that a holistic transitional justice approach is too unfocused a strategy to provide actionable insight – was likewise seen in the Gaza COI. We saw that the Gaza COI’s recommendations were rather non-specific and tended to mirror the standard taxonomy of transitional justice, a problem common to many contemporary UN COIs. So in the Gaza COI we were left with insufficient detail with respect to the history of the conflict, to the breach of social and economic rights, environmental rights, how specifically we might start to reform the justice and political sectors, whether individuals had in fact committed war crimes or crimes against humanity, whether the incidents chosen were numerous enough to justify a generalization in terms of systematic policies and complaints about the limited investigation of incidents, why various legal analyses of certain crimes weren’t more detailed and well-supported, and whether the evidence collected could be used in the subsequent prosecution of individuals. Most of the recommendations, though pointing to the general areas of reform, were little more than calls for more focused inquiries into each element of the transitional justice taxonomy or more detailed analyses of conduct and the law.

Taken together, we might use this review of the Gaza case study to see that what was required of the Gaza COI’s procedures can be broken down into a series of problematic binary oppositions caused by an attempt to make UN COIs a catch-all of transitional justice solutions. On the one hand, the COI process wants to claim the legitimacy, reliability and credibility that a domestic COI generally evinces as a result of its processes and foundational principles of legality. To put it in the words of the Goldstone Report, investigations must observe “the universal principles of independence, effectiveness, promptness and impartially (sic).” On the other hand,

814 Goldstone Report, supra note 6 at 390, para 1814: “[t]hese principles have been developed in the jurisprudence of international courts of human rights and are agreed upon by the States represented within the relevant UN bodies.” The Report then sites two non-binding “sources” of these universal principles in fn. 1158: Principles on
transitional justice COIs have a lot of different tasks to complete requiring different areas of expertise, different types of evidence, and often different fact-finding timelines – for example, a detailed factual inquiry and subsequent legal analysis of purported criminal conduct of even one individual generally takes many years at international courts and tribunals. Yet transitional justice COIs are asked to do all of this in a rather short period of time – usually the timeframe that corresponds with the most pressing need for information, generally that imposed by the need for information on criminal wrongdoing, sets the timing for the whole report, while at the same time demands the greatest amount of time to investigate. As a result, despite the requirements of “independence” and “impartiality”, the COI also wishes to remain “non-judicial” to use Goldstone’s phrase in order to avoid many of the tricky and time-consuming legal and procedural processes and principles required by legality, such as dealing with the dismissal of commissioner for the perception of bias and finding a suitable replacement. Contemporary ad hoc UN COIs also wish to hold public hearings and to tell individual stories and contextualize history in full sections of their reports, much like a truth commission report might attempt to do, but also to concentrate first and foremost on individual accountability and wrongdoing that took place during the war, just as the Gaza COI did. COIs occasionally consider economic and social rights and democratic freedoms – providing citizens with the right to the “truth” as discussed in chapter three – but simultaneously privilege international humanitarian and criminal law over these rights so that they might promote accountability.\textsuperscript{815}

\textsuperscript{815} Such COIs wish to interact (cooperate) with the parties to the conflict, but at the same time only do so when cooperation is on their terms. For example, when the Human Rights Council initially established the Gaza COI, it did not demonstrate an intention to cooperate with those implicated parties – Israel and Hamas – in the creation of the mandate, which admittedly may have been politically impossible; and neither did it seek outside input regarding the type of mechanism that might best respond to the goals of the international community, the interests of the parties to the conflict, and its victims. Rather, the Human Rights Council seemed to want cooperation, but cooperation was viewed as necessary only or at least primarily to ensure the fulfillment of the mandate of the COI as established with minimal outside cooperation or participation. For example, cooperating was seen as necessary to ensure that the COI was given territorial access and access to evidence and witness testimony, but not necessary where the COI had something to give and not receive, for example with respect to the choice of mechanism, COI or otherwise, that would be established to investigate the conflict. Nor, at least initially, did the Human Rights Council seek external input with respect to determining the purposes for which the COI would operate; as we saw,
The 2010 DRC Mapping Exercise inquiry provides a further example of problems associated with these competing requirements, and particularly of the two concerns about holistic transitional justice COIs noted at the outset of this section. Though any number of other contemporary UN COIs could also be chosen to make the same points, the Mapping Exercise in particular is worth briefly considering because it is a recent, thorough, highly professional report, yet nevertheless remains a particularly stark example of the problems associated with holistic transitional justice inquiries. It serves to demonstrate that the Gaza COI was not unique in terms of the problems associated with UN COIs pursuing such robust transitional justice inquiries.

The Mapping Exercise was first conceived of in 2006 by the UN Secretary-General, when, in his 21st report to the Security Council, in response to the long-standing conflict – one might say a civil war – in the DRC, he “indicated his intention to dispatch a human rights team to [the] DRC to conduct a mapping exercise of serious violations committed between 1993 and 2003.” The suspected and previously documented abuses basically run the gamut of human rights and international humanitarian/criminal law violations, from widespread sexual violence, to the use of child soldiers. It should be noted that the inquiry took place after literally hundreds of NGO and UN reports had covered the ongoing conflict in the DRC, as had previous expert panels and UN inquiries only a short time before; the ICC is investigating the conflict and has in fact issued indictments and a recent conviction, and the International Court of Justice had also heard a case on the conflict.

Goldstone eventually negotiated more neutral terms of reference, but there is no evidence to suggest that he looked outside of the Human Rights Council for input.

817 See DRC Mapping Exercise, supra note 7 at Annex III, Terms of Reference, 542.
Exercise was thus seen as a – or perhaps as another – umbrella investigation intended to map out the human rights terrain that existed in the country at the time.821

In its final report, the DRC Mapping Exercise took three pages merely to define the term “transitional justice”, thus unintentionally shedding light on the compendious scale of the task associated with the holistic transitional justice type of inquiry. Quoting the UN Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies,822 it stated that transitional justice encompassed “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”823 According to the Mapping Exercise report, such efforts aim both to “combat impunity” and “to promote the dynamics for reform and reconciliation within societies recovering from armed conflicts or a period marked by large-scale abuses.”824

From this starting point, the Mapping Exercise then attempted to accomplish all of these transitional justice tasks while simultaneously holding firm to the assertion that it was somehow also merely a precursor to the actual implementation of all of these transitional justice goals through future transitional justice initiatives:

821 Included were not just past abuses and their causes and consequences. The Mapping Exercise’s Terms of Reference stated that, “MONUC’s current human rights mandate provides the umbrella for the mapping exercise” and, as a result, the Mapping Exercise was carried out under the human rights mandate of MONUC. See DRC Mapping Exercise, supra note 7 at Annex III, Terms of Reference, 542. Specifically, the mandate was to, “conduct a mapping exercise of 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.” Ibid. Relative to other UN COIs, the mandate was fairly specific as to what the Mapping Exercise was to achieve by conducting its inquiry: “[t]he Mapping Team will assess the existing capacities within the national justice system to deal with such human rights violations that may be uncovered…Taking into account on-going efforts by the DRC authorities, as well as the international community’s support, the Mapping Team shall formulate a series of options aimed at assisting the government of the DRC in identifying appropriate transitional justice mechanisms to deal with the legacy of these violations, in terms of truth, justice, reparation and reform.”


823 DRC Mapping Exercise, supra note 7 at 447, para 989, citing ibid, para 8.

824 DRC Mapping Exercise, ibid at 447, para 991. Again quoting a Report by the UN Secretary-General on transitional justice and the rule of law, the Mapping Exercise Report finds that transitional justice mechanisms are “both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.” See DRC Mapping Exercise, ibid at 448, para 994, citing 2004 Secretary-General Report on the Rule of Law and Transitional Justice, supra note 822 at para 8.
[the Mapping Exercise] functions perfectly as a preliminary step prior to the formulation of transitional justice mechanisms, whether they be judicial or not, to enable the identification of challenges, the assessment of needs and better targeting of interventions. It can also be found in international and hybrid jurisdictions, where it is used to better...devise global investigation and prosecution strategies.\footnote{DRC Mapping Exercise, \textit{ibid} at 36, para 94. The report goes on to say that: “[o]ne of the major premises is that \textit{mapping remains a preliminary exercise that does not seek to gather evidence that would be admissible in court, but rather to ‘provide the basis for the formulation of initial hypotheses of investigation by giving a sense of the evidence.’}” \textit{[Emphasis added.]} \textit{Ibid} at 36, para 95. Elsewhere, the report stated that its aims were, “to assist the Congolese authorities and civil society in defining and implementing a strategy that will enable the many victims to obtain justice and thereby fight the widespread impunity. This should also enable the mobilisation of other international resources to address the principle challenges faced by the DRC with regard to justice and reconciliation.” \textit{Ibid} at 35, para 91.}

In other words, the Mapping Exercise was both a transitional justice inquiry and a precursor to a series of more focused transitional justice inquiries because it could never hope to accomplish all of the relevant transitional justice tasks. The familiar result was that the Mapping Exercise report tends to offer general recommendations in lieu of specifics. For example, the report recommends a series of more focused inquiries, and that prosecutions, reparations, truth-seeking, institutional reform, and vetting be undertaken – just as the Gaza COI did. But just as with the Gaza COI, one could have predicted ahead of time the general types of reforms that were recommended simply by perusing the standard taxonomy of transitional justice.\footnote{For further discussion of this point related to the DRC Mapping Exercise, see Michael Nesbitt, “(Re-) Mapping the Congo, Circa 2010” (2010) 4:2 Rights Review 3.} If the standard list of “transitional justice” tools is so consistently relevant, there is little value-added by including in the recommendations sections of UN COI reports that there is a need for the implementation of such tools.

Moreover, given that COIs are supposed to be consultative and contextual it is remarkable that the recommendations are all general in nature and look almost identical across nearly all inquiries over the past fifteen years or so. The field of transitional justice has already offered a framework solution for countries transitioning to peace in terms of problem definition and solutions across geography and between cultures, but at a general level the transitional justice taxonomy – the solution – needs to be contextualized, first through inquiry. For a COI to add to the knowledge base that already exists it is clearly insufficient merely to repeat the prevailing wisdom even if it does so with a little additional detail. Rather, there is a need for greater consultation, improved specificity, and increased focus in the COI reports such that they go well...
beyond what can already be found in the general transitional justice literature. One might add the need for some thinking outside the now-traditional transitional justice taxonomy.  

In the end, in trying to do all things transitional justice, the Mapping Exercise, arguably like the Gaza COI, did none of it with the specificity necessary to advance significantly any one of the aforementioned transitional justice tasks. Instead, the Mapping Exercise’s report acted as a policy document, which “mapped” the landscape and provided the specific areas where future efforts should be focused. But again, we knew before the Mapping Exercise was established where the transitional justice focus lay, and the conclusions once again merely reiterated the need for prosecutions, reparations, reform, etc. Certainly there were some benefits to the whole enterprise and certainly some insights, the least of which was to consolidate a burdensome amount of information from previous inquiries into one document – three years, a host of well-trained experts, a wonderful commissioner, high expectations, and millions of dollars were bound to bring something to the table. But such benefits – which included bringing to light new information in addition to collating disparate studies and data – were marginal and relatively diffuse given the time, money and expertise devoted to the Mapping Exercise. Perhaps even more clearly than the Gaza COI, even a brief review of the Mapping Exercise reveals that a holistic transitional justice solution adopted by a UN COI is too unfocused an undertaking.

Further, like the Gaza COI, the Mapping Exercise faltered when trying to serve two competing conceptions of justice, one very much a post-conflict conception of reconciliation and reconstruction, the other an intra-conflict interventionist conception. The Mapping Exercise spent so much time investigating accountability and making the case for widespread wrongdoing that everyone already knew had taken place – because of previous UN, NGO and media reports – that it was unable to investigate with sufficient detail how or perhaps whether it was possible to transition when the conflict was ongoing. As we saw in the Gaza case study, when these two competing conceptions of the purpose of UN COIs – one post-conflict, the other intra-conflict – are

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brought together under the auspices of one limited institution, conflicting demands are placed on the COI in terms of due process, admissibility of evidence, standards of proof, the appropriate procedures to follow, what sort of information should be collected, what the ultimate focus should be, whether information is needed immediately to stop the conflict or over time to ensure the stable transition to peace, etc.

The result is that UN COIs are not capable of fulfilling the overambitious, holistic mandates that they are so often burdened with today; they cannot be about everything transitional justice is about and simultaneously provide the contextual insight necessary for specific reform and follow-up. Going forward, some tough choices in terms of narrowing their purposes and goals would seem to have to be made.

With this in mind, let us now turn to the problems of pursuing criminal-oriented inquiries.

6.4.2 Second: The problems with the “non-criminal” criminal investigations

We saw in the Yugoslav, Darfur, Gaza, and other COIs – and it has remained the case in the wake of the UN COIs established in Libya, Syria, and elsewhere in reaction to the ‘Arab Spring’ – that these UN COIs all focus first and foremost on the most serious international crimes; they all recommend ICC or other criminal action; and occasionally, as in Darfur and the 2011 Syria inquiry, they collect names of possible perpetrators to hand over to the Security Council and/or the ICC. As noted by the UN Secretary-General's Report on The Promotion and Protection of Human Rights: Impunity,

[it has been widely recognized that the commissions of inquiry and fact-finding missions can play an important role in combating impunity. As demonstrated in this report, recent international commissions of inquiry have been established with comprehensive mandates, including specific requests for complex legal determinations and identification of perpetrators.]

[Emphasis added.]

828 “The UN has list of top Syrian leaders for crimes probe”, Associated Press (23 February 2012).
829 See Secretary-General Report on Impunity, supra note 386. See also 2011 Secretary-General Report on the Rule of Law and Transitional Justice, supra note 811. At para 25, the Secretary-General asserts: “Commissions of inquiry are increasingly viewed as effective tools to draw out facts necessary for wider accountability efforts...These inquiries have encouraged national authorities to take action and are laying the groundwork for prosecutions. In addition, the Council has relied on commissions of inquiry to refer cases to the International Criminal Court, as in Darfur. Commissions of inquiry have also made a range of broader recommendations for non-judicial measures, including truth-seeking, reparations and institutional reform....” In other words, it is again evident that the COIs are first and foremost about ensuring accountability through prosecutions, potentially by
There clearly exists the perception that UN COIs’ reports do not just make complex legal determinations about individual criminality, but are also intended to help guide courts in making complex legal determinations.\(^{830}\)

Keeping the Gaza COI case study in mind, let us consider the purpose of the 2009 Guinea UN Human Rights Council’s COI in order to illustrate the potential problems with UN COIs undertaking legal-criminal evaluations of conflicts.\(^{831}\) Following a \textit{coup d’état} in December 2008, a military junta took power in Guinea. Though an election was scheduled for January 2010, in the summer of 2009 there were indications that junta leader Captain Moussa Dadis Camara would break his pledge not to run for office. A peaceful protest was called in response to fears of this broken pledge and was held 28 September 2009 in a large stadium in Conakry, Guinea. By way of response to the protest, an official crackdown at the stadium saw at least 156 persons killed or “disappeared”, numerous injuries, widespread sexual violence, and the arrest and torture of various individuals.\(^{832}\) The Guinean COI was set-up by the UN Secretary-General in order to, in the words of its terms of reference:

\begin{quote}
investigate the facts and circumstances of the events of 28 September 2009 and related events in their immediate aftermath. To that end, the Commission shall (a) establish the facts; (b) qualify the crimes; (c) determine responsibilities and, where possible, identify those responsible; and (d) make recommendations, including, in particular, on accountability measures.\(^{833}\)
\end{quote}

First, this is precisely what such UN COIs should not be doing because it confuses the audience as to what the UN COI will be able credibly to claim. The Guinean COI was

\(^{830}\) Once again, consider here the DRC Mapping Exercise’s purpose: \textit{DRC Mapping Exercise, supra} note 7 at 36, para 94. The report goes on to say that: “[o]ne of the major premises is that mapping remains a preliminary exercise that does not seek to gather evidence that would be admissible in court, but rather to ‘provide the basis for the formulation of initial hypotheses of investigation by giving a sense of the evidence.’” [Emphasis added.] \textit{Ibid} at 36, para 95. generally the Report of the United Nations Secretary General to the UN General Assembly, \textit{Delivering Justice}, UNGAOR, UN Doc A/66/749 (16 March 2012), at para 40, online: http://www.unrol.org/files/SGreport%20eng%20A_66_749.pdf: “In addition to the primary role of national authorities to punish those responsible for international crimes and other gross violations of human rights, international and hybrid criminal tribunals have played an important role in closing the accountability gap. Commissions of inquiry and fact-finding missions have also been increasingly viewed as effective tools to draw out facts necessary for wider accountability and transitional justice efforts.”

\(^{831}\) \textit{Guinea COI, supra} note 7.

\(^{832}\) For a brief overview see \textit{ibid} at Annex, page 2.

\(^{833}\) \textit{Ibid} at 6, para 5.
asked to “qualify the crimes” that might have taken place during the post-election violence on 28 September 2009 as though it were a court (something that will be discussed in further detail, below). Yet the COI also claims not to be judicial – just as the Gaza COI did, a trend that has existed since the inception of UN COIs. However, it will be difficult if not impossible to explain how this is not a criminal process when the COI is asked specifically to investigate and qualify crimes with reference to criminal law tests, including the legal elements of the crimes. By “qualify the crimes” with reference to criminal law tests, I mean that possible abuses are legally analyzed with specific reference to criminal law standards and, in the end, qualified as specific international crimes (say the crime against humanity of extermination) based on this criminal or humanitarian law analysis. Thus, just as we saw in the Goldstone Report we get paragraphs such as the following, which offer contradictory signals:

> the final determination of individual criminal responsibility lies exclusively with a court of law. However, the Commission is obliged by its mandate to establish responsibility and to identify, where it can, the perpetrators of the crimes committed. In this section, the Commission assesses the individual criminal responsibility of the presumed perpetrators listed in chapter II (paras. 53 to 168 above). The information in this report could guide any possible future criminal investigation of the presumed perpetrators of the human rights violations which took place at the stadium on 28 September 2009 and the days that followed.  

On the one hand, clearly the Guinea COI is investigating crimes and making findings of individual responsibility – findings which can only obtain where criminal responsibility obtains – and then going a step further by listing the “presumed perpetrators.” On the other hand, the COI is not a court of law, which the COI says has exclusive jurisdiction to make findings of criminal responsibility. Here we find a contradiction in how contemporary UN COIs, including the Gaza, Darfur, Yugoslav, and Guinea COIs as well as the DRC Mapping Exercise, have come to be practiced: such COIs are asked to look into whether war crimes and/or crimes against humanity have been committed without ever being able to make criminal findings. This is particularly

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834 Ibid at 47, para 212.
835 The DRC Mapping Exercise, immediately after stating that it was “not to establish or try to establish individual criminal responsibility of given actors” and that “it would have been imprudent, and unjust, to seek to ascribe personal criminal responsibility to any given individual, which is first and foremost a matter for legal proceedings based on the appropriate level of evidence”, nevertheless stated that, “information on the identity of the alleged perpetrators of some of the crimes listed does not appear in this report but is held in the confidential project database submitted to the UN High Commissioner for Human Rights. However, the identities of alleged perpetrators under warrant of arrest and those already sentenced for crimes listed in the report have been disclosed....” DRC Mapping Exercise, supra note 7 at 5, para 8; see also 40, para 104.
important because many serious international criminal wrongs tend to contemplate the *mens rea* of intent, or something close thereto, which cannot be determined without a trial; and, not incidentally, elements of crimes such as *mens rea* generally cannot be determined, or often even guessed at, without better access to information than COIs tend to have. As a result, there is confusion both about what the COI does – it is both qualifying crimes and identifying perpetrators while simultaneously acting as a non-criminal prelude to a court performing these very same criminal tasks – and how legally determinative its findings are.

The next problem seen in the Guinean COI’s terms of reference is also a common one for UN COIs: because the Guinea COI’s terms of reference were focused on the investigation and qualification of crimes, so too was the majority of the fact-finding and ultimately the final report.\(^{836}\) This meant that little research was available with respect to the underlying or contributing causes of the conflict, possible paths to resolution, or reform recommendations. As a result, as with the Gaza COI and DRC Mapping Exercise, we got the same now-standardized list of broad transitional justice recommendations, with little detail or specificity as to how these recommendations applied or could be achieved in the context of Guinea. Specifically, once again the recommendations were: that the UN Security Council should “remain seized” of the situation; that the national and international community should look into how to reform the army and judiciary; that a truth seeking exercise be initiated to “shed light” on Guinea’s “painful past”\(^{837}\), that the ICC should consider investigating; that reparations should be paid; and that named individuals should be targeted for sanctions.\(^{838}\)

It is unlikely that this problem can easily be resolved, for it is structural to the UN COI process when given such a purpose. UN COIs focused on individual accountability operate during or immediately after a conflict with, in part, the goal of providing updated

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\(^{836}\) The major finding of the Guinea COI’s report was as follows: “The Commission concludes that Guinea violated several provisions of the international human rights conventions ratified by it. The Commission believes that it is reasonable to conclude that the crimes perpetrated on 28 September 2009 and in the immediate aftermath can be described as crimes against humanity. These crimes are part of a widespread and systematic attack launched by the Presidential Guard, the police responsible for combating drug trafficking and organized crime and the militia, among others, against the civilian population. The Commission also concludes that there are sufficient grounds for assuming criminal responsibility on the part of certain persons named in the report, either directly or as a military commander or supervisor.” See *Guinea COI, supra* note 7 at Executive Summary, page 3; 41, para 180; 44-5, paras 198-200.

\(^{837}\) See *ibid* at Executive Summary, page 3.

\(^{838}\) *Ibid* at Executive Summary, page 3; pages 55-59, paras 254-71.
information to the international community upon which decisions can be made. And this information is demanded in short order. But most transitional justice reforms – systemic, *post-conflict reforms* – take a great deal of time to investigate if they are to be of value to future reform initiatives. Moreover, an investigation of individual criminal wrongdoing is a very different task than a structural investigation. Even if timing were not an issue, there would be issues of procedure, standard of proof, probably a different group of experts would be needed for the criminal law portion of the investigation and the systemic investigation, and so on.

In the result, the Guinea Report offers two forms of findings or recommendations. First, it offers a series of recommendations which we already knew applied, which as discussed form the standard taxonomy of transitional justice, which go into virtually no detail about how they should be applied in the context of Guinea, and which offer little justificatory analysis regarding why these general recommendations apply equally in Guinea as they have in cases in the past. Second, the COI offers a series of criminal findings that are not in fact criminal. Instead, the findings of individual criminal responsibility are merely a guide for future criminal investigators. This brings us back to a complaint we saw with respect to the Gaza and Darfur COIs: if what was wanted and needed was a criminal investigation, then why take the time and risk losing or contaminating the evidence by establishing a costly UN COI that cannot make criminal findings? On the contrary, if what was required was a systemic review of the causes of conflict and possible solutions thereto, considering that UN COIs cannot make criminal findings, why focus on criminal wrongdoing to the exclusion of other factors?

Moreover, in the Guinea context – as was the case in the Gaza COI or Darfur context – there is no evidence to suggest that the type of criminal information collected was what a court might need, that the evidence was collected in such a way so as to be admissible before a court, or that the findings would be of great benefit to a court. In other words, beyond a mere assertion that UN COI reports are useable by courts, there is still little research available to suggest that the information collected by UN COIs is of a legally satisfactory standard so as to in fact be usable by courts or even by
prosecutors in their follow-up investigations.\textsuperscript{839} This is not to say that courts do not use such information – they have in the past – only that it is unclear that UN COIs collect evidence in such a way that courts \textit{should} admit it. Indeed, at least some of the evidence relied upon by the Gaza COI to support its findings of fact, including certain types of hearsay evidence and third-party documents, would surely not be admissible in fair criminal proceedings. Likewise, witness testimony before COIs does not always come with the requisite explanations about how the information might be used, witnesses or accused are not necessarily given the right to respond in full, proper witness protection is not necessarily fully afforded, etc.

Further, such UN COI reports would seem to have had a fairly small impact on subsequent reform initiatives or prosecutions. Indeed, one sees few examples of UN COIs leading to or even influencing the beginnings of specific, structural, internal reforms in the nations investigated. For example, while the Darfur COI is generally seen as a great success, no major alleged perpetrator stands before the ICC for prosecution, and two years after the Darfur COI the Human Rights Council appointed a “High-Level Mission” to investigate the human rights situation, and it found that the Government of Sudan had “manifestly failed to protect the population of Darfur from large-scale international crimes” and that little progress had been made since the COI.\textsuperscript{840}

Following the release of the Guinea COI report, just like in the follow-up to the Gaza COI and the DRC Mapping Exercise, there has been little critical discussion of how it is enlightening or valuable for courts in particular – rather than for human rights practitioners or for the UN Security Council – to have a COI investigate government abuses we all knew took place and find that the government, and in particular the government’s civilian and military leaders, was possibly responsible for the abuses.\textsuperscript{841}

\textsuperscript{839} For an assertion that the evidence is not in fact usable in this manner, see Halink, \textit{supra} note 8.


\textsuperscript{841} Other fact-finders could also offer the service in lieu of COIs: see for example Human Rights Watch, “Bloody Monday: The September 28th Massacre and Rapes by Security Forces in Guinea” (2009), online http://www.hrw.org/sites/default/files/reports/guinea1209web_0.pdf [Human Rights Watch, “Bloody Monday”]. Still, this does not mean that the Guinea COI did not or could not serve a purpose: it shed more detailed light on the abuses, bringing them out into the open and to international attention, and giving, to some extent, the right to truth to those victimized by the government.
In today’s globalized world, access to modern technology including government and even private satellite imaging of conflict zones, the internet, twitter, digital photography and media, camera-phones, etc., coupled with freedom of movement of individuals, activists, and various specialized UN and NGO human rights monitoring bodies, mean that with or without a UN COI the international community is generally aware when killings and abuses are taking place. What we tend not to know is how to stop the killings or how to prevent future episodes. We also tend not to know whether these killings amount to crimes and this last point is why, in part, we seem to have UN COIs – although Human Rights Watch, for example, has recently been excellent in shedding light on these discussions. In any event, just because we do not know whether or perhaps what crimes are being committed during a conflict does not mean that UN COIs should be tasked with clarifying the situation. For as we have seen UN COIs by their own admission cannot credibly and reliably make findings of criminal guilt, or make findings that criminal wrongs have taken place. And the first thing that UN COIs should strive to achieve – their primary benefit – is the production of a report that credibly and reliably makes findings of fact that are not likely otherwise available.

But let us take this argument one step further. It is not just that UN COIs should not make findings based on criminal tests because: it is confusing; it is extremely resource and time intensive and requires a very specific type of information and thus detracts significantly from the investigation of other aspects of a conflict or its causes; and because there is no evidence of its legal or factual benefit to courts. It is also that the process of “qualifying crimes” based on criminal tests is contrary to law.

Remembering that UN COIs are legal bodies, it is clear that they are bound by legal norms of due process. For example, the UN has repeatedly affirmed the obligation of its bodies and staff to abide by international human rights norms – and

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842 NGOs and others – even the actor George Clooney – are now using private satellites to capture images of conflict and human rights abuses and track events as they unfold. For the organization Clooney co-founded, see Satellite Sentinel Project (the world is watching because you are watching), online: http://www.satsentinel.org/. Likewise, Amnesty International is able to rent satellite time in order to monitor conflict situations: see Press Release of AAAS Geospatial Technologies and Human Rights Project (October, 2008), online: http://www.aaas.org/news/releases/2008/1009geospatial_georgia.shtml. For an example of analysis based on the use of satellite technology, see Human Rights Watch, “Syria: New Satellite Images Show Homs Shelling” (2 March 2012), online: http://www.hrw.org/news/2012/03/02/syria-new-satellite-images-show-homs-shelling.

843 See for example UN General Assembly, The rule of law at the national and international levels, Draft Resolution A/67/L.1 (19 September 2012), stating at para 2: “We recognize that the rule of law applies to all States
indeed it would make little sense for human rights monitors to be able legally to eschew the norms they were enforcing. But even without the UN’s affirmation, Fuller’s conception of law would likewise require the UN to abide by its own treaty norms and at least those customary norms that resulted from its treaties or, for example, the UN Declaration on Human Rights. As canvassed in chapter one, Fuller’s understanding of law is “reciprocal” in nature: “the existence of a relatively stable reciprocity of expectations between lawgiver and subject is part of the very idea of a functioning legal order.”\(^\text{844}\) By this Fuller meant at least that law was not a vertical, one-way projection of authority from the governing to the governed. Rather, law is seen as operating in a horizontal, reciprocal relationship as between the governed and the governing, and also within these groups. Law applies horizontally to all; it is not merely vertically imposed by some on others. This idea of reciprocity is found most saliently in Fuller’s idea of “congruence” between declared rule and official action; that is, the law should be administered as it is declared.\(^\text{845}\) In Fuller’s words, “[s]urely the very essence of the Rule of Law is that in acting upon the citizen…a government will faithfully apply rules previously declared as those to be followed by the citizen \textit{and} as being determinative of his rights and duties. If the Rule of Law does not mean this, it means nothing.”\(^\text{846}\) [Emphasis added.]

In the international law arena, we do not have the “governing” category that we typically think of domestically – \textit{i.e.} we obviously do not have a world government. But this does not mean that we do not have the rule of law in the international arena.\(^\text{847}\) Internationally, the idea that law is not a one-way projection of authority means that, equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.” See also: “The Secretary-General fully accepts that relevant international law, notably international human rights, humanitarian and refugee law, is binding on the activities of the United Nations Secretariat, and is committed to complying with the corresponding obligations…” Report of the United Nations Secretary General to the UN General Assembly, \textit{Delivering Justice}, UN Doc A/66/749 (16 March 2012), at para 11(c), online: http://www.unrol.org/files/SGreport%20eng%20A_66_749.pdf.

\(^{844}\) Fuller, \textit{The Morality of Law}, supra note 25 at 209.
\(^{845}\) For a discussion, see \textit{ibid} at 208-10.
\(^{846}\) \textit{Ibid} at 209-10.
\(^{847}\) For a discussion, see Brunnée and Toope, \textit{supra} note 21, especially at 352.
government or not, those responsible for establishing or operating legal bodies – those who establish or operate UN COIs for example – have legal obligations and are not just obligation-givers in the same way that courts are bound by law and do not just give decisions. All actors in a legal system, in other words, have an obligation to uphold a fidelity to the law even if it is the international system and not a system based on a Westminster-style government.

So in concrete terms the UN Human Rights Council cannot expect that individuals will abide by the terms of the ICCPR – particularly given its importance as one of the documents in the “International Bill of Rights” – without itself abiding by the due process or fair trial requirements of the ICCPR treaty found in Article 14 that apply in general to law-givers. It would be a mockery of the UN legal system if its own legal bodies were not bound by its own human rights treaties and the various customary duties that UN bodies so often enforce or oversee. Going back to Fuller, the Rule of Law would mean “nothing” if those with the authority to monitor or enforce the law were not themselves responsible both for obeying those same laws as well as those other laws – such as due process rights – “determinative of [an individual’s] rights and duties.”

Moreover, the desiderata of congruence is said by Fuller not merely to be ‘formal’ but also substantive in that it is consistent with certain norms of due process. Thus, even without applying directly international human rights treaty or customary norms of due process, legality itself is sufficiently substantive so as to incorporate the very type of due process norms that would prevent UN COIs from qualifying crimes based on legal tests. For example, without the right to a fair hearing – criminal or not – or to basic due process, an individual will not be accorded due respect, a concept inherent in a Fullerian conception of legality. This is to say that Fuller’s internal morality

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848 Fuller, *The Morality of Law*, supra note 25 at 81. This, I believe, is one reason why it is preferable to analyze UN COIs through the lens of legality as opposed to merely relying on non-binding guidelines and treaty obligations, for example by enumerating the Article 14 protections as binding rules for UN COIs. This general assertion will be discussed in greater detail in the following chapter. For now, it is sufficient to say that legality allows for robust considerations of the plethora of legal documents that already exist; there is no need to consummate a new document and hope that it is binding.

849 TRS Allan has argued that a Fullerian conception of the rule of law makes fair trial rights inherent to the rule of law: “The right to a fair trial or, more accurately, the right not to be subjected to an unfair trial, is a fundamental common law entitlement based on the constitutional principles of equality and due process.” TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2005) at 271.

850 See *ibid* at 271.
compels compliance with at least certain basic human rights norms, most obviously due process of law.\footnote{851}{See Fuller, The Morality of Law, supra note 25 at 81, stating that we “may count [among the necessities of congruence] most of the elements of ‘procedural due process,’ such as the right to representation by counsel and the right to cross-examining adverse witnesses”.}\footnote{852}{Allan, supra note 852 at 121. See also Fuller, ibid.}\footnote{853}{Fox-Decent, supra note 24 at 577. Fox-Decent goes on to argue: “A similar argument can be made from the macro-level perspective of the rule of law considered as a unified and moral ideal, as the combined set of principles which constitute the internal morality. I argued above that the fundamental justification underpinning the rule of law is its capacity to liberate us from the untrammelled power of others by subjecting us to law, a subjection that provides security and independence to the exercise of our agency. Human rights serve the same end by supplying midrange principles which, like Fuller’s internal morality, mediate the relationship between abstract ideals of agency and dignity, on the one hand, and the many conditions under which governance through law is possible, on the other. Human rights, in other words, like the rule of law, protect us from the power of others.” \textit{Ibid.}} As TRS Allan notes in his Fullerian discussion of legality: “[t]he principles of equality and due process lie at the heart of the rule of law…based on each citizen’s [or person’s] equal dignity.”\footnote{854}{See Beckerman, supra note 562; see also Goldstone Recantation, supra note 439. It should also be noted that the choice between “judicial” and “not judicial” probably represents a false dichotomy. Indeed, the processes and procedures of COIs evince this fact: they are flexible and rarely look like a court room, nevertheless they claim independence, fairness, impartiality, and attempt to provide certain due process guarantees. For this reason Canada, for example, will often call COIs “quasi-judicial” bodies, whereby the rules of the criminal justice system do not fully apply, yet nevertheless certain legal guarantees exist. See for example See Russell J Anthony and Alastair R Lucas, \textit{A Handbook on the Conduct of Public Inquiries in Canada} (Butterworth & Co.; Toronto, 1985) at 158 [Anthony and Lucas, \textit{A Handbook on the Conduct of Public Inquiries in Canada}].}\footnote{855}{See \textit{Fuller, The Morality of Law, supra note 25 at 81, stating that we “may count [among the necessities of congruence] most of the elements of ‘procedural due process,’ such as the right to representation by counsel and the right to cross-examining adverse witnesses”}. And as Evan Fox-Decent has argued,

once we see that the best justification of the internal morality’s principles involves a commitment to a view of the person as free and self-determining, as capable of making legal claims and being held accountable in virtue of her agency, and therefore as an end worthy of respect in her own right, we have committed ourselves to exactly the precept – human dignity – that commands respect for human rights. In this sense, a commitment to the principles of [Fuller’s] internal morality entails a commitment to human dignity and human rights.\footnote{856}{See \textit{Fuller, The Morality of Law, supra note 25 at 81, stating that we “may count [among the necessities of congruence] most of the elements of ‘procedural due process,’ such as the right to representation by counsel and the right to cross-examining adverse witnesses”.}}

UN COIs are thus bound by basic international legal norms of due process. As such, it follows that they cannot make findings of wrongdoing based on criminal law tests for two reasons: first, because they cannot make findings with a sufficient degree of certitude to justify a criminal finding; and second, because they legally cannot make findings that appear to be criminal or have criminal-like implications on individuals. Let us now evaluate these two assertions.

First, UN COI cannot legally make findings on a beyond a reasonable doubt standard or a similar standard required for findings of criminal guilt. Quite simply, UN COIs are not trials, do not purport to be trials or to abide by the necessary standards of due process, or make criminal findings. As Justice Goldstone repeated, "[i]f [the Gaza COI] was a court of law, there would have been nothing proven."\footnote{857}{See \textit{Fuller, The Morality of Law, supra note 25 at 81, stating that we “may count [among the necessities of congruence] most of the elements of ‘procedural due process,’ such as the right to representation by counsel and the right to cross-examining adverse witnesses”.}} Indeed, even if Goldstone had felt otherwise UN COIs are not capable of fulfilling the legal obligations
associated with a criminal trial. For example, Article 14(1) of the ICCPR states: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” [Emphasis added.] And the UN Human Rights Committee – the monitoring body of the ICCPR – has repeatedly asserted that Article 14 and the right to a fair and impartial proceeding applies equally to criminal and non-criminal forums. This is to say that international human rights require UN COIs to meet the due process standards of “fair and public hearing” – including those associated with a trial, such as the presumption of innocence until proven guilty, the individual right to respond to charges against an individual, right to be respond or be heard, to examine witnesses, etc. – particularly when making findings based on the elements of or tests for international crimes. But UN war crimes COIs – indeed all COIs – are not set-up like trials. And actual trials of international criminals take many years or even decades, often just to hear a single case. At trial individuals are accorded the opportunity to a full and fair defence, to confront all charges and accusations and to bring forth their own witnesses. For a UN COI to implicate numerous individuals would take even longer even without focusing on any other non-criminal transitional justice

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857 See ICCPR, supra note 855 at Article 14(2).
858 To take one example, the Convention of the Rights of the Child, Article 12(2), requires that children be afforded “the opportunity to be heard in any judicial and administrative proceeding” likely to affect them. See United Nations Convention on the Rights of the Child, UNTS Vol 1577, p 3, art 12(2) (entered into force 20 November 1989) [UN CRC].
859 Cross-examinations or the right to respond is not simply a procedural nicety for the sake of the accused; it has substantive effects and benefits. Sometimes accused persons are in a better position to identify or foresee issues of witness credibility than neutral arbiters such as commissioners. Moreover, providing the opportunity for accused to address their concerns during the proceedings limits the degree to which such accused can later criticize the conduct of proceedings, which they participated in. As stated in Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Program, volume I, at para 7.79, online: www.oilforfoodinquiry.gov.au, citing fn 349 Annetts v McCann (1990) 170 CLR 596, 600-1, 609-10, 619: “[the main requirement of procedural fairness in relation to an Inquiry is that it] cannot lawfully make any finding adverse to the interests of [a person] without first giving [that person] the opportunity to make submissions against the making of such a finding.” [Australian Inquiry in UN Oil-for-Food Program.]
860 See ICCPR, supra note 855 at Article 14(3)(e).
aspects of the situation such as reform, reparations, or even various human rights abuses – and if that kind of time was available, then better to have an actual court of law conduct the trials.

Next, it might be argued that UN COIs can make such legal findings because, technically, they are making findings of “possible” breaches of international criminal law as opposed to findings of criminal guilt and thus are not bound by trial-like due process standards. But this is incorrect for two reasons. First, if a public body cannot claim criminal responsibility beyond a reasonable doubt, it should not make public claims of criminal wrongdoing based explicitly on criminal law tests. Second, when it comes to UN COI findings of international criminal wrongdoing as judged against international criminal law tests for wrongdoing, such findings will always come across as definitive rather than “possible”. As we have seen, when it comes to large scale UN COIs, the distinction between non-criminal findings of “possible” criminal guilt and criminal findings of guilt breaks down in practice.

First, international human rights rules – and the most basic notions of due process – bar not just definitive findings of criminal guilt but determinations that taint individuals with the stigma associated with criminal guilt on a standard lower than that commonly associated with criminal trials. For example, it has been argued that “the presumption of innocence as enshrined in Art 6(2) of the European Convention on Human Rights prohibits a declaration by a public official that somebody is responsible for criminal acts before the competent court has reached such a conclusion.”

861 It is not just UN inquiries that, in general, should not make findings of criminal or even civil culpability. For support in the Canadian and Australian contexts, see Stephen Donaghue, Royal Commissions and Permanent Commissions of Inquiry (Butterworths: Australia, 2001) at 164-5; “the presumption of innocence seems to require that people be free from the stigma of a public finding of criminal guilt other than a finding made by a criminal court and supported beyond reasonable doubt by admissible evidence.” In Canada, for example, COIs into individual criminal responsibility would similarly not be permitted: “Commissions may not make findings of criminal responsibility or civil liability. Provided they do not go that far, they may reach conclusions about whether the conduct of an individual was improper.” See Ratushny, supra note 47 at 27. See Re Nelles and Grange (1984), 46 OR (2d) 210 at 216 (CA): “The purpose of a public inquiry is not to attach criminal culpability. It is not a forum to put individuals on trial. The just and proper place to make and defend allegations of crime or civil liability is in a court of law.” See also Allan Manson & David Mullan, “Introduction”, in Allan Manson & David Mullan, eds, Commissions of Inquiry, Praise or Reappraise? (Toronto: Irwin Law, 2003) at 7: “In particular, one of the major tasks of many commissions of inquiry will be that of conducting their operations in a way that allows them to assess blame without trespassing into the proper domain of courts of civil and criminal jurisdiction.” [Manson and Mullan, COIS, Praise or Reappraise?]

important reputation\textsuperscript{863} of an individual is to be preserved from public indictment, at least as it concerns criminal actions, until a trial. Unless a UN COI can act as a trial and make findings on a beyond a reasonable doubt standard – which, again, it cannot – it cannot pronounce on distinctly criminal responsibility. Legality thus prohibits COIs from making not just criminal findings but also findings that appear to be criminal or have criminal-like reputational implications for individuals.

Second, even if this is incorrect and UN COIs can make findings of possible guilt on a standard lower than beyond a reasonable doubt, UN COI findings of possible criminal responsibility are so confusing that in practice they amount to findings of criminal guilt – which, again, is prohibited because the relevant institutional (due process) protections are not and cannot be in place in UN COIs to make such seemingly determinative findings. So for example we saw that even when the language of the UN COI is consistent in maintaining “possible” criminal responsibility – and we saw that the Gaza COI was definitely not consistent or clear in its language throughout the lengthy report, as one might expect – UN COI findings tend to suggest actual guilt in other ways. It is because the reports are commissioned to shed authoritative light on events that are being reported on elsewhere, because they come from the an important office of the UN (Human Rights Council or Security Council), and in particular are written by bodies (COIs) that are legally constituted, have legal obligations, and deal with legal findings, that these reports are widely treated as highly determinative findings of criminal guilt,\textsuperscript{864} particularly given that they are using criminal law tests to ground

\textsuperscript{863} As a judicial review of a famous Canadian COI stated: “It is true that the findings of a commissioner cannot result in either penal or civil consequences for a witness….Nonetheless, procedural fairness is essential for the findings of commissions may damage the reputation of a witness. For most, a good reputation is their most highly prized attribute. It follows that it is essential that procedural fairness be demonstrated in the hearings of the commission.” See Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission), [1997] 3 SCR 440 at para 55 [Canada Krever Commission].

\textsuperscript{864} Courts, for example, have adopted the findings of truth commissions and COIs as their own: see Halink, supra note 8 at 33. See generally Ricart, supra note 389, especially at 13. Likewise, national courts have begun to issue findings on the principles required of truth commissions and COIs by national law. See Scharf, supra note 7 at 386-388. See generally Rassi, supra note 8 at 215.
their findings. People tend to presume those listed or implicated individuals to be guilty after a COI finding – rather than continuing to “presume them innocent” until trial. So for example, rarely is complaint heard when UN COI findings are used to support subsequent travel bans or asset freezes on individuals, something that happens with a fair degree of regularity.

Indeed, as we have seen, the UN COI process as currently constructed will always be confusing to the international audience, as will the veracity of UN COI’s findings, because why would an expensive, politically supported COI be doing (investigating criminal wrongs) and not doing (pronouncing on criminal wrongs) precisely the same thing? Indeed, if contemporary UN war crimes COIs operate in territories where it is suspected that there are ongoing breaches of international criminal law, then by merely making findings of suspicion of criminal wrongdoing these UN COIs are not officially, according to their own rhetoric, doing anything but parroting a reasonable suspicion that already existed. What happens when the COI reports are released, I would argue, is that the assumption in the international community becomes that UN COIs must be accomplishing something in their investigations of criminal wrongdoing. As such, findings of wrongdoing measured explicitly against the standards of international criminal law will, in this context, always look like criminal law findings or something very close thereto, which again is necessarily a judicial finding. Put simply, if the purported criminal wrong is defined by the criminal definition of that wrong, then a finding by a large scale ad hoc UN COI of said wrong will necessarily be confused with a criminal finding of wrongdoing. And again, UN COIs cannot make or be seen to make criminal findings of wrongdoing.

It might be argued that by not “naming names”, this obstacle is overcome. But as we saw in the Gaza case study, hiding the name of a purported criminal is not the

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865 It has been argued that UN reports often form the basis for government legal and policy opinions, often without recourse to any other sources given that the capacity to verify on the ground the veracity of the claims is limited. Halink, ibid. at 30 and fn 83.
866 The Universal Declaration on Human Rights, GA Res 217(iii), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 at Article 12, offers: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.” See also ICCPR, supra note 855 at Article 17; UN CRC, supra note 858 at Article 16.
867 Indeed, some COIs have by necessity taken explicitly legal and quasi-legal decisions (Franck, supra note 18 at 308). At the very least, they now deal with criminal law tests, that is, they support their findings with specific reference to whether or not actions meet the elements of various international crimes (mens rea, actus reus, etc.).
same as hiding his or her identity. And even when names are hidden, generally they are turned over to other bodies like the Security Council, which is responsible for things like asset freezes, or to the ICC, where the names might become public – as happened with some of the names in the case of Darfur. And again, the names are not merely passed on to the ICC for consideration; they are passed on in the context where a UN COI has already pronounced on responsibility for crimes against humanity.

Finally, one of the critiques of the Gaza COI that was canvassed in chapter five was the failure of the COI to articulate fully and clearly both how various incidents investigated were chosen or not chosen and the COI’s interpretation of the applicable law, as well as its failure to offer comprehensive legal reasoning in support of all of its findings. In chapter five it was also noted that the Gaza COI sometimes failed to connect precise and fully articulated legal findings to the relevant findings of fact associated with those legal findings. Since the Goldstone Report, this has become the one area where UN COIs are occasionally criticized by academic commentators: they note that the COI was not even-handed in its application of the law to the relevant parties,\(^869\) that it got the law wrong, or performed a perfunctory legal analysis with respect to one or more of the relevant crimes.\(^870\) However, to date such scholarly criticisms tend to treat the legal failure as a moderate set-back – a consideration for future UN COIs to improve upon – that does not in the end discredit the partiality of the UN COI\(^871\) or speak to the potential of the system of UN COIs to properly perform the task.

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\(^{868}\) This is only common sense and forms a regular presumption in most legal systems. For example, when protecting the identity of “confidential informants” in Canadian law, it is insufficient to simply remove the person’s name when evidence is disclosed; for the individual’s protection, other evidence that would tend to identify the witness would also be vetted out.

\(^{869}\) See Kevin Jon Heller, “The International Commission of Inquiry on Libya: A Critical Analysis”, SSRN, http://ssrn.com/abstract=2123782 at 36: “Unfortunately, that admirable even-handedness did not extend to one aspect of the Commission’s work: its identification of individuals potentially responsible for war crimes and crimes against humanity. The final report identifies 80 individuals associated with the Qadhafi government by number, yet does not identify even one member of the thuwar.” [Emphasis in original.]

\(^{870}\) \textit{Ibid} at 35 “Even where the Commission applied the law accurately, however, some of its legal conclusions are problematic.”

\(^{871}\) Heller \textit{ibid} at 50 again provides an ideal example: “Despite its best efforts, then, the Commission appears to have been unable to completely cleanse itself of the stain of its politicized birth...That partiality in no way discredits the Commission’s work; its reports provide the most detailed and compelling account of the Libyan conflict to date.” [Emphasis added.]
And this is where such analyses are wrong. The failures are not the result of a series of mere oversights on the part of successive UN COIs; indeed, recently at least the commissioners tend to be very intelligent individuals with a great deal of expertise who have put a lot of thought and effort into the process. Rather, the failures are inherent to the structure of UN COIs. Simply put, UN COIs are not courts of law with the time, resources and specificity of mandate to focus on individuals and follow through until a verdict is reached years later. The mandate of UN COIs is to investigate systemic patterns of abuse – or multiple abuses across time and space committed by various individuals – as opposed to abuses committed by one person or perhaps two people as with a trial. And, as already noted, UN COIs tend to have reporting timelines measured in months rather than the numerous years allotted to the trial of war criminals. Certainly the near constant lack of territorial access hurts UN COIs as well. As a result, for UN COIs there will always be choices to make about what incidents to investigate or not, or whom to investigate or not, or how much detail to provide with respect to the various abuses committed. It will be impossible to investigate all incidents; the best that can be hoped for is some reasonably balanced decision as to what parties and types of incidents should be considered, which undoubtedly will nevertheless be contested as it always has been. But even in the ideal situation, there again is not the time and resources for UN COIs to investigate in detail the wide array of abuses committed by various people in various groups – as was discussed above – and then to provide fully reasoned legal analyses about all of the complex legal issues involved and, taking the next step, associate these findings with the COI’s specific findings of fact. Most UN COIs will fully acknowledge this reality. But this reality is to be contrasted with the fact that UN COIs are expected to provide detailed, fully-supported legal analyses, both about responsibility and about legal interpretations of

872 Indeed, as Heller explains in his paper, ibid at 21, the 2011 Libya “independent international commission of inquiry”, itself stated: “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…the findings and conclusions with respect to specific crimes and violations must be read in that light.” Heller here is citing the Libya COI, supra note 806 at para 8. It should be noted that the three commissioners for the Libya inquiry were experts on the criminal/humanitarian law side of things, and included Philippe Kirsch, the first President (chief judge) of the ICC. A judge of international criminal law, in other words, could not provide more conclusive legal findings given the time, resources, and broad mandate, though it might be said that they did not try to do so.
complex areas of the law, much of which is currently unsettled before the international courts and tribunals.

It is not then so much a failure of the Darfur COI or the Gaza COI to articulate fully or even satisfactorily the law in every complex and debated area of international criminal and humanitarian law. Rather, it is the structure of UN COIs that prevents them from satisfying reasonable expectations with regard to all of the complex factual and legal determinations of wrongdoing pertaining to broad patterns of abuses committed by many individuals. Legality demands transparency and complete, fully reasoned decisions if UN COIs are to implicate individuals’ reputations. UN COIs would seem to be structurally incapable of providing this level of analysis at least as it concerns patterns of widespread criminal, humanitarian and human rights abuses by multiple parties belonging to multiple groups.\(^{873}\)

Now, other fact-finding missions with other goals may have different requirements than those applicable to UN COIs – the analysis herein necessarily applies only to UN COIs. But the result for UN COIs remains: because by virtue of their mandates they are expected to provide conclusions and legal analyses like a court of law\(^{874}\) yet cannot meet the requirements of legality required of courts either in their processes or because they cannot fully articulate the relevant criminal law as it applies to implicated individuals, they should not attempt to make “possible” or real criminal findings based on the elements of those crimes.

In addition to these legal constraints, there is bad precedent for allowing UN COIs to enter too far into the criminal law arena. In Canada, the closer a large-scale ad hoc COI comes to a criminal investigation, the more criticism it is likely to receive from experts or the judiciary: “commissions of inquiry are not supposed to be determining civil guilt or civil responsibility or criminal guilt, they are supposed to be fact-finding investigations leading to recommendations….”\(^{875}\) Moreover, as one prominent expert has stated about the over one hundred years of experience with COIs in Canada: “ad hoc investigations seem to be most appropriate when we intuit that we have a problem

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\(^{873}\) Moreover, when crimes are not actually prosecuted, legal conclusions pertaining to crimes will always be subject to increased second-guessing even when they are well founded.

\(^{874}\) Again, even recent academic scholars are criticizing them on essentially this standard.

with a particular system; they have been less effective in investigating individual blameworthiness.”

Both the trial and COI processes generally start with the idea of a wrong having taken place, and people tend to focus on that wrong throughout the processes. But the court focuses on the wrong in order to make a legal determination of guilt based on criminal-legal standards and to punish or recommend punishment for the offending party based on its findings. Neither UN nor most domestic COIs are empowered to do that. And again the procedures are not in place either to protect fully the rights of the ‘accused’ or to allow for determinative findings of fact. As a result, Kent Roach has argued that COIs have a “distinctive ability…to hold organizations and society accountable”, as opposed to holding individuals accountable or meting out punishment as a court might do.

In Canada, as it should be at the UN, COI fact-finding is thus not to be confused with the trial process, even an informal one. That is, not just from a legal perspective but also from a practical perspective COI fact-finding should not be about collecting evidence to make legal determinations of criminal guilt and it should not be doing in practice what it cannot do in theory. Fact-finding in the context of COIs should therefore not be about using criminal tests for wrongdoing if even to make non-criminal proclamations about individual complicity in international crimes. Instead, the general lesson from Canada has been that fact-finding should refer to the process of unearthing evidence that informs us of what happened not so as to punish individuals but rather with a view to preventing its repetition. Of course it will always be a tricky task to accomplish the latter without verging on the former. In part, the intention is what matters: the focus and intent should not be to punish or investigate individuals; the focus of the investigation and the report will be on what happened and how it might be prevented in the future. Of course, there will still, depending on the mandate of the COI,

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876 Manson and Mullan, COIS, Praise or Reappraise?, supra note 861 at 483.
877 Though certainly individuals might also be called publicly to account. See generally Kent Roach, “Canadian Public Inquiries and Accountability”, in Philip C Stenning, ed, Accountability for Criminal Justice (Toronto: University of Toronto Press, 1995) at 269. I do not, however, wish to rest the case on the Canadian experience, for that is an experience contextual to Canada that may differ from the international experience. However, surely drawing on the experience of countries – and certainly the Canadian expertise is buttressed by that of other countries, such as Australia – can help to reaffirm the position that can already be drawn from the international experience.
be the possibility that individuals will be investigated or decried for wrongdoing. But here what is important is that while a COI might still make a finding of wrongdoing, this is not to be done in the criminal sense but rather by some other standard, be it moral, professional, or communal: In Canada, for example, a COI will examine individual and institutional conduct and may conclude that some conduct was inappropriate. Such a conclusion, however, has no legal consequence. Nor is it reached to embarrass or attempt to “punish” anyone. It would be made only to explain what happened and to avoid similar unfortunate consequences in the future.878

Violations of normative standards are not a concomitant of violations of criminal standards or criminal wrongs – normative standards will not make reference to “war crimes” or “crimes against humanity” or other crimes. The former are violations that UN COIs can reasonably apply, the latter are tougher or impossible to apply for such a body. In practice this means that, in Canada for example, a COI might find a wrongful death, but it cannot find whether this death resulted from first-degree murder or something lesser; to apply the label of first-degree murder implies a specific mens rea – the intent to kill – and while a gunshot wound can speak to a wrongful death, it does not necessarily follow that first-degree murder took place – the death may have resulted by accident or self-defence.

The COI then uses the idea of something having happened that the community does not approve of – perhaps a wrong having been perpetrated on a group of people, or an armed conflict between groups, or the economic collapse of a nation – not to punish an individual but to analyze how and why that wrong happened with a view to preventing its recurrence and, perhaps, helping society move forward safely and peacefully. Individual misconduct does not have to play a role in the investigation, for the investigation can be into policies and structures and not individuals. But even where the investigation touches on individual actions, there is a distinction to be made here between inquiries investigating systemic problems that touch on misconduct and those focused solely or primarily on individual criminal actions; it is time that the UN internalized this distinction.

What then would be the difference between the sort of contemporary COIs discussed to this point and a non-criminal COI? First and foremost we can say that in both cases it may well be that a violation of normative standards – say human rights

878 See Ratushny, supra note 47 at 196-7.
standards – triggers the investigation, only in a COI a criminal test for wrongdoing is not used to make findings that relate necessarily to international criminal wrongs. Moreover, as one famous judicial review of a Canadian COI articulated, there are “moral, legal, scientific, social or political” as well as “professional ethical” standards of conduct on which one can normatively evaluate the behaviour of others. In contrast, as we have seen, a UN war crimes COIs tend to go through the elements of a crime and associate the factual findings with the legal requirements. In a COI, the facts collected in regard to the breach, say of certain normative standards, should be those that help explain why an event took place, and what allowed it to take place. In contrast to a war crimes oriented COI, the goal then is not primarily related to fighting impunity and promoting accountability, to punishing or threatening to punish the wrongdoing, though again that wrongdoing might be the impetus of and/or the starting point from which to analyze measures that can be taken to avoid such future wrongdoing.

6.5 How and Why are the Current Mandates of UN COIs Justified and are these Justifications Tenable?

The explanation for why, despite these above criticisms, the terms of reference of UN COIs continue to focus in particular on legal standards and international crimes is worth exploring at this time because it demonstrates that while the intention behind the criminal law purpose for COIs is benevolent, the justification is weak. I believe that the explanation for why UN COIs have developed in such a way as to focus so heavily on accountability and individual wrongdoing in particular is that there is a current tendency to see the commission of the most serious international crimes as a threshold for humanitarian action or even intervention in its various forms – including

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879 See Canada Krever Commission, supra note 863 at paras 19 and 62.
880 Kent Roach has stated with respect to Canadian COIs that: “a public inquiry has a greater capacity [than do courts] to engage in quasi-legislative activity by openly articulating new standards of proper conduct and applying them to past events. Such departures from adjudicative standards may not seem fair to individuals who are criticized, but they may help stimulate organizational reform.” Roach, supra note 877 at 272.
881 In chapters two and three we covered how and why UN COIs came to be as they are today, and how they came to adopt such broad transitional justice mandates as well as criminal law elements. The intention here is not to duplicate this discussion, but rather to go into more detail not just about why UN COIs have a criminal law element, but why the criminal law and the fight against impunity is particularly prioritized and why it continues to be justified today.
interventionist economic policies or fact-finding missions – while the fight against such crimes has come to represent a moral or legal obligation. We saw in chapter three that accountability and the fight against impunity became catch-phrases in the 1980s and 1990s – inserted into all sorts of UN documents on fact-finding – just as interventionist fact-finding was beginning to take shape. At the same time, there was a political project to establish international criminal tribunals and eventually the ICC. Indeed, the fight against impunity more broadly can now be described as a “political project”.882

Certainly in the wake of genocides in the former Yugoslavia and Rwanda the importance of reawakening a collective humanitarian spirit to ensure that genocides “never again” took place while the world watched was understandable. So it is likewise understandable that, as UN COIs grew-up during this period and began to take on increased prominence,883 they began to be seen as a viable option for fighting impunity and contributing to accountability, as discussed in chapter three.884

The interventionist humanitarian political project – one determined to prevent genocide and other mass atrocities – was subsequently formalized in the Rome Statute for the ICC and in the Responsibility to Protect Doctrine (R2P doctrine) of the early 21st Century.885 The ICC made the assertion that war crimes, crimes against humanity and

882 Alex de Waal, “How to End Mass Atrocities”, New York Times (9 March 2012): “Once an abstract obligation, stopping genocide has become a political project. Building on the humanitarian interventionism of the 1990s, a vast anti-genocide movement…is stirring students and movie stars alike…It enjoins “us” – that is, the United States and the United Nations – to lead the response to mass atrocities.” The goal is not merely to “stop any massacres but also to herald justice and democracy.”

883 In particular, the Yugoslav COI brought COIs to prominence as a method of investigating war crimes, it will be remembered, and is now also associated with the tribunal it recommended be created: the International Criminal Tribunal for the Former Yugoslavia.

884 Documents such as the 1995 Guidelines for inquiries into allegations of massacres, discussed briefly in chapter 3, supra note 305 at para 9, state that the terms of reference for an ad hoc COI should surely include a determination as to whether a “massacre” has taken place; likewise, it asserted that UN COIs should identify those involved in the commission of those massacres. As the 2006 UN Secretary-General Report, supra note 386 at Summary, page 2, stated, “the trend is towards an increase in such [ad hoc COI] missions.”

 genocide were the “most serious” of crimes.\textsuperscript{886} The R2P doctrine drew on the Genocide convention’s assertion regarding the obligation to prevent and punish those responsible for the most serious crimes,\textsuperscript{887} but expanded the list of relevant crimes to coincide with those under the jurisdiction of the ICC, so that states had an obligation to prevent and punish “genocide, war crimes, ethnic cleansing and crimes against humanity.”\textsuperscript{888}

But the R2P doctrine can be seen not merely as a possible expansion of the Genocide convention’s obligation, but also as affirming the limitations on humanitarian intervention. So for example, in January 2009 UN Secretary-General Ban-Ki Moon issued a report entitled \textit{Implementing the responsibility to protect}, which makes the connection between R2P and existing notions of the aforementioned crimes clear, but also makes the limitation to the doctrine clear: to even threaten military intervention, what is needed is the invocation of R2P or the Genocide convention, which in turn requires evidence that genocide, war crimes, ethnic cleansing or crimes against humanity is taking place.\textsuperscript{889} As such, the primacy of those “most serious” crimes over other economic and human rights abuses became abundantly clear; and the implication was that the responsibility to protect citizens relates primarily to these serious crimes, and the responsibility to intervene exists only when violence can be legally and criminally categorized by one of said crimes. It follows that the greatest criticism that can be bestowed on a country – the one carrying the greatest moral indignation, requiring the most international attention, but also the only one carrying the threat of possible legal intervention – is to accuse a country of one of these crimes.


\textsuperscript{887} See the \textit{Convention on the Prevention and Punishment of the Crime of Genocide}, 9 December 1948, 78 UNTS 277, GA Res 260 (III) A (1948), at Article 1: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.” [Genocide Convention.]

\textsuperscript{888} See 2005 World Summit Outcome, supra note 885 at para 138.

\textsuperscript{889} If R2P or the Genocide Convention is not invoked, the default position is that sovereign equality of states as articulated in the \textit{UN Charter}, supra note 16 at Article 2(1), as well as the principle of “non-intervention in the internal affairs of states” from Article 2(7) apply. See Report by the Secretary-General, \textit{Implementing the Responsibility to Protect}, UN Doc A/63/677 (12 January 2009). See especially paras 2, 3, and 10(b). Note that we are thus left with the same conundrum as existed when the UN was in its infancy, that being a complication between the duty of non-intervention and a need to intervene – or justify UN COIs – where human rights abuses are suspected. In a way we have “progressed”, in that the Security Council is relatively more functional; at the same time, we have limited the justification for intervention and set the threshold as high as it could be while still being plausibly attainable.
In the wake of the establishment of the ICC and then the R2P document, in the past decade other new UN documents were drawing from the experiences in Darfur, Gaza and elsewhere, to influence the direction of UN COIs by solidifying the idea that UN COIs are intimately related to the responsibility to protect. Such documents were not the “guidelines” for fact-finders that were promulgated in the 1990s and early 2000s, as discussed in chapter three. Instead, these more recent UN documents of the mid-2000s drew on the humanitarian political project, which again stated that there was a moral and legal imperative to intervene where war crimes, crimes against humanity and genocide were taking place. These documents thus related more to what UN COIs can or should do — “fight impunity” — rather than how they should do it or the principles by which fact-finders should abide, which was the focus of many of the guidelines and principles of the 1990s. The cumulative result was that UN COIs should themselves pursue a “comprehensive” investigative strategy coupled with a primary focus on individual criminal accountability so as to fight impunity, ensure that the international community is not once again running afoul of its “never again” promises, and ensure that threats of intervention carry the weight of legal credibility.

890 For example, shortly after the Security Council adopted a resolution endorsing the R2P (see UNSC Res 1674, UNSCOR, UN Doc S/RES/1674 (28 April 2006), para 4, online: www.un.org/Docs/sc/unsc_resolutions06.htm), they invoked R2P in another resolution with respect to the situation in Darfur (see UNSC Res 1706, UNSCOR, UN Doc S/RES/1706 (31 August 2006), online: www.un.org/Docs/sc/unsc_resolutions06.htm). As but another example, the Secretary-General’s UN Report on Impunity noted that the Darfur COI report should be a model for the UN and its ad hoc COIs moving forward. See Secretary-General Report on Impunity, supra note 386 at para 34.

891 See 2004 Secretary-General Report on the Rule of Law and Transitional Justice, supra note 822; 2011 Secretary-General Report on the Rule of Law and Transitional Justice, supra note 811; Implementing the Responsibility to Protect, supra note 889; Secretary-General Report on Impunity, ibid. Though of course the Joinet Principles were, it will be remembered, updated in 2005: see Orentlicher Principles, supra note 11.

892 The documents often refer explicitly to the Joinet Principles — or other UN Guidelines — as forming the basis for the methodology for fact-finders designated to combat impunity, as though there was now a common practice and understanding in regard to the methodology. They then build on these principles and guidelines and rather work toward increasing awareness of the system of ad hoc UN COIs. See Secretary-General Report on Impunity, ibid at Summary, page 2. The end result is that the contemporary trend toward war crimes fact-finding that we saw in chapters two and three was largely sealed. For even those “comprehensive” transitional justice COIs are largely, first-and-foremost, about international criminal law and accountability.

893 For example, remember that the UN Secretary-General Report on Impunity, supra note 386 (especially at 19) surveyed a number of ad hoc UN COIs in order to demonstrate that, “the commissions of inquiry and fact-finding missions can play an important role in combating impunity.” [Emphasis added.] Such strategies can be seen repeated in the reports and methodologies of the UN COIs responding to the Arab spring in 2011 as well as other UN COIs from this time period. Such documents relating to the UN COI experience in the wake of the 1990s and early 2000s experience with fact-finding, transitional justice, and international criminal prosecutions, retained the focus on “truth telling” but put a premium on criminal findings as an area of priority. It has been said of the Goldstone Report that: “The Goldstone Report follows in a recent tradition of detailed fact-finding missions that investigate conflicts that have drawn global concern. In this sense the report does not single out Israel. Rather, it
We must, in other words, fact-find early on in the conflict to assuage our guilt and make sure that there is no obligation eventually to “protect” or to intervene militarily.

As a result, UN COIs now prioritize the fight against impunity. Indeed, it has gotten to the point where many UN institutions in the field of human rights are judged on their ability to combat impunity, in particular with respect to the most serious crimes. Whether or not they serve other purposes can take on a secondary role, and whether or not those tools or institutions are well suited to combating impunity is rather secondary: the more attempts to end impunity the better until we reach a critical mass – where we also confront the concerns associated with the kitchen-sink approach to fighting impunity.894

To sum up, this process of privileging those who attempt to combat impunity has tended to limit the discourse regarding what needs to be done in the wake of mass atrocities and what UN COIs might do: first and foremost, we must promote accountability, which is a legal as well as a moral obligation. International crimes became, by necessary implication, privileged over other wrongs for humanitarian reasons; and each time the threat of such crimes presents itself, naturally the thinking goes to determining, by whatever means necessary, whether such crimes are being perpetrated. We are thus left with a scenario where we need a criminal finding to justify various forms of humanitarian response, or to give the Security Council the ammunition it often requires to authorize military or economic intervention, but we cannot make criminal findings without a trial.

This process of requiring a criminal finding before criminal trials are possible has arguably introduced the mens rea – specific intent – problem we saw in the Gaza COI

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894 In a rather perverse way, the success of international courts, tribunals and COIs in the 1990s and early 2000s began to circumscribe the broader human rights goals that had started to prevail. While the international community would continue to fact-find in all sorts of domestic settings, intervention could not legally occur – and realistically would not practically occur – unless there was a finding of genocide or crimes against humanity. So now the humanitarians that had fought so hard to prevent and punish all sorts of human rights wrongs were forced to make findings of genocide or crimes against humanity if anything was to come of those findings. See Jules Lobel, “International Law and the Goldstone Report”, in Adam Horowitz, Lizzy Ratner, and Philip Weiss, eds, The Goldstone Report: The Legacy of the Landmark Investigation of the Gaza Conflict (Nation Books: New York, 2011) at 343-4.
case study. Genocide, a specific intent crime, can justify intervention, but intent cannot be known until the facts have been presented at trial. We thus need to take a non-criminal view of genocide to justify an intervention, but genocide itself is now defined by a criminal standard; there is almost bound to be confusion. As a result, UN COIs confront a factual problem: bodies such as UN COIs – the bodies that are left to make the non-criminal findings on criminal standards in order to fight impunity and justify the threat of intervention – are cursed with having to confront a contradiction inherent in their modern purpose for existence.

Because the goal is human rights-centric, it has perhaps been the case that UN COIs have escaped criticism – perhaps, an argument might go, it is better to focus on areas where human rights are abused rather than on the mechanisms such as UN COIs where rights are promoted. It is indeed hard to be wholly critical of the political agenda that has spurred this move toward focusing on international criminal wrongdoing whenever and wherever it is taking place. As we have seen, the idea is, at least in part, the result of a benevolent attempt by international norm entrepreneurs to improve international human rights compliance through the creation of a system that seeks to ensure international action or the threat thereof, at the very least, in cases of serious human rights abuses.

The problem even here is that in the international domain those individuals who are criminal law focused tend to align with those lawyers and advocates who specialize in human rights and due process. The result has tended to be that rather than having a division between prosecutors and human rights advocates, as occasionally happens domestically where the law and order agenda meets the civil rights agenda, in the international arena the positions of both groups are mutually reinforcing. Criminal prosecutions are required for a law and order agenda, but human rights advocates are not generally focusing on the rights of a single or several accused, but rather on the many abuses perpetrated against a society. I suspect that this has contributed to a situation where norms that favour prosecutions or fighting impunity are not challenged, where there is an unquestioning presumption of fit between international human rights and international criminal goals, as discussed by Darryl Robinson in the context of the
ICC. 895 Criminal-centric approaches have thus dominated the interventionist and rebuilding or rule of law discourse, but these approaches have been supported by human rights advocates, and vice versa, such that two somewhat different agendas have melded into one common practice. And within that practice there is little room for dissent. In the result, particular institutions created to deal with human rights abuses, where crimes obviously are also taking place – UN COIs being front and centre among these institutions – can exhibit the theoretical and practical consequences that tend accompany trying to do too much with a limited resource, 896 or the wrong thing – criminal investigations – for an institution not ideally suited to the task.

But in the end, by failing to hold COIs to the requirements of legality, by merely judging them by the benevolence of the intent behind them and not by their processes, we are undermining and misusing a mechanism that might be put to better use. I think what all of this teaches us is that we can be critical of the practice of UN COIs if not the intention, and in practice we must not define future UN COIs as war crimes investigations. If we wish to promote peace and stop future human rights abuses we must look carefully at the systems in place. A non-criminal finding that an individual was possibly criminally liable will not change that which needs changing and prevent a recurrence of violence. That is of course not to say that accountability and the fight against impunity are not tremendously important. However, it is to say that UN COIs are not the institution to promote accountability for criminal wrongs. 897 For UN COIs, with greater expectations comes greater responsibility. When it comes to COIs there is the legitimate expectation that people be treated fairly, and this precludes findings of criminal guilt or possible guilt that would tend to implicate individuals.

896 Fuller in fact discussed just this issue with respect to the limits of adjudication, stating that adjudication was not best suited to resolving polycentric problems of the sort that often appear internationally. UN COIs are so suited, though they, unlike adjudication, are not ideally placed to make criminal pronouncements on the guilt of a party. For Fuller’s discussion, see Fuller, “The Forms and Limits of Adjudication”, supra note 813.
897 It is to say, however, that it is better that such reports and assertions be left to the numerous credible NGOs conducting fact-finding in such situations (see for example Human Rights Watch, “Bloody Monday”, supra note 841). And better yet, courts of law should be left to make legal determinations of criminal or civil wrongdoing.
6.6 Conclusion

UN COIs operate in an extreme political environment. Yet they remain bound by legality both in terms of what they can legally do and in terms of what they can hope to accomplish while simultaneously maintaining their credibility and reliability and thus legitimacy. While it might make for good politics at the UN to use inquiries to indict individuals and nations for violations of international criminal and humanitarian law, it does not make for good law. And even the assumption that UN COIs as war crimes inquiries make for good politics does not necessarily hold true: even though it superficially sounds like the right idea is in place when UN COIs fight suspected war criminals, if UN COIs cannot make criminal judgements based on criminal standards, which this chapter has argued they cannot, it is not always clear that what UN COIs offer in terms of insight and reform recommendations are of sufficient value to justify the time, money and faith that is put into them by transitional justice experts and the UN itself. In any event, the end result is that the contemporary incarnation of UN COIs is untenable: UN COIs should neither act as quasi-criminal investigations that make findings of wrongdoing with reference to the elements of international crimes, nor should they report on everything, or even most things, in the transitional justice taxonomy.

This situation might appear to leave us in a morass, for great hope is placed in the institution of UN COIs, yet these bodies as they once were or as they are now seem to have no place in the modern world of international fact-finding. But we started this chapter with a reminder that there are various benefits associated with the ad hoc UN COI model as compared to the available alternatives and we started to see that some domestic COIs have been of great value in correcting systemic flaws even where they have failed in holding individuals accountable. There still might be hope for UN COIs; but for them to achieve success, they will have to be more focused – using their size and relatively good funding to go deeper rather than more broadly in their analysis – and continue to focus on legality. The next chapter will begin with a very general discussion on why some UN COIs might be useful and then get into how their processes and procedures can be improved to correspond better with the dictates of legality.
CHAPTER 7
THE PURPOSES AND PROCESSES FOR UN COIs

“[T]he key to protecting substantive rights is fair procedures, and the implementation of fair procedures must begin with the human rights organs themselves.”898

7.1 Introduction

The story of ad hoc UN COIs might seem rather bleak at this stage of the analysis. The purposes for which they so often operate neither correspond with the demands of legality nor do they tend to be achieved in practice. Indeed, in many ways this dissertation has told a sobering story of the rise and subsequent over-reach of an international system that developed an increasingly broad set of interventionist human rights ideals only to misapply them to a particular institution – ad hoc UN COIs – in a benevolent though misguided pursuit of those ideals.899

This dissertation posits that the grand ambition to connect war crimes, the responsibility to protect, and the broad truth-telling and democratizing goals of transitional justice with UN COIs is misplaced. Too much has been brought together under the auspices of one institution that has always been limited in terms of time, its ability to make criminal findings or access territory as well as witnesses, forensic or documentary information. As a result, internal tensions – particularly legal tensions – developed within the processes and purposes of UN COIs. UN COIs are now treated as a metaphorical garbage can for the humanitarian mission that really took off in the 1980s, ‘90s and to a lesser extent the beginning of the 21st Century: we have thrown the international human rights and criminal law ambitions at these bodies when the ICC or UN Security Council cannot act and it has resulted in these COIs being hopelessly overwhelmed, or at least overreaching and under-delivering.

In this final chapter I will first suggest a way forward for ad hoc UN COIs. First, I will offer some brief considerations based on the discussion of UN COIs to this point, and particularly in the previous chapter, for how they can better begin to take advantage of all of the structural benefits that they exhibit. Again, these structural benefits include their size, flexible nature, relatively robust funding, and international

898 Frank and Fairley, supra note 191 at 345.
899 Put another way, COIs were enlisted to apply an increasingly broad set of ideals.
support. However, this analysis will remain in some ways a sobering tale, as the optimism and ambition that human rights fact-finders enjoyed in the past will have to be tempered. In practice, this will mean that what UN COIs can hope to undertake and achieve will have to be scaled-back and their processes restricted. Second, I will analyze how UN COIs might start to employ an interactional conception of Fuller’s legality to develop processes that are legally appropriate for their tasks. This will include a discussion of how legality might help us to start to think about some of the ongoing procedural problems we have seen, particularly those canvassed in the Gaza COI case study, and how they can be overcome by a commitment to legality as it relates to the creation of the UN COI and its mandate and to various elements of due process. In particular, through the lens of Lon Fuller’s principles of legality, I will show that such UN COIs can and should draw on some basic and distinctly legal principles embedded in the law itself in order to improve their processes and decision-making, and that these legal principles can create “fidelity” to the law and offer greater legitimacy to COI findings. An interactional account will be used primarily to analyze the importance of inclusive participation in the COI process and how open, participatory processes of establishing COIs can help improve their legitimacy in certain circumstances.

With respect to processes of the COI itself, I will canvass: (1) bias, whether real or perceived; (2) the burden of proof employed by UN COIs; (3) the standard of proof employed by them; (4) evidence-gathering and admissibility and corroboration of evidence; (5) choice of incidents to investigate; (6) how to deal with witness evidence; (7) naming names and witness protection; (8) disclosure of evidence and the right to response; and, (9) the release of the report. Finally, I will conclude with a couple of thoughts about the commissioners themselves.

### 7.2 UN COIs: When and what they might investigate

We saw in the previous chapter what UN COIs should not do. But there is reason for hope that UN COIs can be re-purposed so as to find their place in the international system, with the caveat being that their procedures must commit to legality. At the very least, the perceived benefit of large-scale, ad hoc UN COIs is that they are by their very (ad hoc) nature flexible, versatile and responsive to current events in a way that permanent bureaucratic institutions are not. The purpose,
methodology and composition\textsuperscript{900} of such COIs can be individually tailored to the biggest and most pressing issues of the day so as to respond to the needs of the establishing body – or those for which the establishing body is creating an inquiry. But UN COIs can neither act as a panacea nor as a quasi-criminal investigation. Thus, although they might be employed to respond to the biggest and most pressing issues of the day, each UN COI should not attempt – as has been discussed – to respond to all of issues or to those issues better left to courts of law.

As we have discussed, at a general level UN COIs tend to be about responding to and/or preventing conflict. Such UN COIs need to be more focused first and foremost on preventing future conflict and atrocities, rather than on a reactive notion of accountability for past wrongs or the notion that they must speak to each task associated with transitional justice.\textsuperscript{901} And in this regard they should use their size and resources to delve deeply into a particularly pressing systemic social or institutional problem. Even the narrowest mandates can broaden substantially if a little discretion and flexibility is given to commissioners to pursue the matter, for investigative bodies such as UN COIs tend to focus on serious systemic issues that require such a well-financed, large, flexible body; and serious systemic issues tend to be complex, multi-faceted problems that require time and a great deal of in depth study. In contrast, COI mandates that are extremely broad to begin with are likely to be or at least are likely to become unwieldy – as we saw with the various UN COI transitional justice inquiries canvassed in previous chapters.

\textsuperscript{900} So for example someone like Goldstone can be chosen for the Gaza COI because, as a Jewish Zionist, at the time it was foreseen that Israel would be unlikely to cooperate or support the COI and thus any contra-Israeli findings would need the imprimatur of “impartiality” – from the Israeli perspective – that a perceived pro-Israeli might offer.

\textsuperscript{901} It is worth noting that it is not just UN COIs themselves that seem wedded to the uncritical pursuit of accountability as a common purpose. A recent international conference attended by a host of experts in the field similarly recommended in 2012 that: “A commission of inquiry’s report should describe facts, qualify acts, clearly state where violations have occurred, include a section on accountability of State and non-State actors and should make recommendations from which follow-up mechanisms should be established.” See The Geneva Academy of International Humanitarian Law and Human Rights, conference brief, “The UN Human Rights Council: Commissions of Inquiry”, at 2, online: http://www.geneva-academy.ch/docs/news/HR-council-inquiry-conference-brief.pdf. The conference brief also stated: “The common objectives of any commission of inquiry are numerous and include: to establish impartially whether violations of human rights law and/or humanitarian law have occurred; to investigate whether or not violations are systematic and widespread; to report on a State’s ability to deal with the violations; to highlight the root causes of the situation; to suggest ways of moving forward; and to produce a historical record of events that have occurred. It was said that every commission of inquiry’s primary objective should be to establish accountability for violations that have taken place, ensuring that those responsible for violations are brought to justice.” \textit{Ibid} at 1-2.
We also saw in the previous chapters that most Commonwealth COIs have been more likely to be seen to be successful when they focus on a fairly discrete yet systemic issue.\textsuperscript{902} In pursuing the mandate, COI investigators should be given flexibility to follow the leads that the facts and analysis present. Should the COI fail to elucidate structural causes or should the establishing body – or COI itself – predetermine the outcome, the COI’s report will be self-limiting in terms of proposing possible solutions and reforms, but also in terms of recognizing patterns that might not, on the surface, be evident before an investigation is undertaken.\textsuperscript{903} As we saw in the Gaza COI, some of the most interesting work came from pursuing leads that were not necessarily typical of UN COIs, for example investigating the breach of social and economic rights – investigative pursuits of which the chapter five case study was laudatory, \textit{i.e.} might in

\textsuperscript{902} In the Canadian context, professor Ratushny, \textit{supra} note 47 at 386, has argued with regard to COIs that: “[t]he investigative aspects and findings of misconduct are often important in informing the public what happened. But often that conduct, itself, is influenced or even caused by systemic factors. \textit{The greatest potential for effective recommendations and related change lies in addressing systemic issues} . . .” [Emphasis added.] He goes on to quote from a well-known Canadian judge speaking about his experience with COIs: “[t]he public identification of individual mistakes or wrongdoing, while important, does not necessarily address the underlying problem. And unless the underlying problem is addressed, \textit{the same mistakes or wrongdoing will likely occur again if the system that permitted them is not fixed}.” [Emphasis added.] Ratushny, \textit{ibid} at 386, citing Justice Archie Campbell, “The Bernardo Investigation Review” in Allan Manson & David Mullan, eds., \textit{Commissions of Inquiry, Praise or Reappraise?} (Toronto: Irwin Law, 2003) at 399. A recent and very interesting article in the United States seems to echo the conclusion of this dissertation in that it has found that “quasi-legislative” investigative commissions in the United States – like commissions of inquiry – should not be seen as a panacea but that this does this mean that they are without utility; it also found that such investigations must be flexible and able to adapt as no two commissions will be the same. See Steven R Ross, Raphael A Prober, and Gabriel K Gillett, “The Rise and Permanence of Quasi-Legislative Independent Commissions” (2012) XXVII Journal of Law and Politics 3 at 45. Next, the study found that investigations should be given a specific, limited scope, coupled with a broad flexibility to investigate, a suggestion that might sound contradictory. In effect this recommendation is perfectly mirrored by the \textit{ad hoc} UN COI analysis presented thus far. See \textit{ibid} at 31-3. The headnote of the article states succinctly: “\textit{Then, this Article scrutinizes these case studies and concludes that a quasi-legislative independent commission is most likely to be successful where it has a limited scope and investigative flexibility, features members seen as free from political pressures, uses discretion in compelling information, and ties its mission to larger legislative reform}.” [Emphasis in original.] What is meant is that too broad an investigative mandate will lead to an unfocused result, just as we have seen with the robust transitional justice COIs; the scope of the mandate should therefore be specific and limited. At the same time, one does not want to predetermine the solution by limiting the flexibility of the investigators. A similar recommendation was recently posited by a Working Paper prepared for the Harvard University’s Program on Humanitarian Policy and Conflict Research, which has a new “Monitoring, Reporting, and Fact-finding” Project. The Working Paper argued that “actors note that successful mandates should be both “clear and flexible,” articulating intelligible and manageable directives while also allowing commissioners sufficient interpretive leeway to shape their missions based on logistical, technical, and political considerations that emerge throughout the implementation process.” See Rob Grace and Claude Bruderlein, “Building Effective Monitoring, Reporting, and Fact-finding Mechanisms,” (2012) at 22, online: ssrn.com/abstract=2038854.

\textsuperscript{903} As Susan Marks has said: “To elucidate what is causing abuses is at the same time to shed light on who is most at risk of suffering those abuses.” Susan Marks, “Human Rights and Root Causes”, Presented to the University of Toronto Faculty of Law Globalization, Law and Justice Workshop Series (17 November 2010) at 8.
the right circumstances be worthwhile.\footnote{Looking at the system of UN COIs, the Gaza COI was fairly unique amongst its contemporaries in terms of addressing socio-economic issues – and rights – though as we saw even it stopped short of privileging them over other, more traditional rights abuses, or perhaps short even of putting such socio-economic rights on equal terrain with civil rights. As a tool of transitional justice, UN COIs are not alone in this regard: “To date, transitional justice initiatives have focused on the cessation of violence, establishing order and correcting civil and political injustices. Social and economic factors have taken second or no place at all.” Ismail Muvingi, “Sitting on Powder Kegs: Socioeconomic Rights in Transitional Justice” (2009) 3 International Journal of Transitional Justice 163 at abstract. Ismail Muvingi has argued that: “Three factors appear to contribute to the marginalization of social and economic injustices in transition processes: (1) a preoccupation with the cessation of violence and the transfer of power; (2) the subservience of social and economic rights in the dominant human rights discourse and practice; and (3) the dominance of the neoliberal free market global paradigm, which is perceived as the only viable path to development and human well-being.” \textit{Ibid} at 167.} In the result, such focused-yet-flexible COIs can provide a focused, precise investigation into a rather specific problem upon which subsequent ameliorative action can be based while simultaneously allow the investigators room to follow the facts they deem to be most salient.\footnote{David Kennedy has discussed this sort of effect with respect to the mainstreaming of international human rights, and how it can serve to undermine other ways of thinking about problems by focusing on individual rights or government action to the exclusion of other considerations, by forcing the language to be used to be that of human rights, which might not be up to the task or most apt for solving a problem, or focusing on law to the exclusion of other areas of competence. See David Kennedy, \textit{The Dark Sides of Virtue: Reassessing International Humanitarianism} (Princeton, N.J.: Princeton University Press, 2004), 3–35.} A more concrete example – offered below – might help clarify this proposition.

UN COIs could be in a position to offer a comparatively valuable study in the following way. By using their structural advantages in their favour – their size, funding, \textit{ad hoc} nature, and the expertise of their commissions – they could go deeper into a particular aspect or area of a systemic problem,\footnote{As Naomi Klein has stated with respect to the reporting on the 1980s Dirty War in Argentina, human rights fact-finding that focuses on violations but ignores the larger context – the economic, social and political context – will result in a report containing only “random, free-floating bad events, drifting in the political ether, to be condemned by all people of conscience but impossible to understand.” Naomi Klein, \textit{The Shock Doctrine} (London: Penguin, 2007) at 120.} rather than broadly into a thin analysis of a number of different, often conflicting, objectives as they have tended to do in the past. One possibility for some UN COIs is that they could begin to think about one or two of the salient social, economic and political factors that the Gaza COI began to touch upon: how a particular institution could be reconstituted to disrupt entrenched systems of inequality; to alter institutional arrangements that have historically discriminated or oppressed; to privilege through law or enforceable rights access to water, housing, freedom from serious environmental pollutants, land and mining rights; to promote the regulation of unregulated or captured industry, differential treatment as
between groups, and how bar associations, political parties or electoral boundaries might function, etc.

As but one example, the Gaza COI might have limited its focus on the construction industry, the destruction of food industries, and cement factories and the effect on the reconstruction of houses that had been destroyed. As was discussed in the Gaza COI case study, the destruction of the cement-packaging plant was particularly significant given the targeting of both food production and, especially, of civilian housing. With a more focused inquiry, more could have been done to look at the impact of limited housing options, cramped quarters, etc. Indeed, with respect to the right to housing, the UN has already identified some of the work that a contextually sensitive UN COI might follow-up on, which the Gaza COI did not:

The Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons (2005) mark an important step in the emergence of internationally agreed best practice on housing, land and property rights issues in post-conflict settings. Still, there is need for a wider United Nations institutional and policy framework to address housing, land and property rights more comprehensively, as these rights can contribute to reconciliation and early recovery. The links between housing, land and property policies, and wider development initiatives must be explored further. The need for State security guarantees, together with restoration awards, should also be considered. Reparations mechanisms that compensate returnees for the illegal occupation of their property show promising results and should be replicated. Strengthening of the administrative justice capacities of land commissions must also be undertaken more widely.

The types of questions raised above – questions pertaining to the links between housing, land and property policies, and of how the breach of those rights might relate to restitution awards – reveal precisely the type of issues UN COIs are well-placed to

907 See Goldstone Report, supra note 6 at Chapter XIII, parts A and B on the “destruction of el-Bader flour mill” and the “destruction of the Sawafeary chicken farms”, respectively; see also Chapter XIII, Part E, Section 2 on the “destruction of the remaining food industry”.

908 Ibid at 215-6, paras 1012-7.

909 See the 2011 Secretary-General Report on the Rule of Law and Transitional Justice, supra note 811 at para 53. See also Report of the United Nations Secretary General to the UN General Assembly, Delivering Justice, UN Doc A/66/749 (16 March 2012), at para 29, online: http://www.unrol.org/files/SGreport%20eng%20A_66_749.pdf: “The equitable and transparent administration of housing, land and property based on rule of law principles is key to economic, social and political stability. Serious deficits in this area have caused many violent conflicts and prolonged displacement. In this connection: Member States should resolve to put in place and fully implement housing, land and property governance systems that effectively protect international social and economic rights, with particular emphasis on ensuring women’s equal rights to housing, land and property, including through succession and inheritance.”

910 One might add to this: environmental investigations. For environmental factors, strangely avoided by the Gaza COI, are often central to questions of health, sanitation, food, water safety, safe and affordable habitation, farming, the economy, resource preservation, etc. Yet the Gaza COI, for whatever reason, contracted out this environmental investigation to other UN operations that were or presumably would take place, opting instead to focus on other human rights. See for example Goldstone Report, supra note 6 at 266, para 1250-1.
consider. One can also see here how merely focusing on housing could become broad enough to occupy three years of work.\textsuperscript{911} A flexible yet focused mandate is the initial key to a successful UN COI investigation. But it is by no means the only indicia of success.

We have seen that timing very much matters when it comes to \textit{ad hoc} UN COIs. We saw in the previous chapter that the Gaza COI and DRC Mapping Exercise failed when trying to serve two conceptions of reconciliation and reconstruction, one intra-conflict and one post-conflict. One approach must be chosen at the expense of the other. And it should by now be clear that UN COIs that operate intra-conflict – that is, those that operate while the conflict is ongoing or remains largely unresolved – are less effective. Intra-conflict COIs are more about creating peace where conflict already exists or ensuring accountability for wrongs committed, goals for which UN COIs are less effective, as we have seen. Practically, it is also the case that intra-conflict COIs will rarely get the necessary access to territory, witnesses or information required to make specific, systemic conclusions that will help with a transition; this is true both because it is inherently difficult to access evidence and witnesses during war and because governments or others controlling territory are less likely to grant access during periods of conflict or to investigate individual wrongdoings committed during an ongoing conflict.

UN COIs are more effective when they are about helping to prevent the outbreak of violence either by creating a cooling-off period or by making systemic recommendations that will help form the institutional terrain for a lasting peace before conflict has can erupt. Thus, UN COIs should operate as post-conflict institutions designed to investigate entrenched systemic problems; that is, they should operate in situations where a real or plausible transition is under way. Care should be taken in

\textsuperscript{911} Finally, it should be noted that UN COIs probably will start their investigations with what is happening at a national level, but may also wish to consider the impact of relevant international policies and practices on conflict, development and reconciliation. So the Gaza COI did not merely focus on what Palestinians in Gaza could do to reform their institutions, but focused also on the Israeli blockade and its effects on housing, the movement of people and goods, the economy and food. Similarly, the DRC Mapping Exercise has a complete chapter on “Acts of violence linked to natural resource exploitation”, which documents violations by both domestic and international actors of human rights and humanitarian law “linked to the struggle for control of natural resources” and how this struggle served to exacerbate and prolong the conflict. See \textit{DRC Mapping Exercise, supra} note 7 at Section II, Chapter III, pages 349-67.
establishing a UN COI when the armed conflict is over but there is no transition either toward democracy and openness or between governing parties.

Finally, because UN COIs should generally be post-conflict rather than intra-conflict institutions, and because they will often be dealing with complex, systemic issues, they should be given more time to complete their tasks. The hurry to complete the investigations in a matter of months, either before criminal or forensic evidence is gone or in order to end conflict as quickly as possible, does not exist to the same degree, or perhaps at all, with post-conflict COI investigations. And the systemic nature of large-scale UN COI investigations means that, even if they are much more precise and circumscribed in their mandates, the task will nevertheless almost certainly become fairly large and thus require a good deal of time to investigate. The timeframe for the investigation should be clear, as should be the audience to whom the report is addressed, how the report is to be released, and perhaps how information is to be collected, presented and stored.

With these recommendations in mind, there is no reason why, in the right situation, a UN COI cannot prove useful internationally. However, it should also by now be clear that there is a reciprocal relationship between the purpose for which a UN COI operates and its procedures. No matter a UN COI’s purposes, without procedures in place to ensure that the COI’s recommendations are respected there is little chance of success. This then brings us to the final topic, a discussion of how legality and interactional law-making can contribute to the creation of procedures that will improve UN COIs’ effectiveness.

Before getting underway, it might be noted that there are myriad ways in which the procedures of UN COIs might be improved; legality is just one method to accomplish this task – though as I have maintained it is imperative to ensuring the legitimacy of these legal inquiries. Moreover, starting to think about UN COIs in terms of legality is superior to the most commonly advocated alternative, which is the creation of another document that sets-out the procedures for UN COIs. This is true for at least five reasons.

First, as we saw in chapter three, numerous documents already exist that relate to the procedural elements of UN COIs, and they tend to be non-binding in nature; legality, by way of contrast, is clearly binding on UN COIs. Second, the proliferation of such documents has meant that they are fragmented in that they can get lost in the
morass of UN documents and can be difficult to analyze. Third, such documents tend to offer general recommendations – be “independent” and “impartial” – without instantiating such general terms with substantive meaning and requirements in the way that legality does. A good example is the Gaza COI’s analysis of impartiality and bias. Whereas analyzing bias from the perspective of legality would have required a legal analysis, a full explanation of the ultimate decision, and would have acted as a reminder to the commissioners that there are legal elements to the idea of impartiality, as we saw the alternative approach left the application of the impartiality principle rather hollow. Fourth, UN COIs are flexible institutions that will not all look the same, have the same level of formality, or operate for the same purposes. Legality is helpful in such situations because it necessarily demands a nuanced, contextual approach, one that asks what the requirements of legality demand with reference to the specific situation at hand. Finally, it has been difficult to construct and agree upon a binding document that applies to UN COIs – we have seen that calls for such a document date back decades. However, legality provides an already-existing framework just as capable of helping to ensure that UN COIs operate in a fair, effective, transparent and accountable manner. As we saw in the last chapter, we do not need to rely on the specific application of any document, for legality is sufficient in itself to incorporate the substantive provisions likely required of UN COIs – the example in the previous chapter was the due process provisions found in various international human rights documents.

With this in mind, let us now turn to how legality can help us think about improving the processes and procedures of UN COIs.

7.3 Using Legality to Think about the Procedural Criticisms of UN COIs

For UN COIs to become more effective, the persistent criticisms associated with the procedures of large-scale ad hoc UN COIs must be overcome. These drawbacks have largely been associated with the structure of UN COIs and in particular with their ad hoc nature. And herein lies the dilemma: what has made UN COIs such a valuable and cherished tool of today’s human rights advocates has also undermined their effectiveness as a tool of human rights promotion. UN COIs can be, or can appear to

912 It is worth noting here Fuller’s refrain that, “[a] specious clarity can be more damaging than an honest open-ended vagueness.” Fuller, the Morality of Law, supra note 25 at 64.
be: (1) politicized; (2) to focus disproportionately on a particular conflict or state, and thus be or appear to be arbitrary, unfair, unprincipled and biased; (3) inconsistent in their application of rules and methodologies and, at times, in the ultimate quality of their reporting; and, (4) they have tended to rely on their independence and impartiality for their legitimacy, yet because they are *ad hoc* “administrative” bodies they have also tended to ignore legal procedures because they are not “judicial”.

Dealing first with the final (fourth) criticism, legality can help to serve simply as a reminder that UN COIs are legal enterprises. By keeping legality in mind one cannot so easily ignore, when convenient, the legal implications of decisions or the fact that legal analysis is always relevant. Legality serves as a constant reminder to commissioners that they must articulate rules — that contrary to so many UN COIs of the past they must provide the full terms of reference, that they must explain their decisions and conclusions in full, and that they must be transparent and fair in all of their operations even when it is sometimes easier to avoid legal implications — as the Gaza COI seemed to do with respect to questions of perceived bias.

In terms of the remaining three drawbacks, it can be said that in large part these criticisms have gained some traction over the years simply because UN COIs are, first, established through the UN system, usually by states, to respond to perceived political instability. More to the point, in the first place these criticisms relate to the legitimacy of the establishing body that acts in a highly politicized system. In the second place the persistent criticisms relate to the procedures of the UN COIs — the ability to produce credible and reliable reports.

By focusing on legality and interactional law-making we can begin to see that much can be done procedurally to ameliorate or limit both types of typical concerns. These concerns will therefore now be addressed in turn, starting with a consideration of the political consequences of having an *ad hoc* system of inquiry, and then moving to the various procedural criticisms canvassed in the case study of the Gaza COI, itself being generally representative of the criticisms levelled at the COIs that came before it. The goal will be a very simple one: to show that legality and interactional law can offer us a medium for considering possible solutions to some of the most common criticisms of UN COI procedures that we have seen.
7.3.1 Legality, Interactional Law and the Establishment of UN COIs

Part of the solution to the perceived arbitrariness of the UN COI process is seen at the level of the rules or procedures of the bodies establishing the COIs. As has been stated throughout this dissertation, the ultimate success of a UN COI – its ability to produce a legitimate report that can be relied upon and which is likely to lead to the implementation of its recommendations – depends in large part on the COI’s ability to navigate the institutional terrain in which it is established and implement its mandate in a way that is impartial, independent, credible and reliable. This means that where inconsistency in establishing UN COIs is seen to be at issue, a curative is opening up the process, making the goals and perceived benefits of having a COI in a particular case known and clear, and offering principled justifications explaining the resort to an ad hoc UN COI or, where necessary, why an ad hoc UN COI is not to be established.\footnote{When a rule or process is not seen to be applied with a great deal of consistency it is not necessarily fatal to the legitimacy of the rule or process. As Thomas Franck has argued, “a rule’s inconsistent application does not necessarily undermine its legitimacy as long as the inconsistencies can be explained to the satisfaction of the community by a justifiable (i.e. principled) distinction.” Franck, The Power of Legitimacy Among Nations, supra note 799 at 163. In other words, generality (in the language of legality) does not mean the rote application rules in exactly the same way all people. Rather, the precise nature of a given rule might mean that it applies differently in different contexts. What is fair in one context to one person is not necessarily fair to another person in a different context.}

The creation process must be clear, general, consistent across time, and justify the decision and the mandate of the COI in a transparent and principled manner – all basic elements of Fuller’s legality. COIs with clear mandates – in terms of their scope, territorial and subject-matter jurisdiction, and priorities and goals – are less likely to encounter some of the problems that we saw associated with the Gaza COI and its mandate. The greater the progress toward defining what UN COIs do and when they best do them, both as a general proposition and in terms of the establishment of particular UN COIs, the greater legitimacy they will be endowed with at the time of creation. The theory of interactional law suggests that this improved legitimacy will, in turn, create a greater – though not necessarily full – fidelity to UN COI findings and can help to promote improved cooperation with their work.

Participation in the creation of the mandate – in particular who participates and to what degree – will obviously also be influential in the perceived legitimacy of a COI, perhaps regardless of how the COI subsequently acquits itself. The interactional theory
of international obligation suggests that states and other interested parties are more likely to feel a sense of obligation to interactional, dialogical processes, particularly, as noted above, those that exhibit the principles of legality. By working toward shared understandings of what the UN COI hopes to achieve, a COI is more likely to be complied with by the relevant parties and supported by the broader international community.\(^{914}\) It follows that it is not just that UN COIs should be seen in light of legal principles because their processes and conclusions look legal and have legal repercussions – because they occupy a distinctively legal space. By acting in a manner consistent with interactional law-making, an establishing body can improve a COI’s chances of achieving its purpose through garnering broad support for the COI process.\(^{915}\)

As was discussed in chapter four, the history of UN COIs at the Human Rights Council with respect to Israel has revealed that participation in the construction of COI mandates, and voting in terms of determining whether to undertake a fact-finding mission in the first place, has always been determined by primarily Arab states; there has consistently been a regional bias in terms of participation in the law-making process. While the Gaza COI’s creation was not a great example of an inclusive, participatory construction of a mandate, Goldstone subsequently did a good job of consulting broadly with interest groups and worked hard to maintain contact even with those (Israel, Palestinian armed groups) that did not ultimately cooperate with the COI. Moreover, Goldstone renegotiated the mandate so that it required the evaluation of evidence pertaining to possible wrongdoing by all of the parties to the conflict. From an interactional perspective, this was highly important because it evinced an attempt to be fair and impartial in the evaluation of evidence, undoubtedly standards that UN COIs should strive to attain. As Goldstone demonstrated, continued attempts at communication, even where they are not reciprocated, can at least lend an imprimatur of legitimacy to the attempt to speak to the concerns of all involved.\(^{916}\)

\(^{914}\) Brunnée and Toope note that “[i]t is important to appreciate international ‘relationships’ as interactions, rather than unidirectional transmission belts.” See supra note 21 at 122.

\(^{915}\) For a general discussion of “Interactional law and compliance: law’s hidden power”, see ibid at chapter 3, pages 88-125.

\(^{916}\) We saw in the Gaza COI case study that the systemic issues that seem perpetually to underlie and often lead to and/or exacerbate conflict are social and economic. By privileging interaction with the victims of conflict,
Such dialogue by UN COI commissioners with those involved in or affected by a conflict can also preemptively counter criticisms of bias and help lend credence and legitimacy to the substantive claims in a report.\textsuperscript{917} And, as we saw, perhaps this focus on participation also led the Gaza COI to consider a range of human rights violations that extended beyond what had traditionally been considered by UN COIs. Indeed, Goldstone’s actions in opening up dialogue where none existed went a long way to remedying some of the perceived problems with the original mandate: the wording of the mandate was changed such that no presupposition of guilt was included in the mandate; it was altered so that both sides would be investigated; and, Goldstone was always able to respond to criticisms of bias by saying that he sought Israeli input and that it was the state’s choice not to participate in the investigation and provide evidence. As the second Committee of Independent Experts report that followed-up on the Goldstone Report stated, “transparency and participation help build the confidence of victims and other interested parties in the investigation process, including fostering a sense that credible and genuine investigations are taking place.”\textsuperscript{918} With respect to Israel, at least Goldstone could say he repeatedly asked to talk.

Goldstone identified such socio-economic issues as relevant to the wrongs committed and to overcoming the wrongs. Still, the Gaza needed to go further. For example, it did not explain its decision to follow-up on certain violations of international law, while leaving environmental rights, for example, to be examined by existing processes. The problem was that existing UN processes were examining essentially all aspects of the conflict covered by the UN COI. So why one topic was viewed by the Gaza COI as sufficiently covered by other primarily UN investigations – environmental degradation and transgressions – such that the COI had no need to investigate and form recommendations, while other topics – civil and political rights – needed further investigation by the UN COI was not sufficiently explained.

\textsuperscript{917}The more the UN COI is attenuated from those affected, the lesser the participation, dialogue and involvement with those particularly affected by conflict, the less benefit there is to be derived from a COI. The UN is well aware of the need for such participation in its transitional justice mechanisms: a 2011 UN Secretary-General’s Report to the UN Security Council argued that the UN “must ensure the full inclusiveness of marginalized populations, including displaced persons, refugees, women and children. There is increased recognition that the voluntary participation of children in transitional justice mechanisms enhances accountability and promotes reconciliation.” See the \textit{2011 Secretary-General’s Report on the Rule of Law and Transitional Justice}, supra note 811 at para 21. The Report continues at para 22: “Since 2004, women and girls have increasingly participated in transitional justice processes and have highlighted the grave consequences of forced displacement, abduction, sexual and gender-based violence, and violations of economic and social rights. Going forward, mandates for transitional justice processes should ensure that the perspectives of women and children are taken into account. Furthermore, there is a need for gender-sensitive procedures to protect victims and witnesses, and to provide greater levels of age-appropriate psychosocial support. To guide future efforts, evaluations of the impact of transitional justice measures on women and children must be conducted on a more systematic basis.”

\textsuperscript{918}\textit{Second Report of the Committee of independent experts}, supra note 533 at 22, para 81.
Of course, the Gaza COI also brings an important caveat to the fore: it might be the case that the highly divisive political context in which UN COIs are generally established means that no amount of participation will ever legitimize their creation. Brunnée and Toope recognize that such limitations are possible: “when a law-making project is markedly at odds with – or ahead of – social background understandings, even the best efforts of the most committed international lawyers may not suffice.” But perhaps the experience with the Gaza COI tells a more limited story that speaks to the fact that a UN COI is not an effective tool in certain situations – for example in relation to the putative Middle East Peace Process.

I assert that although we can presume that in most cases, as the history of UN COIs has demonstrated, absolute consensus will not be possible with respect to the creation of UN COIs, the Gaza COI does not demonstrate the futility of the UN COI process as a whole; some UN COIs can be saved by a commitment to legality and interactional law-making coupled with a reformulation of their purpose(s). First, we have already seen how open processes and a commitment to legality might improve dialogue and thus create space for agreement where none would seem to exist. Second – and particularly relevant for the ever-controversial Human Rights Council – shared understandings can be rather thin or procedural and do not have to be comprehensive and substantive. As Brunnée and Toope have argued: “[i]nterational international law can exist in weak or strong forms; the deeper the shared understandings, the greater the possibility of ambitious law. Limited shared understandings do not mean no law, but they limit the possibilities of law-making.”

Shared understandings do not have to be complete for a commitment to interactional law to serve an albeit more limited purpose. Third, if UN COIs begin to operate in

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919 Brunnée and Toope, supra note 21 at 76.
920 This perhaps demands that we ask: if the Gaza COI was really necessary it was best left to the General Assembly or Secretary-General to constitute it in the absence of the Human Rights Council and, failing that, the ever-active NGO community.
921 Brunnée and Toope, supra note 21 at 56. This portrait of the law is taken from Fuller. As noted by Gerald Postema, “Fuller argues, it is not necessary that the environment of social practices and conventions secures broad agreement on general values. It is sufficient if it can provide “shared standards by which differences can be isolated, discussed meaningfully, subjected ultimately to some rational resolution.”” See Gerald J Postema, “Implicit Law” in Willem J Witteveen and Wibren van der Burg, eds, Rediscovering Fuller: Essays on Implicit Law and Institutional Design (Amsterdam: Amsterdam University Press,1999) at 269.
922 See Brunnée and Toope, supra note 21 at 71: “Although the stock of shared understandings may be relatively limited...law-making is possible. But law-makers may have to be modest in their aspirations....”
post-conflict situations – where a transition has taken place – and do not act as primarily an accountability measure, then it will also be true that states are less likely to feel impugned by the process, both because no one is being criminally accused of anything and because, in many cases, the old guard will no longer be running the state.

But this still leaves open the question of how broadly interactional dialogue should extend? Most obviously such interactive dialogue should extend to the parties to the conflict, relevant international actors – likely those with strong feelings about resort to a UN COI – and representative micro-communities, where possible. Fuller has offered his own solution to the definition of “community”, which might be taken to support the above claim. In *the Morality of Law*, he posed the question: “[w]ho are embraced in the moral community, the community within which men owe duties to one another and can meaningfully share their aspirations?”923 His answer was given by resort to a parable, which he took to mean, “not that we should include everyone in the moral community, but that we should aspire to enlarge that community at every opportunity and to include within it ultimately, if we can, all men of good will.”924 Broad interaction, as broad as possible, given limitations of time, for example, is preferred for UN COIs to successfully galvanize international support. While admitting to the contextual nature of what ‘active participation’ might mean, Brunnée and Toope, quoting Andrew Hurrell, have also given an example of how to conceive of participation in international society:

> some acceptance of equality of status, of respect, and of consideration; some commitment to reciprocity and to the public justification of one’s actions; some capacity for autonomous decision making on the basis of reasonable information; a degree of uncoerced willingness to participate; a situation in which the most disadvantaged perceive themselves as having some stake in the system; and some institutional processes by which the weak and disadvantaged are able to make their voice heard and to express claims about unjust treatment.925

A *general* debate about what purposes UN COIs might serve, how they might serve them, and how their mandates might be framed so as to allow COIs to

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923 Fuller, *the Morality of Law*, supra note 25 at 181.
924 *Ibid* at 183.
accomplish their goals, might lead to shared understandings about the role of COIs and greater support for and cooperation with future UN COIs.926

But one can also see benefits to be derived from an interactional approach to UN COI creation beyond just improved cooperation and participation. An interactional approach to the creation of UN COIs would force the participants to consider the interests and needs of others and to engage with the full extent of the problem, rather than only the problem as viewed through the lens of one party (or state). As TRS Allan has stated with regard to legality’s requirement that decisions be publicly justified,

> the discipline of reasoned analysis and explanation is intended chiefly to enable legislators or administrators to resist unconscious prejudice, and to preclude uncritical deference to public opinion, which may in some instances be poorly informed and reflect only bigotry or irrational fear of harmless minorities or their unfamiliar practices.927

Moreover, because the development and rejection of ideas occurs through this deliberative, collaborative process, the reasons, assumptions and justifications of the relevant parties or participants come to the fore, and their respective positions – and their relative strengths and weaknesses – are better understood within the context of the group dynamic and its attendant preconceptions and prejudices. Even if – or perhaps more likely when – this deliberative process does not lead to consensus928 in terms of the definition of the mandate of the COI, an interactional process can provide an understanding of some of the questions that those with an interest in the COI feel need to be addressed during the course of the COI investigations. As Brunnée and Toope argue: “interactional international law’s internal legality requirements provide stronger safeguards against political domination and power than a purely formal account of international law, precisely because the commitment to autonomous actor choices and diversity is internal to the framework itself....”929 In other words, the deliberative process helps to ensure that the problems or disagreements that might arise are discovered ex ante – and can likewise be addressed up front.

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926 It is important that the goals are made clear at the very beginning of the process, and then repeated at the beginning of the report. Philip Alston, the former UN Special Rapporteur on Extra-judicial Executions was excellent in incorporating this practice into his processes. See for example Alston, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mission to Sri Lanka (28 November to 6 December 2005), UN Doc E/CN.4/2006/53/Add.5 (27 March 2006), at para 2.

927 Allan, supra note 852 at 157-8.

928 Brunnée and Toope have persuasively argued that “interactional law can emerge without strong substantive agreement among parties”, simply by “fostering procedural legality”. Brunnée and Toope, supra note 21 at 217.

929 Ibid at 9.
I believe this interactional approach might have another benefit not often associated with the human rights movement: it might open up space for countries legitimately to debate the necessity of a UN COI and explain why the lack of support for the establishment of a UN COI does not mean that the country does not support accountability and human rights. Domestically in many Commonwealth countries, but almost certainly internationally as well, COIs are not always progressive, positive institutions for change. They may instead be established as a way to avoid taking action. For both good and bad, COIs allow countries to appear publicly to be dealing with an issue that they may or may not be dealing with in a meaningful way. UN COIs might also be used as a political tool either to focus in a disproportionate way on an enemy or simply to take international action because a domestic audience/constituency demands it. The point is that COIs, at least in Commonwealth countries, have long been used not just to solve problems, but sometimes as a very expensive tactic of delay or attack. By ensuring that debate surrounding the creation of UN COIs is open and transparent, and not merely the spewing of rote rhetoric either in favour of human rights or in favour of the sovereignty of a rights abusing nation, perhaps a clearer picture can emerge as to when the establishment of a UN COI is actually beneficial and when we should see it as a stalling tactic.

Finally, such participation is not merely instrumental; as Brunnée and Toope have argued, Fuller’s “internal criteria were moral in part because they upheld and promoted agency; they enabled citizens to reason with law, to make choices about their own lives and appropriate conduct.” Increased participation in the formation of the mandate and COI thus has an intrinsic and instrumental value. The promotion of human autonomy and agency is respected and promoted through increased participation; in the international context this is particularly important given that COIs often engage communities where atrocities and political oppression are commonplace; a sense of agency, autonomy and involvement in the processes that affect the lives of individuals is desperately needed. At the same time, the promotion of such agency will not only improve the mandate, through dialogue and reasoning with the problem, but

930 Ibid at 29-30.
also increase “fidelity” to the COI process – both in terms of the likelihood of cooperation with the COI and the implementation of its recommendations. 931

7.3.2 Naming UN COIs: Time to get specific

As an element of being clear and transparent, it is evident that there is a need for a clearer purposive delineation than currently exists between UN COIs and other types of UN fact-finding bodies. What we have been discussing thus far applies to UN COIs. But it is a surprisingly difficult task to determine when a UN investigative mission might be classified as a COI and when – or why – the UN might classify a group of experts investigating mass atrocities as something else. Too often it is hard to tell what the intention and meaning is behind the name of an *ad hoc* UN investigative body – as we have seen, they do not always even make their full terms of reference publicly available.

We can therefore start to be more precise in naming our investigative bodies such that their names and procedures carry meaning and expectation. To name a UN body is to bring it into being with a certain expectation as to what it will look like, what it will focus on, how it will act, and what it will achieve. Going forward there needs to be more clarity as between so-called UN Panels of Experts, UN COIs, Secretary-General investigations, UN expert monitoring missions, etc. Currently, the naming of such bodies seems almost random at the UN; these bodies seem often to act as different forms of the same thing, the primary difference being in name only and perhaps the body – Security Council, Human Rights Council, Secretary-General – that establishes them. For example, as currently conceived, Security Council Panels of Experts 932 – as discussed briefly in chapter three – investigate and report to the Security Council, usually a Sanctions Committee, on violations of UN sanctions or breaches of Security Council resolutions. 933 However, more recently Panels of Experts have come to look

931 See *ibid* at chapter 3.
932 For an interesting analysis of the UN Panels of Experts that, like this dissertation, argues for them to be seen through the lens of administrative law such that certain procedural protections must necessarily append, see: Ricart, *supra* note 389.
933 Such an approach also makes sense as it can be marshaled to threaten sanctions, as was done in Darfur. Though the opposite might also be said: today, given a lack of territorial access for UN COIs coupled with the existing satellite imagery of conflict zones, reporters on the group, cell phone imagery, etc., sometimes such reports provide little that is not already known and publicly available.
very similar to UN COIs, though some UN COIs have also come to look more like what might be traditionally thought of as a Panel of Experts.

By clarifying the name, I believe we can force the establishing body to be very clear – clarity again being a criterion of Fuller’s legality – about what precisely they want investigated or monitored, why, and why the particular body they are establishing is the appropriate one for the task. By admitting of their true identity, subsequent institutions can better understand their use and limitations.

**7.3.3 Legality and Consistency in the Creation of UN COIs: A policy suggestion**

We might also directly tackle the consistency of the establishment of UN COIs, for as we have seen the politics of bringing UN COIs into being in an *ad hoc* manner can make the process appear inconsistent – which invariably it sometimes is – and thus arbitrary and unfair. The creation of an independent review council, or standing committee on inquiries, within the Human Rights Council or office of the Secretary-General would offer an institutional check on the exercise of political power in establishing COIs, and help ensure that the principled goals and benefits of establishing UN COIs guide the process. In other words, it would mitigate resort to naked political self-interest by making the establishment of UN COIs more consistent with the principles for which they are thought to exist in the UN context and the process for making this determination clearer.

Moreover, because the COI would be a factual commission – with the goal of making recommendations, not of making legal-criminal findings – the experts within the review council could consist of professionals in various fields, such as forensic experts, police officers, medical doctors, professors, economists and political scientists, military officers and judges.

This body would help with drafting the terms of reference, creating the mandate, and it might even keep a list of appropriate fact-finders. The advantages to such a body

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935 See for example the *Syrian COI, supra* note 721, which looks a lot like a Panel of Experts: “[I]he Independent International Commission of Inquiry on the Syrian Arab Republic is requested to periodically update the Council on gross violations of human rights as well as on the casualty figures resulting from the conflict…The Syrian Government has not yet afforded access to the Commission to undertake investigations inside the Syrian Arab Republic.” At para 1.
would be numerous. First, it could act as an intermediary to the implicated states. It would also allow for the institutionalization of knowledge, making UN COIs more effective and efficient in their operations, but particularly in the beginning stages where each new COI would not have to be created completely from scratch and a modifiable database – with a secure information filing system – could be created to help guide the information collection procedures of new COIs. Benefits would also accrue to the end stages of COI investigations, where permanent processes could be put in place with respect to witness protection initiatives and the safe storage of information. The money saved here might pay for any additional personnel needed to maintain the permanent body. Note also that the Human Rights Council has already created an “Advisory Committee”, “composed of 18 experts serving in their personal capacity” to “function as a think-tank for the Council and work at its direction.” So, the capacity might already largely be in place for such an initiative.

Either states or the elected members of the commission might bring about a request for an inquiry. After consultation between the states and the independent experts, a working mandate could be established. This then would build a sort of procedural deliberation into the creation of UN COIs, would require that a group of experts consult with those proposing the COI and encourage all parties to consult with other relevant states and constituents, and generally ensure that expertise is brought to bear on the inquiry from its earliest stages, including in the establishment of its mandate. The proposed COI would then be brought to the Human Rights Council, just as it is now, and voted upon just as it is now.

7.4 Another Option when Establishing COIs: Two investigations or mixed investigations?

There is also no reason why a COI and a Panel of Experts could not operate with respect to the same conflict situation, rather than having one body perform both

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936 See Human Rights Council, *Institution-building of the United Nations Human Rights Council*, HRC Res 5/1 9th meeting (adopted without a vote) (18 June 2007), at Part III, para 65. A COI committee could be in addition to, or overlap with, such a committee, and guidelines already exist for how such “experts” are nominated, elected, etc. Moreover, the purpose of the Advisory Committee is already to promote and protect “all human rights” (*ibid* at Part III, C, para 76), and is “urged to establish interaction with States, national human rights institutions, non-governmental organizations and other civil society entities in accordance with the modalities of the Council” (*ibid* at Part III, D, para 82).
tasks. In this way, the Panel of Experts would operate intra-conflict and monitor compliance with sanctions regimes or peace agreements and report authoritatively on breaches to the Security Council and, after the conflict, courts might do what courts do, politicians what politicians do, and UN COIs what they are best-placed to do. Armed conflict draws attention to a nation or region and a UN Security Council Panel of Experts might be the first step in helping to address the ongoing conflict. But after a major conflict, when the world has turned an eye to the events at hand, it can also be precisely the time to focus on the ills that led to the armed conflict and the systemic reforms that might prevent a repetition.

There is domestic precedent for the idea of having two rather complimentary reporting mechanisms. For example, some Canadian COIs have actually split their processes to have separate wrongdoing and policy hearings, the latter of which provides for the opportunity to examine “systemic and policy issues unaffected by the focus on assigning blame.”\(^{937}\)

Two different investigations can of course have drawbacks, not the least of which is to segregate the issues, bureaucratize the process to where two inquiries may be doing overlapping work, and certainly increase the costs of operation on a strapped international system. But if a single UN COI is not capable of undertaking both approaches – if one body is being tasked with too many conflicting demands – then an alternative is necessary.\(^{938}\)

One other option might be available in certain circumstances. While there have been mixed national-international criminal tribunals, for example the Special Court for Sierra Leone, and mixed national-international truth commissions, for example in Guatemala, the idea of a mixed domestic-UN COI has largely been off the radar. The idea would be to try and promote national ownership of the process – and thus promote


\(^{938}\) COIs may also wish to do a variant of the above and “phase” the inquiry into two or more parts such that there is an investigatory and a policy development phase, for example, with sufficient time set aside to consider institutional, structural, and systemic matters. The COI could then use the two phases as chapters in the same report, or issue two reports. The benefits to having two inquiries would be a streamlining of the process whereby the expertise that is gained by a commissioner is maintained in the follow-up stages. At the same time, we return to the problem of the Gaza COI where the historical inquiry led to disproportionate criticism of the inquiry process as a whole and served to undermine other, unrelated, factual findings. We also run the risk of simply compartmentalizing what UN COIs are currently doing, thereby in effect perpetuating UN war crimes COIs as opposed to removing the focus of UN COIs on war crimes and placing it on fact-finding and policy development.
compliance through participation – by having a mixed group of commissioners, some international and some from the domestic nation; likewise, other staffing arrangements could be concluded such that both domestic and international researchers form part of the process. The terms of reference could thus be passed domestically by decree or statute or by the international establishing body, or both.

Certainly a variety of benefits would conduce to a mixed-COI. First, cooperation could hardly be worse in such a situation than it tends to be in the case of international COIs. Second, if the COI is in part a national body, if it is created by law within a nation, then it might be granted important legal protections and powers that international COIs are often missing, such as the power to subpoena witnesses or compel the production of certain types of evidence. Third, territorial access for the UN COI would almost certainly improve as compared to the current state of affairs. Fourth, greater access to territory and individuals would mean greater access to the perceived problems as well as institutional information that might indicate potential avenues of redress, both of which would improve the quality and specificity of the recommendations of a COI.939

The domestic buy-in to the process might extend to the implementation of recommendations as well. This can be asserted not just on the assumption that cooperation during the initial stages of the process will mean improved cooperation with the implementation of the COI’s recommendations, but rests also on the experience with truth commissions, which have consistently been more effective where they are instituted through domestic processes as opposed to being imposed on a population from afar.940 Interactional law-making would also support this assertion: the more interactional, inclusive and participatory the process in creating the legal regime, or in this case the COI process, the more likely the relevant society will feel a connection and understanding with the process and feel a sense of responsibility to comply with the COI’s recommendations because of their participation in the process.941

There would of course be trade-offs, as there always are in negotiations: the scope and purpose of a mixed national-international COI might be more limited –

939 In that way, the recommendations would better relate to the problems as perceived by those affected; and structural, political and economic problems would be more salient and easier, perhaps, to analyze.
940 See supra note 345.
941 See generally Brunnée and Toope, supra note 21. At 21 they state: “Fuller’s conception of the rule of law connects us to his second core idea – reasoning with norms helps to create a sense of responsibility.”
though again this might be beneficial; there might also be fears that a domestic actor would try to undermine or circumscribe the strength or breadth of the COI’s findings, or would – perhaps seen as a pawn of the government – prevent witnesses from coming forward; commissioners chosen from rival factions within a conflict might force a stalemate or worse within the COI; there might be the fear – or reality – that the whole thing might be held up when the structure of the commission is negotiated or the choice of commissioners is discussed. But there will always be benefits and drawbacks to such a scheme, and such a scheme might work in some situations and not in others. Whether any of this, for good or bad, plays out in practice will be something worth studying, should the opportunity come to pass. However, the idea has had success with criminal tribunals and truth commissions so it is worth considering for UN COIs.

7.5 Legality and the Place of UN COIs within the Broader UN System

It is perhaps also time to think about the relationship between various UN organs, particularly between the UN Security Council, General Assembly, Secretary-General and Human Rights Council. Each of these bodies have particular foci, as well as their own institutional advantages and disadvantages in terms of fact finding. So for example the Human Rights Council may not be best placed to consider human rights complaints regarding the Occupied Territories, or even the Middle East in general, at least in the near term and under existing conditions.

It will be recalled that the 1993 Declaration on Fact-Finding by the UN recommended that the Secretary-General was, in most cases, best placed to establish ad hoc COIs. As a general proposition, there are some benefits to such an approach. The Secretary-General is an individual, and thus concerns of partiality or bias against a certain country or region might either not apply or run with the individual rather than the office. The Secretary-General is elected and can thus be removed from office after his or her term should there be problems of real or perceived bias; the Human Rights Council also has elections, though the regional representation within the Human Rights Council remains static and, in the end, Human Rights Council members

942 Res A/ES/46/59, supra note 256 at para 15. See also Report on the UN Charter and Strengthening the Role of the Organization, supra note 258 at 21. 943 For an interesting argument in favour of the Secretary-General conducting such inquiries, see Berg, supra note 263.
represent their countries in a way the Secretary-General does not. Arguably, the Secretary-General will also have more influence over the Security Council and will be able to coordinate with the Office of the High Commissioner for Human Rights as was the case in the Darfur COI. Moreover, the Secretary-General does not suffer from the veto issues associated with the Security Council.

7.6 Legality and UN COI Processes: Bias, standard and burden of proof, and other due process considerations

As was touched in chapter one, Fuller has specifically stated that “procedural due process” is an important device to maintain “congruence,” a criterion of legality. This means that UN COIs must begin to engage with the substance of the due process norms applicable in their context. Fuller has stressed the need to articulate rules of procedure, and that this includes the need to promulgate internal rules of procedure. These rules must be clear and accessible. The status quo for UN COIs – in particular where few clear rules exist with regard to due process and the terms of reference are often not made public – is unacceptable, and this is compounded by the fact that no analysis or discussion is taking place as to what rules might apply and what the substance of those rules might be.

The need for clear, articulated justifications of the procedural methodology is particularly important in the context of UN COIs. Fuller has noted the special need to publish and justify rules and methods of procedure when there is no widely held conception regarding right and wrong, or what should or should not be done. In a pluralistic international society that has not yet agreed on a hard-law text (or treaty) regarding the principles and procedures of UN COIs, such a special need for clarity,

944 Fuller, the Morality of Law, supra note 25 at 81.
945 Ibid at 81.
946 Ibid at 82.
947 Ibid at 50.
948 So for example we saw that UN COI mandates have not always been as clear as they might have been; COIs or those that establish them have not generally been clear as to clarify why responding by establishing a COI is necessary and what that COI will do and how it will do it. Indeed, historically we have seen that UN COIs do not always even publish their terms of reference – and one cannot be clear about one is doing if one is not transparent about it. Going forward, clarity of mandate and purpose are imperative, not simply for practical reasons but because clarity is one of Fuller’s eight criteria of legality. We saw with Goldstone that he was able to consult – be “interactional” – in the mandate formation, but also ensure that the mandate was clear and unbiased.
949 Fuller, the Morality of Law, supra note 25 at 92.
justification and transparency is heightened. Fair, objective procedures, procedures that abide by the dictates of legality, when transparent and highly visible can also act as a signal that there are methods that can be agreed upon to settle disputes in ways that do not involve armed conflict. A culture of legality, in other words, might begin to grow in contrast to a culture of division and/or conflict.

The substance of these norms of due process and the formality of the COI will of course depend on the purpose attributed to a particular COI, its intended goals,\footnote{For a Fullerian discussion of how due process is bound to change depending on the institution and purpose, see Allan, supra note 852 at chapter 5(2), in particular pages 131-132.} and how the report might be used and by whom.\footnote{Fuller has stated that the “eight desiderata” of legality will depend on the area of law examined, the types of legal rules under consideration. It might be added to this that how the decisions made by an administrative body will ultimately be used and by whom also matters. See Fuller, the Morality of Law, supra note 25 at 93.} While the UN has come up with numerous guidelines and largely non-binding documents to focus their work, UN COIs nevertheless remain ad hoc and the quality of their operations, investigations and reports will vary accordingly. Thus, much as the intention in this and the previous chapter was not to identify one standardized purpose for all ad hoc UN COIs, the purpose here is not to provide a standardized set of rules by which all UN COIs must rigidly abide. Instead, the intention is to provide a flexible, principled framework that can be tailored to the ad hoc COI process so that the range of possibilities can be illuminated\footnote{The interactional approach plays an important role here. It bears repeating that the interactional approach can be seen to encourage dialogue and interaction so that the UN COI’s purpose is determined, or at least discussed, in collaboration with a range of actors. When viewed from the perspective of the need to improve dialogue, one might also see how there is a need for dialogue as between the UN COI and those that will ultimately rely upon and use the UN COI report, including other international institutions such as the Security Council, and nation foreign offices. For the extent of corroboration necessary to establish its findings, the extent to which witnesses are warned about use of their testimony in future court proceedings, and generally the legal formality and protections necessary will be influenced by what the implications of the report are likely to be.} and we can begin to determine the applicable rules based on the relevant principles as applied, in their right context, to specific ad hoc UN COIs.\footnote{Indeed, it is better to have legality, a purposive method of approaching these flexible, contextually sensitive, investigations than to try to bend discrete rules to all of the various types of decisions that need to be made. Thomas Franck has persuasively argued that sometimes indeterminate rules or principles can be clearer than rigid rules: “precision in rule drafting may sometimes even undermine, rather than fortify a rule’s determinacy.” Frank, The Power of Legitimacy Among Nations, supra note 799 at 68. Franck argues that even when rules achieve “textual clarity”, it can still be the case that they come to no longer “describe or predict with accuracy the actual behavior of the real world.” Franck, ibid at 78. This has tended to be the case with the plethora of generally non-binding documents associated with UN COIs, which as we saw in chapter three tend to commend “impartiality” and “independence” without giving much sense for what such terms might mean in the context of a large-scale, ad hoc UN COI. According to Franck, the result can be that it is not just that the textual rule starts to seem irrational, but that the failure of the rule “to be instrumental in relation to the purposes for which [it was devised] – causes us to}
Though the principles of legality and interactional law-making can be used to analyze any number of issues that might arise in the course of an ad hoc UN COI investigation, I will begin the application of legality to the central problems with UN COIs that we saw in the Gaza COI, and that had repeated themselves in previous COIs. I will discuss below: (1) bias, whether real or perceived; (2) the burden of proof; (3) the standard of proof; (4) evidence-gathering and admissibility and corroboration of evidence; (5) choice of incidents to investigate; (6) how to deal with witness evidence; (7) naming names witness protection; (8) disclosure of evidence and the right to response; and, (9) the release of the report.

7.6.1 Bias: Real or perceived

As we saw with the Gaza inquiry, even a perception of bias with respect to the terms of reference or the mandate is sufficient to undermine the legitimacy of a UN COI – and we have seen that, historically, the alleged bias of commissioners is one of the first daggers thrown at a UN COI in an attempt to undermine its findings. Fuller provides a starting point for our discussion of what legality might look like when analyzing how UN COIs can address real or perceived bias; first, “there must be rules”.\(^{954}\) [Emphasis added.]

As noted in chapter one, Fuller has also noted that, “congruence [one of his eight criteria of legality] may be destroyed or impaired in a great variety of ways: mistaken interpretation, inaccessibility of the law, lack of insight into what is required to maintain the integrity of a legal system, bribery, prejudice…”\(^{955}\) Therefore, it is imperative to avoid bias or prejudice or the perception thereof – and this starts with the promulgation of rules related bias. Such rules could be promulgated, for example, within the terms of reference of each UN COI or – as some UN COIs have done in the past – or by the commissioners themselves as their own rules of procedure.

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\(^{954}\) Fuller, ibid at 78.

\(^{955}\) Ibid at 81.
As discussed in the Gaza COI case study, the rules will also likely wish to consider how a commissioner is to be removed. Thus, the rules should identify not merely that commissioners are to be dismissed, but lay out a fair and transparent process for making that decision, ensuring that any such decision is fully articulated. The precise method for determining the removal of commissioners is likely less important than it is to have a transparent debate leading to a clear articulation of rules prior to a problem occurring.956

Moreover, possible claims of bias are more likely to arise and be dealt with before the COI begins its work when the relevant actors are consulted with respect to the commissioners and they are fully vetted. Again, participation as a consideration is relevant in this case not just to ensure cooperation and input during investigations, but in the processes of setting the mandate and choosing the commissioners.

7.6.2 Burden of Proof

As we saw in the Gaza COI case study, UN COIs are often – indeed almost always – met with barriers to collecting evidence in the form of non-cooperation by one or more of the parties to a dispute, and as a corollary a lack of territorial and documentary access. And, as we saw, such informational voids can be treated in two ways: first, the lack of evidence can be treated as the responsibility of the party or parties who failed to cooperate with the UN COI; or second, this lack of access to relevant information can be treated as a methodological shortcoming of the UN COI process.

UN COIs – particularly the Gaza COI – have tended to treat inconsistently such situations, and as we saw in the Gaza COI it can lead to confusion or worse about the quality and credibility of the COI findings. Part of the problem here is failing to consider the legal elements of the COI process, in this case in particular asking who bears the burden of proof. This is undoubtedly exacerbated by the tendency, which we have repeatedly seen, to be unclear in terms of how “legal” UN COIs really are. Recognizing

956 Another practical consideration is whether the chosen commissioners have the professional time available to properly complete the task. Sometimes the most knowledgeable person is not the best placed to complete a particularly arduous task, whether because of the stress involved and the health of the individual, or the other commitments of the commissioner and the time given to complete the task. This suggestion might seem trite, but one can see such factors being overlooked in the debate over commissioners – it has certainly happened in domestic COIs.
that UN COIs are not well equipped to make findings of individual criminal responsibility, even in the abstract, and that they bear the burden of actually proving their conclusions forces them to deal consistently with evidentiary holes when they occur. Informational shortcomings must be treated as an unfortunate, and virtually inevitable, methodological shortcoming of the international COI process and, where they exist, COIs may not always be able to make findings.

7.6.3 Standard of Proof

Chapter five on the Gaza COI already evaluated in depth the standard of proof as it applies to UN COIs, and I do not wish to repeat that process here for I think it makes most of the points that need to be made. However, several points of overview, to conclude, are required at this time.

It was clear from the Gaza case study that there is a need to make the standard of proof relied upon by UN COIs clear, to engage with what is demanded of the COI by the end-users of its report, to present analysis transparently and impartially, and to offer reasoned justifications for decisions taken. The legal obligation to provide reasoned justifications extends in the case of UN COIs to the obligation to engage with how the substantive, and not just procedural, law might be interpreted and how it is in fact interpreted by the COI. This does not mean that UN COIs must offer legal interpretations of international law in as thorough a manner as courts might do. But depending on the formality of the COI and its intended purpose, some level of legal analysis and interpretation – and justification of this analysis and interpretation – will be necessary. For example, we saw how the Gaza COI’s failure to consistently conform to a transparent and clear analysis of the law, particularly as it related to its findings of fact, undermined its legitimacy and the authority of its findings.

In general, the standard of proof in past UN COIs – when the COI bothers to offer one – has rightly been neither criminal nor civil, but rather a standard of admitting and relying upon evidence that is unique to a COI.957 There is clarity in distinguishing

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957 A recent international conference on UN COIs came to the conclusion that, “[t]he criminal law standard of proof ‘beyond reasonable doubt’ has no place in commissions of inquiry…Rather, the starting point should be the standard of the balance of probabilities…Various degrees of standard of proof can be applied on a sliding scale, the highest tier of which is that of ‘overwhelming probability.’” The Geneva Academy of International Humanitarian Law and Human Rights, conference brief, “The UN Human Rights Council: Commissions of Inquiry”, at 3, online:
the burden of proof in COIs from those in trials: so distinguishing the standard of proof makes clear that the COI is not a trial, but something separate and different.

The DRC Mapping Exercise did an excellent job in elaborating its standard of proof. To quote from its final report: “the level of evidence required was naturally lesser than would be expected from a case brought before a criminal court. The question was therefore not one of being satisfied beyond [a] reasonable doubt that a violation was committed but rather of reasonably suspecting that the incident did occur.” We see here the reference to a “reasonable suspicion”. The benefits of such an approach have already been discussed in the Gaza COI case study, but in relevant part relate to the fact that this standard necessarily imports a tentative conclusion – by using the term “suspicion” – rather than a definitive finding, and that it follows from the Darfur COI and some other UN COIs and thus can be contextually understood based on a lineage and custom of use.

But the DRC Mapping Exercise – in language virtually identical to that used by the Darfur inquiry – went further in elaborating the standard of proof, though arguably it had already improved on the approach of the Gaza COI: “Reasonable suspicion” is defined as “necessitating a reliable body of material consistent with other verified circumstances tending to show that an incident or event did happen.” In other words, the DRC Mapping Exercise not only set the standard but explained it clearly.

Moreover, the DRC Mapping Exercise stuck with one standard rather than applying different standards throughout the document, or applying different language to explain the standard used. And, as discussed in the Gaza COI case study, the

http://www.geneva-academy.ch/docs/news/HR-council-inquiry-conference-brief.pdf. The “overwhelming probability” scale would, at the very least, seem highly problematic as it indicates a level of certainty that chapter 6 of this dissertation indicated was inappropriate for a COI. As will be discussed below, a “sliding scale” of proof, at least within the same COI, is likewise confusing and thus highly problematic.

958 DRC Mapping Exercise, supra note 7 at 4, para 7; see also 38, para 101.
959 See Darfur COI, supra note 413 and accompanying text. The language of the standard of proof was: “person may reasonably be suspected of being involved in.”
960 DRC Mapping Exercise, supra note 7 at 4-5, para 7; 39, para 101. The DRC Mapping Exercise also offered an alternative formulation in order to clarify. The alternative formulation again built in the tentative nature of the findings: “[a]nother formulation would be reliable and consistent indications tending to show that the incident did happen.” See ibid at 5, fn 13; 39, fn 78.
language must be consistent because when the Gaza COI – and the Darfur COI before it – used inconsistent language to explain the certainty of its different findings, it caused confusion as to the standard of proof that was being employed to make findings of law and fact and, as a result, ultimately undermined the credibility of the findings. In contrast, the DRC Mapping Exercise report is very clear in its language with respect to findings: “[e]ach of these incidents [investigated] points to the possible commission of gross violations of human rights and/or international humanitarian law.”\(^{961}\) Such language is consistent both internally within the sentences in which it appears, and generally throughout the DRC Mapping Exercise report.\(^{962}\)

Finally, with respect to NGO human rights monitoring, Diane Orentlicher has stated: “NGOs should be able to explain any apparent variation in their conclusions about different governments’ violations – including differences in tone – by reference to variations in factual conditions.”\(^{963}\) For UN COIs, such transparent explanations are more than just good practice, they are mandated by legality.

This brings us to the issue of how UN COIs deal with evidence-gathering and particularly the admissibility, credibility and reliability of the evidence that they are able to collect. It will be remembered that the Gaza COI did some things very well with regard to its evidence gathering procedures, including setting a standard for the admission of evidence – even if it was not always implemented consistently – and making public calls for submission of evidence, as well as holding numerous public hearings. However, there is also much that can be learned from past UN COIs to improve procedures in the future.

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\(^{961}\) DRC Mapping Exercise, ibid at 6, para 10.

\(^{962}\) The tenor of the report’s message nevertheless remains condemnatory – and makes clear precisely the point the COI is trying to make, which is that it appears certain violations occurred, that society has been affected, that we must react, but definitive proof of criminal wrongdoing is for a court of law: “the vast majority of the 617 most serious incidents described in this report could, if investigated and proven in a judicial process, point to the commission of multiple violations of human rights but above all of international humanitarian law.” [Emphasis added.] See DRC Mapping Exercise, supra note 7 at 11, para 22. The exact same language is used elsewhere, including ibid at 11, para 24; 12, para 26; 3 para 31. See also ibid at 31 para 85; 46-7, para 125. Moreover, the point that court decisions are necessary to prove beyond a reasonable doubt that crimes have been committed is repeated throughout. See for example ibid at 11, para 24; 12 paras. 26, 28; 14, para 31. Specifically with respect to intent – as it applies to the specific intent crime of genocide – the Mapping Exercise made a point of listing the “countervailing factors that could lead a court to find that the requisite intent was lacking….” Ibid at 14, para 32.

\(^{963}\) See Orentlicher, “Bearing Witness”, supra note 717 at 104.
7.6.4 Evidence Gathering, Admissibility and Corroboration of Evidence

It is imperative that COIs explain their use of evidence,\(^{964}\) just as they must justify their findings. The obligation to articulate rules and principles of due process extends to the need to explain decisions regarding the inclusion and exclusion of evidence and why certain evidence was viewed as credible or reliable. This can be done through an expansion of the methodological section of reports so that they are more robust and clear than they generally tend to be, or in a footnote with regard to specific sources relied upon by the UN COI.

It will be crucial to make an \textit{a priori} decision regarding the admissibility of evidence. For example, a problem for UN COIs is that much of the “background” or contextual information used in reports is often hearsay, or second-hand evidence, as was the case in the Gaza COI. Clearly the preference is to have a hearing on first-hand evidence, but generally first-hand evidence, even if accepted through informal (non-hearing) processes should still be preferred to secondary materials that rely on other reports or secondary-material.

Nevertheless, stating the preference is not always enough. UN COI reports should be clear from the beginning as to whether hearsay evidence will be admissible and, if so, under what conditions; as it stands, they virtually never are sufficiently clear. These are not the type of decisions that should be made when the stress of the inquiry, and the drama of evidence, is before you. Rather, such decisions should in general be taken before commencing the inquiry so as ensure the appearance of fairness and transparency from the beginning.\(^{965}\)

COIs should be clear and transparent about why they are relying on secondary reports and for what purpose. The justificatory process ensures that the UN COI cross-examines its own assumptions and ensures it is relying on credible information; but it also explains to its audience how and why it is relying on evidence such that its

\(^{964}\) Indeed, the Guidelines for the conduct of UN inquiries into allegations of massacres demands just this: \textit{ad hoc} UN COIs must provide an “[e]valuation of the evidence, and description of the procedures and methods used in such evaluation”. See \textit{Guidelines for Inquiries into Allegations of Massacres, supra} note 305 at para 52, section (c).

\(^{965}\) Again, it is vital that the parties are consulted and asked to provide evidence and information on the type of accusation. To its credit, the Gaza inquiry repeatedly requested that Israel provide evidence, though the state did not. This led to a common problem with COIs, as was discussed: a distinct lack of access to the information necessary to found a reliable report on certain subjects.
reasoning process can be understood. When in doubt, it is better to engage publicly with how various methodological decisions were made.

It is doubly imperative that UN COIs explain openly their methods and justify their decisions with regard to including, excluding, corroborating or verifying evidence. The more controversial the evidence is, the greater the need exists for it to be presented in public, where it can be challenged. 966 Public testing of the evidence can offer an important safeguard against claims of unreliability and can help the public and commissioners to ensure that the information obtained is credible. 967 For example, by providing annexes of the press releases, reports, or interview transcripts relied upon, as well as streaming of the interviews as was done on the Gaza COI website, readers can refer to the documents to determine for themselves whether they are credible; readers will also see that the COI is confident in its sources and is making them easy to scrutinize.

And public engagement with how decisions are made has two corollary benefits, according to Fuller. First, “a rule articulated and made known permits the public to judge of its fairness.” 968 Second, if one is forced to articulate the reasons for a decision, it usually follows that those decisions will be better founded. 969 It might also be added that instantiating a “culture of justification” – whereby it becomes the culture to reason with and justify all decisions – not only encourages such behaviour in future UN COI reports, but can also help to develop a standard practice as to how the law, and various rules, are to be applied and interpreted in various UN COI contexts. This in turn will make the applicable rules clearer – more transparent – and better known and understood by those to whom the rules may apply in the future.

In terms of evaluating the reliability and credibility of evidence, the DRC Mapping Exercise is again a good example of a clear, transparent practice built on rules: “[a]ssessing the reliability of the information obtained was a two-stage process

966 See Anthony and Lucas, A Handbook on the Conduct of Public Inquiries in Canada, supra note 854 at 64.
967 The transparency of the process, the consistency with which evidence is dealt, and the accountability that comes from requiring the public presentation or receipt of evidence and the opportunity to interrogate it or explain its credibility and reliance, can be very useful to domestic COIs. The same might be said to apply to UN COIs given the concerns with respect to credibility in international COIs and the difficulty of explaining in a report how information is credible. Transcripts of tapes of the hearings can then be posted online to ensure increased visibility, as the Gaza COI did in certain cases.
968 Fuller, the Morality of Law, supra note 25 at 159.
969 Ibid.
involving evaluation of the reliability and credibility of the source, and then the validity and veracity of the information itself." Reliability of the source – stage one of the above test – was said to be “determined using several factors, including the nature, objectivity and professional standing of the source providing the information, the methodology used and the quality of prior information obtained from that source.” Part-two of the reliability and credibility test – establishing the validity and veracity of the information itself – was described in the following terms: “[t]he validity and authenticity of the information were evaluated through comparison with other data on the same incidents to ensure cohesion with other verified elements and circumstances.” In practice, this meant that each of the over 600 violent incidents listed in the DRC report was, in the words of the report, “backed up by at least two independent sources identified in the report. As serious as they may be, uncorroborated incidents claimed by one single source are not included in this report.” The report also proffered that, “[e]ach paragraph describing an incident is followed by a footnote identifying the primary and secondary sources of the information reported.” Moreover, “each reported incident had to be corroborated by at least one independent source in addition to the primary source in order to confirm its authenticity.” The report went out of its way to indicate that of the 782 opened incidents, 71% were closed through the verification process (563) – some of which were invalidated – though 29% of the cases were not able to be closed either due to lack of time, resources, access to a region or witnesses, “or due to a lack of an independent source to confirm the information obtained from an initial source.”

Similarly, the 2009 UN Human Rights Council COI into abuses in Guinea stated:

970 DRC Mapping Exercise, supra note 7 at 5, para 8; 39, para 102.
971 Ibid at 5, fn 14; 39, para 102.
972 Ibid at 5, fn 15; 39, para 102.
973 Ibid at 6, para10. The report continued: “Incidents not corroborated by a second independent source have not been included in this report, even in cases where the information came from a reliable source. Such incidents are, however, recorded in the database.” Ibid at 41, para 106. See also Ricart, supra note 389 at 22: “at a minimum, the findings [of UN Security Council Expert Panels] should be corroborated by two independent, verifiable sources. This is so because, in the work of the panels generally, at present evidence is insufficiently tested against contrary evidence, and specific facts are only rebutted after the investigators have published their initial report. Evidence, therefore, should be examined in such a way as to facilitate informed cross-examination and rebuttal.”
974 DRC Mapping Exercise, ibid at 41, para 106.
975 Ibid at 44, para 117.
976 Ibid at 44-5, para 118.
In fulfillment of its mandate, the Commission decided that in order to obtain the quality of evidence needed to establish the facts, the information received must be checked against independent sources, preferably eyewitness accounts, and independently verified evidence assembled to demonstrate that a person may reasonably be suspected of having participated in the commission of a crime. This is the approach commonly used by international commissions of inquiry, which endeavour to put together reliable evidence corroborated by verified testimony. Thus, the report does not include any testimony that has not been corroborated by at least one other source and the statistics on the various types of violations refer only to individuals who have been identified by name.  

In general we can say that direct evidence should be preferred, and admissions against interest are likely to be more probative than admissions by an interested party, i.e. one with a strong political affiliation. Even some NGOs will not incorporate hearsay evidence or secondary sources to found assertions of violations. This means that if newspaper articles are going to be relied upon to prove a factual claim, it would be preferable to interview the author to determine first-hand what he or she can directly attest to. As documents of proof, reliable as they might be, newspaper articles should not be relied upon and primary or direct evidence should be preferred. It is not merely the credibility of such commentary, but also that nobody – neither the commissioners nor those implicated – can cross-examine the factual assertions contained in newspaper articles without access to the author.

However, secondary accounts might have a particular value and it should be discerned what that value is as contrasted with direct evidence. For example, NGO reports over time on a country – International Crisis Group country reports, for example – can provide excellent contextual sources of information, but can also help guide investigators toward the people, places and issues that they may wish to begin investigating. Using such documents for the truth of their contents with respect to specific wrongdoing, however, is hearsay and may or may not be viewed as credible. If such documents are used, then their reliability and credibility will again have to be justified, and COIs are better-off explaining why they were used. In other words, like the balancing act that takes place in courts of law, legality requires that the balancing of

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977 *Guinea COI, supra* note 7 at 9, para 22.
978 Looking at testimony from a practical perspective, Orentlicher has stated: “Testimony of eyewitnesses and victims is more valuable than hearsay allegations because the finder of fact has an opportunity to test and, through direct observation, to assess the credibility of persons who purport to have direct knowledge of critical facts. Also, the interviewer is able to elicit, through highly specific questions, the sort of detailed information necessary to a credible inquiry.” See Orentlicher, “Bearing Witness”, *supra* note 717 at 114.
979 *See ibid* at 122.
980 *See ibid* at 109.
evidence before UN COIs considers both sides of the argument and weighs the merits and demerits of each side before arriving at a conclusion and justifying it.

7.6.5 Choice of Incidents

The criticism with regard to the Gaza COI’s choice of which incidents to investigate again speaks to the importance of articulating and following clear, transparent rules of operation and methodology in order to ensure the legitimacy and credibility of UN COIs. For when clear, transparent rules or methods of operation are not available, decisions taken by UN COIs tend to look “political” in nature, i.e. arbitrary or driven by self-interest, as opposed to “legal”, i.e. driven by principle or pre-existing rules; as a result, it becomes easier to impugn the credibility of the processes and findings as a whole.

The existence of known rules ensures that the parties to the dispute are treated with reciprocity – with equal mutual respect – and serves to act as guidance in the decision-making process. A simple and effective example of setting a clear, transparent standard for selecting incidents is found in the DRC Mapping Exercise report. In its report, the DRC Mapping Exercise identified a “gravity threshold” to explain its decision making process. The gravity threshold was then broken down into its component bits and included: consideration of the nature of crimes and violations linked to the incident; the number of crimes and violations linked to the incident; how the crimes were committed; and, the impact of the crimes and violations.\(^9\)

By going through the criteria provided, it is easy to identify why various incidents were chosen by the DRC Mapping Exercise to investigate. Such a procedure also helps commissioners clarify for themselves why they are choosing to investigate certain issues or incidents and not others.

7.6.6 Dealing with Witness Evidence

It is important for UN COIs to explain how witnesses are identified and to justify that process at the outset of the report; indeed, rules for how to deal with witnesses are

\(^9\) DRC Mapping Exercise, supra note 7 at 38, para 100. Note that, in general, “serious violations” as expressed in the Mapping Exercise’s mandate was, “[g]enerally...intended to apply to violations of the right to life and the right to physical integrity.” Ibid at 37, para 98. Historically, NGO human rights fact-finding missions have similarly focused on violations of physical integrity. See Orentlicher, “Bearing Witness”, supra note 717 at 94.
even better dealt with in the terms of reference establishing the processes of the COI, before one gets to the investigative and reporting stages. Nevertheless, at the reporting stage the justificatory requirement runs through all aspects of the UN COI process, including with respect to explaining how witnesses were chosen and interviewed. For example, dealing with whether or not the COI will permit the funding of interest groups or others to represent groups might be considered as a method of saving time while simultaneously ensuring that direct witness testimony is obtained openly by the COI. Rules for how and when experts can be called upon or commissioned to provide insight into a policy or historic issue that requires clarification might also be articulated at the outset of proceedings.

But experts and other witnesses will also have to be vetted, for as we saw in the Gaza COI there can be serious doubts about the testimony of an individual if his political affiliations are unclear. So for example the COI will have to canvass terrorist or other associations that a witness might have in order to determine the person’s credibility before testifying – something not always clearly done by the Gaza COI. Moreover, a search of the name and those associated with known groups implicated in

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982 For example, tackling the issue of how witnesses will be dealt with before the COI gets under way might help the COI determine whether there is a need for commission counsel. While there is the need to “cross-examine” witnesses in some cases to ensure credibility, one does not want a prosecution nor, generally, does one want the commissioners to be too associated with the cross-examination lest it be viewed as an attack. This is a role that an independent counsel could provide. At the same time, the money, time and formality associated with such hearings and “commission counsel” will not always be conducive to such an approach. Best to consider the notion, and let the dictates of legality and fairness guide the process and what is required. The COI should make clear that the cross-examination of witnesses does not mean that it is a court, that attacking witnesses is inappropriate and the COI remains in control of the process. COIs will have to balance the right to be heard and challenge evidence with the need to protect vulnerable witnesses.

Commission counsel, at least during the examination (as opposed to, say, a cross examination) should not ‘lead’ the witness. This is to say that it is the witnesses job to tell the story, and while neutral questions might help to extract this story, questions that also put the answer in the witnesses mouth should be avoided. This is not for strictly legal reasons, but merely because: (1) leading questions can tend to indicate bias either toward or against a witness; and, (2) for practical purposes it is simply better to avoid such questions in order to ensure that those condemned by the eventual report cannot complain that the COI provided the answers it wanted rather than the answers the witnesses actually had.

983 The Walkerton Inquiry – a recent high profile Canadian COI – explains how such decisions can be made: “I also granted standing to a number of groups who represented clearly ascertainable interests and perspectives that were essential to my mandate and who I thought should be separately represented before the Inquiry. These groups included a municipal association, agricultural associations, environmental groups, trade unions, and an association of public health inspectors. By involving these groups in the hearings, the Inquiry benefited from a diverse array of views that would not otherwise have been brought forward. In cases in which several applicants for standing appeared to have similar perspectives, they were given a single grant of standing on the understanding they would form a coalition. I granted standing to a total of 21 groups and individuals in Part 1.” Part One: Report of the Walkerton Inquiry: The Events of May 2000 and Related Issues (Toronto: Queen’s Printer for Ontario, 2002) at 476-7.
the COI’s investigation is highly pertinent to the credibility of the witness and, as we saw with the Gaza COI, the credibility and legitimacy of the ultimate report.

We also saw that the Gaza COI was criticized for having collected evidence from witnesses in the presence of security personnel, whom Israel accused of being partisans. Fairness, but also a duty to protect witnesses, would militate in favour of conducting as many witness interviews either alone, in person,\textsuperscript{984} or through the hearings process, though of course such rules must be flexible and are better interpreted through the lens of legality – balancing due process interests of fairness to the accused parties or states with the interests of obtaining an accurate and full picture of the whole story, all the while giving primacy to witness protection.\textsuperscript{985} Too strict a rule might not provide the COI enough flexibility to proceed effectively, but having a general rule or principle is necessary such that the commissioners can militate against the kind of criticism levelled against the Gaza COI in this regard.\textsuperscript{986} In the end, justifying the ultimate decision by the COI with respect to witnesses and witness testimony with reference to the relevant considerations will likely give the greatest credibility to whatever decision is ultimately taken.

With that in mind, UN COIs would benefit from establishing privacy protocols early on in their processes. Such protocols might cover a standard explanation of the general types of information sought, why this information was sought and what methods of investigation were to be used, how the information would be stored, the ways in which it might be subsequently used and how or if third parties might access the information, whether there were any future implications – legal or otherwise – for the individual in giving the information, and how it was to be decided whether interviews

\textsuperscript{984} UN Guidelines explicitly foresee privacy as a right in the interview process: “The commission should protect, as appropriate, the identity of the interviewee and the confidentiality of the information provided by him or her. To this end, and to avoid intimidation, the commission should seek from the outset clear assurances as to its right to conduct interviews independently and in private.” See Guidelines for Inquiries into Allegations of Massacres, supra note 305 at para.37.

\textsuperscript{985} Again, Diane Orentlicher notes the benefits of such an approach for NGO fact-finders. See Orentlicher, “Bearing Witness”, supra note 717 at 113.

\textsuperscript{986} In the Canadian context it has been said about the COI process, “that diversity is a great strength and is reflected in the flexibility of procedures authorized by administrative law. Such procedures are now expressed as conforming to a broad “principle” rather than “rules”…This permits administrative bodies to be flexible and creative in selecting procedures that will facilitate expeditious proceedings while still ensuring fair treatment to individuals who may be adversely affected by those proceedings.” See Ratushny, supra note 47 at 2.
were in private. And the idea of privacy brings us to witness protection and the question of when to name names.

7.6.7 Due Process Considerations: Naming names, witness protection

By engaging with the inner morality of law – with what legality requires – procedural questions are likely to be confronted that might otherwise have slipped under the radar of UN COIs. For example, in balancing the right to safety for witnesses with the right of an accused to confront an accuser – the right to a response, as discussed below – the UN COI will begin to ask questions rarely asked by UN COIs, such as: whether witnesses were adequately warned of the potential legal ramifications of testifying, particularly if the testimony might be later relied upon or used in court proceedings; or whether simply leaving the witnesses’ names out of the COI’s final report is sufficient to ensure their continued safety; or whether a witness protection program is needed in serious cases; or whether further steps must be taken by UN COIs to ensure the continued safety – and continuity – of evidence in terms of where and how it is stored, and who has access to secreted information. The choice of whether or not to publish personal data, and what constitutes personal data, must also be considered. Names, for example, might be considered personal data, particularly where personal data is defined in terms both of its relation to an individual and its sensitivity.

In camera proceedings might also be considered when certain witnesses are asked to testify. Ideally, rules would be determined beforehand, either by the COI or by the establishing body, setting out the exceptions to the normal presumption that testimony and hearings shall be public. For example, the rule might say no more than

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988 The International Centre for Transitional Justice has offered the following in this regard: “Documentation projects around the world operate in politically charged and chaotic environments…. Absent rule of law, transparent institutions and democratic values, documentation projects are forced to make difficult choices…We feel that documentation projects must follow the basic rule of do no harm or injustice. This rule should be applied to all persons, but especially to victims, witnesses and others who have taken risks to tell the story.” Louis Bickford, Patricia Karam, Hussein Mneimneh and Patrick Pierce, “Documenting Truth”, the International Centre for Transitional Justice and the Documentation Affinity Group (2009) at section 2(B)(I), page 7, online: http://ictj.org/publication/documenting-truth.
there is a presumption in favour of public hearings, but that the importance of public hearings to confidence, transparency, and justification, shall be balanced with competing factors where necessary (these may or may not list factors, such as fair trial rights, privacy rights, witness safety, national security concerns, etc.). Legality is accustomed to such a balancing act, to conducting proportionality analyses to determine how a general rule or principle is to be instantiated in a fair, consistently principled, and contextual manner. Legality, in other words, can be very useful in bringing the benefits of law and due process to bare on the COI processes related to witness safety and protection.

Finally, a practical suggestion can be offered. Work has now begun on truth commissions and the preservation of data – how to store it, when, where, by whom, what considerations are pertinent, etc. It is time that similar work began for UN COIs. Too often this work begins well into the COI process or after it has finished, if at all. This should not still be happening for, as we saw, the process of creating safe, usable databases started at least with the Yugoslav inquiry 20-years ago.

### 7.6.8 Disclosure of Evidence and the Right to Response

As the Australian inquiry into the UN Oil-for-Food program stated, “[the main requirement of procedural fairness in relation to an inquiry is that it] cannot lawfully make any finding adverse to the interests of [a person] without first giving [that person] the opportunity to make submissions against the making of such a finding.”

Likewise, we saw in chapter one that Fuller included “the right of cross-examining adverse witnesses” as one of the elements of “procedural due process”, which forms part of the “congruence” desideratum of his legality. In legal terms, this is often known as the right to response, discussed both in chapters three and in the Gaza COI case study.

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990 See Australian Inquiry in UN Oil-for-Food Program at para 7.79. In the Canadian context it has been repeated that, “[t]he flexible administrative law principle of fairness requires that, when the hearings have greater potential to affect the rights, interests, and reputations of individuals, the procedural protections must also be greater.” See Ratushny, *supra* note 47 at 2-3.

991 Fuller, *the Morality of Law*, supra note 25 at 81.
The right to respond might apply more generally to the right to respond to the report before it is made public, or to have included in the report the response of a government – the right to response does not have to append only to hearings and witness testimony. At the same time, the right to response or disclosure does not necessarily have to include the right to cross-examine a particular witness, or to counsel, etc., though as was mentioned in the Gaza COI case study it certainly should when the evidence presented against an individual might be personally harmful.

TRS Allan has noted that:

The rigour of the necessary procedural constraints is inevitably a matter of degree; but the closer the jurisdiction to a judicial one, involving the determination of rights independently of public policy, the more strongly the analogy with judicial procedure applies. Legislative freedom to confer judicial functions on executive agencies can be permitted only in so far as such bodies act, for the relevant purposes, as if they were courts.992

Generally, what is fair in the circumstances given the interest of the individual, the nature of the interest affected and how it can be rebutted, and the nature of the inquiry itself will determine the scope of the right to response. It may even include the opportunity to suggest witnesses. The idea is that there is a weighing of interests involved, and that the need to investigate and document systemic wrongs does not unduly impact the basic procedural rights of individuals in the context of a public inquiry.

And there is certainly a limitation on what the right to response would entail. The right to response is the right to respond to those accusations or evidentiary matters that brought about the right in the first place. The respondent is not there to impugn the process as a whole, or to attack witnesses or the overarching purpose of the COI to the extent that it is not connected with his or her reputational interest. The idea behind the right to response is merely to offer an individual the opportunity to present his or her side of the story with respect to the issues affecting him or her.993

992 TRS Allan has noted in this regard that: “[t]he rigour of the necessary procedural constraints is inevitably a matter of degree; but the closer the jurisdiction to a judicial one, involving the determination of rights independently of public policy, the more strongly the analogy with judicial procedure applies. Legislative freedom to confer judicial functions on executive agencies can be permitted only in so far as such bodies act, for the relevant purposes, as if they were courts.” See Allan, supra note 852 at 133-4.

993 Indeed, much care will have to be taken should parties be given the right to cross-examine as part of the right to reply. They may have to be restricted in time, in addition to being restricted in order to avoid personal attacks against witnesses or experts. Warnings that such restrictions will apply should be given and explained beforehand, and perhaps publicly at the start of the inquiry and hearings process. Further, rather than a cross-examination, a COI could also request rebuttal information to clarify arguments. This would save time and the witness from being
7.6.9 Release of COI Report

Consideration should also be given to when the report is to be released, to whom, and how widely it will eventually be circulated. For example, should the report be pre-released to the parties, with the opportunity to comment on it in private? Obviously the dependability of the parties and their ability to keep the initial draft secret will be a contextual consideration here.

As should be evident by now, the report generally should be released publicly, should include a methodology, etc., should have a website often with transcripts or taped proceedings, and an explanation of the purpose and mandate of the COI. The UN’s Guinea Report, like so many others, lacked a credible, transparent methodology. Instead of offering rules of procedure, or the methods by which the COI would collect, compile and analyze data, the very short methodology for the most part simply noted what the COI had done, when it held meetings, etc.994 Likewise, though the Darfur COI has been lauded by many commentators, it was noted in chapter three that while it refers to its terms of reference in the report, these terms of reference are neither reproduced in the report nor can they be found publicly. Today, there is little excuse for UN COIs not to have websites or links that contain reports, transcripts, hearing dates, the mandate, the commissioners and other pertinent information. The UN COI’s terms of reference might even require the maintenance of such a website – a procedural requirement that has the added effect of reinforcing the importance of transparency in the COI process.995 By making their procedures and methodologies open, commissioners will also be more likely to turn their minds to why they are proceeding in a particular way, and whether it is publicly justified.

Finally, depending on the legal formality of the report, commissioners may wish to discuss how conclusions are reached for the purposes of publication. For example,

cross-examined, while still giving those affected by the hearings an opportunity to rebut evidence or witnesses who spoke against them.

994 See Guinea COI, supra note 7 at 7-9.

995 In Canada, “[t]he Goudge Inquiry’s terms of reference specifically provided that ‘[t]he Commission shall establish and maintain a website and use other technologies to promote accessibility and transparency to the public.’ In addition to webcasting, such websites also allow access to daily transcripts, rulings of the commissioner, and other information.” See Ratushny, supra note 47 at 177.
must conclusions be unanimous or rather might decisions be made by majority vote, in which case shall there be room for a “dissenting opinion” as might be done in a court proceeding? We saw for example in chapter two that the Model Rules of Procedure for UN COIs left room for the inclusion of dissenting opinions in reports.996

7.7 A Word on the Selection of Commissioners

It is clear from the case studies that the choice of commissioners is crucial to the ultimate success of the inquiry. In terms of selecting commissioners, it is also clear from past UN COIs that they tend to come from the ranks of lawyers, and in particular experts in international criminal law. We saw this in the case of the Gaza COI, where all members of the COI were lawyers or former military. When appointing only or primarily international criminal law experts, no matter how much the intention of those establishing the COI is to leave it to the commissioners to determine what facts to consider, it is not a surprise that they tend to focus on international crimes and the facts pertinent thereto. But if we begin to see UN COIs in a different light, then there will be a need for a greater variety of backgrounds from commissioners. In the past, the tendency has been to ensure regional or gender representation; while important, professional representation should also be considered in the future.997

Varun Gauri has noted the advantages of a human rights approach to human rights and development work,998 but also noted that, in the words of Philip Alston, “a human rights approach gives little or no guidance in terms of prioritizing allocative decisions or making trade-offs, and cannot easily analyse the sometimes perverse consequences of a redistributive policy, such as forms of moral hazard or free riding.”999 As a result, Gauri’s conclusion is that while reconciling human rights and

996 See supra note 223 and accompanying text.
997 For example, COIs might include economists, development experts, environmental and health experts, or others with a focus on development and reconstruction; that is, others whose job it is to focus on how to prevent the recurrence of violence and mitigate the factors that contribute thereto, as opposed to those its job has been to respond to and punish those who resort to criminal acts after a society has begun deteriorating.
economic approaches to development will always be complex, “both approaches can learn from the limitations of the other, and should recognize their complementarities.”\textsuperscript{1000} UN COIs would seem to provide an excellent opportunity to witness such complementarity of approaches and to see this mutual engagement on the same post-conflict context with the goal of coming to a mutually agreeable series of recommendations.

7.8 Introducing the Idea of Commission Counsel

Canadian COIs have resorted, now in most cases, to the idea of commission counsel to help improve the transparency of COI hearings and ensure a separation of judge and advocate to mitigate against perceived bias. Similarly, in the international arena it may be the case that commission counsel can play a role in particularly controversial COIs. Indeed, we saw in chapter two that the idea of employing counsel or a “juge d’instruction” to cross-examine UN COI witnesses dates back at least to the late 1960s.\textsuperscript{1001}

At international COIs, the benefit of having a commission counsel would be to represent neutral parties or the interests of witnesses or parties whose reputation might be affected, to present controversial evidence while allowing the commissioners to focus on its evaluation, or merely to ensure that there is – at least perceptually – a distinction between the commissioner(s) and the advocates or those that present the evidence. International COIs may never have the time and funding to look like domestic COIs in terms of their proceduralism; even domestically, the increased resort to lawyers is sometimes criticized for undermining the pedagogical and discursive elements of the COI process and for making the process more adversarial as opposed inquisitorial.\textsuperscript{1002} However, that does not mean that commission counsel might not be of benefit in certain circumstances.

\textsuperscript{1000} Alston and Robinson, \textit{ibid} at 7. See generally Gauri, \textit{supra} note 998.
\textsuperscript{1001} See supra note 215 and accompanying text.
\textsuperscript{1002} For a Canadian discussion of the distinction between adversarial and inquisitorial models of inquiry, see: Patrick Robardet, “Should We Abandon the Adversarial Model in Favour of the Inquisitorial Model in Commissions of Inquiry?”, in Pross, Christie, Yogis, eds, \textit{Commissions of Inquiry} (Toronto, Calgary, Vancouver: Carswell Publications, 1990) at 111. Robardet offers reasons to reject the dichotomy between adversarial and inquisitorial models.
For example, the proceduralism associated with adding commission counsel to the COI process can provide a benefit for certain problems that might be foreseeable. Presenting evidence through the hearing process, with a commission counsel doing the research and providing the relevant documents to the commissioners allows for a communal debate on the evidence and events investigated. Hearings, and the evidence presented at such hearings, would invariably take on an increased importance in both the COI findings and in the international perception of the fairness and thoroughness of the COI process. This can be a very good thing. Evidence can seem obscure, incomplete and one-dimensional when in report form, no matter how lively the writing. It is very difficult to translate all that was seen and heard, and the implications and understandings gained by making site visits and speaking with forensic experts. But to a degree this process can be made more accessible through the open hearings process – as truth commissions have learned the world over. In the hearings process the audience becomes part of the inquiry and the commissioners become neutral arbiters of the evidence presented.

This is not to say that such a common law, procedurally-heavy approach is necessarily or always best suited for the international system. Rather, it is to say that there are legal-procedural solutions, tried and tested elsewhere in the world, that can be considered by international or mixed domestic-international COIs to help overcome some of the persistent problems with – or criticisms of – international COIs.

Moreover, it is arguable that there is a duty in international law for the UN, given its resources, to provide for commission counsel in certain large-scale UN COIs. Article 14(3)(a) of the ICCPR, for example, provides for the right to assistance of legal counsel before an independent tribunal. In some circumstances, UN COIs – or their public hearing processes – might be sufficiently similar to a “tribunal” so as to require the application of Article 14. So, the fact that cross-examinations can be slow, and timing is always an issue with UN COIs, will need to be balanced with both the benefits

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1003 Similarly, ICCPR, supra note 855 at Article 14(3)(e) provides for the right to examine witnesses and evidence. Moreover, the Guidelines for Inquiries into Allegations of Massacres, supra note 305 at para 36, explicitly states that: “[s]urvivors, eyewitnesses and alleged perpetrators” who are interviewed by COIs should be advised “as to the possible consequences of their statements and that they may, should they so wish, be assisted by counsel.” They should also be made aware that the COI is “not a judicial organ”, but nevertheless “the commission should be satisfied that the interviewees will have a right to their own counsel and enjoy other guarantees of a fair hearing.” Ibid.
of a commission counsel to ensuring that evidence is admitted impartially – as noted above – but also with the right of implicated individuals to be provided with the right of reply to accusations that might implicate them.

7.9 Conclusion

In chapters two and three of this dissertation we saw how UN COIs have developed into the contemporary ad hoc war crimes investigations that we see today. We also saw how this development towards war crimes investigations was informed by the broader trends taking place in both international law and international relations. No longer are international disputes that threaten conflict seen as matters between two nations where simply collecting scientific or objective evidence to shed light on the truth will serve to resolve the tension and dictate the obvious, inescapable solution. Today, the proliferation of technology including satellites, the internet, twitter, digital photography and media, camera-phones, etc., coupled with freedom of movement of individuals, activists, human rights monitoring bodies and NGOs, and a globalized world that shares information between friends, relatives, and strangers through the Internet all across the world combine to ensure that, in general, the facts relevant to disputes are known and simultaneously highly contested, as is the applicable law. Rarely do UN COIs today need to act first and foremost as they did at the end of the nineteenth century when the old Hague Conventions were promulgated: as the disseminators of very basic factual information about whether a conflict is taking place and what is happening or when/how it started. For contemporary UN COIs, the trick is sifting through all of the information and opinions in the public domain and offering a singular, credible, reliable, independent and impartial documentation of evidence on a particular topic.

But this cannot be accomplished while pursuing a holistic transitional inquiry or making claims of individual criminal accountability with reference to international criminal law standards. What is needed is a niche for UN COIs such that they can take advantage of their unique structural benefits. And all is not hopeless, though some caveats do apply. First, UN COIs should operate in post-conflict situations, not intra-conflict. Second, they must have a relatively narrow focus to start and go into greater depth on fewer topics than many UN COIs tend to do – even a narrow focus will take a great deal of time, resources and energy, given the tasks confronted by COIs. Third,
UN COIs should be given more time to complete than, for example, the several months given to the Gaza COI. When the purpose of UN COIs is neither to avert an imminent or existing war nor to gather evidence for the criminal prosecution of individuals, then there is less of a hurry required. In any event, the benefit of a UN COI is its size and expertise, its ability to probe deeply into a problem; UN COIs should be given the time to engage deeply.

But even with the appropriate purpose, for UN COIs to be a success, they must be created through a process that is transparent, clear and participatory and processes of the COIs themselves must ensure the creation of a credible and reliable product. We have seen the benefits of interactional law-making in particular in relation to the creation of UN COIs, and that Fuller’s legality, imported as part of interactional law-making, is the best tool to go about ensuring fair processes that lead to credible, reliable products. In particular, this chapter has offered some preliminary insight into how interactional law-making and legality can help us to begin to think about the common criticisms of UN COIs that we have seen and to make improvements. However, as we saw there are few absolute answers. How legality would apply to UN COIs – or the creation thereof – is highly contextual in nature and depends on the issue at hand, what the nature of the evidence is, whether individual or forensic, whether other rights, interests or reputations are implicated, the purpose(s) of the COI, etc. Many legal and due process decisions are best made by determining what is fair in the context, considering all angles and the context of the report and the decision to be made.

What I have thus offered in the second half of this chapter is the beginnings of a flexible approach to UN COI processes, one that relies on principles – derived from an engagement with the internal morality of the law – applied contextually for its understanding, but also one that asks commissioners to reason with what the law requires and how it can be adapted to their practical needs, rather than simply applying a list of rules. The most important of these principles are very simple indeed: there must be rules set up front; they must be clear and transparent; they should strive to be fair between the parties to the dispute, those implicated by the report and those testifying before it, and respect their basic due process rights; and these rules should be implemented by a UN COI that is created by an inclusive, deliberative process. Almost shockingly, such reminders are necessary because UN COIs have rarely
evinced a consistent commitment to these rather basic ideals. Finally, legality provides a constant reminder of the need to engage with the law, to be open and offer reasoned decisions and this, in itself, is a valuable service.
CHAPTER 8
CONCLUSION

8.1 The Purpose of UN COIs

Ad hoc international COIs have developed incrementally over a period of more than one hundred years, from the Hague Conventions of 1899 and 1907 through to the incorporation of fact-finding into the UN Charter and eventually to the contemporary incarnation of that we see today. The first international COIs under the Hague Conventions were conceived in a very scientific fashion: conflicts can be avoided if two parties are given the time to “cool-off” while objective fact-finders investigate a dispute – usually a maritime dispute – and present evidence not otherwise available in order ultimately to promote the conciliation or arbitration of the dispute. The UN adopted its initial purposive perspective of COIs largely from the Hague Conventions, and saw COIs as contributing to the “maintenance” of international peace and security, although almost immediately inconsistencies arose as UN COIs often acted in instances where conflict had already commenced and where there was no peace to be maintained, a trend that has become the norm today.

Over the years, the purposes and procedures of UN COIs shifted slightly but it was around 1980 when things really began to change. At this time, there were rather significant changes taking place in international law and international relations and in the way that human rights fact-finding was taking place. The increased tendency to view internal armed conflicts as contributing to international insecurity, coupled with the erosion of the concept of the sovereign equality of states as an impermeable barrier to such human rights investigations, contributed to a proliferation of human rights inquiries. This proliferation of NGO and subsequently UN human rights fact-finding in the 1970s and 1980s, in addition to the largely domestic trend to focus on truth commissions and prosecutions as ways of dealing with mass atrocities, had two subsequent consequences. First, it evinced the benefits to be had from human rights fact-finding, from searching for the truth and holding perpetrators of criminal offences to account. Second, it contributed to a fragmentation of the system, meaning that multiple actors were operating where human rights abuses were taking place, each perhaps with a different focus. The fragmentation trend has in turn contributed to a proliferation of rules and guidelines on the principles and procedures of UN COIs in an effort to
bring the system back together. However, these rules have tended to be non-binding, and their substantive content remains rather hollow.

The erosion of the concept of sovereign equality as it pertains to human rights abuses coupled with the success of fact-finding missions and domestic inquiries in promoting accountability for such abuses also contributed to the trend in the early 1990s toward individual criminal accountability in particular as an important consideration in promoting peace and post-conflict justice. This signalled a turn toward the individual, as opposed to the state, as an object and subject of international law, and toward the increased focus by UN COIs on fighting impunity.

Human rights fact-finding had proved successful as part of the response to conflict and massive human rights abuses, and the Yugoslav and then Darfur ad hoc COIs proved that large-scale, ad hoc UN COIs in particular could collect and pass information to a court – the ICTY and ICC respectively – when the court was not available to begin immediately the fact-finding. Further, there was a need to centralize and amalgamate some of the human rights fact-finding work where it pertained to large-scale conflicts because, in to understand the causes and consequences of such conflicts, a big picture view was needed. The development of the field of transitional justice contributed to the sense that there is a need to view conflict and the solutions thereto holistically. And because large-scale UN COIs, in contrast to the Special Rapporteur system for example, were seen to offer holistic, compendious approaches to complex problems of peace and development, there was a renewed role for compendious post-conflict COIs as a method of response to massive human rights abuses.

UN COIs such as that in Gaza and even more so the DRC Mapping Exercise thus adopted broad, “transitional justice approaches” to their work. In practice, this has meant that UN COIs will now generally be established with broad goals built on a robust understanding of how transitions to peace and democracy come about and of how post-conflict societies are best stabilized. As transitional justice instruments, these contemporary ad hoc UN COIs speak to all the buzzwords of the day – the right to truth, peace-building, democratization, vetting, institutional reform, reconciliation, reparations for past wrongs, but most of all ensuring accountability for the most serious crimes. Human rights fact-finders of the 1980s, ‘90s and early 2000s were making great strides, and the biggest, most flexible, and best-resourced fact-finding body at the
UN was thought able to incorporate all of these developments and marshal them to combat the most serious conflicts of the time – those tending to be ongoing intra-state – or internal – conflicts.

But for both practical and legal reasons UN COIs must amend their raison d’être. The grand ambitions of the international human rights fact-finding movement of the past 30-years must be scaled back, at least when it comes to UN COIs. The system of UN COIs has been tasked with too much, with too many competing tasks, many of which they are unable to fulfill. One body – the UN COI – has over-reached and we must now temper and recalibrate our expectations for what they can reasonably – and legally – achieve.

In particular, UN COIs cannot be quasi-criminal investigations. The problems encountered by UN COIs in making the case for criminal wrongdoing is not the result of a failure by a particular UN COI that can be improved with better legal analysis – as much of the academic literature on UN COIs seems to assert – but rather the result of problems structural to the UN COI process. Large-scale criminal investigations are too demanding a task for many courts, let alone for COIs given short timelines and high demands. COIs are asked to investigate numerous incidents as opposed to dealing with just one accused. Quite simply, they are not courts of law and as such are not legally able to make findings of criminal guilt.

Legality also does not countenance UN COIs issuing public reports with non-criminal findings of possible wrongdoing based on criminal law tests. When UN COIs make “non-criminal” findings of probable criminal guilt this causes too much confusion – it is not clear that such findings are not really criminal findings by another name because such findings will always look like conclusive legal findings. And it is no defence to say that UN COIs speak not to individual accountability for international criminal wrongs but to a more general idea that criminal wrongs are likely taking place. International criminal wrongs are individual wrongs; they do not exist in the abstract, disconnected from individuals. One simply cannot evaluate the necessary mens rea for specific intent offences, for example, without a connection to an individual. Indeed, even if the distinction was made clear between criminal findings and non-criminal findings based on criminal tests and if we accepted the notion that individual criminal wrongs could be evaluated in the abstract, the result would be absurd: UN COIs would be making non-criminal findings based on incomplete legal analyses that criminal
wrongs might have taken place during a conflict where, in all likelihood, virtually everyone following the conflict already suspected that criminal wrongs might have taken place. The very best that could be achieved by such a process is, in other words, nothing. The point is only strengthened by the domestic experience with COIs: they function best when focussed on systemic problems, not on individual wrongdoing.

Likewise, UN COIs should no longer operate with a holistic transitional justice purpose for several reasons. First, this approach has tended to cause UN COIs to pursue disparate tasks that require different – and sometimes conflicting – procedures that ultimately undermine the credibility and reliability of the final report. Second, this is too unfocused a strategy and results in conclusions and recommendations that are far too speculative and general. The result is that rather than providing novel insight, the COIs are spread too thin and their conclusions tend to reproduce the standard taxonomy of transitional justice solutions – solutions we are already aware of – rather than offer specific, contextual recommendations.

This does not mean that there is not a place for large-scale ad hoc UN COIs in the fact-finding system. It is just that their place in the international system needs to be different than what it is today. We have seen that UN COIs have many benefits and their purposes can be anywhere along a what this dissertation has called the UN COI “purposive continuum” – it does not have to be at the criminal investigation pole of that continuum, or at the holistic transitional justice pole. UN COIs can leverage their size, flexibility, the expertise of their commissioners and staff, and the fact that they are relatively responsive and well funded, to provide a benefit. Operating in post-conflict scenarios, they should be established with their traditional “Hague Convention” purpose in mind, that being to prevent conflict or the repetition thereof. But they alone cannot provide all or even most of the solutions and they should not be mandated to try.

Instead, future UN COIs need to be more focused with much narrower mandates. Their mandates should remain flexible to take advantage of their ad hoc nature, but this should be a focussed flexibility whereby COIs are asked to delve deeper into a specific aspect of a systemic problem but given room to pursue inquiries into how the causes of that problem will be defined. In other words, the systemic problem for inquiry should be set for UN COIs in a specific, focussed way, but the solutions – whether they be economic, structural, or rights-based – should not be presupposed.
Moreover, *ad hoc* UN COIs must begin to move from operating in *intra-conflict* situations – conflicts that are ongoing or experiencing a downtime between flare-ups – to operating in post-conflict situations. Simply put, the process of operating during a conflict to stop it or hold violators of international norms accountable and operating as part of a post-conflict reconstruction project has tended to put conflicting procedural demands on UN COIs in terms of due process, what types of evidence to collect, how it should be collected and how quickly it must complete its task. UN COIs tend to be more effective in working to find solutions that might benefit society or prevent conflict than they are in working to end an ongoing conflict and, in any event, the primary intra-conflict task for a COI – investigating wrongdoing – is, as suggested, not well suited for UN COIs.

However, to find their place in the international system, more than their purpose will have to change. UN COIs processes – including the process of establishing UN COIs – will also have to evince a greater commitment to legality and interactional law-making.

### 8.2 UN COI Processes and a Commitment to Legality

Even as the purposes for which UN COIs operate have changed and the rules for UN fact-finders proliferated, the same persistent problems continue to be associated with contemporary *ad hoc* UN COIs as have always been associated with large-scale *ad hoc* fact-finding. UN COIs are generally criticized with regard to their partiality, independence and openness, and these general concerns manifest in a series of repeated forms seen in the Gaza COI case study. So UN COIs have consistently been criticized with regard to: their biased mandates; the clarity of their mandate and purpose; a disproportionate focus on a particular country, region or conflict; the selection of biased commissioners; inflammatory language used in reports and shifting standards of proof; a misguided or biased review of the facts; the lack of clarity in or promulgation of their rules and methods of operation; the quality, quantity and use of corroborating evidence; and, their approach to balancing interests in protecting witnesses while also providing full and prompt disclosure of legal findings to individuals and/or states concerned.

Fuller’s criteria of legality and an interactional account of international law can help frame this discussion by speaking to each of the usual criticisms of UN COIs, and
it can do so in a constructive way that leads to some suggestions for improvements in
UN COI processes.

And though a commitment to legality is mandatory for UN COIs, because
singular purposes or particular methodologies cannot be uniform across flexible, ad hoc
UN COIs, the rigid – and historically rather shallow – standards contained in the
applicable guidelines or operation manuals are not the best option to improving UN COI
fact-finding. Instead, approaching UN COIs from a legal perspective, engaging with the
operations, rules and parties in an open, participatory, thoughtful manner is better
suited to the process.

By viewing UN COIs through the lens of legality we can begin to articulate the
appropriate principles and procedures by which a UN COI is to abide by reference to its
mandate. Legality makes clear the need to create and abide by clear and transparent
rules, to treat them as legal rules and interpret them openly and clearly, and to instill a
justificatory culture in UN COIs whereby reasoned decision-making blazes a trail from
the articulated rules through to the conclusions. These principles of legality, applied
contextually to the persistent criticisms of UN COIs, can surely improve their
procedures, their fairness, and ultimately improve the extent to which UN COI reports
are relied upon.

Interactional law extends Fuller’s analysis to the international domain but also, of
particular importance for the creation of UN COIs, offers a view of how open,
participatory processes of creating law – in this case establishing UN COIs – can
ultimately help develop and maintain a distinct legal legitimacy. But a similar focus on
interactional law-making by the commissioners of UN COIs – by those interpreting the
mandates and reaching out to the parties to a conflict for their contributions – can also
improve the quality of their reporting and the solutions provided. In so doing, a focus on
interactional law-making can promote a fidelity to the work and findings of UN COIs.

UN COIs are legal enterprises, so they are obliged to abide by the principles of
legality. But from a practical perspective they are also dependent on credibility and
reliability for their success – attributes that legality and a focus on interactional law-
making can improve. As a result, from start to finish a commitment to legality and
interactional law-making is fundamental for UN COIs, and this is true with respect to
those who constitute UN COIs and to the COIs in their day-to-day operations. As
Brunnée and Toope have posited, “[a]ll that is required to begin the process of law-
building in international society is a shared understanding that law is needed in a given context. “It is time recognize the importance that law has to play in the processes and procedures of UN COIs in order to ensure their effectiveness, reliability, and credibility – their legitimacy.”

8.3 Closing Thoughts

In regard to the persistent problems associated with international fact-finding, Professor Thomas Franck has argued that:

[T]he prospects for fact-finding rest upon a fragile assumption of ‘fairness’ and ‘credibility’ that only a conscious vigilance can sustain...[I]f fact-finding is to become more than another chimera, the sponsoring institutions must develop universally applicable minimal standards of due process to control both the way the facts are established and what is done with them afterwards.

But contrary to Franck’s assertion, the “prospects for fact-finding” do not have to rest on a “fragile assumption” of fairness. For rather than having to “develop” the “universally applicable” principles and standards in the form of more official guidelines, a treaty, or UN legislation, the applicable principles and practices for UN COIs can be discovered by engaging with the principles embedded in the law itself and how they pertain to the strengths, weaknesses and capacity of UN COIs.

Ultimately, the goal is to start to recognize and build the legal architecture applicable to the establishment and operations of UN COIs in order to help find for them purposes that are suitable to their strengths and bring a level of coherence and fairness to their creation and operations such that they might be viewed as increasingly credible and reliable – legitimate – enterprises in the future. There will of course be limits to what legality can provide, and sometimes shared understandings will not be possible in the creation of UN COIs, but a commitment to legality and interactional law-making is “aspirational”, something for UN COIs and those that establish them to strive toward.

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1004 Brunnée and Toope, supra note 21 at 344-5.
1005 For as Fuller has stated, his conception of the inner morality of law depends on an understanding of “maintaining communication with our fellows” as “the principle that supports and infuses all human aspiration.” See Fuller, the Morality of Law, supra note 25 at 185.
1006 Franck and Fairley, supra note 191 at 309.
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