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SOCIALISATION BY INQUIRY

A STUDY OF THE EFFECTIVENESS AND IMPACT OF HUMAN RIGHTS COUNCIL-MANDATED COMMISSIONS OF INQUIRY IN ISRAEL AND PALESTINE

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Even before embarking on this long and perilous adventure that has been my doctorate, I used to receive advice from friends who had already started or completed one. They used to tell me: 'It's a long and strenuous process that will test your resilience to the very end'. I never fully got to understand the meaning of these words, which often open the acknowledgment section of doctoral dissertations, until I started my own research three years ago. Since then, the process has progressively escalated precisely as my friends foresaw it! Until the last seven months, which I literally spent in utter confinement to my studio flat in London or in the British Library. Yet, the road that has led to these pages has also been constellated with delightful moments and encounters. Mostly, it has represented for me an opportunity for personal and professional growth, and for this I am grateful. I think some 'special thanks' are in order.

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INTRODUCTION

The states' inability to respond promptly with decisive action to human rights and humanitarian law violations has been accompanied, throughout approximately the last three decades, with an increased deployment of mechanisms for the clarification of the facts.[1] The United Nations, the Council of Europe, international non-governmental organisations and many other actors[2] regularly establish commissions of inquiry or fact-finding missions to ensure that, at the very least, the world knows what is going on from supposedly reliable and authoritative sources. There is no doubt that securing the facts in such contexts is essential. Indeed, in a world where accounts about human rights and humanitarian law violations swing between opposed ideologies, as has been noted before, 'truth is the first casualty of war'.[3] Against this background, international inquiry mechanisms offer the prospect of, at least, public accountability[4] in that they call domestic actors to account for their actions before the international community of states.

Moreover, international commissions of inquiry are said to contribute to legal accountability by securing an evidentiary record of the events, to defusing tensions by advising restraint or specific action to mitigate ongoing patterns of violations, and to preventing further violent escalations by alerting the international community. But, similarly to other international institutions, the deployment of inquiry mechanisms has also engendered further expectations

[1] However, see infra, how international inquiries have increasingly been applying the law by qualifying the elucidated facts (Chapter I, 41-53).
[2] The list of actors that regularly deploy fact-finding or inquiry to acquire factual knowledge of events is not intended to be exhaustive.
[3] Philip Snowden, 'Introduction' in E D Morel, *Truth and the War* (National Labour Press LTD 1916) vii.
[4] Mark Bovens, 'Public Accountability' in Ewan Ferlie, Laurence E Lynn Jr and Christopher Pollitt (eds), *The Oxford Handbook of Public Management* (online edn, OUP 2009).

among victims, diplomats, historians, legal professionals and even scholars. Part of the academic literature has sought to critically assess the institutional goals international inquiries are entrusted with by also proposing new normative perspectives. For example, an increasingly rich debate is developing around the potential synergies between international prosecutions and inquiry mechanisms, which seems to emphasise a potential link between international non-judicial inquiries and the criminal process.[5]

In contrast, this study seeks to dissect human rights inquiries from a slightly different angle. I am not so much interested in a descriptive-normative understanding of international commissions of inquiry as I am concerned with their impact and way to engender it. While scholars have studied what commissions of inquiry are, how they interpret and apply the law, whether they should be regulated by binding rules of procedure and evidence and how they interact with other institutions, there is a striking lack of research of their impact on domestic systems. In other words, it is still under-researched whether these mechanisms are able to elicit meaningful change at the state level and whether this makes any difference for domestic communities.[6] The central question marks in my research are eminently empirical: what institutional, legislative, jurisprudential and policy change have international commissions of inquiry engendered at the state level? And how have they engendered such domestic change?[7]

These questions raise inter-locked issues of substance and methodology. The first of the two questions essentially is concerned with the impact and effectiveness of international

[5] See, for example, Lyal S Sunga, 'How can UN human rights special procedures sharpen ICC fact-finding?' (2011) 15(2) *International Journal of Human Rights* 187; Carsten Stahn and Dov Jacobs, 'The Interaction between Human Rights Fact-Finding and International Criminal Proceedings' in Philip Alston and Sara Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (Oxford University Press 2016). It is worth reminding the reader that commissions of inquiry and criminal prosecutions may interact in different ways and at different stages. As I explain infra (see Chapter I, 53-60), synergies between these two tools must take into account the different purposes for which they are deployed and the different normative standards that regulate their mode of operation and logic of inference.

[6] However, while this dissertation was being researched, the *European Journal of International Law* published a call for papers for a symposium on the theme of 'International Commissions of Inquiry: What Difference Do They Make?' <https://www.ejiltalk.org/announcements-cfp-for-ejil-symposium-international-commissions-of-inquiry-free-biicl-event-obligations-of-states-in-undelimited-maritime-areas/> accessed 4 January 2019.

[7] A more comprehensive articulation of the central research question can be found at the end of Chapter I.

commissions of inquiry. It implies determining what relevant domestic changes can be attributed to inquiry mechanisms and, as such, it presupposes the second question. Asking *how* commissions of inquiry seek to generate change within states essentially means investigating processes. That is to say that one should establish an uninterrupted chain of causation between the specific outcome considered and its cause, in this case, a commission of inquiry.

Mechanistic theories posit that for a process to unfold, there must always be an agent and an activity undertaken by this agent. But is it possible to uniformly describe what commissions of inquiry do? From a legalistic viewpoint, the diversity that characterises these mechanisms and their *ad-hoc*-ery translate into different mandates and goals, which in turn means different activities. Thus, the first problem concerns the definition of the activities undertaken by international inquiries. Is it possible to find a unifying theory that describes what such tools are employed for? International relations theories on state socialisation offer a broad enough understanding of the relationship between international regimes and states to accommodate all sorts of institutional mechanisms devised to maximise domestic implementation of and compliance with international norms. State socialisation also constitutes the ultimate goal of all international regimes, including the human rights and humanitarian law regimes. Moreover, because these theories seek to explain why states obey international law or, put in another way, how international law and institutions influence states' behaviour, their focus is on processes. In addition, international relations scholars have elaborated a fairly simple grid to explain state socialisation.[8] This includes essentially three different mechanistic explanations: coercion, persuasion and acculturation. An additional explanation has been identified by international lawyers on the basis of the legitimacy of the mechanism employed to engender the desired change. From these theories we can thus extrapolate some more uniform blueprints to describe how commissions of inquiry seek to change the behaviour of – that is, socialise –states.

[8] See infra, Chapter III, 138-147.

Yet, if the analysis were limited to adapting these theories to the specific mode of operation of international inquiries, this study would simply be limited to formulating a set of hypotheses. Instead, the research question whence this study proceeds is, as I have pointed out, eminently empirical. In other words, it requires to be investigated not so much in its theoretical dimension as in its real-life application. Because the focus of this study is the inquiry *process*, which means that I am interested in uncovering the causal mechanisms that explain the effectiveness and impact of international inquiries, the most appropriate methodology must be one that facilitates the identification of chains of causation. Yet again, disciplines other than law offer some useful insights. Social scientists have elaborated methods such as process-tracing or congruence to reconstruct causal paths between variables and outcomes.[9] While these methods have yet to be refined, their practical application requires particular methodological rigour. Moreover, for the depth of analysis that such methods aspire to, they also require a very specific focus. In other words, while quantitative methods of inquiry proceed from data sets concerning large populations, qualitative methods generally focus on specific cases.

In this spirit, I investigate the domestic effectiveness and impact of international commissions of inquiry in a case study that I consider emblematic: the Israeli-Palestinian conflict. Since its inception, the UN Human Rights Council has dispatched five international commissions of inquiry to Israel and Palestine,[10] and two monitoring committees to oversee the implementation of the recommendations of the controversial Goldstone Report. As explained in more details in Chapter II,[11] this case study epitomises some of the problematic issues

[9] Some examples of studies in law that have made use of these methods are Sarah Nouwen, *Complementarity in the Line of Fire. The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (CUP 2013); Jasper Krommendijk, *The Domestic Impact and Effectiveness of the Process of State Reporting under UN Human Rights Treaties in the Netherlands, New Zealand and Finland. Paper-pushing or policy prompting?* (Intersentia 2014).

[10] At the time of writing, the Council has deployed another commission of inquiry to investigate allegations of violations committed during the Gaza border protests throughout the spring 2018 (UNHRC, Violations of international law in the context of large-scale civilian protests in the Occupied Palestinian Territory, including East Jerusalem, Res No S-28/1 (22 May 2018) UN Doc A/HRC/RES/S-28/1).

[11] See infra, Chapter II, 73-78.

identified in the academic literature on international inquiries. The specific context exacerbates the dynamics that underpin the interaction between fact-finding missions and states. While, on the one hand, this makes this case exemplary, on the other, it also poses some problems in terms of generalisability of the findings. The specificities of the Israeli-Palestinian context determine the boundaries of the case study within which there is more space for generalisations. However, by breaking down the case study into thematic units of analysis, it is possible to isolate situations – or sub-case studies – that may be replicable and, therefore, potentially generalisable.

It must be borne in mind though that the objective of this study is predominantly explanatory. Admittedly, all the prescriptive insights that are distilled from the findings of this work are not meant to provide a sufficiently solid basis for reforming international inquiry mechanisms. Rather, they assist in identifying some points for further consideration and research. But it must also be remembered that, at the present stage, commissions of inquiry remain a largely ad hoc mechanism. Arguably, this lack of uniformity also aims to guarantee a certain level of flexibility so that such procedures may be deployed in widely different contexts. The long-debated question of whether commissions of inquiry should be established following a rigid code of practice may thus be partly misplaced. Be that as it may, I think that any such attempt should be discussed not so much – or, at least, not exclusively – in light of what commissions of inquiry are or of how they apply the law, but rather in light of their impact. That is to say that while we may debate about the purpose and mode of operation of international commissions of inquiry in light of what they actually do, reform should also be based on what they are actually able to achieve when they interact with domestic systems.

This study is organised into two parts, each composed of three chapters. Part I provides the theoretical and methodological foundations that guide the empirical analysis in Part II. In particular, Chapter I surveys the existing relevant scholarship on international commissions of inquiry. It provides a definition of international inquiries and contextualises them historically

by showing how they evolved from a dispute settlement mechanism, under the Hague Conventions 1899 and 1907, to a mechanism for the elucidation of facts about human rights and humanitarian law violations. Furthermore, it explores some burning issues that are relevant for the empirical analysis in Part II. Chapter II explains the methodology employed in this study by providing specific reasons for the choice of the Israeli-Palestinian conflict as a case study and by describing how data were collected and interpreted, and what limitations were encountered. Chapter III provides a theoretical framework for the ensuing empirical part. It frames international commissions of inquiry as agents of state socialisation by emphasising their potential and limitations. It implicitly formulates a set of hypothetical claims to be verified with the empirical analysis. Chapter IV delves into the case study by, first, describing the Israeli-Palestinian context in which international commissions of inquiry operate. Based on the existing literature, it seeks to show how Israel and Palestine perceive the intrusion of international law and institutions in matters related to the conflict. It then shows how the Governments of Israel and Palestine reacted to the establishment of five Human Rights Council-mandated commissions of inquiry and how the procedural features of such mechanisms were perceived by domestic actors. Chapter V seeks to reconstruct the attributability of domestic institutional, legislative, jurisprudential and policy change to different commissions of inquiry, by analysing five thematic issues. In seeking to establish causation, Chapter V also describes the micro-processes that underpin such change and endeavours to explain why, in some cases, change did not occur or was not sustained. In the Conclusion, I summarise the empirical findings and, based on such findings, I seek to identify a number of issues that may be the object of future reform.

PART ONE

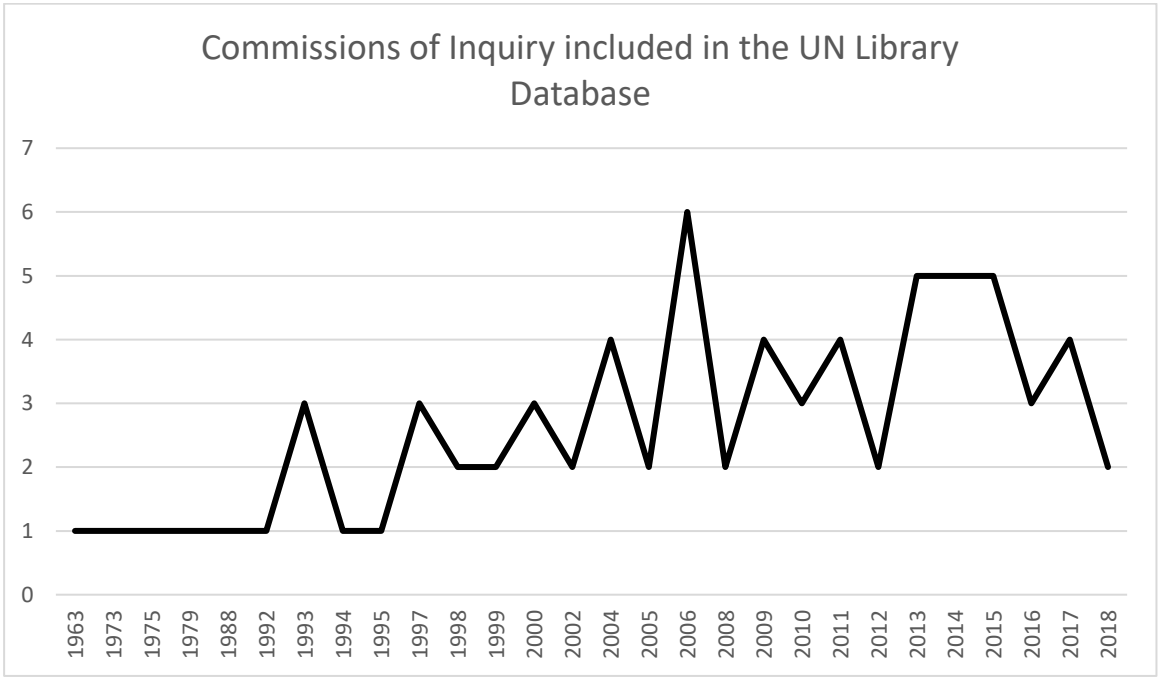
CHAPTER I

INTERNATIONAL COMMISSIONS OF INQUIRY: A PURPOSIVE REVIEW OF THE EXISTING LITERATURE

Introduction

A simple scroll down the chronological list of international commissions of inquiry and fact-finding missions of the UN Library Research Guide shows a dramatic increase in the use of these mechanisms to address human rights violations over the past eighteen years.[1] This trend has been accompanied by a burgeoning scholarship which seeks to analyse in turn the

[1] UN Library Research Guide, International Commissions of Inquiry, Fact-finding Missions: Chronological List <http://libraryresources.unog.ch/factfinding/chronolist> accessed 19 December 2018. The graph below shows the number of commissions of inquiry established by the UN human rights machinery per year since 1963, as reported in the UN Library Research Guide. As can be seen, it is after the end of the Cold War that the UN begun dispatching an increasing number of inquiry mechanisms per year. Such increase coincides with the renewed efforts at the international level to provide accountability for human rights violations around the world, which saw the establishment of the two ad hoc International Tribunals for Former Yugoslavia and Rwanda in the 1990s, and later of the International Criminal Court. A peak can be observed in the period ensuing the so-called Arab Spring (after 2010 and 2011), which was followed by several situations of domestic disturbances or full-fledged armed conflicts. The first decade of 2000 registered another peak of inquiry mechanisms established to investigate widespread violations especially in Africa (Togo, Côte d'Ivoire, Darfur and the Democratic Republic of the Congo). This coincides with the regional focus of the International Criminal Court during its first years of operation.



legitimacy of such mechanisms, their function(s), evolution, operative standards and application of and contribution to the law, specifically international law.[2] Indeed, if one thing can be said with confidence about these commissions it is that, despite their nomenclatures, they do not limit their work to unveiling the facts of a case, but rather venture into sometimes complex legal analyses of those facts. This must not mislead us to think that commissions of inquiry are similar to courts of law. They are not. They normally do not enjoy real investigatory powers, their pronouncements are in no way binding and – it goes without saying – they do not have any authority or capacity to enforce their recommendations.

Factual inquiries can be carried out at several levels. National commissions of inquiry are normally appointed by parliaments or governments;[3] international non-governmental organisations (NGOs) heavily rely on some form of fact-finding, whether conducted by their partners on the field or by ad hoc delegations or groups of experts entrusted with carrying out on-site visits;[4] international and regional organisations regularly appoint fact-finding missions

[2] Some of the most important scholarly contribution to the debate on international commissions of inquiry are: Thomas M Frank and H Scott Fairley, 'Procedural Due Process in Human Rights Fact-Finding by International Agencies' (1980) 74(2) *AJIL* 308; Sylvain Vité, *Les procédures internationales d'établissement des faits dans la mise en œuvre du droit international humanitaire* (Éditions Bruylant 1999); M Cherif Bassiouni, 'Appraising UN Justice-Related Fact-Finding Missions' (2001) 5 *JL&Pol'y* 35; Théo Boutruche, 'Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice' (2011) 16(1) *JC&SL* 105; Lyal S Sunga, 'How can UN human rights special procedures sharpen ICC fact-finding?' (2011) 15(2) *Int'l JHR* 187; Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Torkel Opsahl Academic EPublisher 2013); M Cherif Bassiouni and Christina Abraham (eds), *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies* (intersentia 2013); Larissa J van den Herik, 'An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of International Law' (2014) 13 *Chinese JIL* 507; Philip Alston and Sara Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (OUP 2016); Christian Henderson (ed), *Commissions of Inquiry: Problems and Prospects* (Hart Publishing 2017); Jens Meierhenrich (ed), *The Law and Practice of International Commissions of Inquiry* (OUP 2019).

[3] For example, former British Prime Minister, Gordon Brown, announced on 15 June 2009 that an inquiry would be established to identify lessons that could be drawn from the conflict in Iraq between the summer of 2001 and the end of 2009. The inquiry, which became known as the Chilcot Inquiry, from the name of its Chair, published its final report in July 2016 (for further information on the Chilcot Inquiry, see <http://www.iraqinquiry.org.uk/> accessed 5 January 2019); the Italian Parliament promulgated, on 12 July 2017, a parliamentary commission of inquiry to investigate *inter alia* the effects of the global financial crisis on the Italian bank system and how the relevant public authorities had tackled such effects (for further information about the commission of inquiry, see <http://www.parlamento.it/Parlamento/1190?shadow_organo=421917> accessed 5 January 2019).

[4] For example, both Human Rights Watch and Amnesty International often dispatch fact-finding mission to gather data for their advocacy and lobbying activities.

to investigate specific situations or incidents, or rely on the inquiries conducted by their permanent sub-agencies.[5]

This study focuses on UN ad hoc international inquiries on human rights only, that is, as I define them below, groups of experts appointed on a temporary basis to investigate specific incidents or situations of concern for the international community. UN ad hoc commissions of inquiry or fact-finding missions have an uncertain origin. They seem to have developed from the paradigm provided for in the 1899 and 1907 Hague Conventions for the Pacific Settlement of Disputes, an inquiry model geared towards elucidating contested facts for the purpose of facilitating the settlement of inter-state disputes arising out of those facts. However, they present very distinct features, which distinguish them from the early model of factual inquiries.

Traditionally embedded in the inter-state dispute settlement toolkit, the original model of international commissions of inquiry has, in recent years, been readapted to serve as an accountability mechanism to address human rights violations. This process has not been abrupt. Fact-finding strategies were first transposed to the international organisations' toolbox with the emergence of the human rights regime after WWII. Further to that, as the *Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security* explicitly envisions, international commissions of inquiry have been employed by the UN main organs in an ancillary function to ensure that their action would be informed and

[5] Besides the inquiries deployed within the United Nations system, the Council of Europe has extensively deployed fact-finding missions on the ground. For example, the European Committee for the Prevention of Torture routinely carries out in-country fact-finding missions as required by circumstances, in accordance with Article 7 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (see, for example, Council of Europe: Committee for the Prevention of Torture, *Report to the Russian Government on the visit to the North Caucasian region of the Russian Federation carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 April to 6 May 2011* , 24 January 2013, CPT/Inf (2013) 1; Council of Europe: Committee for the Prevention of Torture, *Report to the Government of "the former Yugoslav Republic of Macedonia" on the visit to "the former Yugoslav Republic of Macedonia" carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 24 November 2011*, 20 December 2012, CPT/Inf (2012) 38; Council of Europe: Committee for the Prevention of Torture, *Rapport au Gouvernement de la Moldova relatif à la visite effectuée en Moldova par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 1er au 10 juin 2011*, 12 January 2012, CPT/Inf (2012) 3).

justified. These shifts have been accompanied by a progressive 'juridification' of commissions' mandates and reports and, since the 1990s, by the spillover of international criminal law into their terms of reference and analytical framework.

However, these changes have occurred almost unquestioned. While several scholars have analysed how commissions of inquiry interpret, apply and contribute to the development of the law, whether international justice mechanisms should engage in a synergic partnership with fact-finding instruments and how inquiry procedures could be improved, there is a shortage of studies on the impact (or lack thereof) of fact-finding missions.[6] In other words, the shifts mentioned above have not occurred as a consequence of sound impact assessments of such commissions in the target states and constituencies, but simply as a reflection of the developments of the international legal system. Hence, some of the weaknesses that commissions of inquiry have displayed may be determined by their un-fitness for the purposes sought by the international community. Or, differently, one may hypothesise that the goals attributed to commissions of inquiry are overambitious or simply inadequate to the type of tool. There seems to be an asynchrony between the structural features of international inquiries and the goals that they pursue or that their establishing bodies attribute to them.[7] Ultimately, these asynchronies revolve around the identity of non-judicial fact-finding mechanisms.

By drawing on the existing scholarship on commissions of inquiry and fact-finding mechanisms, this chapter seeks to critically outline the developments that have marked the history of fact-finding mechanisms and set the stage for the subsequent empirical inquiry. In the first section, I define fact-finding, clarify some terminological issues, identify the object of

[6] See, in particular, Michael Kirby and Sandeep Gopalan, '"Recalcitrant" States and International Law: The Role of the UN Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of Korea' (2015) 37(1) *U Pa J Int'l L* 229; Jawoon Kim and Alan Bloomfield, 'Argumentation, Impact, and Normative Change: Responsibility to Protect after the Commission of Inquiry Report into Human Rights in North Korea' (2017) 9 *GR2P* 173; Shiri Krebs, 'The Legalization of Truth in International Fact-Finding' (2017) 18(1) *Chi J Int'l L* 83. To some extent, issues of impact are also discussed in Zeray Yihdego, 'The Gaza Mission: Implications for International Humanitarian Law and UN Fact-Finding' (2012) 13 *Melb J Int'l L* 158.

[7] See, in particular, Chapter III and Conclusion.

this study and summarily trace their evolution. In the second section, I unpack the so-called 'juridification' of fact-finding while stressing the differences between ascertainment of facts and legal qualification of facts, and outlining some evidentiary issues. Finally, in the third section, I define and preliminarily assess the 'criminalisation' of human rights fact-finding. Throughout the chapter, I raise some practical questions arising out of the developments identified and offer alternative hypothetical answers in order to show how the pros and cons of certain policy or analytical choices may play out differently. In the conclusion, I sum up the overview developed in the preceding sections and clearly identify the gaps in the literature, which leads to the formulation of the research questions that guide this study.

1. Definitions and Terminology

1.1 Fact-Finding

The most classical definition of 'fact-finding' can be found in the *Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security*.[8] Article I(2) of the UN Declaration affirms that:

> For the purpose of the present Declaration fact-finding means 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.

Agnieszka Jachec-Neale defines 'fact-finding' as 'a recognized form of international dispute settlement through the process of elucidating facts, given that it is the varied perceptions of these facts that often give rise to the dispute in the first place'.[9] In a similar fashion, JG Merrills describes inquiries – which Jachec-Neale equates to fact-finding[10] – as a

[8] Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security, UNGA Res 46/59 (9 December 1991), henceforth the 'UN Declaration'.
[9] Agnieszka Jachec-Neale, 'Fact-Finding', *Max Planck Encyclopedia of Public International Law* (online edn, OUP, March 2011).
[10] Ibid.

> specific institutional arrangement which states may select in preference to arbitration or other techniques, because they desire to have some disputed issue independently investigated. In its institutional sense, then, inquiry refers to a particular type of international tribunal, known as the commission of inquiry and introduced by the 1899 Hague Convention.[11]

These definitions display some commonalities while referring to ostensibly different mechanisms, if only for the fact that Merrills's definition seems to be limited to tools pre-dating the establishment of the United Nations. Francisco Jiménez García's definition, which partly mirrors those proposed above while emphasising the procedural dimension of international inquiries, emphasises the evolution of international inquiries from the Hague to the UN models. In particular, García argues that international commissions of inquiry have evolved from a dispute settlement mechanism to a tool for publicly denouncing international wrongs as a form of 'minimal sanction'.[12] While he notes that, more recently, international commissions of inquiry have become more of a legal tool capable of *inter alia* influencing the progressive development of international law, García maintains that the distinctive character of international commissions of inquiry still remains their focus on factual disputes. To further corroborate this point, one should simply consider the nomenclature that international legal scholars of different countries employ to group inquiry mechanisms of different typology under an umbrella term. While inquiry mechanisms may be referred as *comisiones internacionales de investigación*, Spanish public international lawyers tend to refer to them as mechanisms for the *determinación*

[11] JG Merrills, *International Dispute Settlement* (5th edn, CUP 2011) 41.

[12] Francisco Jiménez García, 'Orden internacional, estado de derecho y comisiones internacionales de investigación' (2011) 83-84 *Revista cuatrimestral de las Facultades de Derecho y Ciencias Económicas y Empresariales, Especial 50 Aniversario ICADE* 225, 228-230. The author contextualises international commissions of inquiry as mechanisms for publicly denouncing international wrongs ('La denuncia pública e institucional como sanción mínima, aunque en muchos casos, única') and stresses their focus on factual disputes ('esclarecimiento de una cuestión de hecho en disputa entre las partes mediante un examen completo, contradictorio, objetivo e imparcial, mecanismo que se insertaría y perfeccionaría en acuerdos y convenios posteriores'), which however are normally presented in their legal dimension. Against the more recent juridification of fact-finding mechanisms, he highlights that the clarification of the facts was traditionally aimed at allowing political actors to take political decisions ('desacuerdo entre las partes sobre la materialidad de los hechos frustraba, con frecuencia, el buen resultado de la mera negociación mientras que, por otro lado, se destacaba la posible función pacificadora de este medio de arreglo, porque dilata la adopción de la decisión política última, que habrá de supeditarse y atenerse al debido conocimiento de los hechos del litigio').

de los hechos (literally, establishment of facts).[13] Similarly, part of the French doctrine refers to such mechanisms as *procedures internationals d'établissement des faits*.[14] So does part of the Italian doctrine, which refers to international fact-finding missions as *procedimenti di accertamento dei fatti*.[15]

Even the sort of human rights inquiries that constitutes the object of this study and, as shown *infra*, operates in an arguably more legalised framework often retains the nomenclature of fact-finding commissions. The explicit reference to factuality is neither fortuitous nor merely deferential to traditional labels. Rather, it signifies that international inquiries are – or should be – primarily conceived as tools to determine questions of fact. In other words, they are meant to generate factual narratives that may or may not be assessed against legal standards and thus serve multiple purposes, such as eliciting action at the political level or adjudication of some form. As highlighted by Jachec-Neale, this insistence on factuality is justified by the observation that facts engender disputes or, conversely, that disputes often concern points of fact.[16] And, consequently, clarification or elucidation of the disputed facts may contribute to the settlement of the dispute itself.[17]

1.1.1 The Elucidation of Facts and Dispute Resolution in Early Commissions of Inquiry

History is replete with instances where the elucidation of facts was deemed of crucial importance to settle inter-state disputes and, most importantly, to defuse situations of crisis on

[13] See, for example, Antonio Remiro Brotóns, Rosa M Riquelme Cortado, Javier Díez-Hochleitner, Esperanza Orihuela Calatayud and Luis Pérez-Prat Durbán, *Derecho Internacional* (McGraw-Hill 1997) 887.
[14] Vité (n 2). However, see for example Dominique Carreau, *Droit international* (9th edn, Pedone 2007) 539-541, who adopts the more common nomenclature *commission d'enquête*.
[15] Tullio Treves, *Diritto internazionale. Problemi fondamentali* (Giuffrè Editore 2005) 590.
[16] Note, however, that, in his introduction to the chapter on inquiries, Merrills explicitly refers to 'disagreement between states on some issue of fact, law or policy', thus implying that inquiries may also play a role in disputes which do not simply revolve around facts. In light of this concession, it is not surprising that, in the definition provided above, Merrills describes inquiries as 'a particular type of international tribunal', thus implying a role that could be defined as quasi-judicial and to which perhaps the term 'inquiry' appears better tailored than the term 'fact-finding' (n 11).
[17] James Brown Scott, *The Hague Peace Conferences of 1899 and 1907*, Vol I (Garland Publishing 1972) 265; William I Hull, *The Two Hague Conferences and Their Contributions to International Law* (Garland Publishing 1972) 277.

the verge of turning into violent confrontations. The inclusion of Title III on international commissions of inquiry in the *Hague Convention (I) for the Pacific Settlement of Disputes*,[18] for example, was the result of a Russian proposal to supplant national commissions of inquiry with an international *super partes* inquiry mechanism.[19] The proposal was put forward in response to the 1898 *Maine* incident, which saw a US battleship, named Maine and harboured in Havana, being destroyed by an explosion that resulted in the death of 259 of its crew members and officers. In a context of already strained relations between the US and Spain, the disaster was differently attributed to a submarine mine by a US domestic inquiry,[20] and to an internal defect of the battleship by a Spanish domestic inquiry. This disagreement over the causes of the explosion, jointly with several other factors, spiralled into the Spanish-American war.[21]

The establishment of a commission of inquiry prevented the deterioration of the Anglo-Russian relations following the *Dogger Bank* incident. In October 1904, the Russian Baltic Sea Fleet, on its way from the Baltic to the Far East to join the Russo-Japanese war, encountered the Hull fishing fleet, a British fleet composed of some fifty trawlers. Relying on inaccurate information that Japanese torpedo boats were hiding among the trawlers and fearing an imminent attack, the Russian admiral ordered to open fire on the fleet. One trawler was sunk, five were heavily damaged, two crewmembers were killed and six others wounded. Fearful that Anglo-Russian relations might deteriorate, France engaged in intense diplomatic efforts to persuade the two powers to defer the matter to an international commission of inquiry in accordance with the procedure set forth in the Hague Convention I. A commission was in fact set up with the mandate to 'inquire into and report on all the circumstances relative to the North

[18] Convention for the Pacific Settlement of International Disputes (Hague I) (adopted 29 July 1899, entered into force 4 September 1900) Artt 9-14, henceforth the 'Hague Convention I (1899)'.
[19] Merrills (n 11) 42; Hull (n 17) 277-278.
[20] *Official Report of the Naval Court of Inquiry into the loss of Battleship Maine (Sampson Board)* (21 March 1898) <http://www.spanamwar.com/mainerpt.htm> accessed 28 January 2018.
[21] Merrills (n 11) 41-42.

Sea Incident'.[22] The report, delivered in February 1905, determined that there had been no Japanese boats either among the trawlers or in their vicinity, and that the Russian admiral had erred in ordering to open fire against the fleet. However, the commission pointed out that neither the military expertise nor the humanity of the Russian admiral could be questioned.[23] Both Russia and Great Britain accepted the report and settled the dispute monetarily.[24]

There are other relevant inquiries where the elucidation of facts played a significant role in settling inter-state disputes. The *Tavignano* inquest concerned the interception, during the Turco-Italian war of 1911-12, of a French vessel by the Italian navy off the Tunisian coast on suspicion that the vessel was complicit in the shipment of Turkish contraband. An inquiry commission was set up to establish whether the incident, which also involved the use of firearms on two French vessels, had occurred on the high seas, as Italy claimed, or in Tunisian waters, as France contended. The dispute, which had already been referred to an arbitration tribunal, was eventually settled prior to the conclusion of the arbitration simply based on the findings of the international inquiry.[25] The *Tubantia* inquiry concerned the sinking of a Dutch steamer on the high seas as a result of the actions of a German U-boat in 1916, while the Netherlands had declared their neutrality in the war. At the end of the conflict, the two powers established an international commission of inquiry to determine the factual circumstances of the incident. Germany had in fact claimed that the sinking had been the result of an operational mistake, as

[22] *Declaration between Great Britain and Russia, relating to the constitution of an international commission of inquiry on the subject of the North Sea incident, signed at St Petersburg* (12/25 November 1904) Art 2, as quoted in Merrills (ibid) 42. The mandate was not limited to the elucidation of fact only, but also required the attribution of responsibility and an apportionment of blame to the parties.
[23] *The Dogger Bank Case (Great Britain v. Russia)* (1908) 2 *AJIL* 931 (ICI Report of 26 February 1905).
[24] For an account of the incident and the subsequent inquiry procedure, see Nissim Bar-Yaacov, *The Handling of International Disputes by Means of Inquiry* (OUP 1974) 45-88; Tobias H Irmscher, 'Dogger Bank Incident (1904)', *Max Planck Encyclopedia of Public International Law* (online edn, OUP, March 2006); Jan Martin Lemnitzer, 'International Commissions of Inquiry and the North Sea Incident: A Model for a MH17 Tribunal?' (2016) 27(4) *EJIL* 923, 929-930; Merrills (n 11) 42-43; Scott (n 17) 268-269.
[25] *Capture of the "Tavignano" and cannon shots fired at the "Canouna" and the "Galois" (France v Italy)*, Report (23 July 1912) in James Brown Scott (ed), *The Hague Court Reports* (OUP, 1916) 413; Merrills (n 11) 45-46; see also André Gros, 'Observations sur une enquête internationale: L'affaire du "Tavignano"' in Vladimir Ibler (ed), *Mélanges Offerts à Juraj Andrassy. Essays in International Law in Honour of Juraj Andrassy Festschrift für Juraj Andrassy* (Springer, Dordrecht 1968) 99.

the missile was aimed at a British vessel which it had however missed. The commission determined that the Dutch vessel had indeed sunk as a result of the actions of the German U-boat but refrained from determining whether this was the result of an error. The German government, however, accepted responsibility and paid compensation to the Dutch government.[26]

While the early practice mentioned above hinged on the persuasiveness of facts and the assumption that the mere clarification of points of fact could induce states to settle their disputes without recourse to force or even to arbitration or other judicial mechanisms, new forms of international inquiries have emerged that depart from the Hague model.

1.1.2 Methodological Implications

The emphasis on factuality influences not only the final outcome of the inquiry process, which is meant to take the form of an account or narrative of the events, most likely in the shape of a report, but also and most importantly how fact-finders work – or should work.

Indeed, the word 'fact-finding' identifies primarily an activity, one which is aimed at determining the facts of certain events. In this sense, fact-finding can be differentiated from law application. Fact-finders are expected to answer questions such as what, when, where, who, how, that is to determine what happened. By contrast, there is – or there should be – no expectation that they determine the legal consequences to be attached to certain facts. It has been noted that fact-finders generally work as continental investigative magistrates or "juges d'instruction", that is as authorities that gather both inculpating and exculpating evidence without the necessary participation of the parties involved.[27] Because of its non-adversarial

[26] *Loss of the Dutch Steamer "Tubantia" (Germany v The Netherlands)*, (1922) 16 *AJIL* 485 (ICI Report of 27 February 1922); Merrills (ibid) 46-47.
[27] Frédéric Mégret, 'Do Facts Exist, Can They Be "Found", and Does It Matter?' in Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (OUP 2016) 29.

nature, fact-finding escapes the stringent procedural requirements of the legal process. Moreover, no particular legal consequences flow from its determinations.

1.2 Fact-Finding and Inquiries: Synonyms and Differentiations

Before venturing into the evolution of international commissions of inquiry, however, it is timely to define as precisely as possible what international commissions of inquiry are. Indeed, while the UN Declaration defines fact-finding, in the context of the UN function to maintain international peace and security, as a tool to acquire knowledge of facts in dispute, the term 'fact-finding' also refers to an activity that is ordinarily carried out by courts as well.[28] The judicial fact-finding process consists in the judicial ascertainment of the facts alleged or contested by the parties of a dispute according to certain rules of evidence and a complex cognitive process.[29] The focus of this study is not on the *judicial* fact-finding process, which may however be used as a comparator, but rather on *non-judicial* fact-finding, that is on a process geared towards the ascertainment of facts in dispute akin to that carried out in judicial contexts, yet normally conducted by non-judicial bodies. More specifically, I focus on fact-finding conducted by international commissions of inquiry or international fact-finding missions.

1.2.1 Is There a Difference Between Fact-Finding and Inquiry?

According to the UN Office of the High Commissioner for Human Rights, both terms

> have been used to designate a variety of temporary bodies of a non-judicial nature, established either by an intergovernmental body or by the Secretary-General or the High Commissioner for Human Rights, and tasked with investigating allegations of violations of international human rights, international humanitarian law or international criminal law and making recommendations for corrective action based on their factual and legal findings.[30]

[28] In the context of international courts and tribunals, see for eg Nancy Amoury Combs, *Fact-Finding Without Facts. The Uncertain Evidentiary Foundations of International Criminal Convictions* (CUP 2010).
[29] See, for eg, Adrian Keane and Paul McKeown, *The Modern Law of Evidence* (9th edn, OUP 2012) 2-3; Evan Bell, 'An introduction to judicial fact-finding' (2013) 39(3) *CLB* 519, 519-520.
[30] UNOHCHR, '*Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice'* (2015) 7 (hereinafter the 'UN Guidance and Practice').

Because in the UN context fact-finding can be conducted by a variety of actors, including Special Procedures of the UN Human Rights Council and treaty-based bodies,[31] it is crucial to stress the temporary or ad hoc nature of international fact-finding missions, which distinguishes them from other inquiry mechanisms. In other words, ad hoc international inquiries are committees of experts exclusively appointed, by several UN agencies, on a temporary basis in order to investigate situations of widespread violence or individual incidents which appear to display a fundamental disregard for basic human rights. In accordance with the UN Office of the High Commissioner for Human Rights' label, throughout this study I refer indifferently to these committees as (international) commissions of inquiry, (international) fact-finding missions, international inquiries or simply inquiries, since a cursory review of their features and mandates does not seem to suggest any substantial difference between them.[32]

1.2.2 Are There Different Types of International Inquiries?

Despite the apparent interchangeability of the terms commission of inquiry and fact-finding mission, Carsten Stahn and Dov Jacobs have identified two typologies of international inquiries which, however, are not characterised by different official nomenclatures. They distinguish between *investigative commissions*, that is 'commissions with investigative powers and a focus on criminal responsibility', and *scoping commissions*, that is 'missions with a focus on global situations and context rather than accountability'.[33] According to the authors, the main difference between the two types of international inquiries lies in the fact that investigative commissions generally focus on identifying potential cases for investigation and prosecution, whereas scoping commissions focus on patterns and conduct less legal or quasi-legal analyses. From an ontological perspective, this distinction is not entirely convincing. While it is true that

[31] Bassiouni and Abraham (n 2) 8-29.
[32] See also Patrick Butchard and Christian Henderson, 'A Functional Typology of Commissions of Inquiry' in Christian Henderson (ed), *Commissions of Inquiry: Problems and Prospects* (Hart Publishing 2017) 12, at footnote 5.
[33] Carsten Stahn and Dov Jacobs, 'The Interaction between Human Rights Fact-Finding and International Criminal Proceedings: Toward a (New) Typology' in Alston and Knuckey (n 27) 258-259.

some commissions have been entrusted with determining whether specific categories of crimes have been committed or with identifying individual perpetrators, whereas other commissions have been established with a more general mandate to assess a situation in its entirety or to identify patterns of violence,[34] the distinction is not as clear-cut.

In particular, it is not entirely clear what investigative powers encompass. For example, do such powers include the power to summon witnesses? Or to request domestic authorities to provide the commission with documents? While the mandate-giver may call upon the target state to fully cooperate with a mission, the ultimate decision to do so lies with the state itself, which may refuse cooperation including by barring the commission to travel on its own territory. Hence, it is doubtful that any such international inquiry would be given explicit investigative powers, at least in their most traditional sense. Moreover, commissions of inquiry of both types avail themselves of the same methods to establish the facts of a given situation. For example, the difference in powers between the International Commission of Inquiry on Côte d'Ivoire and the High-Level Mission on the Situation of Human Rights in Darfur, both used by Stahn and Jacobs to illustrate the difference between investigative and scoping commissions, does not appear to be that significant. Because, as it is explained *infra*, such commissions inherit their powers from their parent bodies, one has to look at the establishing instruments for clarifying directions. Both commissions were established by a decision of the

[34] For example, in 2016, the Human Rights Council dispatched a Commission of Inquiry on Human Rights in Burundi, which was mandated to *inter alia* 'identify alleged perpetrators of human rights violations and abuses in Burundi with a view to ensuring full accountability' (UNHRC, Situation of human rights in Burundi, Res 33/24 (5 October 2016) UN Doc A/HRC/RES/33/24, para 23(b)); differently, the Independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, established by the Human Rights Council in 2012, was precisely mandated to 'investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem' (UNHRC, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan, Res 19/17 (10 April 2012) UN Doc A/HRC/RES/19/17, para 9).

Human Rights Council.[35] While the two commissions were mandated with different tasks,[36] they broadly enjoyed the same investigative powers precisely because they were both established pursuant to Human Rights Council resolutions, which are non-binding on states. It is only because of Sudan's non-cooperation that the latter commission determined, on its own motion, that it would base its assessment on the documentation already available.[37] Moreover, while only the former commission was explicitly entrusted with recommending avenues for accountability, the High-Level Mission on Darfur too addressed some accountability-driven recommendations to the Government of Sudan.[38]

Thus, the only clear distinctive trait seems to be the focus on individual criminal liability, which provides the basis for what Stahn and Jacobs call a functional synergy with international criminal courts and tribunals.[39] Quite obviously, a commission entrusted with an international criminal law mandate is compelled to deal with more legally complex issues than a commission mandated to simply establish patterns of violations. However, it is not clear whether such distinction should be made on the basis of the wording of the mandate or the activities carried out by the commissioners throughout the inquiry. Indeed, while some commissions have been *explicitly* entrusted with an international criminal law mandate, others have assumed the

[35] The International Commission of Inquiry on Côte d'Ivoire was established pursuant to UNHRC, Situation of human rights in Côte d'Ivoire, Res 16/25 (13 April 2011) UN Doc A/HRC/RES/16/25, while the High-Level Mission on the Situation of Human Rights in Darfur was dispatched pursuant to UNHRC, Situation of human rights in Darfur, Dec S-4/101 (13 December 2006) in UN Doc A/HRC/S-4/5.

[36] The International Commission of Inquiry on Côte d'Ivoire was mandated 'to investigate the facts and circumstances surrounding the allegations of serious abuses and violations of human rights committed in Côte d'Ivoire following the presidential election of 28 November 2010, in order to identify those responsible for such acts and to bring them to justice, and to present its findings to the Council at its seventeenth session, and calls upon all Ivorian parties to cooperate fully with the commission of inquiry', while the High-Level Mission on the Situation of Human Rights in Darfur was mandated 'to assess the human rights situation in Darfur and the needs of the Sudan in this regard'.

[37] Report of the High-Level Mission on the situation of human rights in Darfur pursuant to Human Rights Council decision S-4/101 (9 March 2007) UN Doc A/HRC/4/80, para 3.

[38] UNHRC, Report of the High-Level Mission on the situation of human rights in Darfur pursuant to Human Rights Council decision S-4/101 (9 March 2007) UN Doc A/HRC/4/80, Recommendation 2(e).

[39] Indeed, Stahn and Jacobs classification is teleologically oriented, in that the seek to identify how international commissions of inquiry could cooperate with international prosecutions.

relevance of this body of law despite the absence of any mention of it in the original mandate.[40] Hence, it would seem that a certain level of unpredictability, or arbitrariness, underpins the choice of a fact-finding mission to delve into issues of international criminal liability. This makes the distinction proposed by Stahn and Jacobs ontologically weak. However, from a teleological perspective – what the authors refer to as a functional perspective – the distinction could hold, but it would imply a price to pay in that it would not solve the problem, relevant from a legitimacy perspective, of how the final report should be used.[41] Such uncertainty poses significant problems from a criminal law perspective, because it does not allow the "accused" to foresee how the information gathered will be used.

1.3 Evolution of International Inquiries

1.3.1 The Hague Model

The Hague Conventions of 1899 and 1907 are perhaps the first international treaties providing for the establishment of international inquiries to address 'differences of an international nature involving neither honour nor vital interests, and arising from a difference of opinion on points of fact'[42] among states. As noted above, Title III of the 1899 Convention was introduced following a draft proposal presented by the Russian government during the Hague Peace Conference. The Russian initiative elicited the concerns of many delegations present at the Conference. Essentially, these revolved around the conflicting values implied in the proposal: on the one hand, the maintenance and promotion of international peace by means of an apparently novel institution; on the other hand, the sovereignty of states, whose integrity

[40] For example, the mandate of the UN Fact-Finding Mission on the Gaza Conflict (2009) only required the Mission 'to investigate all violations of international human rights law and international humanitarian law' committed in the Gaza Strip and the West Bank. However, the final report is replete with international criminal law determinations.
[41] On the use of the report from a procedural fairness (legitimacy) perspective, see Chapter III.
[42] Hague Convention I (1899), Art 9.

depended on the powers to be attributed to future commissions.[43] Other issues that were raised in the course of negotiations were more technical and, to some extent, continue to feed academic debate even today.[44] Eventually, the delegates reached an agreement which entailed a voluntaristic model of international inquiries.[45]

The establishment of an international commission of inquiry was regarded as a last resort that states could agree upon once all diplomatic efforts had been unsuccessfully attempted. Such commission could only formulate findings on facts as long as these would involve 'neither honour nor vital interests' of the contracting states.[46] No specific procedural framework was devised for the functioning of these commissions. While the appointment of commissioners would follow the model provided for arbitration (Article 32 of the Hague Convention I (1899)), the parties involved would have agreed on the procedure to be followed in a separate convention providing the basis for the establishment of the commission.[47] The contracting parties were encouraged to provide logistical assistance, but only 'as fully as they may think possible', to the commission in order for it to fulfil its mandate.[48] Most importantly, Article 14 provided that 'The report of the International Commission of Inquiry is limited to a statement of facts, and

[43] For example, one issue that alarmed other delegations was the binding nature of the provision. In effect, the Russian proposal was intended to compel the signatory powers to set up a commission of inquiry, should the conditions specified in draft Article 14 arise. In particular, the Russian proposal read: 'In cases which may arise between the signatory States where differences of opinions with regard to local circumstances have given rise to a dispute [litige] of an international character which cannot be settled through the ordinary diplomatic channels, but wherein neither the honour nor the vital interests of these States is involved, the interested Governments *agree* [conviennent] to form an international commission of inquiry in order to ascertain the circumstances forming the basis of the disagreement [dissentiment] and to elucidate the facts of the case by means of an impartial and conscientious investigation' [emphasis added] (as cited in Bar-Yaacov (n 24) 20. The final text adopted uses a quite different language: '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' [emphasis added] (Hague Convention I (1899), Art 9). As can be noted, the final text not only adopted a verb tense which does not command obligation, but also added the aside 'as far as circumstances allow', which unequivocally indicate that the inquiry procedure was not intended to be compulsory (see also Hull (n 17) 278).
[44] Bar-Yacoov, for example, highlights that the delegates were concerned with issues such as: what procedure would have applied to inquiry commissions; whether a finding on facts could be given without a concurrent finding in law; whether inquiries should be regarded as preliminary procedure to arbitration (Bar-Yacoov (ibid) 21).
[45] For a detailed account of the negotiation process regarding international commissions of inquiry, see primarily Bar-Yacoov (ibid) 20-44; see also Hull (n 17) 277-288; van den Herik (n 2) 510-512.
[46] Hague Convention I (1899), Art 9.
[47] Hague Convention I (1899), Art 10.
[48] Hague Convention I (1899), Art 12.

has in no way the character of an Arbitral Award. It leaves the conflicting Powers entire freedom as to the effect to be given to this statement'.

As it can be observed, the entire procedure was left to the good will of the concerned parties. It has been noted that facts alone are able to exert a direct moral pressure on the parties involved by implying an attribution of responsibility. As a result of such pressure, the parties may decide to settle the dispute in accordance with the established facts.[49] In a few instances, the subsequent practice, as shown in the preceding sections, has to a limited extent proven the drafters right in this regard. However, it is difficult to regard commissions of inquiry as a self-standing tool without considering the broader institutional context in which they operate.

During the second Hague Peace Conference, in 1907, the success of the new inquiry mechanism, as attested by the outcome of the *Dogger Bank* inquiry, prompted the delegates of Great Britain, France and Russia to submit proposals for amendment of the original inquiry procedure. In particular, Russia and the Netherlands supported a proposal which was reminiscent of the 1899 Russian proposal to make the recourse to international inquiries compulsory. This proposal met with the opposition of Great Britain and Germany and other smaller powers. As a result, Russia withdrew its proposal. An attempt was made by Professor de Martens to confer upon the commission the power not only to elucidate facts, but also to establish responsibilities as these would logically evolve from the clarification of facts. However, this proposal too encountered substantial opposition and was eventually abandoned. Most of the remaining proposed amendments were aimed at filling in the procedural gap left open by the Hague Convention I (1899) and were based on a joint proposal presented by France

[49] Scott (n 17) 267.

and Great Britain, which elicited considerable support in light of the experience of Sir Edward Fry, the British delegate who had also taken part in the *Dogger Bank* inquiry.[50]

The final text of the Convention greatly expanded on Title III of the Hague Convention I (1899). While the Russian proposal to amend Article 9 so as to provide that signatory powers should 'agree to establish' international inquiries was eventually rejected, the final text reinforced the favour with which inquiries of the sort were regarded by the contracting states by providing that 'the contracting powers deem it expedient and desirable that the parties … institute an international commission of inquiry'.[51] Several articles were added to the 1899 text to regulate procedural issues, such as the summon and examination of witnesses.[52] Articles 20 and 21 allow inquiry commissions to undertake on-site visits. Article 30 provides for the confidentiality of the proceedings and the decision-making process, and so does Article 31 for the sittings of the commission. However, Article 34 provides for the publicity of the presentation of the final report.

At this stage, it is worth underscoring two features of the Hague model of international inquiries which substantially differentiate them from the subsequent practice of the United Nations.[53] First, inquiries under the Hague Conventions were only engineered to elucidate factual circumstances. Even when issues of attribution or responsibilities were involved – as, for example, in the *Dogger Bank* inquiry –, these would only be settled on the basis of the established facts, while no legal argument would be made. However, as Larissa van den Herik notices, commissions of inquiry cannot function properly on their own. While the elucidation of facts could, in some cases, suffice to settle a dispute, this would rarely be the case. In this sense, van den Herik observes that: a) a factual assessment of a situation cannot altogether be

[50] For a detailed account of the negotiations that led to the adoption of the final text of the Hague Convention on the Pacific Settlement of International Disputes 1907, see Hull (n 17) 288-297; Bar-Yacoov (n 24) 89-108.
[51] Convention for the Pacific Settlement of International Disputes (Hague I) (adopted 18 October 1907, entered into force 26 January 2010) Art 9, henceforth the 'Hague Convention I (1907)'.
[52] Hague Convention I (1907), Artt 25-28.
[53] See infra 33-41.

divorced from a legal appraisal thereof; and b) commissions of inquiry are often embedded in a greater dispute settlement scheme.[54] Moreover and somewhat relatedly, it should be underlined that neither Convention – the Hague Conventions of 1899 and 1907 – envisioned a commission of inquiry authorised to make recommendations. Indeed, both Article 14 of the Hague Convention I (1899) and Article 35 of the Hague Convention I (1907) provide that 'The report of the commission is limited to a statement of fact'. Second, from a cursory review of the practice, commissions of inquiry based on the Hague Conventions 1899 and 1907 were mainly devised to deal with questions related to boundaries or the determination of specific factual circumstances (such as the precise location and causes of certain incidents).[55] Conversely, over the twentieth century, international commissions of inquiry have been established to deal with a much wider and more technical range of issues.

1.3.2 Subsequent Practice

The procedure provided for in the Hague Conventions 1899 and 1907 formed the basis not only for a number of inquiries into individual incidents, but also for the content of several treaties dealing with the pacific settlement of international disputes. Between 1904 and 1961, five disputes where submitted to inquiry procedures set up according to the provisions of the two Hague Conventions:[56]

[54] Van den Herik (n 2) 511-512. Van den Herik contrasts the opinions of: a) Jean-Pierre Cot, who, by relying on the dual nature of commissions of inquiry as, on the one hand, quasi-arbiters – in that they seek to elucidate facts – and, on the other hand, quasi-mediators – in that they seek to facilitate a settlement of a dispute –, posits that international inquiries have been misconceived as a stand-alone tool for the settlement of disputes, where instead they rarely can function in isolation; and b) John Collier and Vaughan Lowe, who argue that in disputes that only arise out of disagreement over facts and do not imply any legal question, international inquiries could indeed suffice to settle the dispute. Van den Herik seems to subscribe to the former view. To substantiate her claim, she provides an analysis of subsequent inquiry procedures to show that 'These and other inter-bellum inquiries all deviate in their own way from the "Platonic Form of Inquiry" as codified in the Hague Conventions'.

[55] See the so-called vessel inquiries in Van den Herik (ibid) 513.

[56] Permanent Court of Arbitration, '101st Annual Report' (2001), Annex 3, 46 <https://pca-cpa.org/wp-content/uploads/sites/175/2015/12/PCA-annual-report-2001.pdf> accessed 31 January 2018.

i) the *Incident in the North Sea (The Dogger Bank Case)*, which involved Great Britain and Russia;[57]

ii) the *Capture of the "Tavignano" and cannon shots fired at the "Canouna" and the "Galois"*, which involved France and Italy;[58]

iii) the *Steamship Tiger (sinking of the steamer "Tiger")* between Germany and Spain;

iv) the *Loss of the Dutch Steamer "Tubantia"* between Germany and the Netherlands;[59]

v) the *"Red Crusader" Incident*, which involved Great Britain and Denmark.[60]

These five international inquiries demonstrate, in different ways, that the Hague model of inquiry was structurally flawed in that, on the one hand, it paid lip service to the almost utopic idea that a mere elucidation of facts would in itself be sufficient to settle a dispute whereas the reality was that a clarification of the facts could not be divorced altogether from the legal issues arising out of it. On the other hand, commissions of inquiry could hardly achieve any effect in isolation but had to be embedded in a larger endeavour to settle the relevant dispute. Hence, for example, the *Tavignano* inquiry was devised to secure evidence at the earliest opportunity with a view to facilitate an arbitral procedure already initiated by the parties, France and Italy. Incidentally, the elucidation of the facts in dispute – the determination of the *locus commissi delicti* – prompted the parties to settle their dispute before the conclusion of the arbitration.[61]

[57] The Dogger Bank Case (Great Britain v. Russia) (1908) 2 *AJIL* 931 (ICI Report of 26 February 1905).
[58] Scott (n 17) 413.
[59] *Loss of the Dutch Steamer "Tubantia" (Germany v The Netherlands)* (1922) 16 *AJIL* 485 (ICI Report of 27 February 1922).
[60] Investigation of Certain Incidents Affecting the British Trawler Red Crusader (1962) XXIX *Reports of International Arbitral Awards* 521.
[61] For a detailed account of the *Tavignano* incident and subsequent inquiry, see Bar-Yaacov (n 24) 142-156; note that, while the parties settled their dispute before the arbitral procedure could come to a determination, Bar-Yacoov stresses that the Franco-Italian relations were not, at the time, as strained as, for example, the Anglo-Russian relations at the time of the *Dogger Bank* inquiry. On the contrary, several political circumstances point to the fact that Italy, despite being part of the Triple Alliance, opposed to the Triple Entente to which France belonged, sought a closer relationship with the latter. In light of such circumstances, Bar-Yacoov argues that 'It appears, therefore, that the relations between France and Italy were not particularly strained when the *Tavignano* incident occurred, and it was natural for the two countries to seek a peaceful settlement of the dispute'.

The *Tiger* inquiry, which concerned an incident very similar to that examined by the *Tavignano* inquiry,[62] also departed from the Hague model of inquiry in that the conflicting parties, Spain and Germany, accepted in advance that the final report of the commission would bind them, in spite of the language of Article 35 of the Hague Convention I (1907).[63] The *Tubantia* inquiry was the first of its kind to include a jurist among its members. While the commission refrained from engaging with legal issues *per se*, the conflicting parties understood the potential consequences of the inquiry in terms of criminal responsibility and determined that the inclusion of a legally qualified person in the panel was essential.[64] Nevertheless, the commission refused to make a determination as to one of the central claim of Germany, namely that the sinking of the Dutch vessel had been the result of an error.

The most evident departure from the Hague model of inquiries can be observed in the *Red Crusader* investigation, which was set up to elucidate the factual circumstances of the arrest of and subsequent firing at British trawler *Red Crusader* by Danish fisheries protection vessel *Niels Ebbesen*.[65] Similarly to the *Tubantia* inquiry, the commission was composed of eminent jurists and, while the wording of the mandate entailed the mere clarification of the facts of the incident, the panel reached the conclusion that 'the Danish commander "exceeded legitimate use of armed force' because the circumstances did not 'justify such violent action"'.[66]

The inquiry model envisioned in the Hague Conventions 1899 and 1907 also inspired the inclusion of inquiry procedures of the sort in a number of bi- and multilateral treaties. For example, the *Bryan Treaties*, a series of treaties officially called 'Treaties for the Advancement

[62] The facts of the case and the subsequent investigation are comprehensively described by Bar-Yacoov (ibid) 156-179. The dispute concerned the sinking of a Norwegian ship, in 1917, by a German submarine off the coast of Northern Spain. Germany alleged that the ship, belonging to a neutral power, was carrying contraband. The issue at stake concerned the location of the sinking, which arose because of the Spanish allegation that the incident had taken place in its territorial waters, while Germany maintained that it had occurred in the high seas.
[63] Merrills (n 11) 46; van den Herik (n 2) 515.
[64] Merrills (ibid) 47.
[65] For a detailed account of the incident and subsequent investigation, see Bar-Yacoov (n 24) 179-197; Merrills (ibid) 48-51.
[66] Merrills (ibid) 50; see also van den Herik (n 2) 515.

of Peace' negotiated and concluded by then-US Secretary of State William Jennings Bryan between 1913 and 1940, provide for a permanent international commission of inquiry, to which the state parties must submit disputes arising between them, which are not subject to other forms of settlement under other treaties or cannot be settled by diplomatic means.[67] The *Taft (Knox)* arbitration treaties between the US and France and Great Britain provided for the submission of any dispute arising between the parties to a joint commission of inquiry, which, in a clear departure from Article 35 of the Hague Convention I (1907), could make recommendations in addition to determinations of fact. These treaties never entered into force.[68] Finally, it is worth mentioning the Final Protocol of the *Locarno Treaties* of 16 October 1925, which established a Permanent Conciliation Commission that could gather information for the purpose of inquiry with the aim to preserve the post-World War I territorial settlement.[69]

The only notable inquiry established under one set of these treaties, the *Bryan Treaties*, was the *Letelier* inquiry. This was set up to determine the amount of compensation that Chile owed to relatives of Chilean former foreign minister Letelier and relatives of other victims, following the car bomb killing of the former in Washington, DC.[70] In addition to being composed by several international lawyers, in a clear departure from the Hague model, the commission was entrusted with adjudicating the matter in accordance with the principles of public international law.[71]

[67] Carnegie Endowment for International Peace – Division of International Law, *Treaties for the Advancement of Peace between the United States and Other Powers Negotiated by the Honorable Willian J. Bryan, Secretary of State of the United States* (OUP 1920); Bar-Yacoov (n 24) 114-117; Hans-Jürgen Schlochauer, 'Bryan Treaties (1913-1940)', *Max Planck Encyclopedia of Public International Law* (online edn, OUP, August 2007); Jachec-Neale (n 9); Merrills (ibid) 47-48; van den Herik (ibid) 515-516.
[68] Bar-Yacoov (ibid) 113-114; van den Herik (ibid) 515-516; Merrills (ibid) 47-48.
[69] Van den Herik (ibid) 516; Jachec-Neale (n 9).
[70] *Re Letelier and Moffitt, Chile-United States of America International Commission* (11 January 1992) 88 *ILR* 727; van den Herik (ibid) 516-517; Merrills (n 11) 51-53.
[71] Van den Herik (ibid) 517; Merrills (ibid) 52-23.

The Covenant of the League of Nations also provided for an inquiry procedure in particular under Articles 15 and 17.[72] The *travaux préparatoires* show that, in the course of the drafting of the Covenant, some delegations placed great emphasis on mechanisms such as inquiry and conciliation, affording them precedence over other dispute settlements tools.[73] Based on a cursory overview of some of the investigations undertaken under this regime, van den Herik notes that the inquiries conducted under the Covenant of the League of Nations were characterised by:

i) their overwhelming focus on territorial disputes (that is, on matters essential to the state);
ii) their focus on situations (or patterns) rather than individual incidents;
iii) the fact that their members were appointed by the organs of the League and not by the states involved – in fact, the League organs were barred from appointing nationals of the states involved in the dispute;
iv) the fact that they were entrusted not only with making determinations of fact, but also recommendations – in fact, they would be used with a more markedly arbitration function.[74]

More recent international treaties have also provided for the establishment of inquiry procedures with a view to settling disputes.[75] For example, the ILO Constitution provides, at Articles 26 to 29, for the referral of a complaint, filed by any member state, to a commission of inquiry empowered to report on any question of fact arising from the complaint and to formulate recommendations (Article 28).[76] The Convention on the Law of the Non-navigational Uses of

[72] League of Nations, *Covenant of the League of Nations* (28 April 1919) <https://treaties.un.org/doc/source/covenant.pdf> accessed 1 February 2018.
[73] See, extensively, Bar-Yacoov (n 24) 119-132.
[74] Van den Herik (n 2) 517-518.
[75] Van den Herik (ibid) 520; Henry G Schermers and Niels M Blokker, *International Institutional Law* (5th rev edn, Martinus Nijhoff Publishers 2011) 467-479.
[76] International Labour Organization Constitution.

International Watercourses also provides, under Article 33, for the establishment of an impartial fact-finding commission empowered to review disputes arisen between state parties, where such states have been unable to settle their dispute by recourse to other dispute settlements mechanisms as detailed in Paragraph 2 of the same Article.[77] Some environmental treaties provide for dispute settlement mechanisms that resemble inquiry procedures, especially in light of the focus on the facts of the disputes considered, however such treaties tend to refer to these procedures as arbitral in nature and, as a matter of fact, they provide for mechanisms for the implementation of the final report and procedures for its oversight.[78]

1.3.3 The International Humanitarian Fact-Finding Commission

In an unprecedented move, the Plenary Meeting of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict of 1974-77 approved the inclusion, in Additional Protocol I to the Geneva Conventions, of a provision establishing the first permanent international commission of inquiry.[79] Pursuant to Article 90 of the Protocol, the International Humanitarian Fact-Finding Commission thus features as a treaty body competent to:

> (i) enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol; (ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.[80]

[77] Convention on the Law of the Non-navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014), GA Res 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No 49 (A/51/49).

[78] For example, the North American Agreement for Environmental Cooperation provides for the establishment of an arbitral panel in cases of disputes regarding the failure of one party to effectively enforce its environmental law when other mechanisms under the same Agreement have failed to resolve the issue (Article 24). The panel bases its assessment mostly on the submissions of the parties (Article 28) and, within 180 days from the selection of the last panelist, it presents the parties with an initial report, which should include the relevant findings of fact, a determination as to whether a party has consistently failed to enforce its environmental law and recommendations to remedy the systemic failure.

[79] Generally, on the International Humanitarian Fact-Finding Commission see Heike Spieker, 'International (Humanitarian) Fact-Finding Commission', *Max Planck Encyclopedia of Public International Law* (online edn, OUP, October 2015).

[80] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art 90(2)(c).

Two observations can be made upon a first reading of the functions attributed by the Protocol to the newly established Commission. First, the Commission seems to be entrusted with assessing questions of fact only, although a careful analysis of the wording of point (i) shows that a legal assessment of the facts is essential at the very least to establish whether the Commission has competence to review those facts. Second, the Commission is explicitly empowered to offer its good offices in order to facilitate compliance with the Protocol and the Geneva Conventions.

On the first point, suffice it to mention that, in order to determine whether it has competence to review the allegations it has been presented with, the Commission will have to assess whether such allegations may qualify *in abstracto* as grave breaches or other serious violations of the Geneva Conventions or Additional Protocol I. Ostensibly, this requires the Commission to engage with eminently legal questions.[81] The second observation has more to do with the nature and purpose of the Commission. Since its inception, the International Humanitarian Fact-Finding Commission was conceived as a fact-finding and conciliation tool. It was not envisioned as an instrument to '"blame and shame" but to try to resolve disputes'.[82] This is confirmed by further provisions included in Article 90. In particular, Paragraph 5 provides as follows:

> (a) The Commission shall submit *to the Parties* a report on the findings of fact of the Chamber, with such recommendations as it may deem appropriate… (c) The Commission *shall not report its findings publicly*, unless all the Parties to the conflict have requested the Commission to do so. (emphasis added)

Hence, Article 90 provides for a procedure that is intended to engage the parties involved directly, without publicising the findings of the inquiry unless requested by the parties

[81] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987) 1045; see also van den Herik (n 2) 522; Erich Kussbach, 'The International Humanitarian Fact-Finding Commission' (1994) 43(1) *Int'l & Comp LQ* 174, 176-177.

[82] Charles Garraway, 'The International Humanitarian Fact-Finding Commission' (2008) 34 *CLB* 813, 815. Garraway further specifies that 'The intention is to try to take some of the heat out of the propaganda wars that develop at present'.

themselves. In addition, the Commission is not only authorised to elucidate the factual circumstances of the allegations formulated by the parties, but also to recommend actions to be taken in response to its factual determinations. In this sense, the inquiry seems to be conceived as a sort of preliminary to the conciliatory function under Article 90(2)(c)(ii).[83]

After all, that the International Humanitarian Fact-Finding Commission was intended as an instrument to solve disputes rather than to attribute guilt emerges from the outcome of the discussions that took place about its structure, in the context of the Diplomatic Conference in Geneva. Frits Kalshoven, a former member of the Commission, explains that, during the Conference, two fronts emerged. On the one hand, proponents of a strong and independent commission with compulsory jurisdiction and, in some limited cases, a right of initiative; on the other hand, a weaker fact-finding body which would enjoy limited independence.[84] The outcome was a Commission independent from the two dominant actors in international humanitarian law, the International Committee of the Red Cross and the United Nations, yet strongly embedded in a 'consesualist' framework, with no right of initiative nor inherent

[83] Sandoz, Swinarski and Zimmermann (n 81) 1046; Kussbach (n 81) 179; Luigi Condorelli, 'La Commission internationale humanitaire d'établissement des faits: un outil obsolète ou un moyen utile de mise en œuvre du droit international humanitaire?' (2001) 83(842) *IRRC* 393, 402.

[84] Frits Kalshoven, 'The International Humanitarian Fact-Finding Commission: A Sleeping Beauty?' (2002) 4 *Humanitäres Völkerrecht -Informationsschriften* 213, 213-214; see also Frits Kalshoven, 'The International Humanitarian Fact-finding Commission: its Birth and Early Years' in Erik MG Denters and Nico Schrijvers, (eds), *Reflections on International Law from the Low Countries in Honour of Paul de Waart* (Martinus Nijhoff Publishers 1998) 201.

jurisdiction.[85] This has resulted in an almost complete inactivity of the Commission so far,[86] whence Kalshoven's definition of the Commission as a 'sleeping beauty' comes.[87]

Nonetheless, the IHFFC received its first mandate in May 2017 by the Organisation for Security and Cooperation in Europe (OSCE) to investigate the circumstances of the incident that took place on 23 April 2017 in the Luhansk Province in Ukraine, which caused the death of a paramedic and the injury of two monitors of the OSCE Special Monitoring Mission to Ukraine.[88] It has been argued that the inquiry was likely established to provide its 'good offices' pursuant to Article 90(2)(c)(ii) and that this provision constitutes the most promising basis for future IHFFC inquiries.[89] Indeed, the confidence-building and preventive approach that

[85] Art 90(2)(a) of Additional Protocol I, for example, provides for the consent principle. The Commission will only be able to exercise its inquiry powers in relation to States who have accepted its competence. Letter (d) provides that, where the Commission has been requested to inquire into a specific situation whereby one of the parties involved has not yet accepted its competence, it will be able to do so only insofar the State who has not accepted the Commission's competence accepts it *ad hoc*.

[86] The Commission has come close to initiating inquiries into some situations such as in the case of alleged violations of international humanitarian law committed by Sri Lankan forces denounced by the Tamil Tigers; or alleged violations committed by Russian forces denounced by Chechnyan authorities; or in the case of violations of international humanitarian law committed in the course of the civil war in Colombia. In none of these cases, for different reasons, the investigation procedure was eventually actually activated (see Kalshoven (n 84) 215). On 19 May 2017, the International Humanitarian Fact-Finding Commission announced that it would lead a forensic investigation into an attack against the OSCE Special Monitoring Mission to Ukraine, in the Luhansk province, resulted in the death of a paramedic and the injuring of two OSCE monitors. The conclusions of the inquiry, mandated by OSCE, were made public on 7 September 2017 and determined that the OSCE Special Monitoring Mission had not been targeted ('OSCE Special Monitoring Mission was not targeted, concludes Independent Forensic Investigation into tragic incident of 23 April 2017' (7 September 2017) <http://www.ihffc.org/index.asp?mode=shownews&ID=831> accessed 5 February 2018).

[87] Kalshoven (ibid). Note that the author emphasises the 'sleeping' element, while arguing that the Commission could hardly be regarded as a 'beauty'.

[88] See International Humanitarian Fact-Finding Commission, News Archive, 'International Humanitarian Fact-Finding Commission to lead an independent forensic investigation in Eastern Ukraine (Luhansk province)' (19 May 2017) <https://www.ihffc.org/index.asp?page=news&mode=newsarchive> accessed 13 August 2019.

[89] See, in particular, Sofia Poulopoulou, 'Strengthening Compliance with IHL: Back to Square One' (14 February 2019) *EJIL: Talk!* <https://www.ejiltalk.org/strengthening-compliance-with-ihl-back-to-square-one/> accessed 13 August 2019; for different interpretation of the legal basis upon which the inquiry was established see Cristina Azzarello and Matthieu Niederhauser, 'The Independent Humanitarian Fact-Finding Commission: Has the 'Sleeping Beauty' Awoken?' (9 January 2018) *Humanitarian Law and Policy* <https://blogs.icrc.org/law-and-policy/2018/01/09/the-independent-humanitarian-fact-finding-commission-has-the-sleeping-beauty-awoken/> accessed 13 August 2019, who argue that the inquiry was most likely established as an ad hoc one at the request of a party to the conflict. However, in support of Poulopoulou's thesis, see the *Memorandum of Understanding between The Organization for Security and Co-operation in Europe and The International Humanitarian Fact-Finding Commission* (18 May 2017) <https://www.ihffc.org/Files/en/pdf/osce-ihffc-memorandum-of-understand.pdf> accessed 13 August 2019 and the explicit reference to good offices in Réka Varga, 'Reinforcing Respect for the Additional Protocols: The 40th Anniversary as an Opportunity?' (40th Round Table on Current Issues of International Humanitarian Law, 'The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives', Sanremo, 7-9 September 2017) <http://www.iihl.org/wp-content/uploads/2017/11/Varga-REV.pdf> accessed 13 August 2019.

underpins this type of inquiries, jointly with the confidentiality that characterises them, might encourage states to cooperate with the IHFFC. In addition, the same basis would allow the IHFFC to act even at the request of international organisations such as the OSCE.

1.3.4 United Nations Inquiries

With the advent of the United Nations, fact-finding has become one of the chief instruments through which the main organs of the UN can gather information for the exercise of their functions. The UN Charter both encourages States to employ inquiries as a means to settle their disputes peacefully[90] and empowers the primary organs of the UN to dispatch *ad hoc* commissions of inquiry. It should be noted that the establishment of international commissions of inquiry by the UN organs is embedded in the larger institutional mandate that the UN itself is given, that is the maintenance of international peace and security.[91] This is confirmed by the UN Declaration on Fact-Finding. Section I(1) of the Declaration states that:

> *In performing their functions in relation to the maintenance of international peace and security*, the competent organs of the United Nations should endeavour to have full knowledge of all relevant facts. To this end they should consider undertaking fact-finding activities. (emphasis added)

Moreover, Section II(7) states:

> Fact-finding mission may be undertaken by the Security Council, the General Assembly and the Secretary-General, *in the context of their respective responsibilities for the maintenance of international peace and security* in accordance with the Charter. (emphasis added)

[90] Charter of the United Nations, Art 33(1). The relevance of fact-finding as a means to settle disputes peacefully has been reiterated several times by the UN General Assembly in resolutions: UNGA Res 2329 (XXII) (18 December 1967); 'Manila Declaration on the Peaceful Settlement of International Disputes' UNGA Res 37/10 (15 November 1982) UN Doc A/RES/37/10; and upon the General Assembly's request, by the Secretary-General: UNSG, 'Report of the Secretary-General on methods of fact-finding: study prepared in pursuance of resolution 1967 (XVIII) of the General Assembly' (1 May 1964) UN Doc A/5694; UNSG 'Methods of fact-finding with respect to the execution of international agreements (Study prepared by the Secretary-General in pursuance of General Assembly resolution 2104 (XX))' (22 April 1966) UN Doc A/6228. See also Jachec-Neale (n 9); van den Herik (n 2) 523; on the drafting history of Art 33 of the UN Charter, see Bar-Yacoov (n 24) 132-134.

[91] UNSG (1 May 1964) UN Doc A/5694 (ibid) para 144, which states that '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 Charter'; see also van den Herik (ibid).

Moreover, increased recourse to fact-finding, in the last decades, seems to be correlated with, on the hand, the growing expectations of accountability and, on the other hand, the limitations intrinsic to international justice mechanisms.[92]

Security Council

UN-mandated commissions of inquiry can be established pursuant to several legal grounds under the UN Charter. Explicit investigatory powers are afforded by Article 34 of the UN Charter to the Security Council. Embedded in the UN architecture for the maintenance of international peace and security, inquiries under Article 34 should be interpreted as tools for 'preventive diplomacy'.[93] They may be established only to investigate a dispute or a situation that may generate international friction or a dispute and for the sole purpose of determining whether the continuation of such dispute or situation is likely to endanger international peace and security, a determination that ultimately only the Council is authorised to make. However, reliance on such provision has fallen into disuse.[94] This may be because a decision to undertake fact-finding under Article 34, considered to be a substantive rather than procedural decision, is subject to the veto power of the Permanent Members of the Security Council pursuant to Article 27(3) of the UN Charter.[95] Alternatively, it may be argued that the scarce recourse to investigations under Article 34 is due to the fact that this provision would only allow the Council to undertake investigations for the sole purpose of determining its competence in a

[92] Michelle Farrell and Ben Murphy, 'Hegemony and Counter-Hegemony: The Politics of Establishing United Nations Commissions of Inquiry' in Christian Henderson (ed), *Commissions of Inquiry: Problems and Prospects* (Hart Publishing 2017) 39; Marina Aksenova and Morten Bergsmo, 'Non-Criminal Justice Fact-Work in the Age of Accountability' in Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Torkel Opsahl Academic EPublisher 2013) 1; WU Xiaodan, 'Quality Control and the Selection of Members of International Fact-Finding Mandates' in Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Torkel Opsahl Academic EPublisher 2013) 194; Antonio Cassese, 'Fostering Increased Conformity with International Standards: Monitoring and Institutional Fact-Finding' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 295.

[93] UNSG, 'An Agenda for Peace. Preventive diplomacy, peacemaking and peace-keeping', Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992 (17 June 1992) UN Doc A/47/277, paras 23 and 25; see also van den Herik (n 2) 524.

[94] Farrell and Murphy (n 92) 41.

[95] Sydney D Bailey and Sam Daws, *The Procedure of the UN Security Council* (3rd edn, OUP 1998) 353-354.

specific matter.[96] Further, it may be argued that reluctance to rely on Article 34 may be linked to the legally binding nature of such a decision for the states involved.[97] Be as it may, the Security Council has claimed broader fact-finding competence based on the theory of implied powers,[98] in particular relying on Article 29 of the UN Charter which empowers it to establish subsidiary organs 'for the performance of its functions'. This provision presents two advantages: on the one hand, being located under the sub-heading 'Procedure', it may be more easily interpreted as escaping the veto power of the Permanent Five,[99] however, note that according to the 'chain of events' theory, the establishment of a subsidiary organ of the Council may be seen as having substantive consequences and hence fall under the voting requirements established under Article 27(3) of the UN Charter;[100] on the other hand, it allows the Security Council to interpret broadly its implied powers and, thus, to establish fact-finding mechanisms in a wide variety of cases as long as the powers and functions of the subsidiary organ do not exceed the competences and functions of the Council.[101] Van den Herik argues that Article 29 could be used with a variety of purposes, mostly in conjunction with Article 24, 36 or 39 of the UN Charter.[102] Be that as it may, the practice shows that, on the one hand, rarely does the Security Council mention expressly the legal basis for the establishment of fact-finding commissions[103] and, on the other hand, the Security Council regularly delegates the authority to set up such inquiries to the Secretary-General.[104]

[96] Van den Herik (n 2) 524; Ernest L Kerley, 'The Powers of Investigation of the United Nations Security Council' (1961) 55(4) *AJIL* 892, 898.
[97] Theodor Schweisfurth, 'Article 34' in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds), *The Charter of the United Nations. A Commentary* (2nd edn, OUP 2002).
[98] On the theory of implied powers, see *Reparations Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179-182; see also Schermers and Blokker (n 74) 180-189.
[99] Bailey and Daws (n 95) 353.
[100] Andreas Paulus and Matthias Lippold, 'Article 29' in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds), *The Charter of the United Nations. A Commentary* (3rd edn, OUP 2012).
[101] Farrell and Murphy (n 89) 42; Schweisfurth (n 97) 596.
[102] Van den Herik (n 2) 524.
[103] Ibid; Farrell and Murphy (n 92) 42.
[104] See, for example, UN, *Repertory of Practice of the United Nations Organs*, Vol 3, Supplement No 10 (2000-2009) <http://legal.un.org/docs/?path=../repertory/art34/english/rep_supp10_vol3_art34.pdf&lang=E> accessed 6 February 2018; see also van den Herik (ibid) 524.

General Assembly

In contrast to the Security Council, the General Assembly has no express investigatory power assigned to it by the UN Charter. However, the theory of implied powers has been employed to provide it with such competence.[105] In a similar way to Article 29, Article 22 of the UN Charter empowers the General Assembly to establish subsidiary bodies for the performance of its functions. These include a wide range of subsidiary organs or bodies, including arguably fact-finding commissions. Moreover, Farrell and Murphy note that the General Assembly shares with the Security Council the responsibility to ensure that international peace and security are maintained.[106] It must be noted, however, that the role of the General Assembly vis-à-vis the maintenance of international peace and security must be intended as subordinate to that of the Security Council. This is confirmed by the wording of Article 12, which disempowers the Assembly to make recommendations on any dispute or situation[107] unless specifically requested to do so by the Security Council when the latter organ is already seized[108] of the situation or dispute, or by Article 1 of the UN Charter which attributes primary responsibility for the maintenance of international peace and security to the Security Council. At the same time, though, it has been argued that Articles 11 and 14 of the UN Charter provide a clear basis for the General Assembly to establish fact-finding commissions in any situation or dispute as a means to counter the inactivity of the Security Council.[109] Over the years, the General Assembly has established several commissions of inquiry to investigate the most disparate situations, ranging from the South African apartheid policies[110] to the death of

[105] Van den Herik (ibid) 525; Farrell and Murphy (n 89) 43.
[106] Farrell and Murphy (ibid).
[107] According to Eckart Klein and Stefanie Schmahl, 'Article 12' in Simma, Khan, Nolte and Paulus, the situation or dispute that is under consideration of the Security Council must be one that at least potentially threatens international peace and security.
[108] The actual wording of Article 12(1) is as follows: 'While the Security Council is *exercising in respect of any dispute or situation the functions assigned to it in the present Charter*, ….'. This has been interpreted as meaning that the Council must be simultaneously, actually and actively considering the situation or dispute. See ibid.
[109] Farrell and Murphy (ibid).
[110] 'The question of race conflict in South Africa resulting from the policies of *apartheid* of the Government of the Union of South Africa', UNGA Res 616 A (VII) (5 December 1952).

former UN Secretary-General Dag Hammerskjöld[111] to reports of massacres in Mozambique.[112] However, since its establishment in 2006 as a subsidiary organ of the General Assembly, the Human Rights Council has played a dominant role in the establishment of international commissions of inquiry.[113]

Secretary-General

The Secretary-General of the UN may also, by virtue of the theory of implied powers, establish international commissions of inquiry for the performance of its functions. Such prerogative can either derive from acts of other UN primary organs delegating authority to the Secretary-General[114] or be inferred from Article 99 of the UN Charter, which empowers it to bring to the attention of the Security Council any matters that might imply a threat to the maintenance of international peace and security.[115] Farrell and Murphy subscribe to the view that Article 99 should be interpreted so as to provide the Secretary-General with a wide discretion to undertake inquiries unilaterally.[116] The role of the Secretary-General vis-à-vis the establishment of international inquiries is somewhat magnified by the UN Declaration on Fact-Finding which seems to suggest that the Security Council and the General Assembly should give preference to Secretary-General in matters of inquiry.[117] The UN Declaration also confirms

[111] 'An international investigation into the conditions and circumstances resulting in the tragic death of Mr. Dag Hammerskjöld and of members of the party accompanying him' UNGA Res 1628 (XVI) (26 October 1961).
[112] 'Establishment of the Commission of Inquiry on the Reported Massacres in Mozambique' UNGA Res 3114 (XXVIII) (12 December 1973).
[113] See the list of international commissions of inquiry, classified by mandating authority, provided by the United Nations library at <http://libraryresources.unog.ch/c.php?g=462695&p=3162812> accessed 6 February 2018.
[114] Art 98 of the UN Charter states that the Secretary-General should 'perform such other functions as are entrusted to him by [the other UN organs]'.
[115] Van den Herik (n 2) 526; Farrell and Murphy (n 92) 44; Joanna Weschler, 'Human Rights Diplomacy of the United Nations Security Council' in Michael O'Flaherty, Zdzisław Kędzia, Amrei Müller and George Ulrich (eds), *Human Rights Diplomacy: Contemporary Perspectives* (Martinus Nijhoff Publishers 2011) 182-183.
[116] Farrell and Murphy (ibid).
[117] UN Declaration on Fact-Finding (n 8) Section II(15) states that: 'The Security Council and the General Assembly should, in deciding to whom to entrust the conduct of a fact-finding mission, give preference to the Secretary-General, who may, inter alia, designate a special representative or a group of experts reporting to him'; see also Axel Berg, 'The 1991 Declaration on Fact-Finding by the United Nations' (1993) 4 *EJIL* 107, 110.

the Secretary-General's competence to set up inquiries at the request of states or *proprio motu*.[118]

1.3.5 Inquiries by the Human Rights Council

While the Human Rights Council acts as a subsidiary body of the UN General Assembly, and thus UN Human Rights Council-led international inquiries should squarely fall within the category of UN inquiries, it is worth discussing the role of the Council separately in light of its leading role, since its inception in 2006, vis-à-vis the establishment of international fact-finding commissions. According to the UN library online, 34 international inquiries have been established under the Human Rights Council auspices since 2006. This number almost equals the other 40 commissions of inquiries, established by other organs or agencies of the UN since 1963, listed in the database.[119] An additional reason to discuss the role of the Human Rights Council separately from that of the primary UN organs lies in its specific mandate. According to Resolution 60/251:

> 3. … the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote the effective coordination and the mainstreaming of human rights within the United Nations system.[120]

While the General Assembly is also endowed with a partly human rights-related mandate, specifically by virtue of Article 13(1)(b), which establishes that 'The General Assembly shall

[118] UN Declaration on Fact-Finding (ibid) Section II(13).

[119] The UN library database online classifies *ad hoc* international commissions of inquiry according to the following mandating authorities: the Security Council; the General Assembly; the Secretary-General; the former UN Commission on Human Rights; the UN Human Rights Council; and the UN High Commissioner for Human Rights. The earliest international commission of inquiry considered is the 1963 UN Fact-finding mission to South Viet-Nam to ascertain the facts of the situation in that country as regards relations between the Government of the Republic of Viet-Nam and the Viet-Namese Buddhist community, dispatched by the UN General Assembly (<http://libraryresources.unog.ch/c.php?g=462695&p=3162812> accessed 7 February 2018). This choice, of course, dispenses with earlier fact-finding mechanisms such as the UN General Assembly-mandated commission of inquiry dispatched to investigate the South African apartheid policies mentioned in footnote 103. However, it cannot be denied that the number of fact-finding mechanisms set up by the Human Rights Council in a time span of little more than ten years is comparatively higher than the total number of international inquiries established by other organs or agencies of the UN.

[120] UNGA Res 60/251 (3 April 2006) UN Doc A/RES/60/251.

initiate studies and make recommendations for the purpose of: … b) promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion', the Human Rights Council's mandate is human rights specific.

The legal basis for the Human Rights Council's power to establish fact-finding commissions is uncertain because its constitutive instrument, besides stating that the Council shall 'Assume the role and responsibilities of the Commission on Human Rights relating to the work of the Office of the United Nations High Commissioner for Human Rights', does not expressly provide it with such power.[121] Hence, in order to determine whether the Council has inherited a power to establish international commissions of inquiry, one should go back to the prerogatives of the former UN Commission on Human Rights. A prerogative to set up international commissions of inquiry could be inferred from Resolution 1503 (XLVIII) adopted by the former Commission's parent body, the Economic and Social Council (ECOSOC).[122] The procedure introduced by the Resolution to address communications of violations of human rights and fundamental freedoms include, under points 6 and 7, the establishment of *ad hoc* mechanisms of investigation. In the alternative, scholars have argued that the Council's power to establish fact-finding mechanisms could also find a legal basis in the theory of implied powers. Accordingly, the establishment of investigatory mechanisms to collect information regarding human rights would be a pre-requisite for the effective functioning of the Human Rights Council according to its mandate.[123] Furthermore, Farrell and Murphy argue that the

[121] Ibid.
[122] ECOSOC Res 1503 (XLVIII), 48 UN ESCOR (No 1A) at 8, UN Doc. E/4832/Add.1 (1970); on the transfer of the competence to set up inquiries from the former Commission to the Human Rights Council, see also Farrell and Murphy (n 89) 46; van den Herik (n 2) 527.
[123] Christine Chinkin, 'U.N. Human Rights Council Fact-Finding Missions: Lessons from Gaza' in Mahnoush H Arsanjani, Jacob Katz Cogan, Robert D Sloane and Siegfried Wiessner (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers 2011) 481; Farrell and Murphy (ibid) 46-47; the three authors share reliance on Felix Ermacora's statement that: 'It may be assumed that international organizations possess an implied power to establish fact-finding bodies if the statute [or other constitutive instrument] of the international organization allows it to conclude that the investigation of facts is a pre-condition for fulfilling accurately the main function of the organization' (Felix Ermacora, 'The Competence

Human Rights Council could also derive its authority to establish fact-finding commissions from the broader authority of its parent body, the General Assembly.[124]

Whether the legal justification for the establishment of inquiry mechanisms is found in the theory of implied powers or in an implied delegation of powers, one must note that the exercise of this prerogative should remain within the confines of the overall mandate of the parent organisation,[125] notably for UN-mandated fact-finding missions the maintenance of international peace and security. While the Human Rights Council's mandate is human rights-oriented, the Preamble of General Assembly Resolution 60/251 unequivocally embeds human rights in the broader mandate of the UN by acknowledging that:

> peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being, and recognizing that development, peace and security and human rights are interlinked and mutually reinforcing.[126]

Hence, it would seem that the establishment of human rights inquiries should be ultimately geared towards the maintenance of international peace and security, of which respect for human rights constitute an essential pillar. With this ultimate goal in mind, human rights commissions of inquiry have been said to fulfil several purposes. For example, in a 2011 report to the Security Council, the UN Secretary General stated that 'these mechanisms have, in recent years, been effectively leveraged to support preventive diplomacy efforts, helping to shift the calculations of the parties, defuse tensions and build confidence'.[127] In 2006, in a report to the former Commission on Human Rights, the Secretary-General, after surveying the experience of several commissions of inquiry, concluded that:

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and Functions of Fact-Finding Bodies' in Bertrand G Ramcharan (ed), *International Law and Fact-Finding in the Field of Human Rights* (Martinus Nijhoff Publishers, 1982, revised and reprinted 2014) 85).

[124] Farrell and Murphy (ibid) 46.

[125] Van den Herik (n 2) 527.

[126] On the linkage between human rights and international peace and security, see Chinkin (n 123) 480-481; van den Herik (ibid).

[127] UNSC, 'Preventive diplomacy: Delivering results', Report of the Secretary-General (26 August 2011) UN Doc S/2011/552, para 32.

> It has been widely recognized that the commissions of inquiry and fact-finding missions can play an important role in combating impunity. Recent international commissions of inquiry have been established with comprehensive mandates, including specific requests for complex legal determinations and identification of perpetrators. As demonstrated in this report, thorough and comprehensive work by the Commission of Inquiry can assist the United Nations intergovernmental bodies, including the Commission on Human Rights and the Security Council, in their decision-making processes on action when serious violations of international human rights law and international humanitarian law are taking place.[128]

In addition, the UN Guidance and Practice on *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law* suggest that:

> The work of commissions/missions is crucial for strengthening human rights protection in multiple ways. The commissions/missions can provide an historical record of serious violations of human rights and international humanitarian law, and influence changes in law and practice to advance human rights. Critically, they assist in ensuring accountability for serious violations, which is fundamental in order to deter future violations, promote compliance with the law and provide avenues of justice and redress for victims.[129]

Similarly to some extent, some scholars have also identified some differences between human rights fact-finding mechanisms and more traditional forms of fact-finding. Bertrand Ramcharan, for example, notes that:

> The approach of fact-finding in the field of human rights is not primarily to adjudicate or to condemn but to assist in the restoration of human rights; in the second place fact-finding is nevertheless partisan in favour of human rights concerns. It cannot be totally neutral in this respect. Third, fact-finding in the field of human rights proceeds from the basis that governments have a responsibility for guaranteeing human rights in their respective countries and, therefore, once *prima facie* evidence has been established that violations of human rights have occurred, an onus is upon the government concerned to advance evidence to the contrary, or to show that it has taken, is taking, or intends to take measures to guarantee respect for human rights and fundamental freedoms. Fourth, fact-finding in the field of human rights is frequently inquisitorial rather than adversarial, in the sense that generally there are often no parties as such to fact-finding … Fifth, certain rules applicable to traditional fact-finding may not be suitable to fact-finding in the field of human rights.[130]

[128] UN ECOSOC, 'Promotion and Protection for Human Rights: Impunity', Report of the Secretary-General (15 February 2006) UN Doc E/CN.4/2006/89, para 42.
[129] UN Guidance and Practice (n 29) 7.
[130] Bertrand G Ramcharan, 'Introduction to the Original Edition' in Ramcharan (n 123) xxv-xxvi.

It emerges, as both van den Herik and Chinkin have noted, that human rights fact-finding seems to be geared towards inducing positive change in human rights practices in specific contexts.[131]

2. The 'Juridification' of International Commissions of Inquiry

Despite Ramcharan's assertion that 'the approach of fact-finding in the field of human rights is not primarily… to condemn', the depiction of human rights inquiries as accountability mechanisms by the UN itself seems to lend credibility to the opposing view, according to which fact-finding commissions do in fact aim to condemn their targets. They do so by resorting to two interrelated strategies. On the one hand, they frame their findings in legal terms; on the other hand, they seek to elicit the criticism of the international community of states, their domestic constituencies and supranational organisations.

The appeal to law as a discursive frame is the result of the combined effect of the increasing 'juridification' of mandates and the self-identification of commissions of inquiry.[132] The overabundance of facts on the ground necessarily requires the mandating body to provide inquiry panels with selective criteria to determine which facts should be investigated. Hence, mandates are often formulated in legal terms to direct the work of fact-finders. For example, the OHCHR Investigation Mission to Iraq was mandated 'to investigate alleged violations and abuses of *international human rights law* committed by the so-called Islamic State in Iraq and the Levant and associated terrorist groups, and to establish the facts and circumstances of such abuses and violations' (emphasis added).[133] Moreover, mandates may explicitly request inquiry panels to reach a determination in law about the facts gathered. For example, the 2004 International Commission of Inquiry on Darfur was entrusted by the Security Council with the task of determining whether acts of genocide had occurred, thus explicitly requesting the

[131] Van den Herik (n 2) 527; Chinkin (n 123) 480.
[132] Van den Herik (ibid) 529-532.
[133] UNHRC Res S-22/1 (1 September 2014) para 10 in UNGA Official Records, Supplement No 53A, Report of the Human Rights Council, UN Doc A/69/53/Add 1.

Commission to make a legal determination.[134] The appeal to certain bodies of law may also be the result of the interpretation of the mandate by the fact-finding panel itself. Occasionally, fact-finders have repudiated their role as law-applying bodies or have clarified that they were not to act as courts of law. The Palmer Inquiry into the May 2010 Flotilla Incident was particularly outspoken in this regard. Multiple times, it stated in its report that 'The Panel is not a court. It was not asked to make determinations of the legal issues or to adjudicate on liability' and that 'The Panel will not add value for the United Nations by attempting to determine contested facts or by arguing endlessly about the applicable law. Too much legal analysis threatens to produce political paralysis'.[135]

These observations are corroborated by statistical research on international fact-finding mechanisms. By relying mostly on the online UN Library database, Shiri Krebs analysed the mandates of sixty-six fact-finding missions and found that 95% of these commission where tasked with adopting legal discourse in reporting their findings.[136] Even more interestingly, according to the same study, only 25% of the sample contained an explicit reference to fact- or truth-finding.[137] By cross-checking these data with the sharp increase in fact-finding exercises by the UN since the 1990s and, more markedly, over the last decade, Krebs infers an unquestioned rise in what she calls the 'legalisation of truth' in international fact-finding. Further, she criticises this approach by claiming that it is reflective of an unquestioned assumption that exposing violations in legal terms is an effective 'naming and shaming' strategy.[138] Implicitly, this observation is underpinned by the meaning of the differentiation between facts and the law.

[134] UNSC Res 1564(2004) (18 September 2004) UN Doc S/RES/1564 (2004), para 12.
[135] Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (September 2011) paras 5 and 15.
[136] Krebs (n 6) 96.
[137] Ibid.
[138] Ibid 97-98.

2.1 Ascertainment and Legal Qualification of Facts

The idea of a clear distinction between the facts and the law has long been abandoned.[139] As Clarence Morris puts it, it is assumed that 'the facts-of-a-case are legally significant aspects of events, and are "found" by lawyers and judges, whose legal ideas affect selection and identification'.[140] This assertion is underpinned by the quite obvious observation that individuals do not approach reality – if indeed it exists – value-free. On the contrary, every observation of the outer world will be influenced by our pre-conceptions and normative values, in both the selection and the interpretation of the relevant information. In a way similarly to the meaning of Antoine de Saint-Exupery's well-known line 'what is essential is invisible to the eye', that is, it is only through the filter of feelings that one can appreciate the wonderous essence of things, bare facts are meaningless if completely decontextualized from normative lenses. Borrowing Frédéric Mégret effective example, the fact that six million Jews were killed during WWII is – to say the least – a shallow description of the Holocaust, and the only way we can understand the magnitude of such event is through the notion of genocide.[141]

The unquestioned expansion of fact-finding mechanisms' mandates to include quasi-judicial functions, as evidenced by the practice surveyed above, makes this debate all the more relevant. By now, the reader will have understood that pure fact-finding – as if facts had an independent existence and, hence, could really be found – is a myth. The law, as provided in mandates, guides the fact-finder in their selection and identification of relevant facts. To this extent, a certain degree of dependency of fact-finding on legal concepts is inevitable. Otherwise, the fact-finder would face an indistinguishable *mare magnum* of facts with no criteria to sift the

[139] Clarence Morris, 'Law and Fact' (1942) 55 *Harv L Rev* 1303; Adrian AS Zuckerman, 'Law, Fact or Justice?' (1986) 66 *BUL Rev* 487; Ronald J Allen and Michael S Pardo, 'The Myth of the Law-Fact Distinction' (2002) 97 *Nw UL Rev* 1769.
[140] Morris (ibid) 1303-1304.
[141] Which, by the way, was coined by Rafael Lemkin specifically to capture in legal terms the seriousness of this tragic event (Philippe Sands, *East West Street* (Weidenfeld & Nicolson 2016) 106-107). See Mégret (n 27) 34.

information.[142] But there is a great leap between applying legal lenses to the selection of relevant facts and making findings of law. One may thus wonder whether the departure from the dispute settlement model of commissions of inquiry – mostly limited to statements of facts – is justified and by what reasons.

Ultimately, this issue may underpin a strategic choice of fact-finders or their mandating bodies. In the past, the elucidation of facts alone, albeit guided by specific legal lenses, may have proven persuasive enough to encourage states to sit at the negotiating table and settle their dispute on the basis of that record. However, the effectiveness of this strategy must be contextualised with regard to a horizontal fact-finding model, where facts were disputed between states and fact-finders were appointed by the involved parties. There is no guarantee that the same strategy would work for modern international inquiries which reflect a vertical relationship between supervising human rights bodies and states, and where the very concept of 'involved party' is rather blurred. Conversely, one may challenge the assumption that a legal qualification of the facts is more effective than a mere representation of those facts for essentially two reasons. First, authorising international commissions of inquiry to make legal findings, as if they were to pass judgment, might jeopardise their legitimacy intended as their ability to elicit public trust. Second, legal rules are more fluid than facts, are often formulated so as to allow leeway for interpretation and as such are more likely to engender contestation.[143]

2.1.1 A Purposive Definition of Fact

It should now be clear that the conventional definition of 'fact' does not fully capture the complexities of the fact-finding process, be it judicial or non-judicial. Black's Law Dictionary defines 'fact' as 'An actual and absolute reality, as distinguished from mere supposition or

[142] In contrast, the typology of mandates that informed the work of early commissions of inquiry, especially under the Hague Conventions 1899 and 1907, were focused on specific and circumscribed events (for example, the circumstances surrounding the sinking of specific vessel), which made legal analysis less relevant.
[143] However, it is worth re-emphasising that the identification of the relevant facts necessarily presupposes an understanding of the applicable legal norms.

opinion'.[144] While this definition may be ontologically suitable, I have pointed out that there is more to the notion of facts in fact-finding contexts than their mere ontological dimension. While traditionally facts are distinguished from opinions and norms on the ground of their objectivity and non-prescriptiveness,[145] there is something specific about facts gathered by commissions of inquiry, whether we embrace a horizontal dispute settlement model of fact-finding or a vertical human rights-centred one. Such specificity can be ultimately identified in the function of the fact-finding process, that is, to either encourage states to settle their disputes peacefully or induce behavioural change in violators of human rights.

From this viewpoint, facts must be seen as the output of a process. As such they are, to some extent, manipulated by the process itself. They are determined by human beings, fact-finders, committed to certain worldviews, following certain procedures and applying certain evidentiary standards depending on their target audience.[146] To put it in Mégrét's words 'What counts as a fact, then, is something quite complicated. It is typically a reconstruction based on some source and a particular theory of why that source makes it plausible, perhaps very highly plausible, that a certain thing occurred or is'.[147]

Acknowledgement of the influence of the process on the outcome is important because it underlines that facts as presented by fact-finding missions – as by any fact-finding judicial or non-judicial mechanism – are not quite as incontrovertible and bare as common sense would lead us to think. Besides, because one of the goals of (especially) human rights fact-finding is to elicit domestic change in the target state, fact-finders will devise strategies to maximise their impact. This may shift the emphasis from the truthfulness of the facts to their credibility in the

[144] Black, *Law Dictionary Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern and including the Principal Terms of International, Constitutional, Ecclesiastical and Commercial Law, and Medical Jurisprudence* (1910) 475.
[145] See, more extensively on the differences between facts and opinions and facts and norms, Mégrét (n 27) 30-35.
[146] These issues are extensively discussed in Mégrét (ibid) 31-32.
[147] Ibid 32.

eyes of the target state.[148] This is not to say that the substance of the facts does not matter or can deliberately be watered down in the name of some alleged greater interest, but it underlines that procedural fairness is essential to vest commissions of inquiry with legitimacy.[149] Hence, for example, the appointment to an inquiry procedure of a well-known critic of the target state will most likely jeopardise the commission's legitimacy and taint the credibility of the factual findings.

In conclusion, whether facts exist separately as 'an absolute reality' or not, it is quite clear that the facts reported by fact-finding mechanisms cannot attain that same level of absoluteness and are rather reconstructions of the events investigated. Hence, their correspondence to the 'truth' is liable to contestation.

2.1.2 The Role of the Law in Fact-Finding Exercises

The process of 'juridification' or 'legalisation' of fact-finding does not simply refer to the use of legal lenses in the selection of the relevant facts, but also describes the use of legal language in the final outcome of the inquiry, that is, the report. Undeniably, as noted by several scholars, international commissions of inquiry have made extensive use of international law.[150] Despite their often outspokenness in declaring that they are not courts of law, recent international commissions of inquiry seem to have focused more on 'legal truths' at the expenses of important factual controversies.[151]

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[148] Ibid 38.

[149] On the impact of procedural fairness on legitimacy, see Niklas Luhmann, *Procedimenti Giuridici e Legittimazione Sociale* (Alberto Febbrajo ed and Sergio Siragusa tr, Giuffré Editore 1995).

[150] On the selection, application and impact of legal language by commissions of inquiry, see Van den Herik (n 2) 532-535; Catherine Harwood, 'International Commissions of Inquiry as Law-Makers' (2016) 7(1) *ESIL Conference Paper Series*; Théo Boutruche, 'Selecting and Applying Legal Lenses in Monitoring, Reporting, and Fact-Finding Missions' (October 2013) *HPCR Working Papers*; Catherine Harwood, 'Human Rights in Fancy Dress? The Use of International Criminal Law by Human Rights Council Commissions of Inquiry in Pursuit of Accountability' (2015) *Grotius Centre Working Paper 2015/043-ICL*; Catherine Harwood and Larissa van den Herik, 'Commissions of Inquiry and *Jus ad Bellum*' (2017) *Grotius Centre Working Paper 2017/065-PSL* also in Leila Nadya Sadat (ed), *Seeking Accountability for the Unlawful Use of Force* (CUP 2018).

[151] Krebs (n 6); Shiri Krebs, 'Designing International Fact-Finding: Facts, Alternative Facts, and National Identities' (2018) 41(2) *Fordham International Law Journal* 337, 340-343.

While, as I have clarified above, a factual inquiry cannot be conducted in a vacuum and, hence, the law is necessary to provide selection criteria for sifting through the enormous amount of information that real-life events engender, legal findings imply a further analytical step. They depart from the more neutral – albeit not infrequently contested – presentation of facts by being deliberately and admittedly partisan. Much more than facts, legal norms are prone to interpretations; they are often formulated in vague terms so as to allow a balancing exercise between the competing interests potentially affected by the specific norm. This is particularly evident with regard to the laws of war which seek a balance between the necessities of belligerents and the protection of certain categories of individuals and goods. Probably, the most obvious example, in this context, is the principle of proportionality which prohibits launching attacks that are expected to cause excessive loss of civilian lives or damage to civilian infrastructures in relation to the anticipated military advantage.[152] A determination of what amounts to a disproportionate attack clearly implies a – at least partially – subjective assessment, despite the fact that the analysis should be made against the standard of the 'reasonable commander'.[153] Because there is no clear yardstick, determining the proportionality of an attack is not simply a factual assessment but implies a choice between conflicting values: on the one hand, the military necessity underpinning that specific strike; on the other hand, the protection of the civilian population and infrastructures. Moreover, any assessment of the like requires the collection and analysis of several information, which may include the number of

[152] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law. Volume I. Rules* (3rd reprinting with corrections, CUP 2009) 46.

[153] On the relationship between proportionality and the 'reasonable commander' in international humanitarian law, see for example, Ian Henderson and Kate Reece, 'Proportionality under International Humanitarian Law: The "Reasonable Military Commander" Standard and Reverberating Effects' (2018) 51 *Vand J Transnat'l L* 835; Robert D Sloane, 'Puzzles of Proportion and the "Reasonable Military Commander": Reflections of the Law, Ethics, and Geopolitics of Proportionality' (2015) 6 *Harv Nat'l Sec J* 299; on the proportionality standard, see Jason D Wright, '"Excessive" ambiguity: analysing and refining the proportionality standard' (2012) 94(886) *IRRC* 819; in the context of the Israeli military operation on the Gaza Strip, known as 'Cast Lead', see Amichai Cohen, 'Principle of Proportionality in the Context of Operations Cast Lead: Institutional Perspectives' (2009) 35 *Rutgers L Rec* 23;

civilian casualties, the intelligence available to the military commander at the time of the strike, the relevance of the military target and so on.

As Shiri Krebs notes, facts, as presented by fact-finding bodies, almost never 'speak for themselves'. Rather, 'the decision to adopt legal categories to interpret the facts, produces a contingent version of reality, as it adheres to legal rules and processes that frame the story, infuse it with meaning, and dictate how the relevant facts are construed'.[154] 'Legalisation' also restricts the range of facts available by dint of stringent rules of procedure and evidence, and force the relevant facts into limited descriptive boxes thus potentially oversimplifying reality.[155] In other words, reporting facts in legal jargon and by employing legal frames is not a neutral operation. As such, it is liable to trigger contestation and, as studies on the effects of international norms on state behaviour have shown, it may spiral into a counter-productive ideological polarisation within the target audience.[156]

2.1.3 Fact-Finding Strategies: Conflating Ascertainment and Legal Qualification of Facts

Fact-finding missions have been described as employing a 'naming and shaming' strategy akin to many non-governmental organisations.[157] In the field of human rights, this consists in publicising countries' violations of human rights standards and norms in order to urge domestic reforms or accountability efforts.[158] From this viewpoint, the legal framing of facts corresponds

[154] Krebs (n 151) 347.
[155] Ibid 348.
[156] Shiri Krebs, 'The Dark Side of Legal Truth' (2016) *Conflict, Accountability, and Justice (New Voices) ASIL Proceedings* 163; Krebs (n 6) 98; ibid 359-361; James C Franklin, 'Shame on You: The Impact of Human Rights Criticism on Political Repression in Latin America' (2008) 52 *Int Stud Q* 187; Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2004) 28 *Int'l Sec* 5.
[157] Krebs (n 6) 97-98; see, also, more generally on the politics of shame within the UN context, Wade M Cole, 'Institutionalizing shame: The effects of Human Rights Committee rulings on abuse, 1981-2007' (2012) 41 *Soc Sci Res* 539; James H Lebovic and Erik Voeten, 'The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR' (2006) 50 *Int'l Stud Q* 861. The 'naming and shaming' function of international commissions of inquiry can also be inferred from the Report of the UN Secretary-General, *Preventive Diplomacy: Delivering Results* (2011), where the Secretary-General refers to such commissions as instruments used for altering the cost-benefit calculations of the parties.
[158] See, generally, on the politics of 'naming and shaming', Emilie M Hafner-Burton, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem' (2008) 62(4) *Int Organ* 689; Jacob Ausderan, 'How naming and shaming affects human rights perceptions in the shamed country' (2014) 51(1) *J Peace Res* 81.

to a deliberate strategy aimed at influencing domestic legal and policy responses by spotlighting where and how the country has fallen short of international standards. Krebs identifies two assumptions underlying 'naming and shaming' strategies in human rights fact-finding.[159] On the one hand, the 'credibility assumption', which refers to the ability of fact-finding mechanisms to resolve factual disputes by clarifying what happened.[160] On the other hand, the 'mobilisation assumption', which points to the ability of fact-finding reports to pressure domestic constituencies to halt abuses and sanction perpetrators.[161]

Additionally, it has been suggested that international commissions of inquiry form part of the legal accountability process in their own right.[162] Specifically, since their departure from the Hague model, international inquiries have sought to address a larger audience than merely the states parties to the dispute. In this sense, fact-finding mechanisms act as delegates of the international community in its broadest sense. They attempt to engage several different actors, including political bodies such as the UN Human Rights Council or the General Assembly, states, international non-governmental organisations and, most importantly, legal institutions such as the International Criminal Court. Hence, legal frames maximise the ability of such commissions to elicit the action of other international institutions. The use of tentative language, such as 'From the facts ascertained by it, the Mission finds that the destruction of the mill … *may* constitute a war crime',[163] demonstrates, on the one hand, the self-perception of such commissions as non-judicial bodies and, on the other hand, their appeal to a specific audience, that is, in this case, international criminal justice circles.

[159] Krebs (n 6) 98.
[160] David R Davis, Amanda Murdie and Coty Garnett Steinmetz, '"Makers and Shapers": Human Rights INGOs and Public Opinion' (2012) 34 *Hum Rts Q* 199; Matthew Krain, 'J'Accuse! Does Naming and Shaming Perpetrators Reduce the Severity of Genocides or Politicides?' (2012) 56 *Int Stud Q* 574.
[161] Jacqueline HR DeMeritt, 'International Organizations and Government Killing: Does Naming and Shaming Save Lives?' (2012) 38 *Int'l Interactions* 597.
[162] Butchard and Henderson (n 32) 21.
[163] *Human Rights in Palestine and Other Occupied Arab Territories*, Report of the United Nations Fact-Finding Mission on the Gaza Conflict (25 September 2009) UN Doc A/HRC/12/48, para 937 (emphasis added).

Indeed, while no specific binding legal consequences flow from the findings – even legal findings – of international commissions of inquiry, the mere use of legal terminology evokes certain consequences for the simple reason that the law attaches such consequences to those determinations.[164] In other words, while the simple presentation of a set of facts provides a narrative of the specific events under investigation, the legal qualification of those same facts describes this narrative as either lawful or unlawful, according to specific bodies of law. Even without a thorough analysis of issues of attributability by the commission, this dichotomic qualification of the facts begs a more in-depth determination of who is responsible for the unlawful conduct. Sometimes, such determination is carried out tentatively by commissions of inquiry themselves, albeit with no binding effects on the recipients of the final report. Most importantly, though, commissions of inquiry often explicitly call upon the recipients of their reports to make this further determination. This is to say that the mere finding that what happened in a given set of circumstances may be unlawful constitutes an allegation of a wrongdoing that states, in the first place, and international actors, in a subsidiary or complementary way, should further investigate to establish responsibility.[165] In this sense, the use of legal terminology to qualify the factual narrative is clearly aimed at prompting some form of accountability.[166]

[164] For example, from the viewpoint of international human rights law, the statement that the deprivation of someone's life is unlawful and is attributable to a police officer on duty implies that that police officer is individually responsible for the victims' death as well as that the state is responsible under international human rights law for a violation of the substantive content of the right to life. If the state fails to genuinely investigate and prosecute the alleged responsible individual, that is if the state fails to make them accountable for their actions, such a finding would imply that the state has a procedural obligation to investigate and prosecute the alleged responsible individual, which it should abide by.

[165] This is not to say that all allegations of human rights violations give rise to a state duty to investigate in its technical acceptation. However, it is worth noting that situations for which international inquiries are normally established are characterised by violations that generally attain such a gravity as to give rise to such an obligation. In particular on the right to a remedy, see UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Res 60/147 (21 March 2006) UN Doc A/RES/60/147.

[166] While the use of binary legal terminology seems more closely tied to the notion of legal accountability, Larissa van den Herik emphasises that inquiry mechanisms, 'ultimately predominantly driven by a desire to uncover and understand and to learn lessons', may combine such an analysis with addressing questions of accountability in a non-legal sense. See Larissa van den Herik, 'Accountability Through Fact-Finding: Appraising Inquiry in the Context of Srebrenica' (2015) 62 *Neth Int Law Rev* 295, 309.

The success of these strategies, however, may depend on a number of ulterior factors such as the perceived legitimacy of the specific fact-finding mechanism, which in turn may depend on the formulation of its mandate, the impartiality and independence of its members as well as the rules of procedure and evidence adopted.[167] In addition, as pointed out above, while it may succeed in eliciting the action of international actors, the uncritical appeal to legal notions may prove counter-productive at the domestic level by radicalising the public debate on the events scrutinised by the inquiry mechanism or further entrenching the bias against international institutions.

2.2 The Evidentiary Value of Inquiries' Findings

In an influential article, Thomas M Franck and H Scott Fairley argued that 'the prospects for fact-finding rest upon a fragile assumption of "fairness" and "credibility"'[168] to underline the importance of sound procedural rules as a *condicio sine qua non* for the success of any fact-finding exercise. This observation resonates even more loudly today, at a time where ideology and political partisanship supersede the factuality of certain events. If factual accounts are to stand a chance to persuade, they need to logically stem from an epistemological process which, by virtue of its characteristics, has to be, as far as possible, immune to criticism.[169] Among the several features that contribute to vest such process with legitimacy and credibility, the standard of proof is central.

Clear evidentiary standards, on the one hand, determine the degree of (procedural) certainty which can be attached to individual factual findings and, on the other hand, speak directly to the target audiences of fact-finding mechanisms by providing guidance for the 'usability' of those findings. Conversely, a clear and explicit standard of proof is dependent on the specific

[167] All of these factors are discussed infra.
[168] Thomas H Franck and H Scott Fairley, 'Procedural Due Process in Human Rights Fact-Finding by International Agencies' (1980) 74(2) *AJIL* 308, 309.
[169] See, also, Mégrét (n 27) 32.

function of each fact-finding exercise. Facts may be sought for purely informational purposes, political action or further legal accountability exercises. Thus, the fact-finder is often confronted with a choice between pursuing the best approximation to reality, which requires a substantial investment in proving facts *beyond reasonable doubt*, and vesting factual findings with enough credibility, which might be achieved even without satisfying the highest evidentiary standard.[170]

While the *ad hoc* nature of international inquiries has prevented the adoption of a binding standard of proof to guide investigations, the subject has attracted considerable attention both in academic and professional circles. In a seminal study on the standard of proof for international fact-finding missions in the field of human rights and humanitarian law, Stephen Wilkinson, after surveying the different evidentiary standards adopted in some common and civil law systems and the practice of several inquiry mechanisms, concludes that sound fact-finding methodology requires a clear and explicit statement of the standard(s) of proof adopted at the outset of the report. He proposes the *balance of probability* standard as the baseline for a factual finding to be made. Furthermore, he recommends the adjustment of such standard according to: a) the type of facts to be proved; b) whether the fact-finders deem it necessary to prove the existence of an unlawful policy; c) whether issues of attribution are to be proven; and d) whether individuals allegedly responsible for the conducts described are to be named in the final report.[171] A similar approach is sanctioned in the *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies*, which state that 'The fact-finding body should clearly articulate the standard it has used to make its findings. The minimum standard for the review and evaluation of evidence and other information should be a balance of

[170] Ibid 38.

[171] Stephen Wilkinson, 'Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions', Geneva academy of international humanitarian law and human rights. Wilkinson's recommendations extend beyond the four points I have indicated and seek to take into consideration additional factors which may affect the identification of a suitable standard of proof, such as the level of cooperation of the investigated state or group, the nature of the mandating body and the anticipated impact of the report. The *balance of probabilities* standard was also endorsed by Bertrand Ramcharan, 'Evidence' in Bertrand Ramcharan (ed), *International Law and Fact-Finding in the Field of Human Rights* (Martinus Nijhoff 1982) 78.

probabilities'.[172] The *Lund-London Guidelines*, albeit devised to apply to NGO fact-finding, also endorse the *balance of probability* standard.[173]

As I have hinted above, standards of proof, goals of fact-finding mechanisms and usability of the findings are interrelated. On the one hand, the goal of the specific inquiry mechanism should guide fact-finders in their selection of the most appropriate evidentiary standard. There is no doubt that achieving criminal accountability for the facts investigated requires an exceptionally high standard of proof and, despite the admittedly non-judicial nature of international inquiries, the identification and subsequent naming – whether publicly or confidentially – of alleged perpetrators demands that fact-finders attain a comparable level of certainty not just of the facts reported but also of their attributability to individuals.[174] When the findings are intended for purposes other than accountability, such as informing the targeted state authorities about the circumstances of certain events with the goal of triggering political action, a lower standard of proof would certainly be acceptable. In such a case, the fact-finding mechanisms is only concerned with providing the target state or group with fresh information so that the competent authorities can initiate a review process – be it judicial or political. However, what is the most suitable standard of proof in situations where the fact-finding mechanism aims to elicit the action of other international agencies or states by shaming the

[172] Bassiouni and Abraham (n 2) Guideline 8, p 43. The *Siracusa Guidelines* are a set of non-binding principles which seek to provide guidance to international fact-finders and mandating bodies in the establishment and conduct of fact-finding exercises.

[173] *Guidelines on International Human Rights Fact-Finding Visits and Reports by Non-Governmental Organisations* (The Lund-London Guidelines), Raoul Wallenberg Institute of Human Rights and Humanitarian Law and International Bar Association, Guideline 70.

[174] See the ground-breaking study on the evidentiary hurdles faced by international criminal tribunals and the subsequent largely unfounded convictions issued by such tribunals by Combs (n 27). The author explores the numerous impediments that plague the international criminal fact-finding process conducted by international tribunals and concludes that such process is tainted by several capacity pitfalls, which negatively impact on the quality of international convictions. Considering the extent of these problems in international tribunals, one can only expect their re-occurrence in international inquiries only to a much larger extent in light of their time and resource constraints. This makes them particularly inapt to reach determinations on individual blameworthiness, even more so when individuals' names are intended to be published. For a nuanced view on the opportunity to name alleged perpetrators, see Carsten Stahn and Catherine Harwood, What's the Point of 'Naming Names' in International Inquiry? Counseling Caution in the Turn Towards Individual Responsibility' (11 November 2016) *EJIL: Talk!* <https://www.ejiltalk.org/whats-the-point-of-naming-names-in-international-inquiry-counseling-caution-in-the-turn-towards-individual-responsibility/>.

target government or group? An argument could be made that 'naming and shaming' entails condemnation and, thus, negatively reflects on the international standing of the target state or group. These consequences are grave enough to warrant the adoption of a higher standard of proof if the fact-finding process is to be perceived as fair. But the adoption of a higher evidentiary standard is also necessary, as I have already pointed out, to vest the inquiry with credibility and dispel any legitimate doubt of politicisation.

3. The 'Criminalisation' of Human Rights Fact-Finding

Modern international commissions of inquiry have increasingly been adopting a language akin to international criminal courts and tribunals by employing categories typically embedded in domestic or international criminal law. International humanitarian and human rights law frames are complemented with references to war crimes, crimes against humanity, genocide, individual perpetrators and *mens rea*.[175] This phenomenon has been named in academic circles as the 'criminalisation' of human rights fact-finding.[176] Its emergence has resulted in fresh scholarship analysing in turn the origins of this shift,[177] its legitimacy, limitations and impact,[178]

[175] See, for example, the Report of the Commission of Inquiry on Burundi (11 August 2017) UN Doc A/HRC/36/54, in particular at paras 65-79; Comprehensive report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka (28 September 2015) UN Doc A/HRC/30/61, specifically at paras 24-27, 30, 35, 37, 39; Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so called Islamic State in Iraq and the Levant and associated groups (27 March 2015) UN Doc A/HRC/28/18, para 76.

[176] The term seems to have been used first by Philip Alston, 'The Criminalisation of International Human Rights Fact-Finding', Keynote Address at Conference on Fact-Finding on Gross Violations of Human Rights during and after Conflicts, Norwegian Centre for Human Rights (17-18 November 2011) <http://www.jus.uio.no/smr/om/aktuelt/aktuelle-saker/2011/faktaeiendom.html> accessed 3 April 2018; see also Larissa van den Herik, 'The Migration of International Criminal Law: Moving beyond the Court Room in The Hague', War Crimes Research Office and The Academy on Human Rights and Humanitarian Law, American University Washington College of Law (4 April 2013); Larissa van den Herik and Catherine Harwood, 'Commissions of Inquiry and the Charm of International Criminal Law: Between Transactional and Authoritative Approaches' in Alston and Knuckey (n 2) 233; van den Herik (n 2) 532-533.

[177] See, for example, Micaela Frulli, 'Fact-Finding or Paving the Road to Criminal Justice?' (2012) 10 *JICJ* 1323, which surveys chronologically the experience of different international commissions of inquiry and how they related to criminal justice mechanisms.

[178] See, for example, Christine Schwöbel-Patel, ' Commissions of Inquiry: Courting International Criminal Courts and Tribunals' in Henderson (n 2) 145, dissecting the shortcomings of an international criminal law approach – and of a juridical approach more broadly – by international commissions of inquiry and their appeal to international criminal courts and tribunals, which makes them part of 'an intervention formula which serves the interests of the big political, economic and military powers'. The author also proposes 'that fact-finding in a less juridical and non-criminalised form could provide a welcome means for investigating and exposing the key socio-economic

the opportunity of developing adequate evidentiary standards and theorising models of interaction with other accountability mechanisms.[179]

While in certain cases international criminal law may provide a perhaps more accurate interpretive lens of the facts gathered, one cannot ignore the non-judicial nature of fact-finding bodies. Arguably more than any other body of law, criminal law is evocative of the dialectic of the trial, which a commission of inquiry is structurally unequipped to reproduce. The consequences of a pronouncement under criminal law span well beyond the mere characterisation of facts, because of the individualised nature of criminal liability and despite the non-judicial character of fact-finding. Hence, the application of international criminal law lenses by fact-finding bodies may be problematic and raise questions of legitimacy and credibility. Besides, little or no research exists that explores how international criminal law qualifications of facts by international inquiries impact on domestic constituencies. Given the specificities of this body of law and the non-judicial, ad hoc nature of commissions of inquiry, domestic rejection of the findings, especially on methodological grounds, has to be expected to a certain extent. Yet, there is room for arguing that international inquiries' engagement with criminal law could be justified – or even expected or welcomed – as part of a more general strategy. In Cherif Bassiouni's words, 'fact-finding and investigation are a means to an end. With respect to the values of truth and justice, the end is accountability of the perpetrators, particularly the leaders of *jus cogens* crimes of genocide, crimes against humanity, war crimes, torture, slavery and slave-related practices, and apartheid'.[180]

root causes of conflict'. See also Triestino Mariniello, 'The Impact of International Commissions of Inquiry on the Proceedings before the International Criminal Court' in Christian Henderson (n 2) 171, which assesses the impact of international commissions of inquiry's reports on the case law of the International Criminal Court by showing that the findings of such bodies are more likely to be relied on at the early stages of the proceedings, where the standard of proof required by the Rome Statute and the Rules of Procedure and Evidence is relatively low.

[179] For example, Stahn and Jacobs (n 3) 255.

[180] M Cherif Bassiouni, 'Appraising UN Justice-Related Fact-Finding Missions' (2001) 5 *JL & Pol'y* 35, 45.

3.1 'Criminalisation' of Human Rights Fact-Finding in Context

The term 'criminalisation' may suggest that non-judicial fact-finding has undergone some sort of rebranding of its own and seem to point to a stand-alone process. However, the "contamination" of international inquiries' mandates and reports with international criminal law must be read in context. Arguably the first international commission of inquiry to use international criminal law is also the one that prompted the renaissance of international criminal law, which had remained somewhat dormant after the post-WWII trials in Nuremberg and Tokyo. The 1992 Commission of Experts for the former Yugoslavia, headed first by Frits Kalshoven and later by Cherif Bassiouni, was mandated with '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'.[181] In its first Interim Report to the Secretary-General, the Commission concluded that there was *prima facie* evidence of war crimes and crimes against humanity having been perpetrated and went so far to suggest the establishment of an ad hoc international criminal jurisdiction to try the responsible individuals.[182]

In the 1990s, the resurgence of international criminal law was the result of a shift in the international legal discourse towards accountability, which signalled a preference for (international) prosecutions as a tool to tackle grave human rights and humanitarian law violations.[183] The spillover of international criminal law into fact-finding professional circles was thus the result of a broader strategy of international institutions aimed at shifting the debate towards allegations of international crimes so as to justify an 'intervention formula'.[184] Dov

[181] UNSC Res 780 (1992) (6 October 1992) UN Doc S/RES/780 (1992) para 2.
[182] Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UNSC, Letter dated 9 February 1993 from the Secretary-General Addressed to the President of the Security Council (10 February 1993) UN Doc S/25274, Annex I.
[183] Dov Jacobs and Catherine Harwood, 'International Criminal Law Outside the Courtroom: The Impact of Focusing on International Crimes for the Quality of Fact-Finding' in Morten Bergsmo (n 2) 325-326; José Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda' (1999) 24(365) *Yale J Int'l L* 375.
[184] Schwöbel-Patel (n 178) 166-167.

Jacobs and Catherine Harwood identify three ways by which international criminal law migrates into international inquiries: through express inclusion in the commissions' mandates; by reason of the interrelatedness of international criminal law with other branches of international law, and more specifically due to international criminal law being the enforcement tool of international humanitarian and human rights law; and as a normative development of the goals attributed to international inquiries of ensuring accountability and justice for victims.[185]

Hence, the increasing application of international criminal law lenses by international inquiries should not be seen as a unique phenomenon nor does it mark an identity shift of fact-finding bodies. Rather, it is demonstrative of an 'accountability turn' of the international human rights system as a whole. As a result, international commissions of inquiry appear to be, more than ever, embedded in a global system geared towards holding perpetrators of gross human rights and humanitarian law violations to account.[186]

3.2 Opportunities and Potential Pitfalls

The so called 'accountability turn' of human rights fact-finding has not been accompanied by a substantial restructuring of inquiry mechanisms. The 1991 UN Declaration arguably remains to these days the most authoritative set of regulations for fact-finding mechanisms. The Declaration endows fact-finding with the chief objective of informing the competent UN organs about the facts of disputes or situations that may constitute a threat to international peace and security.[187] The text does not mention accountability. However, this shift in purpose has been acknowledged also in professional circles, including the UN itself.[188] Mindful of the challenges

[185] Jacobs and Harwood (n 176) 330-334.
[186] On the accountability turn of human rights fact-finding, see Federica D'Alessandra, 'The Accountability Turn in Third Wave Human Rights Fact-Finding' (2017) 33(84) *Utrecht J Int Eur Law* 59. See also Harwood (n 176).
[187] UN Declaration on Fact-Finding (n 8) Section I(1) and (2).
[188] Zeid Ra'ad Al Hussein, current UN High Commissioner for Human Rights, acknowledged in its foreword to the UN Guidance and Practice (n 29) that 'international commissions of inquiry and fact-finding missions are now a key tool in the United Nations response to situations of violations of international human rights law and

that the 'criminalisation' – and, more generally, the 'juridification' – of human rights fact-finding entails, scholars and professionals alike have taken upon themselves to draft guidelines based on best practices for the successful conduct of international inquiries geared towards accountability. However, these work as a corrective and do not change the fact that inquiry commissions still emanate from agencies that operate at the crossroad between law and politics. Moreover, because they are non-judicial in nature, international inquiries do not have to abide by the same judicial restraint as courts of law. Hence, one may legitimately question the appropriateness of this shift. Does international criminal law enrich the toolkit of fact-finders? Or does it create more challenges?

Some scholars argue that an international criminal law focus in human rights international inquiries may contribute to increasing the quality of fact-finding methodology by forcing fact-finders to introduce a higher standard of proof thus bolstering the credibility of reports, and ultimately making the information gathered 'more usable' to international prosecutors.[189] Furthermore, Catherine Harwood argues that framing findings in the language of international criminal law may represent a symbolic form of accountability for victims, in light of the limitations of the international criminal justice system and the structural deficiencies of international human rights law which does not provide for individual liability.[190]

However, the same international criminal law lenses may also exceedingly narrow the focus of the inquiry both in scope and individual targets of the investigation.[191] Furthermore, international commissions of inquiry may not possess the requisite technical capacity to 'make good law'.[192] As a matter of fact, fact-finding missions have often been criticised for their sloppy application of international (criminal) law. In addition, identifying commissions of

international humanitarian law, including international crimes … Commissions of inquiry and fact-finding missions have proved to be valuable in countering impunity by promoting accountability for such violations'.
[189] Jacobs and Harwood (n 176) 327.
[190] Harwood (n 150) 23.
[191] Jacobs and Harwood (n 183) 327; Schwöbel-Patel (n 178) 155, 169.
[192] Schwöbel-Patel (ibid) 150.

inquiry as part of the accountability toolkit of international institutions makes them liable to the same criticism that international criminal justice institutions – in particular, the International Criminal Court – face.[193]

3.3 Models of Interaction Between Prosecutions and Fact-Finding Mechanisms

A further stream of scholarship has explored the intersections between human rights fact-finding and international criminal justice mechanisms. The aim of this literature is to determine, on the one hand, whether and how international commissions of inquiry could lay the groundwork for international prosecutions by providing international criminal justice actors with valuable information and, on the other hand, whether international criminal courts and tribunals should rely on the information gathered by fact-finding bodies. In this context, normative questions are confronted with an inconsistent practice. As I have pointed out above, no common procedural and evidentiary standards exist for international inquiries, despite several efforts to draw guidelines for their effective functioning. As a result, some fact-finding exercises may be more attuned to judicial proceedings than others. Yet, as I have emphasised time and again, commissions of inquiry are not courts of law nor are they entitled to use any sort of judicial power. Furthermore, international courts have adopted a casuistic approach to fact-finding missions' reports whilst dodging the thorny issue of determining crystal clear criteria for their admission into judicial proceedings.

Carsten Stahn and Dov Jacobs have usefully classified the existing scholarship on the interplay between commissions of inquiry and international criminal courts and tribunals into three main categories.[194] First, 'separatists' posit that fact-finding missions and international

[193] Schwöbel-Patel (ibid) 166-169 addresses this problem by claiming that international inquiries have become part of an 'intervention formula'. She posits that, by focusing on individual accountability, modern inquiries narrow the post-conflict options to deal with the past. Moreover, because superimposed forms of accountability are carried out on behalf of and (at least partially) in the interest of the international community, commissions of inquiry struggle to emancipate from the political imbalances of their parent institutions.
[194] Stahn and Jacobs (n 3) 256-257.

criminal tribunals should operate autonomously and independently from each other mainly because of their goal differences. While international criminal tribunals are geared towards accountability, international inquiries seek to prevent and halt the violence with a view to improving the humanitarian condition of individuals.[195] One may add to this cluster the scholars who believe that fact-finding missions should seek to unveil the root causes of conflicts thus assuming a more informative or narrative function.[196] Second, 'constructivists' advocate a strong cooperative model between international inquiries and international criminal courts and tribunals, guided by the elaboration of guidelines. In their view, international fact-finding missions form part of an accountability-driven synergic system and, within this system, they fill in the operational gaps left by international tribunals by providing authoritative pronouncements on alleged human rights and humanitarian law violations. They can do so because their establishment is not dependent on state consent.[197] Third, 'pragmatists' believe that there may be merit for substantial interaction between international inquiries and international courts and tribunals, however, they avert proposing a systemic model while maintaining that such interplay should be the result of a case-by-case assessment.[198]

By reflecting on the case law of international criminal courts and tribunals, Stahn and Jacobs propose an alternative model of interactions which partially draws on those presented above.

[195] Stahn and Jacobs cite as proponents of this functional separation between international inquiries and international criminal courts and tribunals Morten Bergsmo and Willian H Wiley, 'Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes' in Siri Skåre, Ingvild Burkey and Hege Mørk (eds), *Manual on Human Rights Monitoring. An Introduction for Human Rights Field Officers* (Norwegian Centre for Human Rights 2008) and Gerald Steinberg, Anne Herzberg and Jordan Berman, *Best Practices for Human Rights and Humanitarian NGO Fact-Finding* (Brill | Nijhoff 2012).

[196] For eg, Schwöbel-Patel (n 178).

[197] Among the authors cited by Stahn and Jacobs, it is worth recalling Antonio Cassese, 'Gathering Up the Main Threads' in Antonio Cassese (ed), *Realizing Utopia. The Future of International Law* (OUP 2012); Dapo Akande and Hannah Tomkin, 'International Commissions of Inquiry: A New Form of Adjudication?' (6 April 2012) *EJIL: Talk!* <https://www.ejiltalk.org/international-commissions-of-inquiry-a-new-form-of-adjudication/> accessed 11 April 2018; Frulli (n 167); Bassiouni and Abraham (n 2); Dan Saxon, 'Purpose and Legitimacy in International Fact-Finding Bodies' in Morten Bergsmo (n 2) 211; Sunga (n 2).

[198] Stahn and Jacobs include in this cluster authors such as David Re, 'Fact-Finding in the Former Yugoslavia: What the Courts Did' in Morten Bergsmo (n 2) 279; Philip Alston, 'The Darfur Commission as a Model for Future Responses to Crisis Situations' (2005) 3 *JICJ* 600; Kevin Jon Heller, 'The International Commission of Inquiry on Libya: A Critical Analysis' in Jens Meierhenrich (ed), *International Commissions: The Role of Commissions of Inquiry in the Investigation of International Crimes* (forthcoming 2019).

Mindful of international criminal tribunals' cautious scrutiny of information gathered by fact-finding missions, such 'polycentric' – as they call it – interaction model recognises the relevance of the evidence collected to the work of international courts especially in relation to so called 'context-related evidence'. They also call for greater clarity through both the elaboration of formal guidelines specifying the role of related types of evidence and their probative value in respect to the different elements of the crime and specific directions of the courts on the way they use different sources of evidence.[199] Regardless of these more normative considerations, the case law of international criminal courts and tribunals, as shown by Triestino Mariniello, seems to indicate 'that the impact of fact-finding sources decreases in the progression of the proceedings'.[200]

Determining the degree of interplay between commissions of inquiry and international criminal courts and tribunals is significant to assess the likely impact of such inquiries on states. Greater synergy may indirectly empower fact-finding missions by affording them the ability to influence subsequent criminal processes and, hence, exert greater pressure on domestic authorities and individuals. However, in light of the non-judicial, ad hoc and non-consensual nature of international inquiries, a 'constructivist' interaction model may negatively reflect on the legitimacy of such commissions. By dint of this model, the commissions' purpose would change to one of feeding judicial proceedings and, in the absence of clear procedures that allow all parties involved to question the evidence in its formative stage, this may twist the procedural safeguards provided for in the criminal trial. Conversely, a weaker interaction model may result in a type of inquiry that is less threatening to the states and individuals' interests and a focus shift on the contextual elements of international crimes. This, in turn, may minimise the negative legitimacy impact that the 'criminalisation' of human rights fact-finding is liable to

[199] Stahn and Jacobs (n 3) 271-272.
[200] Mariniello (n 178) 183-194.

engender. Be that as it may, the accountability shift in human rights fact-finding has generated a fundamental challenge: how can the focus on (individual) criminal responsibility be reconciled with the non-judicial, ad hoc, non-consensual and sometimes non-participatory[201] nature of fact-finding missions?

4. Conclusion: Research Questions

This chapter has outlined the evolution of the models of international commissions of inquiry since their early appearance. Specifically, I have focused on the 'juridification' and subsequent 'accountability turn' of human rights fact-finding while highlighting the challenges that these developments have engendered. In particular, I have pointed out that the use of legal lenses, albeit necessary at least as criteria to select the relevant facts, has marked a strategy shift in the way commissions of inquiry are used, which might be justified in light of their acquired monitoring function within the broader human rights regime. However, this shift may have come with a price. On a technical level, framing findings in legal terms – especially if the lens is criminal law – has an impact on the standard of proof to be employed, even if commissions of inquiry are not courts of law nor do their pronouncements entail any sort of adverse obligatory consequence for the target state. Furthermore, the legal qualification of facts by a body whose legitimacy rests on a thin assumption of credibility[202] may be problematic in two different ways. First, for the legal pronouncement to carry any authoritativeness, the commission must be sustained by solid foundations, that is, its mandate must be formulated in even-handed terms, the commissioners must be and appear to be independent and impartial, the fact-finding process itself must rest on solid rules of procedure and evidence and the language used in the final report must reflect the inquiry process that has led to that finding. Second, especially when these foundations are not as solid, legal qualifications of fact may engender

[201] Admittedly, due to the states' choice not to cooperate.
[202] Echoing Franck and Fairley (n 168).

contestation by the target groups and potentially exacerbate hostility towards the commission. This is even more likely when international inquiries have an accountability-driven mandate and (international) criminal law is part of the terms of reference. In addition, the use of criminal law entails complex legal analyses which go beyond a mere assessment of the facts, but include a determination as to the attributability of the material conduct of the crime to individual perpetrators, something that modern commissions of inquiry are increasingly requested to assess. Even more problematic is the stigma that a finding of criminal liability, even if not binding, is likely to impose on targeted individuals or groups of individuals. Allegations of war crimes, for example, may substantially damage the reputation of states, state structures like the military and the individuals that hold leadership position within these structures. This, in turn, may have more concrete repercussions on the standing of a country in international relations, as explained in Chapter III.

In light of these problems, one may legitimately ask whether commissions of inquiry are the most suitable instrument to address the accountability gap left by other international and domestic actors and indeed constitute the most viable surrogate of international justice. Perhaps non-judicial fact-finding is suffering from the same "illness" that, according to Mirjan Damaska, has struck international courts: an overburdening with expectations on account of the international community.[203] There seems to be an asynchrony between the structural features of non-judicial fact-finding mechanisms and their functions, which ultimately revolves around their identity. Proposals for the introduction of standardised guidelines have been put forward as a sort of panacea to mend the pitfalls of modern non-judicial fact-finding. However, these proposals, while elaborated by experienced fact-finders, have rarely been accompanied by a

[203] See Mirjan R Damaska, 'What is the Point of International Criminal Justice?' (2008) 83(1) *Chi-Kent L Rev* 329.

thorough reflection on the purpose and identity of international commissions of inquiry. Even more rarely have they sprung from a sound impact assessment process.

This study seeks to address this gap in the literature. However, instead of departing from a legalistic understanding of international commissions of inquiry, I propose to conceive of such tools as mechanisms for the socialisation of states. Socialisation is a sociological concept that has incrementally made its way into the burgeoning field of the sociology of international law, as explained in Chapter III. So far, theories on state socialisation have been employed to explain why states obey international law and how international legal regimes should be designed to best drive states into complying with their norms. They thus have both an explanatory and a guiding function. Moreover, as shown in Chapter III, while they are normally predicated of norm regimes, state socialisation theories may also be used to explain how institutions embedded in those regimes operate. Methodologically, such theories also provide a working hypothesis of the processes – both international and domestic – engendered by international commissions of inquiry and, as such, they allow us to make predictions about the expected outcomes of an inquiry. Finally, because it is underpinned by an understanding of commissions of inquiry as mechanisms of state socialisation, this study is chiefly concerned with the *domestic* developments or outcomes that can be traced back to commissions of inquiry. Yet, because such theories also presuppose the action of the international community – understood both in its institutional dimension and as the states that belong to it –, this research cannot do without considering the role of other international actors who either are mobilised by commissions of inquiry or synergistically contribute to exert a pull on domestic authorities with the goal of engendering the desired change. Hence, this study seeks to provide an answer to the following research questions and sub-questions:

1) How do international commissions of inquiry on human rights seek to achieve their goals? (*effectiveness*)

1.1) Have institutional, legislative, jurisprudential and policy changes occurred *as a result of* the commissions of inquiry considered?

1.2) What argumentative strategies do such commissions of inquiry employ to engender domestic change?

1.3) What processes have such commissions of inquiry been able to engender?

1.4) Why some strategies work better than others?

2) What is the broader impact of international commissions of inquiry on human rights? (*impact*)

The operationalisation of these questions is discussed in Chapter II, where I also define some key terms, including impact and effectiveness. Furthermore, the answer to such questions can only be empirical. Hence, my choice to use a case study with all its limitations, which are spelled out in Chapter II and throughout the empirical Chapters IV and V.

CHAPTER II

DEFINITIONS AND METHODOLOGY

This study investigates the domestic effectiveness and impact of international commissions of inquiry and how they deploy argumentative strategies to elicit domestic action. While the first two questions are largely separate – despite significant ontological overlaps in the definitions of effectiveness and impact –, the deployment of argumentative strategies is cross-cutting and requires an integrated analysis of the goals of international inquiries, their strategic deployment of factual or legal arguments and their ability to elicit the action of other actors. On closer inspection, as I show in the following chapter, language is the main discursive and societal superstructure through which effectiveness- and impact-generating mechanisms, that is, commissions of inquiry, communicate their "catalyst force". I carry out this analysis in two steps. First, I build a theoretical framework and a set of hypothetical claims. Second, I test these claims empirically. Preliminarily, however, I provide a definition of impact and effectiveness, specify the epistemological view that underpins the inquiry, justify my methodological choices in relation to the research questions asked and account for the limitations encountered throughout the research process and how these have been mitigated or have influenced the analysis. I conclude by stating the objectives of this research and I specify how the findings of the empirical analysis not only assist in refining the theoretical framework outlined in Chapter III, but also inform a series of recommendations for reform of inquiry procedures.

1. Defining Effectiveness and Impact

In this study, I research two distinct and yet closely related concepts: effectiveness and impact. The former concept is traditionally understood as a static notion which mostly captures a state of correspondence between the outcome of a given process with its pre-determined goals. Conversely, impact tend to have a more indefinite and significantly broader scope. However,

in order to appraise the impact and effectiveness of international commissions of inquiry, a clear definition of these two concepts ought to be provided.

Because the focus of this study is to determine what processes international inquiries seek to engender in order to trigger compliance or conformity, I provide a definition of the two concepts that is capable of accounting for process-related outcomes.

1.1 Effectiveness

Effectiveness in relation to the law may generally be defined in either of two ways: that the law is obeyed or that a specific legal regime is capable of solving a problem.[1] Such definitions underscore the idea that the law seeks to interact – *sic* influence – reality. Indeed, *Black's Law Dictionary* succinctly defines effectiveness as 'The closeness of actual results achieved to meeting expectations'.[2] This definition implies an *ex post* evaluative stage. It focuses on the ability of the law to influence the factual situation. From this perspective, the problem of the effectiveness of the law is underpinned by the relationship between law and society. That is to say, effectiveness measures the realisation of the law in practice. Attempts to measure the gap between a normative understanding of the law and its societal dimension are central to socio-legal scholarship that has long focused on the study of legal effectiveness.[3] The notion of effectiveness that I propose is situated within this framework.

Black's Law Dictionary's definition of effectiveness employs the term 'expectations' to indicate the terms of reference against which a factual situation allegedly generated by a law must be measured. The closer the expectations and factual situation are, the more effective the

[1] Michael Bothe, 'The Evaluation of Enforcement Mechanisms in International Environmental Law: An Overview' in Rüdiger Wolfrum (ed), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* (Springer 1996) 15.
[2] *Black's Law Dictionary Free* (2nd edn) 'Effectiveness', <http://thelawdictionary.org/effectiveness/> accessed 27 April 2017.
[3] Lawrence M Friedman and Stewart Macaulay (eds), *Law and the Behavioral Sciences* (2nd edn, The Bobbs-Merrill Company 1977); Austin Sarat, 'Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistance of a Research Tradition' (1985) IX(1) *Legal Studies Forum* 23, 23; Pierre Lascoumes and Evelyne Serverin, 'Théories et pratiques de l'effectivité du Droit' (1986) 2 *Droit et société* 101, 101-102.

law is. The question that immediately comes to mind is what the term 'expectations' alludes to. In other words, what is the law expected to accomplish? In recent years, a growing body of literature has turned to the study of effectiveness.[4] Yet, many of these studies limit themselves to providing an assessment of the level of compliance with the law. For example, Anthony Allott has argued that because legal systems are purposive and their laws aim 'to regulate or shape the behavior of the members of the society, both by prescribing what is permitted or forbidden, and by enabling them, through the establishment of institutions and processes in the law, to carry out functions more effectively', the effectiveness of a law may be measured by verifying 'how far it realizes its objectives, ie. fulfills its purposes'.[5] He further claims that the 'effectiveness of a law (…) is measured by the degree of compliance', which means that if a piece of legislation aims to prevent individuals from doing something, it will be effective if a decrease or absence of that behaviour can be detected.[6]

Conversely and in keeping with a solid stream of scholarship, I accept that compliance and effectiveness are not the same and one does not necessarily imply the other. Rather, compliance is but one element that may assist in assessing effectiveness. Even more significantly, compliance can – and in certain cases does – differ from effectiveness all together, so that inferring effectiveness from high levels of compliance may be misleading.[7]

[4] In the fields of international human rights and international criminal law, see, for example, Patrick James Flood, *The Effectiveness of UN Human Rights Institutions* (Praeger 1998); Ryan Goodman and Derek Jinks, 'Measuring the Effects of Human Rights Treaties' (2003) 14(1) *EJIL* 171; Daniel H Hill, 'Estimating the Effects of Human Rights Treaties on State Behavior' (2010) 72(4) *JOP* 1061; Jasper Krommendijk, *The Domestic Impact and Effectiveness of the Process of State Reporting under UN Human Rights Treaties in the Netherlands, New Zealand and Finland: Paper-pushing or policy prompting?* (Intersentia 2014); Moses Retselisitsoe Phooko, 'How Effective the International Criminal Court Has Been: Evaluating the Work and Progress of the International Criminal Court' (2011) 1(1) *Notre Dame Journal of International & Comparative Law* 182.
[5] Anthony Allott, 'The Effectiveness of Laws' (1981) 15(2) *Val U L Rev* 229, 233.
[6] Ibid 234; similarly, Eric A Posner and John C Yoo, 'Judicial Independence in International Tribunals' (2005) 93 *CLR* 1, 7; *contra*, Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 4-6.
[7] Andrew Guzman, 'International Tribunals: A Rational Choice Analysis' (2008) 157 *U Pa L Rev* 171, 187; Yuval Shany, 'Compliance with Decisions of International Courts as Indicative of their Effectiveness: A Goal-Based Analysis' in James Crawford and Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law 2010* (Hart Publishing 2012) 229, 231.

Several socio-legal scholars tend to regard effectiveness as being separate and independent from compliance. Kal Raustiala, for example, draws a distinction between compliance, implementation, and effectiveness. For him, 'Compliance generally refers to a state of conformity or identity between an actor's behavior and specified rule', whereas 'Implementation refers to the process of putting international commitments into practice' by, for example, adopting domestic legislation.[8] He argues that, while generally implementation is conducive to compliance, the latter can be realised even in the absence of formal implementation. This is particularly evident within the international legal order, where treaty commitments are often agreed upon by states with reference to already existing practices so that none of them has to put too much of an effort into complying with the new standard.[9] But, if compliance simply measures a state of conformity between a normative commitment and a factual situation, it does not tell us much about whether the factual situation has been determined by the normative commitment. In other words, compliance does not take into account causality and, in fact, it can occur for reasons that are unrelated to the normative commitment against which the factual situation is assessed.[10]

For example, if we consider the imposition of a 30mph speed limit in a built-up area, we may reasonably argue that most drivers, regardless of the existence of such speed limit, would not drive faster than 30mph. This may be because the intricate road network, existence of speed bumps and scarce visibility coupled with the presence of pedestrians would warrant caution to

[8] Kal Raustiala, 'Compliance & Effectiveness in International Regulatory Cooperation' (2000) 32 *Case W Res J Int'l L* 387, 391-393; on the notion of 'compliance', see also Edward C Luck and Michael W Doyle (eds), *International Law and Organization* (Rowman & Littlefield Publishers 2004) where compliance is defined as 'first, conformity to the rules, laws, and norms of a particular regime and, second, because these rules are often ambiguous or actors are for unanticipated reasons unable or unwilling to comply, acquiescence in the procedures that resolve disputes about the practical meaning of the rules, laws, or norms in question'; see also Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Walter Carlsnaes, Thomas Risse, and Beth A Simmons (eds), *Handbook of International Relations* (Sage 2002) 539.

[9] Luis Henkin's famous remark ('almost all nations obey almost all principles of international law and almost all of their obligations almost all of the time') may be read in this light, Luis Henkin, *How Nations Behave* (2nd edn, Columbia University Press 1979) 47.

[10] Raustiala (n 8) 393.

a reasonable driver. Thus, the speed limit would add little to a pre-existing factual situation. An external observer would not be able to establish a causal relationship between the limit and the drivers' behaviour by simply verifying the correspondence between the drivers' behaviour and the existence of the speed limit. Epistemologically, effectiveness provides a remedy to this situation because it represents the measure of the change induced by a norm. In Raustiala's words:

> Effectiveness is a concept that can be defined in varying ways: as the degree to which a given rule induces changes in behavior that further the goals of the rule; the degree to which a rule improves the state of the underlying problem; or the degree to which a rule achieves its inherent policy objectives. While most common-sense notions of effectiveness relate to "solving the underlying problem," the factors that may influence the solution to a complex international problem are myriad. In many cases disentangling them is impossible. Hence, many analysts define and assess effectiveness in more modest terms: as observable, desired changes in behaviour.[11]

The emphasis here is on the process rather than on the final result and this makes the definition interesting for our purposes. In the speed limit example, the fact that most drivers do not speed over 30mph would indicate a high level of compliance, yet this would tell us little about the usefulness of the limit. In order to assess whether the norm has in fact induced a change in the drivers' behaviour we need to engage in a measurement of the causal link existing between the drivers' behaviour and the limit. This calculation would force us to consider factors other than mere compliance. Moreover, as noted by Raustiala, it may be the case that, because a standard set by a legal rule is too high and difficult to meet, compliance may be low but behavioural change, and therefore effectiveness, very high.

1.2 Impact

Yann Leroy, a French scholar, offers a definition of effectiveness that encompasses a broader range of measurable effects than those identified above. In his words:

> L'effectivité vise, dès lors, tout à la fois les effets concrets ou symboliques, les effets juridiques, économiques, sociaux ou de quelque autre nature, les effets désirés

[11] Ibid 393-394.

> ou non voulus, prévus ou non intentionnels, immédiats ou différés, à la seule condition qu'ils n'entrent pas en contradiction avec les finalités des règles de droit évaluées.[12]

This definition purports to introduce an additional dimension of effectiveness that is no longer limited to *desired* changes but encompasses also *desirable* changes. That is, effectiveness should take into account all changes engendered by the norm as long as they do not contradict the aims of the norm itself.

While this definition of effectiveness has the merit of being able to account for collateral "positive" effects generated by the mechanism considered, its scope is too broad, and it risks confounding the objectives pursued by the deployment of a mechanism with its positive externalities. In other words, by adopting this broad definition of effectiveness, one may conclude that a mechanism is effective only based on the observation that it has produced desirable, but unforeseen, changes. Nonetheless, an appraisal of an institutional mechanism based not simply on its ability to achieve its goals, but also on the collateral effects that it is capable of eliciting is desirable if one aims to provide policy or technical guidance as to how to reform that mechanism.

These considerations underpin the distinction between impact and effectiveness. The former notion is broader that effectiveness. It accounts for precisely those unforeseen effects encompassed in Leroy's definition. With the caveat that impact should not necessarily be limited to positive effects, that is, effects that do not contradict the institutional purposes of the mechanism examined, but also negative effects, that is, unforeseen effects that contradict the spirit and rationale underpinning the mechanism deployed, or, one could say, material and immaterial costs or externalities. Hence, I propose to employ Leroy's definition, complemented with the element of negative externalities, to define impact. In this sense, there is a set-subset relationship between impact and effectiveness, whereby effectiveness can still be accounted as

[12] Yann Leroy, 'La notion d'effectivité du droit' (2011) 3(79) *Droit et société* 715 731.

impact but is further qualified by an element of finality: any manifestation of effectiveness should be geared towards the achievement of the institutional goals of the mechanism considered.

Such a broad definition of impact entails obvious measurement constraints. The most apparent is that, so generally defined, impact could assume potentially numerous and unpredictable forms. It thus needs to be carefully operationalised.

2. Methodology

In this study, I resort to qualitative research methods and resort to a case study. Drawing on the existing theories on legitimacy and state socialisation, I propose a theoretical model that seeks to explain how commissions of inquiry engender domestic institutional, legislative, jurisprudential and policy change. In particular, I focus on the argumentative strategies deployed by such commissions to achieve their goals by also taking into account contextual factors that might affect the effectiveness analysis. In order to do that, preliminarily I critically review the existing debate about the goals of international commissions of inquiry and identify a hierarchy of such goals. In particular, by proposing an understanding of commissions of inquiry as agents of international (human rights, humanitarian law and criminal law) regimes, I show that they share in the responsibility to socialise states thus justifying the application of state socialisation theories. Subsequently, I seek to test these hypothetical claims in a single longitudinal and embedded case study.[13]

[13] I employ a case study in the acceptation given to this term by Robert K Yin, *Case Study Research: Design and Methods* (4th edn, SAGE 2009) who provides a two-fold technical definition of case study: 'The first part begins with the scope of a case study: 1. A case study is an empirical inquiry that investigates a contemporary phenomenon in depth and within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident …. Second, because phenomenon and context are not always distinguishable in real-life situations, other technical characteristics, including data collection and data analysis strategies, now become the second part of our technical definition of case studies: 2. The case study inquiry copes with the technically distinctive situation in which there will be many more variables of interest than data points, and as one result relies on multiple sources of evidence, with data needing to converge in a triangulating fashion, and as another result benefits from the prior development of theoretical propositions to guide data collection and analysis'. According to Yin, a longitudinal case study involves 'studying the same single case at two or more different points in time', while an embedded case study 'involve[s] *more than one unit of analysis*' (Yin 49-50).

Theory-testing is geared towards both confirming or disconfirming the hypothetical claims formulated in the theoretical part of the study and providing elements for further developing the theory (theory-building). It goes without saying that claims of generalisation from single case study research cannot be made without significant risks. Each case study is in fact an independent micro-galaxy which not only includes different modes of interactions between variables but also is influenced by the specific context in which the case study is immersed.[14] A careful formulation of the theoretical claims to be tested and selection of the case to be studied may mitigate such risk. However, general 'rules of thumb' may be distilled from the disconfirmation or confirmation of the theoretical claims in the specific case study that transcend the specificities of the case itself. These rules may contribute to refining the theoretical claims but need not be crystallised and may be further tested by other studies.

In this section, I justify the selection of Israel and Palestine as a single case study by, first, providing reasons for treating two separate state or quasi-state entities as one case study and, second, motivating my choice to conduct a single case study. Furthermore, I sample the international commissions of inquiry whose impact and effectiveness I seek to assess. In addition, I explain how I determine causality throughout the study and the limitations intrinsic to the privileged approach, what methods of data collection and analysis I have employed and their limitations while also explaining the steps I have taken to mitigate such limitations.

2.1 International Commissions of Inquiry in Israel and Palestine as a Case Study

Several reasons underpin the choice of the domestic effectiveness and impact of international commissions of inquiry in Israel and Palestine as a case study. However, before spelling out the rationale for such choice, I should point out that, despite the fact that Israel and Palestine could

[14] Pascal Vennesson, 'Case studies and process tracing: theories and practices' in Donatella Della Porta and Michael Keating (eds), *Approaches and Methodologies in the Social Sciences. A Pluralist Perspective* (CUP 2008) 237.

be considered two different countries[15] and thus generate separate empirical analyses, the mandates of the international commissions of inquiry considered in this study systematically cover incidents or situations which involve both parties – contrary to most international commissions of inquiry on human rights, which focus on one state or quasi-state only – and almost always take place on the territory of what can be considered to be the State of Palestine. Moreover, Israel constitutes the sole domestic forum for complaints in cases of alleged violations of human rights or humanitarian law committed in the territory of either Palestine or Israel by one group against the other. Similarly, while it is possible to clearly distinguish civil society organisations that carry out their work exclusively in the West Bank or the Gaza Strip from those that operate in Israel, both categories participate in pressuring the Israeli government to comply with international norms.[16] This overlap in both territorial and subject-matter scope of the inquiries considered, and the interdependence of some of the recommendations formulated by the different commissions, beg for a unitary treatment of both countries in a

[15] As it is well known, at the time of writing, the statehood of Palestine is contested. While the State of Palestine entertains diplomatic relations with 137 countries (Permanent Observer Mission of the State of Palestine to the United Nations, Diplomatic Relations <http://palestineun.org/about-palestine/diplomatic-relations/> accessed 23 July 2018) and is a state party of, for example, the Rome Statute of the International Criminal Court (UN, Rome Statute of the International Criminal Court, State of Palestine: Accession, Reference: C.N.13.2015.TREATIES-XVIII.10 (Depositary Notification) <https://treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf> accessed 23 July 2018), it enjoys only non-member state status in the UN General Assembly (UNGA, Status of Palestine in the United Nations, Res 67/19 (4 December 2012) UN Doc A/RES/67/19). For discussions about the statehood of Palestine, see, for example, James Crawford, 'The Creation of the State of Palestine: Too Much Too Soon' (1990) 1 *EJIL* 307; John Quigley, *The Statehood of Palestine. International Law in the Middle East Conflict* (CUP 2010); John Quigley, 'The Palestine Declaration to the International Criminal Court: The Statehood Issue' in Chantal Meloni and Gianni Tognoni (eds), *Is There a Court for Gaza?* (TMC Asser Press 2012) 429; Robert Weston Ash, 'Is Palestine a "State"? A Response to Professor's John Quigley's Article, "The Palestine Declaration to the International Criminal Court: The Statehood Issue"' in Meloni and Tognoni (ibid) 441; John Quigley, 'Palestine Statehood: A Rejoinder to Professor Robert Weston Ash' in Meloni and Tognoni (ibid) 461; Marco Longobardo, 'Lo Stato di Palestina: emersione fattuale e autodeterminazione dei popoli prima e dopo il riconoscimento dello *status* di Stato non membro delle Nazioni Unite' in Marcella Distefano (ed), *Il principio di autodeterminazione dei popoli alla prova del nuovo millennio* (Cedam 2014) 9-35.

[16] On civil society in Israel and Palestine, see Gideon Doron, 'Two Civil Societies and One State: Jews and Arabs in the State of Israel' in Augustus Richard Norton (ed), *Civil Society in the Middle East, Volume 2* (Brill 1996) 193; Walid Salem, 'Civil Society in Palestine: Approaches, Historical Context and the Role of the NGOs' (2012) 18(2&3) *PIJ* <http://pij.org/details.php?id=1437> accessed 24 July 2018; Caroline Abu-Sada, *ONG palestiniennes et construction étatique* (accès ouvert, Press de l'Ifpo 2007) <https://books.openedition.org/ifpo/134> accessed 24 July 2018; Brigitte Curmi, 'Les enjeux de l'après-Oslo: Le movement associative dans les Territooires palestiniens' in Sarah Ben Nefissa (ed), *Pouvoir et associations dans le monde arabe* (CNRS Editions 2002) 95. Note, however, that many organisations exclusively based in the territory of the State of Palestine also work to pressure Palestinian authorities to comply with international norms. Examples may be the Palestinian Center for Human Rights or Al-Haq, respectively based in the Gaza Strip and the West Bank.

single case study. However, the reader should note that separate considerations are made throughout the analysis which account for the impact and effectiveness of the commissions of inquiry sampled on, on the one hand, Israel and, on the other, Palestine.

I turn now to the reasons underpinning the choice of Israel and Palestine as *the* single case study in this research. First, one has to consider the separate but partly similar quests for international legitimacy[17] undertaken by both Israel and Palestine. The former country seeks to establish itself as essentially a Western democracy founded on the values of the separation of powers, the rule of law, the independence of the judiciary and human rights, as so clearly expressed by Aharon Barak, one of the most prominent Israeli jurists and former President of the Israeli Supreme Court.[18] Such self-perception plays a fundamental role in the activation of, in particular, acculturation mechanisms due to their reliance on the ability of the influencer to generate a state of dissonance between the target state's self-perceived identity or role and its actual practices.[19] Differently, Palestine is chiefly in search of clear international recognition of its statehood.[20] Human rights commitments, whether sincere or not, are a fundamental step to provide evidence of the fact that Palestinian institutions share the foundational values underpinning democratic states. In turn, this signals Palestine's self-perceived identity as a legitimate member of the international community of states.[21] Similarly to the case of Israel,

[17] On the different conceptions of international legitimacy, see for example, David Beetham, *The Legitimation of Power* (Palgrave 1991); Thomas M Frank, *The Power of Legitimacy among Nations* (OUP 1990); Ian Clark, *Legitimacy in International Society* (OUP 2005).

[18] Aharon Barak, 'The Values of the State of Israel as a Jewish and Democratic State' (August 2009) *Jewish Virtual Library Publications* <https://www.jewishvirtuallibrary.org/jsource/isdf/text/barak.pdf> accessed 24 July 2018. See also Raffaella A Del Sarto, 'Israel's Contested Identity and the Mediterranean' (2003) 8(1) *Mediterr Politics* 27, 36. However, recent developments in Israel and, in particular, the introduction of controversial measures such as the Basic Law: Israel as the Nation State of the Jewish People (19 July 2018) <https://knesset.gov.il/spokesman/eng/PR_eng.asp?PRID=139 78> accessed 24 July 2018, which pierces the veil of Israel's pretended democracy by privileging one religious or, indeed, ethnic group (see, for example, Na'eem Jeenah (ed), *Pretending Democracy. Israel, an Ethnocratic State* (AMEC 2012), cast substantial doubt on the real importance attached by Israeli decision- and policy-makers to some of the democratic values mentioned above.

[19] See Chapter III, pp 144-146.

[20] See, for example, Khaled Elgindy, 'Palestine Goes to the UN: Understanding the New Statehood Strategy' (2011) 90 *Foreign Aff* 102, which emphasises Palestine's shift in strategy, which entailed the bypassing of bilateral peace talks and the privileging of international fora for the recognition of statehood.

[21] As I have had the opportunity to experience first-hand, such self-perceived identity can also be inferred from, for example, an increased engagement of the Palestinian International Cooperation Agency (PICA) with several

this perception constitutes the minimum basis for the effective deployment of acculturation mechanisms. Second, both Israel and Palestine host an active civil society that is capable of both putting pressure on domestic authorities through legal and non-legal mechanisms and eliciting the support of a vast and influential network of transnational advocacy actors. The presence of such non-state actors within states is essential for the activation of both persuasion and acculturation mechanisms.[22] Third, both Israeli and Palestinian societies are highly legalised. By this, I refer to the existence of vibrant communities of lawyers in both societies. One caveat is in order though. While Israel has been able to deploy an impressive number of domestically-trained lawyers, who work at several levels, including the private sector, universities, the military and state agencies, Palestine has mostly relied on the legal NGO sector, which often includes foreign or double citizen lawyers.[23] Moreover, the deployment of NGO legal expertise in Palestine has not been equalled in sectors such as universities, police forces and state agencies.[24] This difference may have an impact on the ability of the legal sector to produce internalisation or contestation of international norms in the respective state – or quasi-state – structures. Moreover, the interconnectedness of the two civil societies on issues of substance and their often-concerted efforts to pressure Israeli authorities to conform to international norms, as well as the presence of a strong legal community in Israel makes this third issue apparently more relevant in the context of attempts to persuade or acculturate Israel. However, the importance of civil society organisations for the development of a human rights discourse in Palestine should not be underestimated.[25]

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foreign governments and agencies with a view to intensify cooperation exchanges at several levels such as emergency relief programmes or health and education programmes.

[22] See Chapter III, pp 142-146.

[23] For example, on Israel's deployment of legal expertise in the military, see Alan Craig, *International Legitimacy and the Politics of Security: The Strategic Deployment of Lawyers in the Israeli Military* (Lexington Books 2013) 108-132. On the role of human rights NGOs in Palestine, see Lisa Hajjar, 'Human Rights in Israel/Palestine: The History and Politics of a Movement' (2001) 30(4) *J Palest Stud* 21.

[24] Jeremy Sarkin, 'The Role of the Legal Profession in the Promotion and Advancement of a Human Rights Culture' (1995) 21(4) *Commonwealth Law Bulletin* 1306, 1311; Mouin Rabbani, 'Palestinian Human Rights Activism under Israeli Occupation: The Case of Al-Haw' (1994) 16(2) *Arab Studies Quarterly* 27.

[25] Hajjar (n 23).

Beyond the above substantial reasons, there are more practical considerations that can be added to justify the choice of this specific case study. In his book on *Case Study Research: Design and Methods*, Robert K Yin, and American social scientist known for his work on case study research, makes the case for designing a single case study when the case selected in *longitudinal*, that is, when 'the same single case' can be studied 'at two or more different points in time'.[26] Israel, in particular, has had a long-term, somewhat conflictual relationship, with the UN human rights machinery. Specifically, the former UN Commission on Human Rights, first, and the UN Human Rights Council, later, have established an impressive number of international inquiries in response to either Israeli practices vis-à-vis the Palestinian population and territory or military operations conducted by the Israel Defense Forces (IDF) on Palestinian territories.[27] This provides an opportunity to study the impact and effectiveness of different international commissions of inquiry in Israel and Palestine at different moments in time, by taking into account the changing international and domestic context as well as the thematic issues investigated and the strategies deployed by the commissions considered. Alternatively, it may be argued that Israel and Palestine constitute an *extreme* or *unique* case study, that is, a rare unusually high or low performing case.[28] In fact, anecdotal evidence suggests a complete and systematic lack of effectiveness or positive impact of international commissions of inquiry in both Palestine and Israel. For example, the repeated formal lack of cooperation of the Israeli Government with international inquiries is usually interpreted as a sign of such ineffectiveness. This begs the question, why is this the case? But, preliminarily, it may be appropriate to challenge the view that commissions of inquiry do not make any difference by looking more closely at this particular case.

[26] Yin (n 13) 49.
[27] For a numerical account of the international inquiries established by the UN human rights machinery on Israel and Palestine, see UN Library, UN Research Guides, 'International Commissions of Inquiry, Fact-finding Missions: Home' <http://libraryresources.unog.ch/c.php?g=462695&p=3162764> accessed 25 July 2018.
[28] Kathleen M Eisenhardt and Melissa E Graebner, 'Theory Building from Cases: Opportunities and Challenges' (2007) 50(1) *Acad Manag J* 25, 28.

2.2 Sampling International Commissions of Inquiry

Chapter I has shown that international commissions of inquiry may be established by several different actors. The situation in Israel and Palestine is no exception. International commissions of inquiry on issues related to the Israeli-Palestinian situation have been established by the Security Council,[29] the UN Secretary-General,[30] the former UN Commission on Human Rights[31] and the UN Human Rights Council.[32] While most of the commissions of inquiry deployed by these organs are ad hoc, that is, established for a limited time and with a very specific mandate which usually include the investigation of a very specific set of factual circumstances, they stem from different institutional backgrounds. This reflects on both the broader goals they pursue and their perceived impartiality and independence.

Hence, for the purposes of this study, I have sampled commissions of inquiry with similar mandates and established by the same UN body, the UN Human Rights Council. In the table

[29] For example, see the Security Council Commission concerning Israeli settlements in Arab territories occupied since 1967, including Jerusalem established with UNSC Res 446(1979) (22 March 1979) UN Doc S/RES/446(1979) 'to examine the situation relating to settlements in the Arab territories occupied since 1967, including Jerusalem'.

[30] For example, see the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (see Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (September 2011) <http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf> accessed 26 July 2018).

[31] For example, see the Commission of inquiry to gather and compile information on violations of human rights and acts which constitute grave breaches of international humanitarian law by the Israeli occupying Power in the occupied Palestinian territories established with UNCHR Res S-5/1 (17-19 October 2000) in UN Doc E/2000/112 E/CN.4/S-5/5 'to gather and compile information on violations of human rights and acts which constitute grave breaches of international humanitarian law by the Israeli occupying Power in the occupied Palestinian territories and to provide the Commission with its conclusions and recommendations, with the aim of preventing the repetition of the recent human rights violation'.

[32] For example, the most recent one being the United Nations Commission of Inquiry on the 2018 protests in the Occupied Palestinian Territory established with UNHRC Res S-28/1 (22 May 2018) UN Doc A/HRC/RES/S-28/1 'to investigate all alleged violations and abuses of international humanitarian law and international human rights law in the Occupied Palestinian Territory, including East Jerusalem, particularly in the occupied Gaza Strip, in the context of the military assaults on the large-scale civilian protests that began on 30 March 2018, whether before, during or after; to establish the facts and circumstances, with assistance from relevant experts and special procedure mandate holders, of the alleged violations and abuses, including those that may amount to war crimes; to identify those responsible; to make recommendations, in particular on accountability measures, all with a view to avoiding and ending impunity and ensuring legal accountability, including individual criminal and command responsibility, for such violations and abuses, and on protecting civilians against any further assaults; and to present an oral update thereon to the Council at its thirty-ninth session and a final, written report at its fortieth session'.

below, I list the commissions of inquiry I take into account by specifying their year of establishment, their name and the incidents or situations they were entrusted with investigating.

Table 1. *International Commissions of Inquiry Sample*

Year of Establishment	Name	Incident or Situation Investigated
2006	High-level fact-finding mission to Beit Hanoun	Shelling by the IDF of al-Madakkha neighbourhood and vicinities of Hamad Street in the village of Beit Hanoun, following the termination of a military operation. The shelling resulted in the death of 19 civilians (all but one from the Al-Athamna family) and the wounding of more than 50 civilians
2009	UN Fact-finding mission on the Gaza conflict	IDF military operation 'Cast Lead' on the Gaza Strip, which lasted from 27 December 2008 to 18 January 2009. Allegedly, the military operation resulted in the killing of 1,166 to 1,444 Palestinians, according to different sources, and the wounding of many more, and the killing of 4 Israeli civilians and 9 soldiers
2010	International fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance to Gaza	Interception operation, on 31 May 2010, by the Israeli Navy of a flotilla of ships, registered in several countries, headed to the Gaza Strip allegedly to break the Israeli naval blockade on the Strip and deliver humanitarian assistance to the population of Gaza. The interception operation resulted in the killing of 9 passengers and the wounding of at least 50 more passengers
2012	Independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem	Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem
2014	UN Independent Commission of Inquiry on the 2014 Gaza Conflict	IDF military operation 'Protective Edge' on the Gaza Strip, which took place during the summer of 2014. Allegedly, the military operation resulted in the killing of 2,251 Palestinians and the wounding of 11,231 more, as well as the killing of 6 Israeli civilians and 67 soldiers, and the injuring of approximately 1,600 others

While I provide an in-depth appraisal of the impact and effectiveness of the international commissions of inquiry mentioned above only, I also examine, where appropriate, the parallel role of other ad hoc inquiry mechanisms established by other UN bodies, such as the two Boards of Inquiry deployed by the UN Secretary-General to investigate specific incidents occurred in the contexts of the Israeli military operations 'Cast Lead' and 'Protective Edge' and the Secretary-General's Panel of Inquiry on the 2010 Flotilla incident. The purpose of extending the analysis to these mechanisms is not to assess their impact and effectiveness too, but to compare and contrast elements of the commissions of inquiry established by the Human Rights Council in the same situations with corresponding elements of these parallel inquiries. Indeed, structural characteristics of the mandating body, the formulation of the mandate itself and the terms of reference included therein, the choice of the commissioners as well as the reporting style may, in some cases, explain the differences in impact and effectiveness between the different inquiries.

2.3 Causality

The study of the effectiveness and impact of a mechanism implies claiming that a given effect is the result of the mechanism considered. In other words, it requires discussing causality. While social scientists have long been struggling to define ontologically causality and to find an epistemologically valid way to establish its presence, legal scholars have largely neglected this issue. Effectiveness is often claimed on the basis of the mere correspondence between a purported outcome and a normative prescription contained in the instrument that is believed to have caused such outcome. However, such a claim only describes a correlation between the outcome and its purported cause. In other words, that specific outcome, despite being relatable in substance to its purported cause, may in fact have been caused by other factors – causes – that the observer may have failed to consider. Moreover, even if the specific purported cause has in fact contributed to cause the specific outcome observed, it may have done so in synergy

with other factors that, absent the claimed cause, would have been sufficient to produce the same outcome. The array of tools for the promotion and enforcement of human rights is so complex and counts with so many actors, at both the domestic and the international levels, that claiming that specific domestic change occurred *as a result of* one specific such tool is likely to incur in the problems sketched above. In order to minimise such issues, borrowing from the social sciences some ontological and epistemological insights into the nature and measurement of causality may come in handy.

Social scientists have developed several approaches to determining causality in social phenomena. Proponents of counterfactual accounts of causation posit that this can be established by mentally removing a potential causal factor to determine whether the outcome would have been different.[33] Typically, this approach has been used by historians and legal theorists, who claim that it is not necessary to universally establish the regular manifestation of a causal link between a given cause and outcome, but rather that 'one observation of a cause followed by an effect is sufficient for establishing causation if it can be shown that in a most similar world without the cause, the effect does not occur'.[34] Regularity accounts of causation emphasise the generalisable claim that, in order for causality to be established, a factor must be an insufficient (I) but necessary (N) part of a condition which is itself unnecessary (U) but exclusively sufficient (S) for the effect to occur.[35] This approach is normally acronymised as INUS and is typical of qualitative comparative analyses. It is widely used in fields such as sociology, political science, economics and criminology. Probabilistic accounts of causation favour statistical analyses of data to infer causation and have devised adjustments to avoid

[33] Julian Reiss, 'Causation in the Social Sciences: Evidence, Inference, and Purpose' (2009) 39(1) *Philos Soc Sci* 20, 21-23; Henry E Brady, 'Causation and Explanation in Social Science' in Robert E Goodin (ed), *The Oxford Handbook of Political Science* (OUP 2011), 1069-1075; John Gerring, *Social Science Methodology. A Unified Framework* (CUP 2012) 199.
[34] Reiss (ibid) 22.
[35] Brady (n 33) 1063-1069; Reiss (ibid) 23.

confounding correlation and causation.[36] Interventionist or manipulation accounts of causation underline the role of human agency in changing outcomes by intervening on causal factors. This approach, which can be seen as a variant of the experimental approach, privileges the role of the manipulator to elicit change.[37] Mechanistic accounts of causation emphasise the existence of mechanisms that lead from a given cause to its outcome by successive transmissions of causal force.[38]

In this study, I privilege a mechanistic approach to causation and seek to uncover the causal contribution of international commissions of inquiry to domestic changes by emphasising the micro-processes that such commissions elicit. Thus, it is necessary to outline the ontological and epistemological premises that underpin this approach, the associated method to infer causality, and the advantages and disadvantages of applying this approach and method in the context of this research.

Mechanistic conceptions of causality

The mechanistic explanations of causality introduced earlier posit that the causal relation between a cause X and its outcome Y can be deconstructed into interlocked parts that contribute to transmitting the causal force triggered by cause X to the outcome Y. In an oft-quoted analogy, it is said that 'a mechanism is a set of interacting parts – an assembly of elements producing an effect not inherent in any one of them. A mechanism is not so much about "nuts and bolts" as about "cogs and wheels" – the wheelwork or agency by which an effect is produced'.[39] In another definition, Peter Machamer, Lindley Darden and Carl F Craver posit that 'mechanisms are entities and activities organized such that they are productive of regular changes from start

[36] Reiss (ibid) 24; the partial replacement of the notion of causation with that of correlation in the legal domain has been dissected in a recent publication on the impact of the artificial intelligence on the justice system, Antoine Garapon and Jean Lassègue, *Justice digitale. Révolution graphique et rupture anthropologique* (puf 2018).
[37] Reiss, (ibid) 25-26; Brady (n 33) 1076-1078.
[38] Reiss (ibid) 24-25; Brady (ibid) 1078-1083; Gerring (n 33) 215-217.
[39] Gudmund Hernes, 'Real Virtuality' in Peter Hedström and Richard Swedberg (eds), *Social Mechanisms. An Analytical Approach to Social Theory* (CUP 1998) 74.

or set-up to finish or termination conditions'.[40] The reference to 'entities and activities' in this last definition is key to understanding that the parts of a causal mechanism can themselves be deconstructed into entities, or factors, that engage in activities, that is in transmitting the causal force triggered by the cause X.[41] Derek Beach and Rasmus Brun Pedersen argue that the INUS conditions – conceptualised in the context of the Humean or regularity approaches to causality – can apply to each part of a mechanism as well and thus contribute to define such parts as necessary but insufficient for the production of the outcome Y.[42] This implies that if it is not possible to theoretically explain why a part of the mechanism is necessary for the transmission of the causal force, this should be discarded. Similarly, if the empirical analysis demonstrates that a part of the mechanism is not in fact necessary, the underpinning theoretical model should be updated so as not to include that part of the mechanism.

Method of causal inference

The method of causal inference most commonly associated with the mechanistic approach to causality is process-tracing. Process-tracing seeks 'to identify the intervening causal process – the causal chain and causal mechanism – between an independent variable (or variables) and the outcome of the dependent variable'.[43] Broadly speaking, the existing scholarship has identified three variants of process-tracing. Theory-testing process-tracing follows a largely deductive logic in that it seeks to show that each part of a hypothesised mechanism, deduced from the existing literature, is present in a given case, so that if the empirical analysis shows that parts of such theorised mechanism are not present, the mechanism itself is updated accordingly. In contrast, theory-building process-tracing follows an inductive logic in that it

[40] Peter Machamer, Lindley Darden and Carl F Craver, 'Thinking about Mechanisms' (2000) 67(1) *Philos Sci* 1, 3.
[41] Derek Beach and Rasmus Brun Pedersen, *Process-Tracing Methods. Foundations and Guidelines* (University of Michigan 2013) 29; Brady (n 33) 1080-1081.
[42] Beach and Pedersen (ibid) 30-31.
[43] Alexander L George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press 2005) 206-207.

seeks to infer generalisable theoretical explanations from case-specific empirical evidence. Finally, explaining-outcome process-tracing seeks to infer a minimally sufficient explanation for a specific puzzling outcome in a historical case.[44]

In practice, however, these distinctions are less clear-cut than theory would make us believe. Often, the researcher does not have a full theoretical model readily available to test, or while there may not be a theoretical model at all, fragmented theoretical insights might explain single parts of the purported mechanism. In other words, the researcher's logic of inference lies more often than not somewhere in between deduction and induction. Indeed, it would be more appropriate to describe it as abductive, that is proceeding from the cyclic juxtaposition between empirical material and theories.[45]

Process-tracing differs from other methods in that it explicitly seeks to trace the theoretical causal mechanism that links two variables. For example, the congruence method, which is also employed to determine that a causal-like relation exists between two variables, essentially requires the researcher to assess the ability of a theory to predict the outcome of a specific independent variable by matching the observable outcome with the theoretically predicted one. If the actual outcome and the prediction match, then the researcher may entertain the possibility that a causal relation between the two variables exists.[46] The congruence method often relies on a narrative description of the events and the correlations linking each step of the process. Tim Büthe argues that 'narratives, in addition to presenting information about correlations at every step of the causal process, can contextualize these steps in ways that make the entire process visible rather than leaving it fragmented into analytical stages'.[47] In contrast, process-tracing

[44] Beach and Pedersen (n 41) 3.
[45] Derek Beach, 'Process-Tracing Methods in Social Science' (2017) *Oxford Research Encyclopedia* of *Politics* <http://politics.oxfordre.com/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-176> accessed 3 November 2018.
[46] George and Bennett (n 43) 181-204.
[47] Tim Büthe, 'Taking Temporality Seriously: Modeling History and the Use of Narratives as Evidence' (2002) 96(3) *Am Political Sci Rev* 481, 486.

case studies only incidentally rely on temporality as an indicator of causality. Instead, their emphasis is on the steps that characterise the transmission of causal force from the independent to the dependent variables.[48] Hence, the type of relation that process-tracing allows the researcher to infer goes beyond correlation and is rather one of causation.

Nonetheless, George and Bennett posit that the congruence method and process-tracing can be combined to determine whether the relation between independent and dependent variables is causal or spurious and to detect any intervening variable.[49] For example, Beach and Pedersen posit that the congruence method can be used in a two-step research design, when competing theories are evaluated. The congruence method may be used either to discard a competing explanation of a given outcome and subsequently test the existence of an alternative causal mechanism that could account for the specific outcome considered with process-tracing, or to check whether, after having process-traced the causal mechanism connecting two variables, such findings were not biased due to an overly subjective interpretation of the raw data by testing which, among competing explanations of a given outcome, displays the higher congruence with the predicted outcome.[50]

Research design: advantages and potential pitfalls of a mechanistic approach

A mechanistic approach to causality is particularly suited to the object of this study. Commissions of inquiry do not enjoy coercive powers, nor are their pronouncements binding in any way. Except in those few cases in which their recommendations are accepted and implemented directly by domestic authorities, the commissions of inquiry's ability to engender domestic change is largely reliant on the capacity that they display to mobilise other actors that in turn leverage the findings, conclusions and recommendations of such commissions to trigger the expected change. By envisioning this synergistic model, commissions of inquiry and other

[48] Beach and Pedersen (n 41) 4-5.
[49] George and Bennett (n 43)182.
[50] Beach and Pedersen (n 41) 90-91.

actors may be conceived as entities who perform certain activities (for example, recommend, litigate, advocate, etc). While there is no comprehensive theory that seeks to explain how commissions of inquiry endeavour to catalyse change through the actions of other actors, theories on state socialisation, developed to explain how international norms and institutions influence states' behaviour, may offer some useful insights, as shown in the next chapter. Consequently, the method of inquiry must be theory-centric and should lie in between theory-testing and theory-building. As shown above, process-tracing constitutes a powerful tool for tracing the causal mechanism that allows one to infer that a given domestic policy, piece of legislation, praxis or jurisprudential orientation is the outcome of a specific commission of inquiry. But because the themes investigated by such commissions are also often scrutinised by other international or domestic, governmental or non-governmental, mechanisms, or simply by the press or the public opinion, which may be acting on their own independent initiative – and, thus, as independent variables themselves –, one runs the risk of incurring in problems of spuriousness, causal priority and causal depth.

In other words, the cause of a given domestic outcome may only apparently be a specific commission of inquiry, whereas both the formation of the commission, its specific findings, conclusions or recommendations and the observed outcome may have been in fact caused by a third, more remote, factor (*spuriousness*); it may also be the case that the commission of inquiry act as an intervening variable in the causal mechanism and that there is a prior variable that nullifies the independent explanatory potential of the commission itself (*causal priority*); another case may be such that a variable, which is more remote than the commission of inquiry, is in and of itself necessary and sufficient to produce the observed outcome, perhaps even through some other intervening variable different from the inquiry (*causal depth*).[51]

[51] George and Bennett (n 43) 185-186.

Moreover, a further problem that may be encountered can be referred to as reverse causality. In particular epidemiological studies have shown that, in certain cases, one may be led to believe that a certain variable is the cause of a specific outcome, where in fact the contrary is true. It may be that what one may regard as the cause of an outcome is in fact the outcome of the latter. Most often, though, the reality shows that cause and outcome may interact and be linked by a bidirectional causal relation (*simultaneity*).[52] This is demonstrated, for example, in Chapter V, by the interaction between the Independent Fact-Finding Mission to investigate the impact of settlements in the Occupied Palestinian territories and efforts by the EU and European States to exclude settlement produce from the preferential treatment provided for under the EU-Israel Association Agreement.[53]

The simultaneous application of process-tracing and the congruence method may assist in minimising these risks. This study seeks to combine a narrative approach (*congruence*) that allows the reader to probe the validity of some theoretical claims in relation to the congruence of the observed outcomes with the expectations harboured by international decision-makers in deploying international inquiries, and a process-based explanation of the mechanisms, or micro-processes, engendered by such international inquiries. The combination of these two approaches allows me to consider both the influence of contextual factors (for example, Israel's permeability to international pronouncements by certain UN agencies[54]) and interfering causes, which may generate the problems outlined above (for example, the existence of a competing pronouncement with binding force issued by another agency or the pressures of civil society organisations).

[52] Jeffrey B Vancouver and Michael A Warren, 'This Is How We Do Research Around Here: Socializing Methodological and Measurement Issues' in Connie R Wanberg (ed), *The Oxford Handbook of Organizational Socialization* (OUP 2012) 196.
[53] See infra Chapter V.
[54] See infra Chapter IV.

Indicators of causality

While this research emphasises the role of narrative and mechanism-based theoretical insights in guiding the reconstruction of causal relations, it may be useful to briefly discuss some indicators of causality, which may complement the analysis of the raw data with the congruence method and process-tracing.

Temporality. A first obvious indicator that there may be a causal relation between two variables, or simply a transmission of causal force, is time. Time in itself does not provide a sufficient indicator of the fact that a given outcome is the result of a specific factor. However, time can corroborate claims, based on alternative indicators, that a specific outcome is the result of a specific factor. In other words, time – or, better said, sequence – may prevent the researcher from incurring in circular reasoning that may originate from an apparent situation of simultaneity or, in some cases, reverse causality.[55]

Authority. Citations offer an obvious yet strong indication that a given outcome is the result of the variable considered, namely, in this study, commissions of inquiry. For example, the minutes of a parliamentary debate over the introduction into Parliament of a specific bill may explicitly make reference to the text of a commission of inquiry's report. However, such indicator tells little about alternative or more remote explanations. Contextual factors and mechanisms may remedy such shortcoming.

Expert opinion. The opinion of experts who have insider knowledge of domestic decision-making processes may corroborate claims of causality. As shown below, this study makes use of some in-depth expert interviews with Israeli and Palestinian decision-makers and representatives of civil society. Some of these individuals participated in the decision-making processes discussed in this research, while others were qualified observers of such processes.

[55] Büthe (n 47) 485-486.

Their opinions certainly bear substantial weight in determining whether certain actions were determined, or were taken in response, to a specific causal factor. However, claims of the sort – or including to the contrary – should be assessed with caution as they may be reflective of a biased perception of reality, or simply be deferential to a mainstream or official narrative and, thus, opportunistic.

Legal indicators. Legal argumentation may be itself an indicator of causation. A change in policy, for example, may be guided by international legal principles or domestic legislation. Sometimes, the shift is cloaked in domestic robes, having declaredly occurred to comply with domestic legal principles, but a specific sequence of events, coupled with, for example, a specific assessment of such domestic principles in light of international norms by international monitors may lead us to infer that the change occurred not so much by dint of the domestic legal framework, but to adapt the relevant domestic policy to the re-interpretation of such framework in light of international standards. The rationale for such change may emerge from texts or legal opinions in point, thus providing the opportunity to assess it in light of the relevant international standards invoked at the international level. The inference may be even stronger when there are alternative legal-argumentative routes to reach the same outcome, which have been discarded. The risk in drawing such inference is that the circulation of legal models is nothing new. Legal rules and systems are inevitably – and necessarily – characterised by a level of indeterminacy and ambiguity,[56] which may be exploited opportunistically to advance self-interests. Opposed legal constructs, which may be generated at different levels, circulate rapidly, and it is very likely that such constructs may spread even among influential communities within the borders of states holding official adverse positions. This complexity makes it harder to identify the specific determinant of domestic change. The rationale for the domestic shift may mirror legal constructs generated both at the sub-state and international

[56] Ken Kress, 'Legal Indeterminacy' (1989) 77(2) *CLR* 283.

levels. In such cases, other additional factors must be employed to update the confidence of claims hypothesising such causal link. It is likely that, in most cases, domestic change occurred as a result of the combination of different factors. However, other indicators may assist in identifying the turning point, that is a causal factor that, because of contextual circumstances, inherent characteristics of the determinant or specific strategic approaches, was key in determining that particular change at that specific moment.

2.4 Methods Employed to Gather Raw Data

The data employed in the empirical chapters of this study have been gathered through two main data sources: publicly available documents and expert interviews. Documents have been relied on at different stages and for different purposes of the research process. First, as a source of data to contextualise the case study. Second, as a way to generate questions for interviews. Third, as a way to independently generate data or to corroborate data gathered through other sources, in particular interviews.[57] A set of in-depth expert semi-structured interviews has been held with civilian and military state officials in Israel and Palestine, as well as with NGOs representatives and academics. A detailed list of the interviewees is provided in Annex A. Interviews have been prepared and conducted according to best practices in expert interviewing for qualitative data generation.[58] This includes the preparation of interview guides which included broad themes and questions tailored to the specific interviewees approached. While the broad themes were largely overlapping in almost all interviews and, where appropriate, the same question would be asked to multiple interviewees to corroborate information provided by other interviewees, I opted for semi-structured interviews so as to allow for the introduction by the participants of issues I had not foreseen in preparing them. Previous informed consent was

[57] On the uses of documents in qualitative research, see Glenn A Bowen, 'Document Analysis as a Qualitative Research Method' (2009) 9(2) *Qualitative Research Journal* 27, 29-31.
[58] On interviewing for qualitative data generation, see generally Jaber F Gubrium, James A Holstein, Amir B Marvasti and Karyn D McKinney (eds), *The SAGE Handbook of Interview Research. The Complexity of the Craft* (2nd edn, SAGE 2012); on expert interviewing, see Lewis Anthony Dexter, *Elite and Specialized Interviewing* (ecpr press 2006).

sought from each participant in written form.[59] Some participants agreed to their interview being recorded, while others did not. Recorded interviews were later transcribed. The corresponding transcripts are kept confidential. When data extracted from interviews are used, the identity of the participant and their relevant professional position are detailed in the footnotes. However, some participants did not agree to their identity or professional position being disclosed. In such cases, the source is referenced in the footnotes in a way appropriate to shielding their identity or position. An assessment of the credibility and reliability of the source of information is also provided, where appropriate, in the footnotes.

Additional insights and data for this study have been collected through the participation in conferences, lectures and workshops, field trips to areas interested by issues raised in the inquiries' reports, movie screenings and exchanges with a dense network of individuals who have either been involved with international inquiries or been part of the commissions' staff. As far as possible, the evidence has been corroborated by extrapolating data from at least two independent observations.[60] The risk of incurring in confirmation bias has been mitigated by accounting for alternative explanations for the outcome in turn encountered.[61]

2.5 Limitations Contingent to the Research Context

The two main limitations contingent to this study stem from the specific research context in which the data have been extracted. The research context may influence both the accessibility of certain sources of information and the reliability of the source itself. The context in which this study has been conducted poses specific challenges, which stem from the polarisation of

[59] Consent forms where signed by both the interviewee and the author of this study. These are kept by the author for five years and then destroyed.

[60] A common way to minimise the risk of unreliable sources of evidence is to use *triangulation*, which requires collecting 'multiple independent observations …. Either from different sources of the same type …. or across different type of sources …. or different types of evidence …. However, triangulation does not hep unless we can substantiate that the sources are independent of each other. Doing three interviews and postulating that sources have been triangulated is not enough – the researcher needs to substantiate the fact that the interviews are independent of each other' (Beach and Pedersen (n 41) 128.

[61] Confirmation bias is a cognitive bias whereby the researcher tends to pre-screen, interpret or understand information in a manner that confirms the researcher's pre-existing belief or hypotheses (Jonathan Baron, *Thinking and Deciding* (4th edn; CUP 2008)172).

opinions and the secretive nature of, in particular, Israeli official circles. The Israeli-Palestinian conflict has transcended the mere contingent and technical aspects of its development on the ground. It has generated widely differing (moral) views within the societies affected, as well as among external observers, and is characterised by the high stakes involved. To the point that some refer to it as an 'intractable conflict'.[62] Both secrecy and ideological polarisation influence generally access to and reliability of the sources of information. At this stage, it is not possible to discuss every single instance in which these factors have influenced the evidential value of the observations carried out. It is only possible to outline generally the main problems encountered, while postponing discussions of the impact on the individual sources to the empirical part of this study.

Secrecy has mainly affected access to sources in Israel. In spite of the existence of modern physical and electronic archives in this country, there are several barriers to accessing documents that might reveal sensitive information. Access to information in Israel is regulated by the Freedom of Information Law 5758-1998, which generally states that 'Every Israel citizen or resident has the right to obtain information from a public authority in accordance with the provisions of this Law'.[63] Access to state archives is regulated by the Archives Law 1955 and subsequent regulations.[64] However, Akevot has documented that only 1.29% of the files kept by the Israel State Archives and the IDF and Defense Establishment Archives are accessible to the public for several reasons.[65] As a result, some sources of information relevant

[62] See, for example, Jacob Bercovitch and S Ayse Kadayfci, 'Conflict Management and Israeli-Palestinian Conflict: The Importance of Capturing the "right Moment"' (2010) 9(2) *Asia-Pacific Review* 113. On the notion of 'intractable conflicts' see Heidi Burgess and Guy M Burgess, 'What Are Intractable Conflicts' (2003) *Beyond Intractability* <https://www.beyondintractability.org/essay/meaning_intractability> accessed 29 July 2018.

[63] Freedom of Information Law 5758-1998 [unofficial translation in English] <http://www.sviva.gov.il/English/Legislation/Documents/Freedom%20of%20Information%20Laws%20and%20Regulations/FreedomOfInformationLaw1988.pdf> accessed 1 August 2018.

[64] These regulations are only available in Hebrew. However, see the dedicated webpage by Akevot, an Israeli institute whose purpose is to digitalise documentation about the Israeli-Palestinian conflict <https://akevot.org.il/en/article/archive s-law-regulations/?full#chapter-1> accessed 1 August 2018.

[65] Akevot, State of Access to Israeli Government Archives, Data sheet (September 2017) <https://akevot.org.il/wp-conte nt/uploads/2017/09/Akevot-State-of-Access-to-Govt-Archives-2017-09-Eng.pdf> accessed 1 August 2018; for an in-depth study of the barriers to access to archival information in Israel see Noam Hofstadter and Lior

in the context of this research could not be accessed. Where this has happened and no alternative source could be found, the empirical certainty attached to the individual piece of mechanistic evidence has been updated and no inference has been made.[66]

Ideological polarisation has impacted on access to sources. For example, some Palestinian academics refused to be interviewed for fear of breaching Rule 3 of the Boycott Guidelines Applicable to Visits by International Academics and Artists to the Occupied Palestinian Territories. Where possible, alternative interviewees have been contacted. Ideological polarisation has also been taken into account when assessing the reliability of interviewees. Commitment to moral or political views may influence the interviewee's account or explanation of events and thus constitute a form of bias, which has to be accounted for when assessing the probative value of the information extrapolated through interviews.

Conclusion: Research Objectives and Broader Implications

The results of this study shed light on the specific causal contribution of international commissions of inquiry to state socialisation. It counters generic claims of ineffectiveness of international inquiries by better accounting for the reasons that explain such outcome and by better allotting responsibilities for failures. Moreover, by including an assessment of the broader impact of international commissions of inquiry, this study also provides examples of the positive and negative externalities generated by such inquiries. These, in turn, may inform a re-discussion of the institutional objectives of international inquiries, in particular accountability. Thus, this study builds on the existing burgeoning scholarship on commissions of inquiry by offering an alternative reading of their functioning and contribute to two broader strands of

Yavne, *Point of Access: Barriers for Public Access to Israeli Government Archives* (Noam Ben Ishie tr, Akevot 2016) <http://akevot.org.il/wp-content/uploads/2016/05/Point-of-Access-English.pdf> accessed 1 August 2018.

[66] Derek Beach and Rasmus Brun Pedersen, *Causal Case Study Methods: Foundations and Guidelines for Comparing, Matching, and Tracing* (University of Michigan Press 2016) 189.

academic literature: on the one hand, the literature on the UN human rights machinery and, on the other hand, the literature on the influence of international human rights norms on states.

In addition, the findings of this study challenge the mainstream on reforms of international commissions of inquiry. The predominant literature has focused on improving quality control by crafting increasingly detailed rules of procedure and evidence. While procedural aspects of international commissions of inquiry are certainly crucial to maximising effectiveness and positive impact, this study shows that there are additional expedients that might be introduced to improve the effective functioning of non-judicial fact-finding mechanisms. This, however, requires a finalistic re-conceptualisation of commissions of inquiry. From this viewpoint, this research also offers some recommendations for reform of international inquiries that are not simply based on anecdotal evidence but on a sound impact assessment of these mechanisms.

CHAPTER III

THE FUNCTIONS OF INTERNATIONAL INQUIRIES: TOWARDS A THEORY OF EFFECTIVENESS

Introduction

International human rights inquiries are normally dispatched in situations where grave, systematic or particularly intense human rights and humanitarian law violations are alleged to have been perpetrated. Moshe Hirsh argues that ad hoc commissions of inquiry operate as international labelling agencies, that is, as institutional mechanisms legally authorised to determine whether an actor is a law-breaker.[1] Labelling theories hinge on the assumption that deviance is not an objective property of the act committed, but rather stems from the determination that others have made of that act.[2] In other words, the fact that an act contravenes a specific rule does not automatically and by itself qualify that act as deviant. It is the successful application of the rule (and sanction) by others that makes it so.[3] Modern commissions of inquiry, acting upon the mandate attributed to them by their parent organisation, carry out precisely this function: they determine whether the alleged conducts constitute a violation of the international norms or standards they are entitled to apply. In other words, they label conducts and, by labelling conducts, they label those who carried out such conducts as law-breakers. However, Hirsch also notes that findings of labelling agencies that work in a less legalised manner are more easily rebuttable by target states than determinations reached by courts and tribunals.[4] Such is the case of international commissions of inquiry, which, as I have

[1] Moshe Hirsch, *Invitation to the Sociology of International Law* (OUP 2015) 170.
[2] On labelling theories and deviance, see Ryken Grattet, 'Labelling Theory' in Clifton D Bryant (ed), *The Routledge Handbook of Deviant Behaviour* (Routledge 2011); Malcolm Waters, *Modern Sociological Theory* (SAGE Publications 1994) 29; Erich Goode, *Deviant Behaviour* (9th edn, Prentice Hall 2011) 6–18; Alex Thio, *Deviant Behaviour* (10th edn, Pearson 2010) 6–13.
[3] Howard S Becker, *Outsiders: Studies in the Sociology of Deviance* (Free Press 1963) 9.
[4] Hirsch (n 1) 171.

shown in Chapter I, are ad hoc mechanisms that work according to minimal, non-binding rules of procedure and evidence and whose pronouncements are neither binding nor enforceable.

At the same time, one must bear in mind that fact-finding and inquiry are not ends in themselves. As part of a wider legal regime, these mechanisms are deployed on a need basis and act in pursuance of the specific mandate they are entrusted with. Their immediate goal of determining whether specific conducts constitute human rights or humanitarian law violations is functional to broader systemic objectives. In the UN context, such objectives are identifiable with the maintenance of international peace and security and the promotion and protection of human rights. While these systemic goals are pursued by facilitating the peaceful settlement of inter-state disputes or by seeking to de-escalate inter-group violence, prevent human rights abuses – for example, by activating legal mechanisms such as the responsibility to protect – and promote accountability to remedy human rights violations, the preferable course of action would be to have states conforming to international norms and obligations without the need to activate further coercive external mechanisms.[5] International commissions of inquiry, as 'soft' enforcement mechanisms, whose impingement on state sovereignty is limited, may provide a flexible answer to such issue. Their pronouncements are neither legally binding nor enforceable, which constitutes a lesser threat for state sovereignty than, for example, international courts. Yet, they can function despite the state's refusal to cooperate with them, albeit with significant operational limitations. They generally seek to reach their determinations through a participatory process akin to constructive dialogue,[6] which signals a cooperative rather than

[5] The preference for domestic action underpins, for example, the complementarity regime under the Rome Statute of the International Criminal Court, grants primacy to domestic jurisdictions.

[6] The UN Human Rights Bodies Glossary of Technical Terms defines 'constructive dialogue' as 'The practice, adopted by all treaty bodies, of inviting State parties to send a delegation to the session at which their report will be considered in order to enable them to respond to members' questions and provide additional information on their efforts to implement the provisions of the relevant treaty. The notion of constructive dialogue emphasizes the fact that the treaty bodies are not judicial bodies (even if some of their functions are quasi-judicial), but are created to review the implementation of the treaties' (see Human Rights Treaty Bodies - Glossary of technical terms related to the treaty bodies <https://www.ohchr.org/en/hrbodies/pages/tbglossary.aspx> accessed 17 July 2018); see also John P Grant and J Craig Barker (eds), *Encyclopaedic Dictionary of International Law* (3rd edn, OUP 2009) 119-120.

adversarial management of deviance. In other words, international inquiries, in pursuing the institutional goals of their parent bodies, implicitly contribute to what international relations and international law scholars have called the socialisation of states. They seek to influence the state behaviour vis-à-vis the issues that they are mandated to investigate. In fact, recommendations addressed at state authorities or non-state groups may be seen as a "nudge" to get them on the right compliance track.

Determining how commissions of inquiry seek to socialise states implies asking what operational and argumentative strategies they use to influence their interlocutors. Indeed, commissions of inquiry have essentially two ways of interacting with domestic actors: through an exchange of information and through their final report. Ultimately, this is part of a broader question that seeks to explain how international legal regimes and institutions endeavour to influence states, or, to be even more terminologically precise, how international regimes – in particular, the international human rights regime – seek to influence their recipients. The mechanisms that have been theorised to explain how international legal regimes are designed to socialise states are normally applied to entire legal regimes or large institutional settings, but that does not mean that they cannot be used to explain how sub-sets of such regimes or institutions work. Thus, we can exploit the notions of coercion, persuasion and acculturation – the three main mechanisms of state socialisation identified by the academic literature – to interpret how international commissions of inquiry seek to influence state behaviour. Hence, in my construction, these mechanisms must be understood as hermeneutical or interpretive conceptual categories that explain how international regimes pursue state socialisation.

In this chapter, by drawing on the above theories, I propose a theoretical model that explains how international commissions of inquiry seek to achieve their institutional goals. In other words, I apply the conceptual categories of coercion, persuasion and acculturation to international inquiries and tie the deployment of these strategies to the achievement of the goals

commissions of inquiries are mandated to pursue. In order to better adapt these conceptual categories, normally employed to describe the functioning of regimes, to an institutional mechanism such as international commissions of inquiry, I complement my construction with an analysis of what has been termed the procedural fairness or legitimacy of international inquiries.[7] In this way, I account for those structural factors that, by influencing the legitimacy of commissions of inquiry, are liable to bolster or undermine their success.

Inevitably, because the activities carried out by commissions of inquiry materialise essentially in the form of a written document – the report –, the overarching theme that runs through the entire theoretical model that I propose is one of language and argument construction. There are two sides of language construction that have to be taken into account. On the one hand, the external or formal dimension of language. That is, the words used and their connectedness to the specific – often technical – meanings of the legal categories they evoke.[8] On the other hand, the argumentative strategies adopted to persuade or acculturate the targeted interlocutors. These may include, for example, the legal lenses employed to qualify certain conducts or the reference to state practice as evidence of an environmental dissonance between the targeted state's practice and that of its peers. It is by manipulating language in these ways that the coercive, persuasive and acculturative power of commissions of inquiry reveals itself. Nonetheless, despite the salience of this aspect, I do not dwell on the communicative force of commissions of inquiry separately. Rather, while discussing the different socialisation strategies as deployed by commissions of inquiry, I seek to highlight the expressive advantages and disadvantages that attach to the language and arguments generally used to influence states.

[7] As I explain below (see infra pp 125-127), legitimacy or procedural fairness refer to those rules or conventions that facilitate the perception of a procedural mechanism or process by its users as fair or legitimate.
[8] In other words, the use of terms such as 'war crimes', 'grave breaches of the Geneva Conventions', 'knowledge and intent', and many others is not fortuitous but stems from the intention of the individuals that use them to evoke specific technical meanings.

This chapter is thus structured in two parts. In the first part, I explain how international commissions of inquiry serve the regime purpose of state socialisation and I seek to identify how the pursuit of the ultimate, operative and self-imposed goals of such inquiries contributes to the socialisation of the target state(s). In the second part of the chapter, I discuss the impact of procedural rules on the legitimacy, fairness and credibility of international commissions of inquiry and, eventually, on the acceptance of their conclusions and recommendations by the targeted actors. Furthermore, I show how rhetorical and argumentative strategies employed by commissions of inquiry may be read as attempts at socialising states by either coercing, persuading or acculturating them. This theoretical construction serves as a set of hypothetical claims for the ensuing empirical work.

1. The Goals of International Commissions of Inquiry

According to the definition of effectiveness provided in the preceding chapter,[9] an organisation is effective if it manages to trigger processes geared towards the achievement of its specific goals. Hence, in order to proceed with the effectiveness analysis of international commissions of inquiry, we need to identify their goals. In his book *Assessing the Effectiveness of International Courts*, Yuval Shany draws on the writings of Charles Perrow, an influential American sociologist, who distinguishes between official and operative goals of organisations. The former goals are those formally stated often in vague, open-ended terms in official documents or charters of the organisation considered, while the latter goals are those that stem from the specific, often unofficial, prioritisation policies of the organisation considered.[10] Shany exemplifies this distinction by differentiating between the official goal of an international court, which may be to fight impunity, and its unofficial operative goals, which may include, for example, expediting courts proceedings or increasing the number of prosecutions. It is worth

[9] See Chapter II, pp 67-71.
[10] Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 17; Charles Perrow, 'The Analysis of Goals in Complex Organizations' (1961) 26(6) *Am Sociol Rev* 854, 855-856.

mentioning that in Perrow's construction, operative goals are not necessarily related to the official goals of an organisation. Quite to the contrary, they may subvert the latter goals because they are more directly tied to group interests.[11]

Building on this model, Shany proposes a further taxonomical classification of organisational goals according to their source, level of abstraction and form of articulation. According to their *source*, goals can be differentiated between external and internal. External goals are set by constituencies that do not belong to the organisation considered, such as the general public or the parent institutions. Internal goals are set by constituencies that belong to the organisation itself, such as its employees or directors. According to their *abstraction hierarchy*, goals can represent either the ultimate ends of the organisation considered or strategic objectives that are instrumental to the achievement of the ultimate goals of the organisation. In the example proposed above, increasing the number of prosecutions may be seen as instrumental to the overarching objective of fighting impunity. According to their *form of articulation*, goals can be explicitly identified in instruments promulgated by the organisation itself or its stakeholders, implied in these same instruments or embraced in an unstated form by the organisation itself or its stakeholders.[12] Shany's classification intersects the binary one proposed by Perrow while better describing the nature and hierarchy of the goals considered. For example, fighting impunity may be classified as an externally-imposed, ultimate, explicit goal of some existing international courts. Shany further describes a number of ontological and methodological challenges that can be encountered in identifying the goals of complex organisations. Such challenges stem from competing understandings of the organisation's goals. In turn, this 'goal ambiguity'[13] proceeds from the political compromises that, especially

[11] Perrow (ibid) 856; see infra how both external and internal constituencies contribute to setting the goal agenda of an organisation.
[12] Shany (n 10) 18-19.
[13] On organisational goal ambiguity, see also Young Han Chun and Hal G Rainey, 'Goal Ambiguity and Organizational Performance in U.S. Federal Agencies' (2005) 15(4) *JPART* 529; Chan Su Jung, 'Organizational Goal Ambiguity and Performance: Conceptualization, Measurement, and Relationships' (2011) 14(2) *IPMJ* 193.

at the international level, underpin the institution-building process. In this context, ambiguity is often seen as an open-ended solution to opposed views. Problems that may be encountered concern the vague language formulation of certain goals, their abstract nature, which may complicate their operationalisation, the lack of a clear hierarchy among multiple goals and the unavailability of measurement criteria and methods for certain goals.[14]

While devised with international courts in mind, Shany's model is no less relevant for international commissions of inquiry. Its application to the object of this study has advantages and disadvantages, some of which may be appreciated by referring to the historical-evolutional overview conducted in Chapter I. A clear advantage is that international commissions of inquiry are normally deployed for a very limited period of time, which minimises variations or adjustments of the goals attributed to them by internal constituencies, because otherwise this would risk diverting the commission's work away from the goals set in the mandate. This in turn facilitates the effectiveness analysis because we can assume a certain stability in the goals of the individual commission of inquiry considered. Conversely, the ad hoc nature of commissions of inquiry hinders the identification of goals common to all international inquiries. As I have shown in Chapter I, commissions of inquiry are generally deployed when their parent institutions deem it necessary to collect information for the correct exercise of their functions. In other words, they are ancillary to the institution that holds the power to set them up. In this sense, they share the overall goals of their parent bodies but do so in a very specific and situation-dependent manner. In fact, each commission of inquiry is provided with a specific mandate that is generally stated in their constitutive instrument. These mandates, which are construed so as to facilitate the achievement of the ultimate goals of the parent organisations, are often formulated in vague terms. Thus, they need further operationalisation, a task which is normally left to the commissioners. While this multi-level functionality of commissions of

[14] Ibid 20-21.

inquiry complicates the goal abstraction hierarchy, good practices require commissioners to be explicit and detailed about the way they interpret their mandates.[15]

Concomitantly, the establishment of international commissions of inquiry may engender expectations in the end users, that is, those constituencies that hold a direct interest in the inquiry process. Among these constituencies may be, for example, domestic professional circles, victims or politicians. One way for domestic political circles to influence the goal setting of international inquiries is through their official representatives, who take part in the decision-making process that prompt the establishment of such inquiries. Hence, the coexistence of different professional and social communities within domestic constituencies generates multi-level externally-imposed goals for commissions of inquiry. For example, diplomats of a certain state where widespread violations of human rights are alleged to have been perpetrated may participate in the supranational decision-making process that establishes the international inquiry, thus contributing to the formulation of an accountability-geared mandate which calls for the collection of information relevant for subsequent prosecution. However, other professional circles or society sectors within the same state constituency, who will be involved at some stage in the inquiry process, may form expectations about other goals that the commission of inquiry should accomplish: for example, providing a reliable narrative to facilitate reconciliation or simply to counter state-sponsored inaccurate depictions of the events.

This study assumes a state socialising role for international commissions of inquiry and argues that all goals of such mechanisms are ultimately geared towards ensuring that states conform to international norms and standards. Building on Perrow and Shany's classifications, I seek to identify a hierarchy of the goals of international commissions of inquiry, while

[15] For example, the HPCR Advance Practitioner's Handbook on commissions of inquiry emphasises the role of commissioners in the interpretation of the mandate and attaches great importance to the clear and precise articulation of the mandate in the final report (*HPCR Advanced Practitioner's Handbook on Commissions of Inquiry. Monitoring, Reporting and Fact-Finding* (Harvard Humanitarian Initiative 2015) 7-18).

simultaneously showing how all such goals converge towards the ultimate regime goal of state socialisation.

1.1 Socialisation by Inquiry

The international human rights regime[16] and, similarly, the partly different international humanitarian and criminal law regimes seek to regulate the conduct of states vis-à-vis individuals or between individuals. Remedial or enforcement mechanisms are devised to step in when the domestic mechanisms fail to implement, enforce or protect the rights and obligations arising out of these regimes. In other words, the activation of international enforcement mechanisms is necessary only when the best possible outcome, that is compliance with international norms and commitment, is incomplete. International commissions of inquiry form part of the arsenal that the UN human rights machinery can deploy to *latu sensu* enforce human rights norms.[17] However, inquiry procedures are, so to speak, 'soft' enforcement tools. In fact, the use of the term enforcement with regard to such mechanisms may be misplaced as commissions of inquiry have no way to enforce *directly* their pronouncements, as explained in Chapter I.

Domestic implementation, protection and enforcement of international human rights and humanitarian law do not necessarily follow the formation of a new international norm. On the contrary, achieving full implementation may be a lengthy process that partly depends on the ability of the international society to exert some form of pressure on deviant states. This

[16] On the disagreements on the definition of 'regime' see Andreas Hasenclever, Peter Mayer and Volker Rittberger, *Theories of International Regimes* (CUP 1997) 8-14.

[17] See also Gerd Oberleitner, 'Does enforcement matter?' in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (CUP 2012) 257-258, who includes international commissions of inquiry among the monitoring mechanisms available within the UN human rights machinery. Gerd aver that 'monitoring comprises different activities, none of which is aimed at coercion. Monitoring bodies engage in processes geared towards promoting human rights through consultation, justification, recommendation and persuasion…. Inquiries and fact-finding missions, such as those carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in places of detention, are examples of a more forceful intrusion into the domestic affairs of states. The Committee's inquiry, which ends with the publication of a report, weaves together prevention, investigation, public pressure and cooperation with domestic institutions and demonstrates that meaningful supervisory mechanisms can be developed despite the limits of international law'.

phenomenon, which I have so far described simplistically, is normally referred to as state socialisation. Building on several attempts at defining the notion of state socialisation, Kai Alderson posited that it is 'the process by which states internalize norms originating elsewhere in the international system'.[18] It is, in other words, a process-based explanation of norm diffusion, the best possible outcome of which is domestic institutionalisation of the relevant international norms. As I show in the second section of this chapter, socialisation is explained as being generated through the deployment of three different mechanisms. The fundamental assumption is that every international regime is strategically and teleologically designed to induce domestic compliance or conformity with its own internal norms. In turn, individual institutional components of a larger regime share in the responsibility to drive conformity and compliance with that regime standards. It could be said that international regimes as a whole are primarily designed to drive state conformity and compliance. The international human rights regime[19] makes no exception. Hence, as institutional actors that operate within the confines and towards the ends of their parent normative regimes, international commissions of inquiry can be understood as mechanisms for state socialisation.

Such understanding of international inquiries is not new in the fact-finding epistemic community. Rob Grace posits that the use of investigative mechanisms to collect evidence of human rights abuses hinges on the assumption that, by exposing facts to the international community, target states may be driven to comply with international standards. The peer-pressure exerted by the community of states may engender a deterrent effect that is capable of generating better compliance at the domestic level.[20] Antonio Cassese argued that

> true, the world legal order does not have yet the various means available in each domestic legal system to centralize authority. To induce compliance with

[18] Kai Alderson, 'Making Sense of State Socialization' (2001) 27(3) *Rev Int Stud* 415, 417 (original in italics).
[19] For a cursory description of international human rights, see Hans Peter Schmitz and Kathryn Sikkink, 'International Human Rights' in Walter Carlsnaes, Thomas Risse and Beth A Simmons (eds), *Handbook of International Relations* (Sage 2013) 827.
[20] Rob Grace, 'From Design to Implementation: The Interpretation of Fact-finding Mandates' (2015) 20(1) *JC&SL* 27, 27-28.

> international standards it cannot therefore resort to compulsory judicial determination let alone to collective enforcement. Monitoring and institutional fact-finding are thus the best way of bringing the weight of the community to bear on each member state (and other international legal subjects).[21]

The UN Secretary General himself has understood this function as one of 'preventive diplomacy', which should assist in 'helping to shift the calculations of the parties, defuse tensions and build confidence'.[22]

Hence, it is fair to state that the pursuit of all goals for which international commissions of inquiry are deployed is teleologically oriented towards inducing states to internalise regime norms. But how can the pursuit of specific institutional goals be tied to state socialisation? Following, I survey the goals of international commissions of inquiry as they emerge from the practice of the UN and according to the relevant academic literature, classify them according to their hierarchy and source, following Perrow and Shany's model and explain how their pursuit may contribute to the internalisation of international human rights and humanitarian norms.

1.2 Ultimate Goals of International Commissions of Inquiry: Between Dispute Settlement, Prevention and Accountability

In Chapter I, I have shown through a cursory overview of the historical evolution of commissions of inquiry that international organisations, in particular the UN, have employed them to pursue different goals. The Hague-based model of commissions of inquiry, which constitutes a archetype[23] of modern commissions of inquiry, was aimed at facilitating the

[21] Antonio Cassese 'Fostering Increased Conformity with International Standards: Monitoring and Institutional Fact-finding' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 303.
[22] Report of the Secretary General, *Preventive Diplomacy: Delivering Results*, UN Doc S/2011/552 (26 August 2011) para 32; on the notion of preventive diplomacy, see also Bertrand G Ramcharan, *Preventive Diplomacy at the UN* (Indiana University Press 2008), in particular at page 158 where, in relation to international fact-finding missions, he argues that 'the urgent action procedures of these fact-finders, their visits to countries, and their reports on thematic and country situations had significant elements of mitigatory and preventive diplomacy'.
[23] See, in particular, Larissa van den Herik, 'International Commissions of Inquiry as a Template for a MH17 Tribunal? A Reply to Jan Lemnitzer' (9 February 2017) *EJIL: Talk!* <https://www.ejiltalk.org/international-commissions-of-inquiry-as-a-template-for-a-mh17-tribunal-a-reply-to-jan-lemnitzer/> accessed 22 June 2018, who argues that there is no typological continuity between early commissions of inquiry and modern fact-finding

friendly settlement of international disputes and possibly at preventing further escalations of controversies.[24] After the Second World War, commissions of inquiry became a valuable instrument under the emerging human rights regime, thus embracing a monitoring or alerting function in order to facilitate the intervention of other international actors.[25] It is only since the 1990s, with the re-emergence of international criminal law and the attempt to provide the human rights and humanitarian law regimes with 'teeth', that commissions of inquiry have been used as tools geared towards accountability.[26] However, this broad typification of commissions of inquiry should not be understood as having led to a rigid division of labour between different types of commissions of inquiry. In fact, and quite to the contrary, different functions tend to coexist in each international inquiry exercise. Proof is that the recommendations formulated by modern international commissions of inquiry are much more varied than in the past and address a wide range of actors, both domestic and international.

Rob Grace and Claude Bruderlein propose a distinction between monitoring, reporting and fact-finding as three separate activities with specific strategic objectives.[27] They claim that monitoring, which 'entails examining contextual information in search of patterns that indicate

missions. While they have in common some core features, they essentially respond to different needs of the international community and, as such, must be seen as two different tools. For a contrary position, see Jan Martin Lemnitzer, 'International Commissions of Inquiry and the North Sea Incident: A Model for a MH17 Tribunal?' (2016) 27(4) *EJIL* 923.

[24] Patrick Butchard and Christian Henderson, 'A Functional Typology of Commissions of Inquiry' in Christian Henderson (ed), *Commissions of Inquiry: Problems and Prospects* (Hart Publishing 2017) 14-17.

[25] Butchard and Henderson distinguish between an informing and an alerting function. The former activity consists in the provision of an account of the facts related to a specific situation and, perhaps, of an historical record of serious violations of human rights and international humanitarian law. Differently, the alerting function consists in the provision of an early warning system so as to make the international community aware of a potential problematic situation, typically a threat to international peace and security (Butchard and Henderson (ibid) 17-19 and 25-26).

[26] For a partially similar account of human rights fact-finding, see Federica D'Alessandra, 'The Accountability Turn in Third Wave Human Rights Fact-Finding' (2017) 33(84) *Utrecht J Int Eur Law* 59, 61-64; see also Butchard and Henderson (ibid) 19-22.

[27] Rob Grace and Claude Bruderlein, 'Building Effective Monitoring, Reporting, and Fact-finding Mechanisms' (April 2012) HPCR Draft Working Paper, 10-17; note that Grace and Bruderlein seem to group several difference mechanisms under the same umbrella term (MRF – Monitoring, Reporting and Fact-Finding) failing to highlight the distinctiveness of certain mechanisms over others. For example, they use the term 'inquiry' to address mechanisms of different nature and with different purposes. What they do, as I explain in more details below, is to distinguish different activities that, to some extent, all these mechanisms carry out.

the potential perpetration of international law violations',[28] has a predominantly preventive function as it alerts the mandating authorities about a potential crisis so that the said authorities can take preventive action. Reporting, which seeks to induce alleged perpetrators to alter their behaviour by addressing specific ongoing incidents, is advisory in nature and aims to mitigate an ongoing crisis. Fact-finding, focused on individual incidents and responsibilities, is geared towards providing corrective actions and avenues for accountability. To different extent, all three activities are regularly carried out by international commissions of inquiry with some modal variations. For example, reporting is normally carried out by international inquiries not simply on the basis of individual incidents, as Grace and Bruderlein aver, but also to advise governments and international actors how to address patterns of violations. Moreover, fact-finding is generally conducted to both identify patterns of violations and clarify the facts of individual incidents or situations. It is thus fair to state that, by monitoring, reporting and fact-finding, international commissions of inquiry contribute to prevent violations, advise the relevant actors how to remedy violations with a view to both provide redress for victims and avoid further escalations, and identify avenues for accountability.

There is some overlap between the goals identified by Grace and Bruderlein and those traditionally attributed to international commissions of inquiry by the prevailing scholarship. The one traditional goal that appears to have disappeared is dispute settlement, which however characterised early commissions of inquiry. These, as explained above, cannot be squarely grouped in with modern inquiries. Yet, we may compare the dispute settlement function of early inquiries with the preventive function of modern human rights inquiries. While the former sought to avoid the escalation of disputes arisen between states into violent confrontations, the latter aim to alert relevant actors as to the imminence – or possibility – of human rights

[28] Ibid 11; see also the definition of 'monitoring' in Butchard and Henderson (n 24) 23. They argue that 'today, the use of the monitoring function has been principally focused upon the observance and verification of a state's compliance with a particular obligation or duty'.

violations, perpetrated by state or non-state actors, so that they can put in place measures to avoid such violations. In other words, both forms of inquiry share the common goal of preventing undesirable situations.

But how do international commissions of inquiry contribute to socialising states by preventing, advising and providing avenues for accountability? And what do they socialise states into? From a substantive viewpoint, the functions of international inquiries outlined above should be read in light of the regime goals of the UN system and, in particular, of the UN human rights machinery. Such reading provides content to the mechanism of socialisation with reference to international inquiries. The UN retains the broadly-formulated function of maintaining international peace and security. Hence, it does not come as a surprise that the 1991 UN Declaration of Fact-Finding contextualises the use of international commissions of inquiry within the broad goal of the maintenance of international peace and security.[29] A more specific goal can be identified for those commissions of inquiry established within the UN human rights framework and, in particular, by the Human Rights Council, the UN body competent for the promotion and protection of human rights. Such inquiries share the chief overall objective of promoting and protecting human rights. However, one should note that such goal is considered to be ancillary to the maintenance of international peace and security.[30]

How the pursuit of the three goals of modern human rights inquiries contribute to socialising states into complying, implementing and enforcing domestically human rights norms is a matter that is discussed at length in the second section of this chapter. At this point, it is sufficient to emphasise that each function is better carried out by leveraging specific pulls to induce domestic

[29] Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security, UNGA Res 46/59 (9 December 1991), Annex (hereinafter the 'UN Declaration on Fact-Finding'); see also Butchard and Henderson (n 24) 15.

[30] General Assembly Resolution 60/251 unequivocally ties human rights with the primary role of the UN, the maintenance of international peace and security, by affirming that 'peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being, and recognizing that development, peace and security and human rights are interlinked and mutually reinforcing' (General Assembly resolution 60/251, Human Rights Council (3 April 2006) UN Doc. A/RES/60/251).

change. For example, prospecting avenues for externally-imposed accountability, in the absence of a serious domestic process to this effect, may constitute a prospective material cost for the target state, which in turns may decide to comply in order to avoid the material damage implied in such form of inducement. Such is the logic of coercion, which seeks to alter the cost-benefit calculation of states in order to induce a behavioural change.

In conclusion, three are the main functions – or goals – of modern fact-finding missions and commissions of inquiry, namely providing avenues for accountability, mitigating situation of crisis by providing advice[31] and preventing (further) violence[32]. In the UN context, these objectives must be read in light of the institutional goals of the organisation, which include the maintenance of international peace and security and the promotion and protection of human rights as an essential component thereof.

1.3 Mandates of International Commissions of Inquiry: Some Common Traits

The mandates of international commissions of inquiry provide an explicit and clearly attributable operationalisation of the ultimate goals for which such mechanisms are established. They spell out how commissions of inquiry are expected to contribute concretely to the pursuit

[31] For example, UNHRC, Twenty-fifth session, Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea (7 February 2014) UN Doc A/HRC/25/CRP.1, para 1220(f), where the Commission stated that the Republic of Korea should 'Introduce education to ensure respect for human rights and fundamental freedoms. Abolish any propaganda or educational activities that espouse national, racial or political hatred or war propaganda'. The recommendation could be read as aiming not only to induce the Republic of Korea to amend their legislation so as to introduce educational programmes compatible with human rights, but also to influence educational boards and individuals in the field of education to propagate a human rights culture, although the legal responsibility to do so would ultimately lie with the state authorities.

[32] The preventive function often emerges from the combination of different recommendations. Generally, the halt to violence is expressed in imperative form such as in the case of the UNHRC, Eighteenth session, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Syrian Arab Republic (15 September 2011) UN Doc A/HRC/18/53, para 93(a), where the Mission recommended the Syrian government to 'Put an immediate end to gross human rights violations, including the excessive use of force against demonstrators and the killing of protestors, torture and ill-treatment of detainees and enforced disappearances, and halt all violations of economic, social and cultural right'. The recommendation to halt violence is often accompanied by a contextual recommendation that an international body or other actors monitor the situation so as to take action should the state authority fail to implement the first recommendation. For example, at para 94(c), the Mission to Syria 'Urge[d] the Security Council to remain seized of and to address, in the strongest terms, the killing of peaceful protestors and other civilians in the Syrian Arab Republic through the use of excessive force and other grave human right violations, to call for an immediate cessation of attacks against the civilian population, and to consider referring the situation in the Syrian Arab Republic to the International Criminal Court'.

of the ultimate goals of accountability, prevention and provision of technical advice. As explained in the preceding sub-section, Grace and Bruderlein have identified three main operational functions – or strategic goals – that human rights mechanisms regularly carry out: monitoring, reporting and fact-finding. I have argued that, to different extent, international commissions of inquiry pursue all three functions. Below I show how such operational goals are normally embedded in the mandates of international inquiries and how such inquiries, by carrying out these activities, contribute to the advancement of the ultimate goals of accountability, preventions and provision of technical advice.

Fact-finding

The most basic strategic objective – or operationalisation of the ultimate goals – of commissions of inquiry is said to be fact-finding, that is gathering or collecting facts, or, to be more precise, clarifying the factual circumstances of a specific event. The historical overview in Chapter I has shown that this goal was pursued in its 'pure' form only by early commissions of inquiry, although the clarification of facts was ultimately aimed at facilitating the settlement of international disputes by inducing the parties to acknowledge a certain account of the facts and act upon that reconstruction to set the record straight.[33] Nowadays, however, 'pure' fact-finding is rare. It is virtually almost always accompanied by other additional less neutral functions. Philip Alston and Sarah Knuckey note that 'the goals of [human rights fact-finding missions] are generally to: (1) ascertain facts about alleged human rights abuses, ideally through on-site visits; (2) determine state responsibility and perhaps also individual responsibility for violations of human rights; and (3) make recommendations as to reform and reparations'.[34] These tasks are pursued by most UN ad hoc human rights commissions of inquiry and fact-

[33] See also Butchard and Henderson (n 24) 13.
[34] Philip Alston and Sarah Knuckey, 'Introduction' in Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (OUP 2016) 5.

finding missions. The most recent Human Rights Council-sponsored fact-finding mission to Myanmar, for example, was entrusted with establishing the facts and circumstances of alleged human rights violations by military and security forces in Myanmar, with a view to ensuring accountability for perpetrators and justice for victims.[35] Similarly, an investigation mission to Libya was dispatched in 2014 to clarify the facts and circumstances surrounding alleged violations of international human rights law with a view to ensure accountability and to formulate recommendations on technical assistance, capacity-building and cooperation with the Government of Libya.[36]

However, the formulation of the mandate does not always clarify whether the commissions should indeed establish whether a violation of normative standards has been perpetrated. Reference to specific bodies of law in the mandates may create ambiguity as to the specific tasks that inquiries should carry out. For example, in 2000, a commission of inquiry was dispatched by the former UN Commission on Human Rights 'to gather and compile information on violations of human rights and acts which constitute grave breaches of international humanitarian law by the Israeli occupying Power in the occupied Palestinian territories'.[37] How should such formulation be interpreted? Are legal frames intended to provide commissioners with selection criteria or do they require that facts be not only clarified but also legally interpreted? Obviously, there is an inextricable link between facts and legal categories,[38] but to what extent this link should simply guide the selection of the relevant facts or also emerge at the reporting stage so that facts are not presented neutrally but in their legal dimension is not

[35] UNHRC, Thirty-fourth Session 27 February-24 March 2017 'Situation of Human Rights in Myanmar' (22 March 2017) UN Doc A/HRC/34/L.8/Rev.1.
[36] UNHRC Res 28/30 (7 April 2015) UN Doc A/HRC/RES/28/30.
[37] UNCHR, Report on the Fifth Special Session (17-19 October 2000) UN Doc E/CN.4/S-5/5, 4-7.
[38] See, for example, Théo Boutruche, 'Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice' (2011) 16(1) *JC&SL* 105, 110-112 who argues that there is an inextricable link between the activities of ascertaining and legally assessing facts; further, he argues that the selection of a legal lens by the mandating authority does not preclude the selection of other legal lenses by the commission (Théo Boutruche, 'Selecting and Applying Legal Lenses in Monitoring, Reporting and Fact-Finding Missions' (October 2013) HPCR Working Paper 9-13); see also Chapter I.

entirely clear. A virtuous approach would be that adopted by the Secretary-General in establishing the International Commission of Inquiry on Guinea. The mandate of the commission reads as follows: '[the Commission] shall (a) establish the facts; (b) qualify the crimes; (c) determine responsibilities and, where possible, identify those responsible; (d) make recommendations'.[39] By separating the activities of gathering and legally qualifying the facts, the Secretary-General pre-empted any criticism that could have been directed at the commission, had it interpreted its mandate as encompassing both the clarification and qualification of facts in the absence of a clear mandate to carry out both activities.

The type of accountability that commissions of inquiry seek to promote is also subject to further specification in the mandates, in either explicit or implicit form. The 2016 Commission of Inquiry on human rights in Burundi, for example, was mandated 'to identify alleged perpetrators of human rights violations and abuses in Burundi with a view to ensuring full accountability'.[40] In this case, the explicit reference to perpetrators indicates that the focus was clearly on individual liability. In other cases, either the absence of an explicit reference to individual responsibility or the reference to state authorities suggest that the main purpose should be the promotion of state responsibility, as in the case of the Committee of independent experts to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side. The Committee was clearly mandated to assess the responsibility of the State of Israel and the Palestinian Authorities.[41] In some cases, accountability may not even be mentioned in the mandate, but be inferred from it by the commissioners. For example, the International fact-finding mission on the incident involving the Gaza flotilla, established by the UN Human Rights Council, was only mandated 'to

[39] UNSC 'Annex to the letter dated 28 October 2009 from the Secretary-General addressed to the President of the Security Council. Terms of reference for the Commission of Inquiry for Guinea' (29 October 2009) in UN Doc S/2009/556.
[40] UNHRC Res 33/24 (5 October 2016) UN Doc A/HRC/RES/33/24.
[41] UNHRC Res 13/9 (14 April 2010) UN Doc A/HRC/RES/13/9 and 15/6 (6 October 2010) UN Doc A/HRC/RES/15/6.

investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance'.[42] Nonetheless, in its final report, the Mission discussed, albeit briefly, issues of accountability.[43] While it may not constitute a too great departure from the terms of the mandate, it may be reasonably argued that considering issues of accountability in the absence of clear directions to do so may amount to exceeding the mandate itself and could thus hamper the legitimacy of the inquiry mechanism.

Reporting

As shown above, Grace and Bruderlein argue that

> reporting entails addressing specific ongoing incidents of international law violations. … actors engaging in reporting work in an advisory capacity to endeavour to convince alleged perpetrators to alter their behaviour [and] advocate for specific steps that can be taken by their … mission, by members of the local and international communities and by the investigative targets themselves to address ongoing incidents and mitigate the likelihood of future incidents.[44]

Reporting is often associated with, and proceeds from, either fact-finding or monitoring, in that data collected through either activity is then organised into a final report. In fact, all commissions of inquiry are mandated not only to monitor or fact-find but also to produce a final report. Moreover, mandate-givers often require international inquiries to recommend specific actions to be taken. The mandate generally specifies whether the recommendations requested by the parent institution should be forward- or backward-looking, depending on whether the purpose of the specific mission is to tackle past abuses or to suggest how to prevent future violations.[45] For example, the High Commissioner for Human Rights mission to Western Sahara

[42] UNHRC Res 14/1 (23 June 2010) UN Doc A/HRC/RES/14/1.
[43] UNHRC, Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance (27 September 2010) UN Doc A/HRC/15/21, paras 258-259.
[44] Grace and Bruderlein (n 27) 12.
[45] However, see Butchard and Henderson (n 24) 27 who argue that 'the *scope* and *addressees* of recommendations made by inquiries is also often determined by the inquiry itself rather than the mandate that establishes it'.

and refugee camps in Tindouf had to 'make recommendations on how to assist the concerned parties to improve the promotion and protection of human rights of the people of Western Sahara',[46] thus proposing how to improve the human rights situation on the ground, rather than simply tackling past abuses.

Monitoring

According to the Office of the High Commissioner for Human Rights, the term monitoring is broad and generally describes 'the *active collection, verification and immediate use* of information to address human rights problems' of which fact-finding is but an example.[47] A more specific idea of what monitoring means in the context of international inquiries may be gathered from Grace and Bruderlein, who aver that 'monitoring entails examining contextual information in search of patterns that indicate the potential perpetration of international law violations'.[48] While this type of activity is normally carried out while violations are still taking place or might take place in the imminent future in order to ensure that effective preventive action is taken, international commissions of inquiry do engage with monitoring mostly to determine whether human rights or humanitarian law violations are carried out systematically. Information gathered through monitoring might inform both accountability-driven and advisory recommendations. Such advisory recommendations are generally oriented towards avoiding future incidents or situations of a similar nature as those under scrutiny and may entail a wide range of domestic actions, from abrogating specific legal regimes to implementing international standards by, for example, introducing specific institutional arrangements. For example, in 2006, the UN Secretary General decided to dispatch a human rights team to 'conduct a mapping exercise of the most serious violations of human rights and international humanitarian law

[46] United Nations library at <http://libraryresources.unog.ch/c.php?g=462695&p=3162785#21493185> accessed 20 July 2017.
[47] UNOHCHR, *Training Manual on Human Rights Monitoring* (Professional Training Series No 7; United Nations 2001) 9.
[48] Grace and Bruderlein (n 27) 11.

committed within the territory of the [Democratic Republic of the Congo] between March 1993 and June 2003' with a view to assessing the capacity of the domestic justice system to tackle such violations and to advising the Government about effective transitional justice arrangements.[49] The Independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem was also entrusted with a predominantly monitoring mandate, which resulted in a final report submitted to the Human Rights Council.[50] As explained in Chapter V, the Mission formulated several recommendations to advise foreign governments and private actors how to ensure that their actions would not assist in the perpetuation of the Israeli settlement enterprise.

According to Perrow's distinction between official and operative goals,[51] those identified by Grace and Bruderlein may be classified as operative goals. They set out *how* commissions of inquiry are expected to operate, that is, what operational steps they are expected to take. Furthermore, following Shany's model, we can also describe these goals as strategic to the achievement of the ultimate ends of the fact-finding process, mostly externally imposed by the mandating authorities and generally explicitly stated in the mandates. However, one cannot overlook the complications that may emerge from their partially vague formulation. Inevitably, some of the goals mentioned will need further specification or interpretation by the commissioners. The example of the High Commissioner for Human Rights mission to Western Sahara is explanatory of this dynamic. How should the expression 'assist the concerned parties

[49] UNSC, Twenty-first report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo (13 June 2006) UN Doc S/2006/390, para 54.
[50] UNHRC, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan, Res No 19/17 (10 April 2012) UN Doc A/HRC/RES/19/17.
[51] It is worth recalling Perrow's description of operative goals: 'Operative goals designate the ends sought through the actual operating policies of the organization; they tell us what the organization actually is trying to do, regardless of what the official goals say are the aims. Where operative goals provide the specific content of official goals they reflect choices among competing values. They may be justified on the basis of an official goal, even though they may subvert another official goal. In one sense they are means to official goals, but since the latter are vague or of high abstraction, the "means" become ends in themselves when the organization is the object of analysis' (Perrow (n 10) 855).

to improve the promotion and protection of human rights' be understood? Should the commissioner privilege redress or reconciliation, reparatory or pre-emptive action? Questions of the sort need to be clarified by the fact-finders by also weighing context-specific demands. In turn, this adds at least two levels of complication. First, some goals may be further operationalised implicitly or in an unstated form by the commissioners, which may pose problems of transparency. Second, the source of the new operationalised goals may shift from the internal restricted circle of the commissioners to the external, potentially vast, community of people directly affected by the investigation.

1.4 Interpretation of Mandates and Self-Imposed Goals

Valuable sources for understanding the role of commissions of inquiry are the words of fact-finders themselves. How they interpret their mandate, what they expect to accomplish and how they weigh in the needs of communities, victims, and states can shed light on the link between the operative goals in the mandates, sometimes formulated in still vague terms, and the ultimate goals of commissions of inquiry. Moreover, fact-finders represent a constituency internal to international inquiries and, as posited by Shany in his classification of organisational goals, they contribute to defining such goals. Their hermeneutical function at this stage constitutes also an important bridge between the overarching institutional aims of the commissions and the expectations that the prospective inquiry process engenders in the affected communities. Generalisations are inappropriate when it comes to the interpretation of the mandates, precisely because this operation is fundamentally case-specific. However, there are some recurring elements in the interpretive operation conducted by fact-finders. More generally, this shows that, very much like in other contexts such as international criminal justice,[52] internal

[52] See, for example, Mirjan Damaška, 'What is the Point of International Criminal Justice?' (2008) 83 *Chi-Kent L Rev* 329, 331.

constituencies can manipulate, to a certain extent, their institutional setting by pursuing collateral goals originally unforeseen by the mandating authorities.[53]

For example, one such self-imposed goal is pursued through witnesses and victims' interviews, one of the most common means to gather facts about human rights abuses. Such interviews may produce positive externalities for communities affected by violence by providing a space for victims to voice their stories.[54] Both the Commission of Experts on the Former Yugoslavia and the Fact-Finding Mission on the 2008-2009 Gaza Conflict have acknowledged the importance of testimonies for victims.[55] In addition, the Goldstone Commission has set up *public* hearings '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. The Mission is of the view that no written word can replace the voice of victims'.[56] In this way, not only does the hearing serve as a cathartic moment for victims of human rights, but also testimonies reach the investigators and, sometimes, the wider public relatively unfiltered.

The way in which fact-finders have understood their role points also to a collateral truth-seeking function. This may assist both the subsequent accountability process and the construction of a historical record. However, bearing in mind the time constraints in which

[53] While these goals may be originally unforeseen or, perhaps, unspecified by the parent body, as a matter of principle, they should not be at odds with the original mandate, lest the commission itself risks losing legitimacy and credibility in the face of states or other international actors.

[54] Catherine Harwood, 'Contribution of international commissions of inquiry to transitional justice' (2016) Grotius Centre Working Paper 2016/054-ICL, 11-12 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795971> accessed 21 July 2017; Théo Boutruche, 'The Relationship between Fact-Finders and Witnesses in Human Rights Fact-Finding: What Place for the Victims?' in Alston and Knuckey (n 31) 131, 142-143.

[55] 'Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)' Annex to UNSC 'Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council' (27 May 1994) UN Doc S/1994/674, 82, which states that 'the mere fact that a United Nations body tangibly expressed its concern for them was comforting and uplifting. Almost all interviewees expressed their appreciation to the interviewers in the warmest ways. If nothing else, this unique investigation brought some human comfort and support to these victims'; UNHRC, Twelfth session, Human Rights in Palestine and Other Occupied Arab Territories. Report of the United Nations Fact-Finding Mission on the Gaza Conflict (25 September 2009) UN Doc A/HRC/12/48, 44, (hereinafter the 'Goldstone Report') which states that 'The Mission received expressions of gratitude from participants, as well as members of the affected communities, for having provided an opportunity to speak publicly of their experiences'.

[56] Goldstone Report (ibid).

commissions of inquiry have to operate and their procedural limitations, this function cannot be overplayed.[57] Several commissions have underscored that their investigations, while not being all-encompassing, constitutes a representation of the main patterns of violence. The Goldstone Commission, for example, pointed out that while 'the report does not purport to be exhaustive …. [it] is illustrative of the main patterns of violations'.[58] Similarly, the International Commission of Inquiry on Libya remarked that while 'the report does not purport to be exhaustive …. [it] is illustrative of the main patterns of violations'.[59] The Commission of Inquiry on human rights in the Democratic People's Republic of Korea underlined the importance of its work for the creation of 'an archive of the testimony of individual witnesses on human rights abuses'.[60] Often murky remains the way in which fact-finders select the relevant episodes and thus their representativeness of the main patterns of violations.[61]

To conclude, I provide below a table that summarises the above discussions by situating the goals of international commissions of inquiry according to their abstraction hierarchy. The side arrows show how each goal level is instrumental to the pursuit of the goals provided in the levels above.

[57] Harwood (n 54) 12-13.
[58] Goldstone Report (n 55) para 157.
[59] UNHRC, Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya (12 January 2012) UN Doc A/HRC/17/44, para 5.
[60] UNHRC, Twenty-fifth session, Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea (7 February 2014) UN Doc A/HRC/25/CRP.1, para 84.
[61] Grace (n 20) 36-39.

Table 1. *A hierarchical representation of the goals of international inquiries*

<table>
<tr><td rowspan="2">Ultimate Goals</td><td colspan="3">State socialisation (regime goal)</td></tr>
<tr><td>Prevention</td><td>Advice (with a view to mitigation)</td><td>Accountability</td></tr>
<tr><td>Strategic Goals</td><td colspan="2">Mandate-dependant – set by external constituency, ie parent body, often in stated form</td><td>BUT generally:
• Fact-finding
• Reporting
• Monitoring</td></tr>
<tr><td>Self-Imposed Goals</td><td colspan="3">Context-dependant (eg, truth-seeking, narrating history, etc) – set by internal constituency, ie commissioners in stated or unstated form</td></tr>
</table>

2. Effectiveness Strategies

As explained in Chapter II, if we appraise effectiveness from a purely legalistic, compliance-based, viewpoint, we run the risk of overlooking some important domestic changes that, despite falling short of compliance, may be indicators of effectiveness or, more generally, positive impact of international inquiries. Indeed, processes of state socialisation rarely take place in a short time-span, which means that in order to assess the short-term effectiveness of certain institutional mechanisms we need to look beyond the mere indicator of compliance. Moreover, as explained in Chapters I and II, restricting the analysis to commissions of inquiry only would likely either yield poor results or risk confounding causal factors. The non-judicial nature of international inquiries, the facts that they lack enforcement powers and that there is no uniform set of binding procedural rules and standards make their effectiveness partly dependent on the initiative of other domestic or international actors. If we overlook the synergistic aspect of inquiry processes, we may end up easily attributing negative results to commissions of inquiry, implicitly attaching unrealistic expectations to these tools.

However, if we define effectiveness as the measure of a process of change oriented towards the goals of the institutional mechanism whose effectiveness we aim to measure, we may be able to capture effects that a static definition of effectiveness may not be able to detect because they would not amount to a correspondence between the results obtained and the pre-determined goals of the organisation.[62] Similarly, as we consider effectiveness in its dynamic dimension, we cannot reduce international inquiries to their reports and findings. These are only the result of a complex epistemological process which combines procedural and substantial elements. International inquiries are much more than simply reporting the facts found and their legal implications. The conclusions formulated by fact-finders stem from both argumentative strategies as regards, for example, how to interpret the evidence gathered or how a legal standard should be applied in a specific context and the methodology employed to gather the elements on which those argumentative strategies are based. For example, in order to gather information or secure access to information, inquiries repeatedly interact with state and non-state authorities, civil society organisations, the local press and other actors on the ground. Forms of interaction include information feeding, generally triggered by calls for inputs published by commissions of inquiry, requests for cooperation or access to sites, informal meetings with state and non-state authorities, correspondence, public hearings with victims or witnesses and others. Quite obviously, the way in which these interactions are carried out – for example, by consulting only certain actors to the exclusion of others – is going to affect the inferential value of the information collected and, consequently, the confidence with which the final finding can be formulated. But the choice to consult certain actors may also be determined by strategic considerations. For example, a commission of inquiry may decide to rely – albeit not exclusively – on information provided by civil society organisations, as long as they are credible and reliable, which in turn may legitimise fact-finding activities carried out by those

[62] See Chapter II, pp 67-71.

organisations within the domestic forum, thus bolstering domestic bottom-up influence processes.

The use of specific linguistic frames itself may be guided by strategic considerations and not necessarily respond to strict inferential logic. This can be observed, for example, with reference to the use of international criminal law language by commissions of inquiry. Inferences about war crimes or crimes against humanity may be guided not so much by a thorough examination of the evidence collected as by the need to stigmatise actors. On the one hand, this may detract from the legitimacy of the finding and, hence, from its fairness but, on the other, it may also succeed in damaging the reputation of the targeted actor and, in turn, drive them to reconsider their practices or to take remedial action.

A static understanding of commissions of inquiry cannot capture the issues outlined above. Only by appraising inquiry processes in their dynamic unfolding and by considering the strategies underpinning their inferential reasoning as well as their investigative and argumentative choices can we hope to provide a better account of their effectiveness. The fundamental question that underlies these considerations is, how do international commissions of inquiry purport to influence states? As I have hinted at in the preceding section, international relations theories on the mechanisms of social influence may provide a better account for the impact directly engendered by the inquiry process and facilitate a more comprehensive understanding of the interaction between the process itself and the final output, the report, as well as the impact of the language used by commissions of inquiry. Previous international legal scholarship has drawn extensively on these theories to explain why states obey (or not) international law. Coercion, persuasion and acculturation are the three main mechanisms identified by the relevant scholarship for explaining how international legal regimes seek to catalyse state action. These are normally evoked synergistically, that is, they ‘reinforce each

other through a dynamic relationship among them that is sacrificed when a regime emphasizes one mechanism to the exclusion of others' as Ryan Goodman and Derek Jinks note.[63]

Goodman and Jinks dissect these mechanisms with a view to suggesting better regime design. They borrow Stephen D Krasner's definition of international regimes as 'principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area'.[64] Furthermore, they define the global promotion of human rights as a discrete international regime with distinctive features. They posit that 1) states retain much of the capacity to promote human rights domestically; 2) states have generally little interest in contributing to the promotion and protection of human rights abroad; and 3) many states simply do not care about promotion and protection of human rights domestically and they violate them whenever it is convenient to do so.[65] Against this backdrop, human rights emerge as essentially a domestic matter. Thus, international human rights institutions seek 'to hold governments accountable for purely internal activities'.[66] Whether this fundamentally realist understanding of human rights regimes is accurate or not, it is clear that, despite the burgeoning of international treaties and instruments, human rights remain an essentially domestic matter, which international norms seek to constrain within certain boundaries. International commissions of inquiry form active part of that international human rights law regime that seeks to influence domestic actors to promote and protect human rights.[67] As such, their action can be read through

[63] Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54(3) *Duke LJ* 621, 627.
[64] Stephen D Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' (1982) 36(2) *Int'l Org* 185, 185; ibid 621.
[65] Goodman and Jinks (ibid) 628-629.
[66] Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *Int'l Org* 217, 217.
[67] The functional analysis conducted in the previous sections shows that international commissions of inquiry, in addition to pursuing goals such as accountability and prevention, also seek to influence state practice by, for example, shaming actors (see, for example, Pascal Vennesson, 'War under transnational surveillance: framing ambiguity and the politics of shame' (2014) 40 *Rev Int Stud* 25. His analysis, while focusing on the 'name and shame' strategy used by Human Rights Watch, an international non-governmental organisation, as a form of coercion, can similarly be applied to commissions of inquiry. As a matter of fact, these adopt very similar frames – in the article, international humanitarian law – to those employed by Human Rights Watch in order to qualify the facts documented) or persuading them (see, for example, Jawoon Kim and Alan Bloomfield, 'Argumentation, Impact, and Normative Change: Responsibility to Protect after the Commission of Inquiry Report into Human

the lenses of social influence mechanisms. In this sense, coercion, persuasion and acculturation constitute typological as well as interpretive categories that can assist us to unpack inquiry processes and language and to assess the impact of international commissions of inquiry on domestic actors.

At the same time, this analysis would not be complete without accounting also for those factors that constitute the preconditions for effective influence mechanisms. Why should a state agree to heed the pronouncements of a commission of inquiry or even engage with it? This is essentially a question of legitimacy. Several scholars have posited that a state may be persuaded to accept the decision of an institution because it regards the decision-making process as legitimate. According to legitimacy theories, the findings and recommendations of international inquiries would be more likely to be accepted in so far as the inquiry process could be seen as legitimate. In this sense, legitimacy provides the inquiry mechanism with authoritativeness and maximise domestic compliance with its determinations and, more generally, effectiveness. Furthermore, on closer inspection, one may argue that legitimacy does not simply constitute a pre-condition for the efficacy of social influence mechanisms, but it may also explain in and of itself why a state would accept the findings of an international inquiry, even when they are averse to it. In sum, legitimacy provides a fourth hermeneutical explanation for the (in-)ability of commissions of inquiry to influence domestic constituencies.[68]

In this section, I provide an overview of the above four explanations of state's compliance with international law and I formulate some hypothetical claims to explain how commissions of inquiry themselves recur to argumentative strategies that draw on these mechanisms. First, I

Rights in North Korea' (2017) 9 *GR2P* 173, which analyses the argumentative impact of the Report of the Commission of Inquiry on human rights in the Democratic People's Republic of Korea on the entrenchment of the international responsibility to protect norm as a form of incomplete persuasion or, perhaps, acculturation).

[68] This idea is drawn from the legal process theory of international law (liberalism), which posits that international law identifies with the entire decision-making process and not simply with the impartial application of legal norms. See, in particular, David Armstrong, Theo Farrell and Hélène Lambert, *International Law and International Relations* (2nd edn; CUP 2012) 92-97.

show how procedural quality control is an essential pre-condition for the effectiveness of socialisation strategies and how procedural fairness may itself constitute a compliance pull. Second, I seek to highlight how strategy choices are tied to the goals pursued, while at the same time showing the potential risks of combining non-homogeneous strategies. Third, and throughout this entire section, I highlight the role of language as the main expressive means through which commissions of inquiry engage states and other actors by, at the same time, warning about the risks implied in the use of overly technical – especially, legalistic – categories. I substantiate my theoretical claims by employing examples that may signal the use of specific strategies and further formulate a set of empirical propositions that guide the subsequent empirical analysis.

2.1 The Procedural Fairness Model

One of the explanation for why people obey the law is that they feel 'that the authority enforcing the law has the right to dictate behavior'.[69] Such right is said to depend on a number of factors such as the independence and impartiality of the authority entrusted with enforcement powers, the rules that govern its activities, the formulation of its terms of reference, the formulation of its mandate and the use that it makes of their final product. All these elements merge into the notion of *due process*, which in turn informs procedural fairness. In rational-legal systems of authority,[70] procedural fairness, jointly with substantive fairness, has been devised to explain why individuals obey the law and therefore determines the legitimacy of the system, rule or mechanism. Thomas M Franck has explained legitimacy as one of the two components of fairness, the other being distributive justice. In his construction, legitimacy corresponds to procedural fairness and is defined as that attribute of a rule that makes it fair in the eyes of the end users of the system because it has been applied according to the right

[69] Tom Tyler, *Why People Obey the Law* (Princeton University Press 2006) 3-4.
[70] Max Weber, 'The Three Types of Legitimate Rule' (Hans Gerth tr, 1958) 4(1) *Berkeley publications in society and institutions* 1.

process.[71] Franck has usefully underscored the significance of legitimacy and linked it to the effectiveness of a legal system in the following terms: 'to be effective, the system must be *seen* to be effective. To be seen as effective, its decisions must be arrived at discursively in accordance with what is accepted by the parties as *right process*'.[72] This means that procedural fairness is a pre-condition for the effectiveness of a system, because it guarantees that the output of the process is not tainted by extra-systemic elements, such as personal bias or interests. The idea of legitimacy as procedural fairness can be related to a vast stream of scholarship that identifies the final user of the system as the one who decides whether justice has been made or not.[73] Legitimacy is thus defined as 'the property that a rule or an authority has when others feel obligated to defer voluntarily'.[74]

From this perspective, legitimacy stems as both an essential pre-condition for any legal and social influence mechanism to work and as an influence mechanism itself. This is even more so for commissions of inquiry whose determinations do not enjoy the finality that international law confers upon international courts' judgments.[75] Coercion, persuasion, and acculturation as exercised by fact-finding missions also rest on the assumption that the influencer – the fact-finding mission – is regarded as legitimate by the targeted individual(s) or state(s). At the same

[71] Thomas M Franck, *Fairness in International Law and Institutions* (OUP 1995) 26.
[72] Ibid 7; procedures emerge as crucial to legitimacy also in the writings of Niklas Luhmann, *Procedimenti giuridici e legittimazione sociale* (Alberto Febbrajo tr, Giuffré 1995).
[73] Jeremy Bentham, 'Principles of Judicial Procedure, with the Outlines of a Procedure Code', in John Bowring (ed), *The Works of Jeremy Bentham, Published under the Superintendence of his Executor, John Bowring* (William Tait 1838-1843), Vol II, Ch 2, 11-15; J H Burns and H L A Hart, *An Introduction to the Principles of Morals and Legislation: The Collected Works of Jeremy Bentham* (OUP 1970); F Rosen, 'Utilitarianism and justice: a note on Bentham and Godwin' in B Parckh (ed), *Jeremy Bentham: Critical Assessments* 3-8 (Routledge 1993); H P Young, *Equity in Theory and Practice* (Princeton University Press 1994); Vicky De Mesmaecker, *Perceptions of Criminal Justice* (Routledge 2014) 5-7.
[74] Tom R Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 *Crime & Just* 283, 307; similarly, see Franck (n 71) 26, where the author claims that 'Legitimacy can only be accorded to rules and institutions, or to claims of right and obligation, in the circumstance of an existing community. It is only by reference to a community's evolving standards of what constitutes right process that it is possible to assert meaningfully that a law, or an executive order, or a court's judgment, or a citizen's claim on a compatriot, or a government's claim on a citizen, is *legitimate*. When it is asserted that a rule or its application is legitimate, two things are implied: that it is a rule made or applied in accordance with right process, and *therefore* that it ought to promote voluntary compliance by those to whom it is addressed. It is deserving validation'.
[75] Thomas M Franck and H Scott Fairley, 'Procedural Due Process in Human Rights Fact-Finding by International Agencies' (1980) 74(2) *AJIL* 308, 309-311.

time, states may independently abide by a commission of inquiry's determination simply because the inquiry process has been conducted in a manner which guarantees its fairness. Furthermore, this presupposes a double level of legitimacy. First, each inquiry must be legitimately dispatched (generative stage). Second, each commission must be seen to be working legitimately (operative stage).

Drawing on the existing scholarship, Thomas M Franck and H Scott Fairley argued that there are 'five key indicators of procedural probity: (1) choice of subject, (2) choice of fact finders, (3) terms of reference, (4) procedures for investigation, and (5) utilization of product'.[76] The first three indicators pertain to the generative stage of any inquiry. They influence the external perception of the choice to establish the investigative mechanism and, should they conceal a bias, are liable to undermine the entire investigation. Conversely, the last two indicators are concerned with the operative stage of any inquiry and influence the external perception of the *modus operandi* of the commission, that is, the way the evidence is collected, and the facts established and reported. Should such indicators be perceived as unfair, they are liable to jeopardise the final output of the inquest or may uncover a pre-existing bias.

For the empirical analysis, these indicators must be taken into account insofar as they are capable of strengthening or weakening the strategies employed by commissions of inquiry to induce change at the state level or to directly determine such change simply by reason of the authoritativeness that they confer upon commissions of inquiry. In the following sub-sections, I discuss these indicators in more detail, focusing in particular on their potential impact on the investigations.

[76] Ibid 311.

2.1.1 Choice of Subject

The UN Declaration on Fact-Finding, arguably the most authoritative official document on fact-finding that comes close to a code of practice,[77] lays down a number of procedural criteria that should guide the decision to establish international inquiries.[78] The prime criterion that the UN organs should consider in deciding whether to dispatch a commission of inquiry should be whether the situation to be investigated falls within their remit, that is, whether it is their responsibility to address that situation within the general UN mandate to preserve international peace and security and, for the UN Secretary-General only, to prevent disputes and situations. Both the Security Council and the General Assembly may delegate their subsidiary bodies to undertake fact-finding missions, but preference is assigned to the Secretary-General who, being an administrative office, is in the best position to carry out inquiries expeditiously.[79]

Besides these skeletal directions, the text of the Declaration remains silent as to how the subject of the investigation should be chosen. So does a recent publication of the UN Office of the High Commissioner for Human Rights (OHCHR) on commissions of inquiry and fact-finding missions in the field of human rights and humanitarian law.[80] It has been pointed out, however, that (mis-)using commissions of inquiry to address only certain situations over others that may display a similar pattern of human rights violations could hinder their credibility and legitimacy.[81] In other words, while the parent body should be primarily concerned with situations where systematic or grave violations of human rights or humanitarian law have

[77] On the legal effect of UNGA declarations, see Bruno Simma (ed), *The Charter of the United Nations. A Commentary. Volume I* (2nd edn, OUP 2002) 268-274. The author maintains that while non-binding, 'GA declarations convey strong indications of elements of the international *ordre public*. They have been ascribed such "authority" as to function as a starting point, frame, and scheme for discussing and establishing certain rules of customary international law'. Note that the UN Declaration on Fact-Finding does not have binding effect and only constitutes a set of policy recommendations for the UN organs (Axel Berg, 'The 1991 Declaration on Fact-Finding by the United Nations' (1993) 4(1) *EJIL* 107, 113).
[78] Declaration on Fact-Finding, Part II.
[79] Berg (n 77) 110.
[80] OHCHR, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law. Guidance and Practice* (2015) 12-13 (hereinafter the 'UN Guidance and Practice').
[81] Franck and Fairley (n 75) 311-312.

allegedly been committed, it should also convey the idea that the deployment of international inquiries responds to an established 'normativeness' of the human rights regime. That is, systematic or grave violations of human rights and humanitarian law should be investigated everywhere in the world. Targeting repeatedly the same countries or group of countries may fuel the idea that fact-finding is only intended to perpetuate a political prejudice about those countries.[82]

That is not to say that rigid distributive criteria for the establishment of commissions of inquiry should be applied.[83] However, avoiding selectivity by favouring routine scrutiny of state practice vis-à-vis human rights or the conduct of hostilities is likely to enhance the credibility and legitimacy of international inquiries. Conversely, a body whose decisions are predominantly targeted at specific states, within a larger pool of candidate states that may well be investigated for similar or worse allegations, is likely to be regarded as politically biased. In turn, this is likely to trigger non-cooperation with such a body or with the mechanisms established by it, rejection of its determinations and discursive or argumentative backlash against it.

2.1.2 Choice of Fact-Finders

According to Paragraph 25 of the UN Declaration on Fact-Finding:

> Fact-finding missions have an obligation to act in strict conformity with their mandate and perform their task in an impartial way. Their members have an obligation not to seek or receive instructions from any Government or from any authority other than the competent United Nations organ. They should keep the information acquired in discharging their mandate confidential even after the mission has fulfilled its task.

[82] A problem all too well known to both the UN Human Rights Council and the ICC (see, for example, Margaret M deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33 *Mich J Int'l L* 265).

[83] For example, Franck and Fairley (n 75) 312 argue that applying the UN principle of "geographical distribution" would likely be a step too far and may run counter to the function of commissions of inquiry, that is to address situations that threaten international peace and security.

While this provision is meant to regulate how commissions of inquiry work, it clearly sets out some requirements that fact-finders should possess in order to be appointed as such. These are impartiality, independence and confidentiality. The OHCHR Guidance and Practice builds on this limited list by adding further general criteria such as personal integrity and moral standing, competence on the subject to be investigated, knowledge of fact-finding standards and principles, previous experience, and commitment to human rights. It also adds criteria that are specific to each situation to be investigated such as language skills, public visibility, and physical suitability.[84]

Franck and Fairley argued that fact-finders should be 'distinguished individuals who have made no prior assumption about the matters to be investigated and come from countries with no direct stake in the outcome'.[85] It is clear that the standards applicable to fact-finders are aimed at preventing the consolidation within the investigative group of pre-conceived positions as regards the situation under investigation and the politicisation of the fact-finding exercise caused by the interference of governments. Moreover, professional standards such as competence, knowledge and prior experience are aimed at ensuring that the investigation is conducted in a reliable and accurate manner. While the appointment of commissioners who possess these standards is likely to prompt cooperation and acceptance of the final report as well as domestic use of or follow-up to the findings and recommendations of the commission, their absence may, conversely, trigger non-cooperation, rejection of the report of the commission, personal attacks against the professionalism of individual fact-finders and backlash against the parent organisation.

[84] UN Guidance and Practice (n 80) 19-20.
[85] Franck and Fairley (n 75) 314.

2.1.3 Mandate and Terms of Reference

Paragraph 17 of the UN Declaration on Fact-Finding states that 'The decision by the competent United Nations organs to undertake fact-finding should always contain a clear mandate for the fact-finding mission and precise requirements to be met by its report'. While Paragraph 17 only stresses the importance of *clarity* and *precision* in the drafting of the mandate, a systematic reading of the Declaration shows that the terms of reference should also be drafted in an *impartial* and *objective* way (Paragraphs 3 and 25). The OHCHR Guidance and Practice further specifies that mandates should be drafted 'in such a way as to enable the commission/mission to conduct its work in line with best practice methodology, without *prejudging* any aspects of its work'.[86]

The use of conclusive language or the insistence that only one of the parties involved in the situation under scrutiny be investigated is likely to undermine the integrity of the fact-finding process and violate 'the essential line between political assumptions and issues to be impartially determined'.[87]

The Goldstone Commission, for example, was criticised *inter alia* because its original mandate provided for the investigation of 'the occupying Power, Israel' only.[88] In response to the Chair's concerns, the President of the Human Rights Council informally amended the mandate so as to entrust the Commission with investigating 'all violations of international human rights law and international humanitarian law that might have been committed at any

[86] UN Guidance and Practice (n 80) 10.
[87] Franck and Fairley (n 75) 316.
[88] See UNHRC, Ninth Special Session 9-12 January 2009, 'The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip' (12 January 2009) UN Doc A/HRC/S-9/L.1, which read at its Paragraph 14 '*Decides* to dispatch an urgent, independent international 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'. For a critique of the mandate of the Commission, see Laurie R Blank, 'The Application of IHL in the Goldstone Report: A Critical Commentary' (2009) 12 *YIHL* 347, 350.

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'.[89] Kevin Jon Heller infers that the mandate of the International Commission of Inquiry on Libya was blatantly biased from the fact that Resolution S-15/1,[90] which established the Commission, not only employed strong condemnatory language against the Libyan government, but also did not even consider the possibility that the *thuwar* could be responsible for human rights violations.[91]

However, the formulation of mandates often in general terms requires fact-finders to interpret them in order to (further) determine the geographical, temporal, and subject-matter scope of the investigation as well as the actors that should be investigated.[92] Thus, they retain the power to adjust mandates that exhibit a questionable formulation.[93] Yet, in such a case, it remains doubtful whether the fact-finders' adjustment is sufficient to remove the stain caused by a mandate that unveils the political motivations or bias of the parent body. A biased mandate is likely to generate suspicions that the parent organisation is politically biased and, therefore, trigger the same rejection mechanisms described above. In addition, the selection of specific terms of reference may offer opportunities for stronger counter-arguments. It may be reasonably argued that the vaguer the legal frames selected are, the more opportunities for legal contestation arise.

[89] This version of the mandate is available on the public website of the Goldstone Commission at <http://www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Session9/Pages/FactFindingMission.aspx> accessed 11 September 2017.
[90] UNHRC, Fifteenth special session 25 February 2011, 'Situation of human rights in the Libyan Arab Jamahiriya' (3 March 2011) UN Doc A/HRC/RES/S-15/1.
[91] Kevin Jon Heller, 'The International Commission of Inquiry on Libya: A Critical Analysis' (2012) in Jens Meierhenrich (ed), *International Commissions: The Role of Commissions of Inquiry in the Investigation of International Crimes* (OUP forthcoming) 8-10, at SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2123782> accessed 11 September 2017.
[92] UN Guidance and Practice (n 80) 36-37.
[93] See, for example, Heller (n 91) 10 as regards the Commission's interpretation of its mandate.

2.1.4 Procedures for Investigation

The credibility of a commission of inquiry's findings rests mainly on a slim assumption of fairness of the fact-finding process. To maintain this credibility, commissions of inquiry have to implement 'sound and elaborated'[94] rules of procedure for the conduct of the investigation. Franck and Fairley argue that clear procedural rules are not the only determinant of the reliability of the inquiry, but are also capable of eliciting the cooperation of the target state(s).[95] Indeed, it is not a coincidence that, recently, several attempts have been made to lay down a model code of procedure and evidence for fact-finding missions.[96] The meaning of 'sound and elaborated' rules of procedure is certainly debatable. The OHCHR Guidance and Practice sets out a number of core principles that should underpin any fact-finding process.

The general rule is that commissions of inquiry should abide by high methodological standards in order to ensure that they are able to withstand the scrutiny of alleged perpetrators. In addition, fact-finders should be chiefly concerned with the protection of victims and witnesses and the integrity of all the sources of information pursuant to the 'do no harm' principle.[97] These components display both an internal and an external dimension. Internally, they function as criteria that should guide the investigators in carrying out their tasks. Externally, they justify the reaching of certain findings to the users of the final report. For the purposes of this study, we are less concerned with the internal use of procedural rules than with the perception that external stakeholders form of those same rules.

Hence, the foremost rule for any inquiry dictates that they should strive to guarantee the utmost level of *transparency* in order to both allow external users to assess the final output of

[94] Theo Boutruche, 'Credible Fact-Finding and Allegations …' (n 38) 106-107.
[95] Franck and Fairley (n 75) 317.
[96] Harvard Humanitarian Initiative, Program on Humanitarian Policy and Conflict Research, 'HPCR Advanced Practitioner's Handbook on Commissions of Inquiry: Monitoring, Reporting, and Fact-Finding' (2015); M Cherif Bassiouni and Christina Abraham (eds), *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies* (Intersentia 2013); UN Guidance and Practice (n 80).
[97] UN Guidance and Practice (ibid) 36.

the investigation and defuse as much as possible criticisms directed at the findings. Transparency is however limited by the overriding interest to security of victims, witnesses, other sources of information and staff.[98]

In the first place, investigators should explain the criteria that guided their inquiry, including but not limited to, the identification of the issues to be investigated and any prioritisation criterion adopted.[99] Fact-finding should be explicit about the sources of information while at the same time seeking to diversify as much as possible those sources (victims and witnesses, alleged perpetrators, satellite images, official documents, expert opinions, videos, photographs, and open sources including social media).[100] Fact-finders should always assess overtly the validity and reliability of the source.[101] Furthermore, commissions of inquiry should be clear about the methods employed to extract information and should endeavour to implement the highest professional standards in the information gathering process. Interviews, for example, should be conducted while bearing in mind the safety of the interviewees. The Commission should assess whether it would be appropriate to carry them out in private and should always seek the prior informed consent of the interviewees. Commissioners should always refrain from influencing the interviewee by asking preferably open-ended questions. They should always attempt to corroborate the information collected through interviews, for example with field and site visits.[102] Failure to employ sound rules of evidence is likely to engender contestation of the specific findings or conclusions reached. Moreover, if coupled with other structural or procedural features of international inquiries that might engender suspicions of partiality or political bias, such failure is likely to reinforce the idea that the commission is biased towards the investigated party. Lack of clarity on the inquiry methods used is also likely to prompt

[98] Ibid 34.
[99] Ibid 38.
[100] Ibid 42-49.
[101] Ibid 42.
[102] Ibid 49-56.

suspicion of partiality of the final findings and conclusions, because the sources of information have not been disclosed.

The practice of UN commissions of inquiry varies considerably. The methodology followed by the Goldstone Commission appears to set a virtuous example. The Commission explicitly listed all the sources of information that it considered and the methods it employed to extract the relevant information.[103] It also provided an account of the hindrances it encountered with reference to sources of information located in Israel and in the West Bank, having been refused permission to move freely in those territories, and detailed how it tackled these limitations.[104] Most importantly, the Mission was explicit about how it assessed the credibility and reliability of its sources, as exemplified by the below two paragraphs extracted from the final report:

> 170. The Mission met or spoke with witnesses, listened to what they had to say and questioned them wherever necessary. Taking into account 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, the Mission was able to determine the credibility and reliability of those people it heard. Regarding the large amount of documentary information the Mission received or had access to as documents in the public domain, it tried as far as possible to speak with the authors of the documents in order to ascertain the methodologies used and to clarify any doubts or problems.
>
> 171. The final conclusions on the reliability of the information received were made taking all of these matters into consideration, cross-referencing the relevant material and information, and assessing whether, in all the circumstances, there was sufficient information of a credible and reliable nature for the Mission to make a finding in fact.[105]

The UNSC-sponsored International Commission of Inquiry on Darfur adopted a less rigorous approach to outlining its methodology. While it explained clearly the investigative plan adopted, it devoted only one paragraph, in the methodology section, to identifying the sources of information and the information gathering process.[106] The individual factual findings

[103] Goldstone Report (n 55) para 159.
[104] Ibid paras 161-165.
[105] Ibid paras 170-171.
[106] Report of the International Commission of Inquiry on Darfur to the Secretary-General (1 February 2005) UN Doc S/2005/60, para 16.

display a more thorough analysis of the sources of information and an assessment of their credibility and reliability.[107]

The standard of proof adopted by the commissions is another key determinant of the influence that these mechanisms may be able to have on domestic actors. Very much like for other procedural rules, fact-finders should strive to be transparent and coherent about the standard applied. Failure to establish facts to a minimum evidentiary standard that is applied coherently throughout the investigation process is likely to elicit criticism by the addressees of the final report, especially if they come across as responsible for the violations established.[108] Moreover, fact-finding missions should adopt such standard that could accommodate, on the one hand, their primary task of establishing facts and determining in a non-judicial manner whether normative standards have been violated and, on the other hand, the time, resource and personnel limitations involved in any fact-finding process of a non-judicial nature.[109] In determining this balance between competing objectives, one should bear in mind that, as pointed out above, commissions of inquiry are not judicial mechanisms and their determinations are not final with regard to a certain situation. This means that a court of law could establish the facts of the same situation investigated by a fact-finding mission in a completely different way from the latter without, for this reason alone, compromising its legitimacy or in any other way undermining it.[110] It has been suggested that, because of the structural limitations of non-

[107] For example, see ibid paras 238-240, where the Commission indicates the sources of information employed for the finding of indiscriminate attacks on civilians and explains how such information was corroborated.
[108] Stephen Wilkinson, '"Finding the Facts": Standards of proof and information handling in monitoring, reporting and fact-finding mission' (2014) HPCR Draft Working Paper, 3-5.
[109] Stephen Wilkinson, 'Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions' (Geneva Academy of International Humanitarian Law and Human Rights) 59 <https://www.geneva-academy.ch/joomlatools-files/docman-files/Standards%20of%20Proof%20in%20Fact-Finding.pdf> accessed 12 September 2017.
[110] However, note that it can also be argued that stating that certain facts have been proven to a very high evidentiary standards might compromise the inquiry, should a court of law subsequently find that those facts are not in fact proven. In other words, the separation between non-judicial human rights fact-finding and judicial proceedings does not imply that commissions of inquiry should feel confident to state that certain facts have been proved to a high standard even when that standard has not in fact been attained. Rather, a cautious approach should be pursued.

judicial fact-finding,[111] commissioners should embrace a 'layered approach' to evidentiary standards. That is, they should explicitly state the standard of proof attained for each finding, thus conveying a more realistic depiction of the level of certainty that they reached in making specific determinations.[112] This is not to say that there should not be a common baseline for all findings. On the contrary, the practice of commissions of inquiry shows that an evidentiary standard that fluctuates between the common-law 'balance of probabilities' and 'reasonable suspicion' or 'reasonable grounds to believe' seems the more adequate.[113] However, fact-finders should adjust this standard depending on several factors including the importance of the normative standards employed, the type of behaviour investigated (individual instance or pattern), the attributability of the conduct, the identification of individual perpetrators, the mandating authority, the relationship with other justice-oriented mechanisms and the level of cooperation of the parties involved.[114]

For example, the 2009 International Commission of Inquiry on Guinea adopted a general 'reasonable suspicion' standard of proof.[115] At the same time, the Commission applied

[111] For example, Wilkinson (n 108) 17-28, based on interviews with former or then-current commissioners, identifies eight practical constraints that often limit the ability of fact-finding missions to adopt a uniform, coherent and at times sufficient evidentiary standard: a) the difficulties in securing access and cooperation from the governments involved; b) the often short timeframe within which fact-finding missions are required to complete their investigation; c) the risks incurred in by fact-finders when they are deployed in certain environments, including for example theatres of ongoing conflicts or even post-conflict environments, and those incurred in by witnesses, for whose safety commissioners are responsible; d) the ability to appropriately staff the mission with individuals who have the right expertise and to strike the right balance between thematic or regional expertise with practical investigative expertise; e) an often lacking clear division of labour and responsibilities between commissioners and technical staff; f) the lack of standardised guidelines or regulations, and of training opportunities; g) the often poor logistic and the unavailability of adequate evidence storage and management systems; h) the level of political interactions of commissioners with state or non-state authorities, which may lead to a distorted perception of the inquiry itself.

[112] Ibid 48.

[113] Ibid 49; UN Guidance and Practice (n 80) 62-63.

[114] Wilkinson (ibid) 52-58.

[115] Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea (18 December 2009) UN Doc S/2009/693, para 22, where the Commission explains that the collected information was assessed to 'demonstrate that a person may reasonably be suspected of having participated in the commission of a crime'.

variations of that standard when it engaged in determinations as to the criminal liability of individuals.[116]

Ultimately, however, one should consider that the purpose of human rights inquiries is not to attribute individual responsibilities, but to flag situations of concern for the purpose of eliciting some form of response from either domestic actors, states or international organisations. This consideration should have a bearing on the choice of the most appropriate standard of proof and help guide fact-finders in striking the right balance between their primary task of establishing the facts and the limitations implicit to the non-judicial fact-finding process.

Finally, the protection of individuals who cooperate with the mission is another determinant of the potential impact factor of commissions of inquiry. In general, fact-finders should respect the confidentiality, informed consent and 'do no harm' principles.[117] They should adopt an inclusive approach to the protection of witnesses and victims by considering the local context and the views of the individuals affected. Moreover, they should devise both preventive and coping strategies to tackle threats to the security of individuals. This may involve the use of risk assessments, the implementation of preventive measures such as minimising exposure, providing emergency contacts, or refraining from sharing names of other interviewees, and the developing of strategies to deal with sources of threat, which includes advocacy, shaming and mobilisation strategies.[118] Obviously, transparency on these issues may be limited in order to protect individuals at risk.

[116] Wilkinson (n 109) 34-35. The Commission applied three different standards: 'reasonable grounds *to suspect* individual criminal responsibility' (Report (ibid) para 215, emphasis added); grounds to 'believe that other people *may be* held criminally liable' (Report (ibid) para 243, emphasis added); 'reasonable grounds for naming others, whose *presumed involvement* in the events suggests that they should be the object of a more in-depth investigation' (Report (ibid) para 252, emphasis added).
[117] UN Guidance and Practice (n 80) 74-76.
[118] Ibid 74-82.

2.1.5 Utilisation of Product

The material outcome of any fact-finding process is a report which presents the main findings, their legal analysis, and the recommendations that the fact-finders address to the parties involved. How facts are presented to the public may entail far-reaching consequences. Fact-finders have to be aware of, on the one hand, how the report may influence the target states and individuals' perception of the inquiry and, on the other hand, the implications of the report within the sponsoring body.[119] Franck and Fairley's suggested that reports of fact-finding mechanisms should be protected against criticisms by the sponsoring body.[120] On the contrary, written best practices suggest that they should be published prior to their formal discussion within the mandating body.[121] The OHCHR Guidance and Practice underlines that public reports can 'contribute to the historical recording of events, strengthen the calls for accountability and promote implementation of the recommendations'.[122]

Nowadays, the debate regarding the publicity or confidentiality of the final report, especially within UN human rights circles, seems to be leaning in favour of publicity.[123] Such an approach is motivated by the assumption that wide public dissemination of the report is likely to enhance its impact on the situations under investigation by influencing the behaviour of the parties or actors involved, and by building international support to address the situation.[124] While this assumption certainly retains some truth, especially in certain regional contexts, there may be

[119] Franck and Fairley (n 75) 321-322.
[120] Ibid; the authors were concerned that, should the report of a fact-finding mission be unwelcome to the sponsoring political body, their members might ignore it or, worse, slander the fact-finders, thus compromising their integrity. This was dependant on the control that political bodies retained over the publication of the final report. Frack and Fairley argued that the procedural practice of the time did allow for disagreement among investigators which could be voiced through dissenting opinions. However, they regretted that the dialectics between the fact-finders could be concealed by a willing decision of the sponsoring body who could decide to favour only one version of the narrative by publishing only that portion of the final report.
[121] UN Guidance and Practice (n 80) 92.
[122] Ibid.
[123] Rob Grace, 'Communication and Report Drafting in Monitoring, Reporting, and Fact-Finding Mechanisms' (July 2014) HPCR Draft Working Paper, 18; UN Guidance and Practice (n 80) 100; Bassiouni and Abraham (n 97) 51.
[124] Grace (ibid) 21.

good reasons to depart from this practice. Discretion may be warranted, for example, when international staff remain present on the ground or when certain findings may lead to outbreaks of violence in the relevant context. In addition, it may be worth considering the practice of both the IHFFC and the International Committee of the Red Cross (ICRC), which operate according to a strict confidentiality rule. As already note, Article 90(5)(c) of Additional Protocol I to the Geneva Conventions establishes that the findings of the IHFFC shall be kept confidential unless the parties to the investigations agree to them being made public. At the Diplomatic Conference of 1974-77, several delegations highlighted that publishing the report would have amounted to publicly sanctioning the party concerned by subjecting it to the pressure of the international community. For this reason, the majority voted for what has been referred to as 'quiet diplomacy' over public reproach.[125] The ICRC also abides by a strict rule of confidentiality,[126] but it retains the power to publish statements regarding violations of humanitarian law under certain circumstances, namely 'if the violations are grave and have been committed repeatedly, the confidential interventions were not effective, if publicity serves the interest of the people concerned or the population as a whole, if a delegate of the ICRC personally has become a witness of the violation or if the existence and the scope of violations have been proved'.[127] Other factors that deserve consideration is that, by retaining the report from public scrutiny, non-compliance with its recommendations may be more difficult to manage and cooperation with other UN bodies would likely be hindered, given the unavailability of the report to the international community.[128]

[125] Erich Kussbach, 'The International Humanitarian Fact-Finding Commission' (1994) 43(1) *Int'l & Comp LQ* 174, 180.
[126] Daniel Warner, 'Naming and Shaming: The ICRC and the Public/Private Divide' (2006) 34(2) *Millen J Int Stud* 449; Stéphane Jeannet, 'Recognition of the ICRC's long-standing rule of confidentiality' (2010) 82(838) *IRRC* 403.
[127] Kussbach (n 125) 180-181.
[128] Ibid 180 and 184-185.

There are some guidelines that commissions of inquiry should implement in the drafting and subsequent utilisation of their reports that could enhance the legitimacy of inquiries. As a general rule, the report should not be used to portray only one narrative. Where the parties under investigation have provided their account of the events or have responded to the allegations formulated in the course of the investigation, these should be included in the final report either in the main text or as annexes. To this end, fact-finders may decide to share advanced copies of the report with state authorities or non-state groups in order to gather their responses prior to the publication.[129]

Reports are normally submitted to the parent body and, if relevant, to other UN organs. Conclusions and recommendations remain solely attributable to the fact-finders. However, the mandating body or others who have received the report may decide to endorse them in full or in part.[130] This is likely to enhance their authoritativeness and persuasiveness.

Furthermore, the legitimacy of the fact-finding process rests also on the follow-up to the inquiry, that is, on how the findings are employed outside the context of the investigation. While it is common for mandating bodies to set up further mechanisms to overview the implementation of the recommendations at the domestic level, and for civil society organisations to use the reports as advocacy tools both at the domestic and international level, some scholars have proposed some form of direct cooperation between fact-finding mechanisms and judicial bodies.[131] The ICC case law demonstrates that this is not only a purely academic speculation, but also a reality, despite the fact that the approach of the Court to

[129] Ibid.
[130] Ibid 99.
[131] Lyal S Sunga, 'How can UN human rights special procedures sharpen ICC fact-finding?' (2011) 15(2) *IJHR*, 187; for a more nuanced approach, see Carsten Stahn and Dov Jacobs, 'The Interaction between Human Rights Fact-Finding and International Criminal Proceedings: Toward a (New) Typology' in Alston and Knuckey (eds) (n 31) 255-272; see also Triestino Mariniello, 'The Impact of International Commissions of Inquiry on the Proceedings before the International Criminal Court' in Christian Henderson (ed), *Commissions of Inquiry: Problems and Prospects* (2017) 194-196.

commissions of inquiry's reports is often inconsistent.[132] However, a strong argument could be made that courts should treat such reports with caution. While they may be an important source of contextual information and provide leads to persons for investigative purposes, by no means they reach the evidentiary standards of judicial processes. An uncritical and incoherent reliance on this type of information is liable to undermine the related legal proceedings. Moreover, it is likely that the underlying fact-finding process would be delegitimised, should the targeted actors come to believe that the inquiry was a judicial investigation in disguise.

2.2 Mechanisms of Social Influence

Asking how international commissions of inquiry seek to prompt change in the target state is akin to investigating how international institutions and norms seek to influence states and, to an extent, why states obey such norms or listen to such institutions. International inquiries on human rights are only one tool in the complex international human rights regime.[133] While unequivocally deployed to clarify factual circumstances with a view to contributing to the institutional goals of their parent institution, commissions of inquiry inevitably participate in the process of state socialisation that underpins the design of international law regimes, including the international human rights law regime. Coercion, persuasion, and acculturation are considered by the predominant scholarship the three main mechanisms that explain how international law influences states' behaviour. Their theorisation stems from the two main

[132] ICC, PTC-II, *Situation in Côte d'Ivoire*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire, Case No ICC-02/11-14, 3 October 2011; ICC, PTC-II, *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No ICC-01/09-19, 31 March 2010; ICC, PTC-I, *Situation in Darfur, Prosecutor v Omar Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Case No ICC-02/05-01/09-3, 4 March 2009; ICC, PTC-II, *Situation in the Republic of Kenya, Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Case No ICC-01/09-02/11-382-Red, 23 January 2012.

[133] For a brief contextualisation of the role of international fact-finding mechanisms within the UN system, see for example Christian Tomuschat, *Human Rights. Between Idealism and Realism* (3rd edn, OUP 2014) 271.

international relations scholarly traditions, namely realism and constructivism,[134] and each of them is better accommodated by either of the two. Coercion, which, as I show below, hinges on the power hierarchies in the international community, reflects a markedly realist understanding of international relations, whereas persuasion and acculturation, the latter of which some consider a distinct explanation of state socialisation and others only a form of incomplete persuasion, are underpinned by a predominantly constructivist understanding of international relations. However, as explained above, this responsiveness to different conceptions of international relations does not exclude the simultaneous deployment of such strategic devices. Below I briefly explain the functioning of each of these mechanisms.

Coercion

Coercion hinges on a notion of international society and institutions that reflects the hierarchies of power determined by its material distribution. Coercive strategies seek to alter the state's behaviour by threatening material sanctions or promising material rewards. The state is thus forced to reconsider its practices in light of externally imposed costs or rewards. When the cost attached to the threatened sanction outweighs the benefit of nonconformity or the benefits of material rewards outweigh those accruing to the state from the maintenance of nonconformity, the state is expected to change its cost-benefit calculation. That means that coercion does not necessarily seek to alter the state's preferences. It only juxtaposes such

[134] For a literature review of international relations theories and their compatibility with international law theories, see David Armstrong, Theo Farrell and Hélène Lambert, *International Law and International Relations* (2nd edn; CUP 2012) 74-121. In simplistic terms, realist theory underlines the rational character of state actors in international relations and posits that selfish interests and power dominate world politics. For a review of the realist international relation literature, see Jack Donnelly, *Realism in International Relations* (CUP 2000); Brian Schmidt, *The Political Discourse of Anarchy: A Disciplinary History of International Relations* (State University of New York Press 1998); Michael J Smith, *Realist Thought from Weber to Kissinger* (Louisiana State University Press 1986). In a few words, constructivist theory privileges the role of norms and identity in world politics and emphasises the inter-dependency between agency and structure by positing that the two are mutually constituted. Prominent constructivist works in international relations are Alexander Wendt, *Social Theory of International Politics* (CUP 1999); John Gerard Ruggie, *Constructing the World Polity: Essays on International Institutionalization* (Routledge 1998); Martha Finnemore, *National Interests in International Society* (Cornell University Press 1996).

preferences with a cost.[135] Costs may assume different forms and, according to some scholars, they may even have a markedly social dimension as long as they translate ultimately into material costs (such as lack of cooperation or economic sanctions).[136]

Reputational costs constitute a peculiar cost typology which can stem from rhetorical coercion[137] strategies such as 'naming and shaming'. Pascal Vennesson notes that 'naming and shaming' indicates 'situations in which the rhetorical coercer seeks to show that its target country's actual practices are in conflict with its declared commitment to normative standards of conduct, and to expose this contradiction publicly'.[138] Normally, reputational costs would be associated with acculturation rather than coercion processes, because they rely simply on the discomfort derived to the state by dint of its exclusion from its community of peers.[139] However, if the state believes that reputational costs may translate into further material costs, such as non-cooperation, 'naming and shaming' can also be understood as a component of a coercive strategy. Studies on the effects of 'naming and shaming' strategies on states' behaviour have come to mixed results. Some scholars emphasise that 'naming and shaming' is only effective with reference to certain categories of rights. For example, in a quantitative study on 'naming and shaming' global efforts and governmental human rights practices between 1975 and 2000 in 145 countries, Emilie M Hafner-Burton shows that 'governments put in the global spotlight for violations often adopt better protections for political rights afterward, but they rarely stop or appear to lessen acts of terror'.[140] Wade M Cole has come to a similar conclusion in a study on the Human Rights Committee practice under the International Covenant of Civic and Political Rights. He concludes that 'fundamental civil rights strengthened under the cumulative

[135] Goodman and Jinks (n 63) 633-634.
[136] Ibid 645.
[137] Vennesson (n 67) 30 defines rhetorical coercion as 'the use of rhetoric to change the behavior of a state by manipulating symbolic and material costs and benefits related to the objectionable actions'. See also Alistair Iain Johnston, 'Treating International Institutions as Social Environments' (2001) 45(4) *Int Stud Q* 487, 499-506.
[138] Vennesson (ibid).
[139] Johnston (n 137) 500.
[140] Emilie M Hafner-Burton, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem' (2008) 62 *Int'l Org* 689, 707.

weight of decisions rendered against (and also for) a country, but the [Human Rights Committee] was somewhat less effective in curbing abuse of physical integrity rights'.[141] Other studies offer a seemingly more optimistic account. A study of the former UN Commission on Human Rights by James H Lebovic and Erik Voeten shows that

> results provide considerable empirical support for the existence of mechanisms – drawn from liberal institutionalist and constructivist theory – that could push commission targets toward domestic reforms. If it can be surmised from our evidence that governments are held accountable for their behavior and not just the "spin" put on that behavior, and that governments can acquire (or lose) legitimacy through their association (disassociation) with [international organisations], then there is reason to suppose that governments can change their behavior in response to nonmaterial rewards and punishments.[142]

As Lebovic and Voeten seem to suggest, the effectiveness of 'naming and shaming' strategies may be tied to the credibility of the associated coercive strategies. In other words, 'naming and shaming' could only be successful if reputational costs are complemented with actual accountability or other material costs. Moreover, a commitment to imposing material sanctions or costs is not sufficient per se to induce change. This must be accompanied by a more or less consistent practice demonstrating that the actor(s) is prepared to translate the threat into actual sanction or cost.[143]

Persuasion

Differently from coercion, persuasion seeks to alter states' behaviour by "changing their mind".[144] Persuading entails, on the one hand, an exogenous process of argumentation and, on the other hand, a process of internalisation of the norm or rule that in turn produces an

[141] Wade M Cole, 'Institutionalizing shame: The effect of Human Rights Committee rulings on abuse, 1981-2007' (2012) 41 *Soc Sci Res* 539, 552.
[142] James H Lebovic and Erik Voeten, 'The Politics of Shame: The Condemnation of Countries Human Rights Practices in the UNCHR' (2006) 50 *Int Stud Q* 861, 886.
[143] On the deterrence and effectiveness of international sanctions, see Kim Richard Nossal, 'International sanctions as international punishment' (1989) 43(2) *Int'l Org* 301.
[144] Alastair Iain Johnston, 'The Social Effects of International Institutions on Domestic (and Foreign Policy) Actors' in Daniel W Drezner (ed), *Locating the Proper Authorities: The Interaction of Domestic and International Institutions* (the University of Michigan Press 2003) 145, 153.

adjustment of the state's preferences.[145] This process may be triggered in several ways. Goodman and Jinks describe two of them, 'framing' and 'cuing'. 'Framing' means strategically presenting a message by using a language that is already normatively accepted in the target state.[146] The Goldstone Mission, for example, reported that, during the Israeli military offensive on the Gaza Strip in 2008-2009, the way in which the Israeli Defence Forces (IDF) used white phosphorus – which is not prohibited *per se* under international humanitarian law – did not permit to distinguish civilians from combatants and was thus indiscriminate.[147] In other words, the Commission framed the use of white phosphorus by the IDF as a violation of the well-established prohibition of indiscriminate attacks. 'Cuing' means strategically presenting states with new information in order to persuade them into re-thinking a specific understanding or practice and engaging them in an argumentative discourse regarding that practice or understanding. Goodman and Jinks exemplify this practice by reference to the documentation of human rights abuses, especially in the context of international human rights institutions.[148]

Another effective example may be the study conducted by Jawoon Kim and Alan Bloomfield on the impact of the Report of the UN Commission of Inquiry on human rights in the Democratic People's Republic of Korea. Kim and Bloomfield conclude *inter alia* that, despite its outright rejection of the Commission's report, the Republic of Korea changed behaviour shortly after by participating in the second UPR and amending its responses to the first UPR, and by entering into human rights dialogues with both Japan and the European Union.[149]

[145] Goodman and Jinks (n 63) 635; see also Stefan Voigt, 'Institutions and Transformation', in Wolfgang Merkel, Raj Kollmorgen, and Hans-Jürgen Wagener (eds), *Handbook of Political, Social, and Economic Transformation* (OUP forthcoming) 3, available at SSRN <https://ssrn.com/abstract=2893300> accessed 2 October 2019.

[146] Note, however, that 'frames' can be more generally defined as 'interpretative structures, embedded in political discourse that organise reality and provide meaning of an issue or an event' (Vennesson (n 67) 31). Frame-users adopt a specific frame to elicit support or pressure (in Vennesson's construction, coerce) actors. As a specific triggering mechanism for persuasion, 'framing' aims at putting in motion the domestic internalisation of the international norm.

[147] See Chapter V, pp 259-268.

[148] Goodman and Jinks (n 63) 637.

[149] Kim and Bloomfield (n 67) 198-199.

Whether this shift came about as a result of the internalisation by the Republic of Korea of part of the human rights discourse, or as a result of threats of material sanctions, or simply because, as the authors note, Korea became 'rhetorically entrapped' as a result of its cosmetic commitment to human rights which demanded denial of the alleged facts is here irrelevant. What should be noted is that the Commission, by providing factual information regarding the widespread and systematic gross human rights violations in the country, coupled with the threat of material sanctions, managed to cue Korea to rethink its practices vis-à-vis human rights issues. This may be read as an incomplete instance of persuasion or, alternatively, as an example of acculturation.

Acculturation

Finally, acculturation seeks to induce behavioural change through pressure to conform to the social patterns of the surrounding environment.[150] Acculturation can be propelled by both cognitive and social pressures. Cognitive pressures spring from the state's sense of belonging to a certain social group or self-attributed social identity or role. When the state becomes cognisant of aspects of its behaviour that are at odds with its self-perceived social identity or role, or perceives that conforming to social norms will enhance its sense of membership in a social environment, it will be driven to conform to the relevant social norm. In other words, the state is highly motivated to change behaviour in order to live up to its expectations as to its social identity, role and membership in a community of peers. This micro-process requires internalisation of the social identity, role and symbolic benefits accruing to the state from belonging to a specific social environment. As a consequence, the state will likely work to minimise dissonance with such perceived role by seeking to enhance its legitimacy (*orthodoxy* and *social legitimacy*). One way to do so, it has been shown, is by searching for a sort of 'role

[150] See, for example, the notion of *homo sociologicus* in Mark Granovetter, 'Economic Action and Social Structure: The Problem of Embeddedness' (1985) 91(3) *Am J Sociol* 481-510; Voigt (n 145) 5-6.

model' among other states, members of the same social environment, who already enjoy a high level of legitimacy (*mimicry*).

Differently, social pressures are external to the state, which is externally shamed into conforming to its social environment by peers or is symbolically rewarded for doing so by, for example, praising it for the behaviour adopted.[151] The same shaming techniques that coercive strategies often employ are used also in acculturation processes by social pressures. However, while in coercive strategies the costs associated with shaming are accounted for insofar as they translate into material costs (such as future cooperation opportunities), shaming in acculturation strategies is deemed effective if it only manages to portray the deviant state as a sort of pariah and this, in turn, produces negative psychological effects on the state's self-perception.[152] However, as we have seen above, mere symbolic costs may not be enough to drive the state to conform to social norms. Moreover, this second type of acculturation is likely to yield cosmetic conformity, not accompanied by internal acceptance of social norms. Kim and Bloomfield's study of the impact of the Report of the UN Commission of Inquiry on human rights in the Democratic People's Republic of Korea may also be read as portraying an example of acculturation through social pressures. While Korea's engagement with other actors in human rights dialogues in response to the Commission's report may signal a normative commitment to human rights, this may only have been driven by the desire to conform to cognitive or social pressures to conform in order to bolster membership in the community of states. As a matter of fact, continued in-country human rights abuses, as documented by UN Special Rapporteur Marzuki Durusman, may signal a lack of sincere internalisation of human rights norms.[153]

[151] Goodman and Jinks (n 63) 639-642.
[152] Ibid 645.
[153] Kim and Bloomfield (n 67) 188; UNHRC, Report of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea (13 June 2014) UN Doc A/HRC/26/43.

As noted by Goodman and Jinks, the empirical evidence shows that there may be several possible causal explanations of how acculturation occurs. Government officials and policy-makers may be acculturated as a result of the institutional environment where they operate; special interest groups may also be directly acculturated and, in turn, try to persuade domestic actors to conform to certain social norms; other domestic constituencies may be acculturated by broader social groups and, in turn, try to coerce or persuade domestic leaders to change policies.[154]

Acculturation has also caused some disquiet among scholars who have criticised the fact that regimes designed after it would engender only cosmetic changes, that is, formal commitment to international norms unaccompanied by internal acceptance of their normativity. This, in turn, would likely produce a detachment of the actual practices of the state – especially as regards domestic matters – from the normative standards formally adopted.[155] However, Goodman and Jinks, the main proponents of acculturation, aver that claims about decoupling are overly inflated, that decoupling often facilitates compliance and that, even when forms of negative decoupling persist, the overall conformity to norms improves and, in any case, acculturation prompts further social processes that contribute to reducing the gap between formal commitment and actual practice.[156]

2.2.1 Coercion, Persuasion and Acculturation through Monitoring and Reporting

In identifying how human rights regimes concretely seek to discourage deviant behaviour and encourage compliance and conformity, Goodman and Jinks analyse four mechanisms,

[154] Goodman and Jinks (n 63) 654-655.
[155] Ryan Goodman and Derek Jinks, 'Incomplete Internalization and Compliance with Human Rights Law' (2008) 19(4) *EJIL* 725, 727; Jose E Alvarez, 'Do States Socialize?' (2005) 54 *Duke LJ* 961; Harold Hongju Koh, 'Internalization Through Socialization' (2005) 4 *Duke LJ* 975; Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (OUP 2005) 127; Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale LJ* 1935; Beth A Simmons, 'International Law' in Walter Carlsnaes, Thomas Risse and Beth A Simmons (eds), *Handbook of International Relations* (2nd edn, Sage 2013) 370-371.
[156] Goodman and Jinks (ibid) 748.

including publishing best practices, monitoring and reporting, criticising bad actors, and binding decisions and material sanctions. As they note preliminarily, options range from 'soft' to 'hard' techniques and these are only four possibilities in the spectrum of available options.[157] At least two of such options are relevant for our discussion, since, as shown in the first part of this chapter, they are routinely carried out by international commissions of inquiry. These are monitoring and reporting and, to a lesser extent, criticising bad actors.

Goodman and Jinks show how monitoring and reporting, and criticising bad actors are generally better valued in constructivist approaches, namely persuasion and acculturation. However, this does not imply that such 'soft' measures are completely incompatible with coercive strategies. Indeed, material sanctions and rewards may be associated with the type of information gathered through monitoring. Similarly, criticism normally engenders nominal sanctions which, some argue, can hardly coerce actors into conforming to norms per se. However, specific institutional arrangements may provide for a system of graduated criticism that signals an ever-increasing political commitment to coercive action, as criticism escalates. Nonetheless, Goodman and Jinks warn against the dangers of commingling influence strategies. They aver that regime designs should be devised according to clear priorities in order to maximise the efficiency of resource allocation. Furthermore, and more importantly, different strategies are underpinned by different understandings of the state's position in the community of states. Notably, coercion is better valued by realists, whereas persuasion and acculturation mirror a predominantly constructivist understanding of inter-state relations. Hence, inconsistencies and contradictions between different strategies may arise which could frustrate their effectiveness.

In addition to these activities, international commissions of inquiry routinely conduct fact-finding and formulate recommendations for further action, whether directed at international,

[157] Goodman and Jinks (n 63) 687-688.

state, sub-state or non-state actors. In its original form, fact-finding was clearly an activity aimed at cuing states to reconsider their conducts with a view to making mutual concessions to de-escalate conflicts or disputes. As the survey of the early practice conducted in Chapter I has shown, commissions of inquiry modelled after the prototype included in the Hague Conventions of 1899 and 1907 were explicitly aimed at facilitating 'a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation'.[158] To a certain extent, modern commissions of inquiry on human rights have retained this function. Documentation of factual circumstances that signal systematic or widespread disregard for human rights might certainly be able to cue states to reconsider their practices and, thus, constitute a technique of persuasion. However, the language employed by international inquiries is, more often than not, condemnatory and provocative rather than conciliatory.[159] The 'legalisation' of facts is certainly part of this trend and its compatibility with cuing as a persuasion technique is doubtful.[160] Moreover, the formulation of recommendations can be seen either as a continuation of persuasion or acculturation strategies – specifically as a form of managerialism[161] – or as an attempt at coercing states to comply with international norms – especially, when sanctions are invoked.

In the following paragraphs, I seek to identify how commissions of inquiry make use of socialisation strategies and how they discursively engage states and other actors in this process. While I do not seek to provide an exhaustive classification of the argumentative strategies employed by commissions of inquiry, I show, on the one hand, how to identify them by linking

[158] Convention for the Pacific Settlement of International Disputes (Hague I) (adopted 18 October 1907, entered into force 26 January 2010) Art 9 (hereinafter the 'Hague Convention I (1907)').
[159] Larissa van den Herik, 'An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of International Law' (2014) 13 *Chinese JIL* 507, 537.
[160] Goodman and Jinks (n 59) 690.
[161] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995).

language usage to specific strategies and, on the other hand, how employing a given strategy is functional to the achievement of specific goals.

2.2.2 International Inquiries and Coercion

While international commissions of inquiry are neither devised to directly coerce states to comply with international law nor equipped with powers which they may independently exercise for this purpose, certain elements common to virtually all inquiry processes are evocative of the dynamics of coercion. Coercive strategies hinge on the existing power hierarchies in the international community of states. They seek to influence state practice by escalating the costs associated with non-conformity or by outweighing its benefits by means of material sanctions or rewards. Commissions of inquiry lack enforcement powers and normally operate as 'soft' mechanisms. Thus, they are operationally incapable to impose direct material costs on states.

However, modern international inquiries do not operate in isolation and do not constitute a regime *per se*. They act as institutional actors of either the human rights or the international security regimes. This is confirmed by their instrumentality to both the functions of the UN system – in particular, the maintenance of international peace and security and the promotion and protection of human rights – and the accountability infrastructure for human rights abuses. In particular, as shown in Chapter I, the 'accountability turn' in international inquiry mechanisms has been marked by an increase in the use of legal language related to notions of state or individual criminal responsibility.[162] This turn can be recognised, specifically, in the formulation of some sets of recommendations. For example, the Goldstone Commission recommended that

> upon receipt of the committee's report, the Security Council should consider the situation and, in the absence of good-faith investigations that are independent and

[162] See Chapter I.

> in conformity with international standards having been undertaken or being under way …. by the appropriate authorities of the State of Israel, again acting under Chapter VII of the Charter of the United Nations, refer the situation in Gaza to the Prosecutor of the International Criminal Court pursuant to article 13 (b) of the Rome Statute.[163]

This recommendation is evocative of the complementarity regime that underpins the system of the International Criminal Court. By recommending the UN Security Council to exercise its coercive powers under Chapter VII of the UN Charter, which read in light of Article 13(b) of the Rome Statute of the International Criminal Court empowers the Council to refer a situation to the Court thus triggering its jurisdiction, the Commission sought to indirectly threaten the imposition of a material cost, represented by the possibility that an investigation and prosecution could be initiated against Israeli citizens, should the State of Israel fail to comply with its obligations to investigate and prosecute alleged international crimes, grave breaches of international humanitarian law and serious violations of human rights.[164]

Threats of material sanctions do not necessarily have to target individuals but may also prospect an economic damage for the state involved. For example, the Independent International Fact-Finding Mission on Israeli Settlements recommended that 'all Member States … take appropriate measures to ensure that business enterprises domiciled in their territory and/or under their jurisdiction, including those owned or controlled by them, that conduct activities in or related to the settlements respect human rights throughout their operations'.[165] While unable to directly impose any material cost, the Mission sought to coerce the State of Israel to terminate all settlement activities, in compliance with Article 49 of the Fourth Geneva Convention, by invoking the states' responsibility to ensure that they do not acquiesce in an unlawful situation. Abidance by the obligation not to recognise an unlawful

[163] UNHRC, Human Rights in Palestine and Other Occupied Arab Territories. Report of the United Nations Fact-Finding Mission on the Gaza Conflict (25 September 2009) UN Doc A/HRC/12/48, para 1969(c).
[164] See Chapter V, pp 294-295.
[165] UNHRC, Report of the independent international factfinding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem (7 February 2013) UN Doc A/HRC/22/63, para 117.

situation would translate *inter alia* in economic costs at the expense of the economy of Israeli settlements.[166]

The above examples demonstrate how commissions of inquiry tie the prospect of material costs, represented by the threat of coercive tools, to information gathering, typically a form of persuasion. In the former example, the Commission seems to be engaged also in a form of graduated criticism, which is signalled by the reference to increasingly costly measures: first, the pronouncement of the commission of inquiry; second, the recommendation that the Security Council becomes seized of the matter and considers employing its coercive powers under Chapter VII of the UN Charter; third, the recommendation that, upon referral by the Security Council, the International Criminal Court exercises its jurisdiction over the situation in the Gaza Strip.

Two issues, however, should be considered: strategic dissonance and the credibility of the threat. First, as Goodman and Jinks underline, coexistence of different influence strategies is not always problem-free.[167] From this viewpoint, language is key. Graduated criticism signalling an increasing commitment to using coercive mechanisms is incompatible with the sweeping pronouncements that normally characterise recourse to persuasion or acculturation strategies. To some extent, the 'juridification' and, in particular, subsequent 'criminalisation' of human rights fact-finding epitomise this problem. Legal categories are highly technical, and their invocation should normally follow a process whereby truth-seeking is strictly proceduralised. Invocation of state or individual liability, even *prima facie*, should not be made light-heartedly. Rather, it should be backed by a clear and transparent argumentative process to justify the application of a given legal notion to a factual state of affairs, in light of the procedural and substantive rules that tie the facts to the law. But commissions of inquiry, as

[166] See Chapter V, pp 337-340.
[167] Goodman and Jinks (n 63) 691-692.

shown at the beginning of this chapter, wear multiple hats. Notably, they seek to promote both public and legal accountability. These two acceptations of accountability, however, do not necessarily coincide and, most importantly, the standards against which accountable actors are expected to account diverge significantly. So does the language that may be used to evoke either. To what extent can the same pronouncement, or for what it matters different pronouncements in the same material document, hope to achieve both purposes at once?

The use of international criminal law categories by commissions of inquiry provides a clear example of the above dynamics. For example, a statement by a commission of inquiry that, based on the established facts and evidence reviewed, certain actions 'would constitute war crimes'[168] echoes the International Criminal Tribunal for the former Yugoslavia (ICTY) test elaborated by Judge Richard May in the case *Prosecutor v Milošević* to determine whether a *prima facie* case has been established by the Prosecutor in the indictment – 'the case must be one which is based on evidence, which if it is accepted by a Trial Chamber, would be a sufficient basis for conviction'.[169] However, whether the evidence reviewed and the degree of certainty with which the material facts and, most importantly, the *mens rea* of the alleged wrongdoer – provided that there is one – have been established corresponds to the *prima facie* case test elaborated by the Trial Chamber of the ICTY is at least dubious. Given the likely inability of the commission to identify alleged individual perpetrators and its likely focus on generic, rather than specific, allegations, coupled with the resource and time constraints faced by such inquiries,[170] it would be more appropriate to use a formulation more akin to the test employed by the ICC Pre-Trial Chamber in determining whether there is a 'reasonable basis to believe

[168] See, for example, Goldstone Report (n 55) para 1950.
[169] ICTY, Trial Chamber, *Prosecutor v Milošević*, Case No IT-01-51-I, Decision on Review of Indictment (22 November 2001) para 14; see also, Gideon Boas, James L Bischoff, Natalie L Reid and B Don Taylor III, *International Criminal Procedure* (International Criminal Law Practitioner Library Series, Volume III; CUP 2011) 181-183.
[170] All these factors should, however, be assessed on a case-by-case basis as not all international commissions of inquiry operate within the same constraints.

that a crime within the jurisdiction of the Court has been or is being committed'.[171] In its decision to authorize an investigation into the situation in Kenya, the ICC Pre-Trial Chamber II interpreted such standard as requiring that the Chamber is satisfied 'that there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court "has been or is being committed" …. bearing in mind the specific purpose underlying this procedure'.[172] This implies two considerations that suit well international commissions of inquiry: first, at this stage there is no identifiable alleged perpetrator and; second, the conclusion as to the fact that an international crime might have been perpetrated is only one of the possible conclusions that may be inferred from the facts.

This point is not merely technical. Indeed, different language gradations are likely to provoke different reactions in the target states and groups, especially if such states or groups do not regard the inquiry process as legitimate, regular or professional, or the epistemological foundations of the pronouncement are weak or inconsistent with its degree of certainty. Opportunities for contestation are likely to increase with the widening of the gap between the degree of certainty of the factual determinations and the "gravity" of the subsequent legal conclusion. However, this argumentative gap may be justified if the sole purpose of the inquiry were to catalyse the attention of other actors or to acculturate the target state through shame. Conversely, a credible coercive strategy – especially if legal in nature – must be fashioned in the usual self-restraint that characterises legal reasoning.

Second, a credible threat needs to be backed by a sincere commitment to enforcing the prospected sanction or material cost. This implies, on the one hand, a judicious use of criticism

[171] Rome Statute of the International Criminal Court, Art 53(1)(a).
[172] ICC, PTC-II, *Situation in the Republic of Kenya*, Case No ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (31 March 2010) para 35; see also Morten Bergsmo, Pieter Kruger and Olympia Bekou, 'Article 53: Initiation of an Investigation' in Otto Triffterer and Kai Ambos (eds), *Commentary The Rome Statue of the International Criminal Court - A Commentary* (3rd edn; C.H.Beck/Hart/Nomos 2016) 1371-1372.

accompanied by the threat of sanction or material cost[173] and, on the other hand, a demonstrated willingness to act on the threat of sanction. However, as noted by Larissa van den Herik, 'whereas the traditional commissions of inquiry were principally meant to pacify and defuse a conflict, contemporary human rights commissions rather aim to stir, to evoke action, to opine and to condemn'.[174] This is reflected in an instrumental use of the legal language 'as the predominant language of communication and construction of facts in a quest to make the facts more objective and to create political effects'.[175] Against this backdrop, the above example about international criminal law qualifications should be read as a form of mild "sensationalisation" of state and individual responsibilities, not so much concerned with eliciting real accountability measures as with resoundingly condemning and shaming the actors allegedly responsible for the violations highlighted. This would justify the adoption of a relaxed and imprecise standard of proof and inconsistent sweeping conclusions by the commission of inquiry. At the same time, though, following Goodman and Jinks' model, such an approach would seriously undermine the commission's effectiveness prospects at coercing the state to conform to international standards.

Moreover, one cannot ignore the fact that commissions of inquiry are not entrusted with enforcement powers. Hence, the implementation of any threat of sanction or material cost that they seek to impose will be dependent on other actors, notably third states and international organisations. For example, in their study on the impact of the Report of the Commission of Inquiry on human rights in the Democratic People's Republic of Korea, Kim and Bloomfield show that the fact that some states were unprepared to consider 'chronic' mass atrocities as threatening international peace and security and therefore vetoed the imposition of costly measures on Pyongyang – namely, the activation of Pillar III obligations under the

[173] Goodman and Jinks (n 63) 692.
[174] Van den Herik (n 159) 536.
[175] Ibid.

Responsibility to Protect – coupled with the implementation of only one recommendation of the Commission, one which only entailed the establishment of a further monitoring mechanism by the Human Rights Council, may have led to the adoption of merely cosmetic measures by the Republic of Korea, unaccompanied by a sincere commitment to the normative values underlying human rights.[176] It is to be expected that repeated failure to act on threats of sanctions or material costs is likely to engender scepticism about the willingness of international actors to enforce international pronouncements.[177] Hence, international commissions of inquiry should be strategic in choosing which external actors to address in their recommendations. Most importantly, coercive measures should be prospected judiciously in order to avoid creating a form of path-dependency should such threats remain unfulfilled repeatedly. This implies both carefully appraising the relevant institutional and political environment and refraining from employing the same, or similar, threats repeatedly.

2.2.3 International Inquiries and Persuasion

By referencing the work of Professors Abram and Antonia Handler Chayes, Goodman and Jinks posit that, if conducted sensitively, monitoring and reporting can induce change by providing information and cooperative solutions. Furthermore, they note that these processes may also assist in isolating episodes of wilful human rights violations from unintended or justifiable ones and cue states to re-consider their practices in light of the information provided vis-à-vis established normative values. This argumentative process has also the effect of spotlighting deviant practices of states who have engaged in the process.[178] As I have pointed out in Chapter I and the first part of this chapter, an essential component of modern international

[176] Kim and Bloomfield (n 67) 198-199.
[177] See, for example, Dong-Hun Kim, 'Coercive Assets? Foreign Direct Investment and the Use of Economic Sanctions' (2013) 39(1) *International Interactions: Empirical and Theoretical Research in International Relations* 99, 103-104; H Richard Friman, 'Conclusion: Exploring the Politics of Leverage' in H Richard Friman (ed), *The Politics of Leverage in International Relations Name, Shame, and Sanction* (Palgrave Macmillan 2015) 209.
[178] Goodman and Jinks (n 63) 693-694; Chayes and Chayes (n 161) 28 and 126-127; see also Kim and Bloomfield (n 67) 198-199.

inquiries is monitoring and reporting and, hence, the above considerations apply to such mechanisms as well. By clarifying the content and scope of complex legal obligations as well as the consequences of their violation and by highlighting how state performance deviates from normative standards, fact-finding missions supply expert advice on how to interpret and comply with those norms. Examples of this process can be found in the arguments put forward by several commissions of inquiry to outline the responsibilities of non-state actors stemming from international human rights and humanitarian law vis-à-vis the civilian population. Albeit with different depth of analysis, both the Goldstone Commission and the 2015 OHCHR investigation mission to Libya provide a useful illustration of this strategy.

The Goldstone Commission found evidence that, in some occasions, Palestinian armed groups had failed to take all feasible precautions to protect the civilian population of Gaza.[179] Faced with the alleged inability of Gaza authorities to provide details about the tactics of Palestinian armed groups, the Commission explained that nevertheless the local authorities retained an obligation to ensure that armed groups on the territory under their control conduct the hostilities in a manner compatible with international humanitarian law and human rights law.[180] In the legal framework section of the report, the Commission not only provided authority for establishing a general obligation of all parties to a conflict – both state and non-state actors – to respect international humanitarian law and, based on the effective control test, human rights law, but also explained that these ensure 'the protection of people and' the enjoyment of 'their human rights in all circumstances'.[181] By determining that non-state actors who exercise government-like functions have an obligation to take all feasible precautions to protect the civilian population, the Commission clarified that they cannot outright reject responsibility for

[179] For example, the Commission found 'that there are indications that Palestinian armed groups launched rockets from urban areas' and that they 'do not appear to have given Gaza residents sufficient warning of their intention to launch rockets from their neighbourhoods to allow them to leave and protect themselves against Israeli strikes at the rocket launching sites', Goldstone Report (n 54) para 482.
[180] Ibid para 498.
[181] Ibid para 305.

conducts carried out by armed groups operating in the territory under their control simply because they do not respond to the command structure of the controlling group.

The investigation commission on Libya faced a situation where several different non-state actors had allegedly engaged in serious human rights and humanitarian law violations. In the legal framework section, the Commission, without delving into the issue as much as the Goldstone Commission, explained that 'non-State actors who exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control'.[182]

The authoritativeness of these pronouncements, while arguably not comparable to court judgments, may facilitate internalisation of international norms and standards. Internalisation can occur at different levels and through different mechanisms. Interpretive clarity may assist domestic authorities willing to abide by certain international rules to implement them in a way that satisfy the goals of those norms. In this sense, commissions of inquiry may be exercising a sort of *ex post facto* but forward-looking advisory function. By identifying how a factual situation contravenes a legal norm, they recommend actions to correct the deviant behaviour and to prevent future violations. For example, several fact-finding missions recommended the adoption of specific legislation or suggested amendments to existing legislation.[183] These are forward-looking recommendations that do not aim at simply tackling a specific incident or set of incidents, but rather suggest how to ensure that the state is equipped with the legal instruments to prevent or deal with the same events, should they re-occur in the future.

[182] UNHRC, Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: detailed findings (15 February 2016) UN Doc A/HRC/31/CRP.3, para 29.

[183] For example, see UNHRC, Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea (7 February 2014) UN Doc A/HRC/25/63, para 89(a); UNHRC, Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups (27 March 2015) UN Doc A/HRC/28/18, para 79, where the commission recommended that the Government of Iraq should 'take the necessary steps for Iraq to become a party to the Rome Statute of the International Criminal Court and ensure that the international crimes defined in the Rome Statute are criminalized under domestic law'; UNHRC, Report of the International Commission of Inquiry on Côte d'Ivoire (1 July 2011) UN Doc A/HRC/17/48, para 127(h).

Internalisation can also be prompted by non-state actors through the pressures they exercise on state structures through advocacy and litigation.[184] By authoritatively determining that a violation has been perpetrated and how it should be dealt with at the domestic level, commissions of inquiry back civil society organisations who demand accountability and reform from state authorities or non-state groups who have allegedly perpetrated the illegal conducts. In this sense, commissions of inquiry form part of a transnational advocacy network and their role may be explained with the 'boomerang pattern' model theorised by Margaret Keck and Kathryn Sikkink.[185] Accordingly, domestic civil society organisations, who do not succeed in directly pressuring their governments to conform to international norms through domestic bottom-up channels, seek the assistance of international allies to bring pressure on states. Coherently with this construction, commissions of inquiry constitute the international vehicle for domestic grievances thanks to their reliance on reports and information provided by domestic NGOs.[186] However, commissions of inquiry should avoid conveying the impression that they are ideologically aligned to domestic groups since this would run counter to the principles of independence and impartiality that should govern their functioning. In turn, this may require reliance on a widely diversified range of sources and a careful assessment of the reliability of the sources of information.

As discussed above, a method frequently employed to persuade states to conform to international norms is 'framing'. 'Framing' is commonly defined as a 'process by which people develop a particular conceptualization of an issue or reorient their thinking about an issue', given that such issue 'can be viewed from a variety of perspectives and be construed as having

[184] See, for example, Jean Grugel and Enrique Peruzzotti, 'Grounding Global Norms in Domestic Politics: Advocacy Coalitions and the Convention on the Rights of the Child in Argentina' (2010) 42 *J Lat Amer Stud* 29-57, where the authors argues that the ratification of the Convention on the Rights of the Child altered the relation of forces in Argentinian civil society by strengthening the position of advocacy groups and networks and providing opportunities for starting new advocacy processes centred on the rights provided for in the Convention.
[185] Margaret E Keck and Kathryn Sikkink, *Activists beyond Borders. Advocacy Networks in International Politics* (Cornell University Press 1998) 12-13.
[186] Indeed, sometimes international commissions of inquiry who are not granted access to the territory of the state they seek to investigate rely exclusively on information provided by NGOs or other domestic groups.

implications for multiple values or considerations'.[187] International commissions of inquiry on human rights regularly resort to legal frames. Specifically, in Chapter I, I have shown that the main legal frames employed by international commissions of inquiry on human rights are drawn from international human rights, humanitarian and criminal law. While the choice of such frames is oriented by the institutional setting in which commissions of inquiry operate, their wide resonance among states and their domestic constituencies represent a clear advantage. Indeed, established acceptance of the normative values encapsulated in these bodies of law may bolster the internalisation process as well as the mobilisation of external allies. However, there are also intrinsic risks that may jeopardise the attempt at persuasion. In particular, both Pascal Vennesson and Shiri Krebs have shown, albeit from different perspectives, the dangers inherent to the legal language. The former author has demonstrated that international humanitarian law frames are inherently ambiguous and may provide counter-arguments to target states to claim that their actions are in conformity with the law.[188] The latter author has shown that the binary structure of legal language, often adopted by international commissions of inquiry to qualify facts,

> tends to trigger cognitive and emotional biases …. An adversarial, binary, legal judgment-approach to truth might frustrate attempts at resolving factual controversies and disseminate threatening information. "Hot" legal terminology, such as "war crimes", might trigger a defensive reaction or rejection of information and decrease the perceived fairness of the report.[189]

[187] Dennis Chong and James N Druckman, 'Framing Theory' (2007) 10 *Annu Rev Polit Sci* 103, 104; see also Vennesson (n 67) 31; Rodger A Payne, 'Persuasion, Frames and Norm Construction' (2001) 7(1) *Eur J Int Relat* 37, 39; Robert D Benford and David A Snow, 'Framing Processes and Social Movements: An Overview and Assessment' (2000) 26 *Annu Rev Socio* 611, 614; Keck and Sikkink (n 185) 2-3.

[188] See, generally, Vennesson (ibid), who analyses two cases whereby Human Rights Watch contested the Israel Defense Forces (IDF) actions during the wars in Lebanon (2006) and Gaza (2008-2009) by resorting to international humanitarian law frames. He shows that 'the ambiguity of the frame also provided the IDF with a range of material and ideational assets that gave it scope to claim that its actions were actually in conformity with applicable law, and to justify continuing to use force in densely populated areas'.

[189] Shiri Krebs, 'The Legalization of Truth in International Fact-Finding' (2017) 18(1) *C J Int'l L* 83, 144; see also Shiri Krebs, 'Designing International Fact-Finding: Facts, Alternative Facts, and National Identities' (2018) 41(2) *Fordham Int'l LJ* 337, 379, where she argues that 'The Report's focus on binary legal categories intensified Israelis' defensive response aimed at protecting and preserving their national narrative. At the same time, it shifted attention from the brute facts - the sounds and images, the voices and faces, the dust, ruins, hunger, blood and tears - to sophisticated and abstract debates over legal interpretations and definitions'.

In conclusion, commissions of inquiry are well positioned and equipped to persuade states to conform to international norms. They can and do make use of informational, rhetorical and discursive strategies to cue states to re-think their conducts and can easily be afforded the necessary expertise and operational capacity to carry out these functions. However, language is key to their success. Notably, reports of commissions of inquiry speak to different audiences, including international organisations, diplomats, state officials, domestic judiciaries, law- and policy-makers, civil society organisations and the wide public more generally. This is a consequence of both the specific mandate each commission of inquiry is given and their contribution towards multiple policy goals, and it implies the use of different languages. The co-existence of multiple policy goals, and thus the need to make language choices, evokes some of the problems identified by Goodman and Jinks, in particular, the potential conflict between multiple strategies.[190] From this viewpoint, legal frames, despite their apparent objectivity, pose specific problems as they provide grounds for contestation and may prove counter-productive in fostering conformity or compliance in a persuasion setting. Moreover, the duality of legal language may hinder attempts at persuasion by triggering rejection. Powerful legal terminology may well be suited for prompting acculturation processes but may not be well tailored to a persuasion approach.

2.2.4 International Inquiries and Acculturation

International commissions of inquiry may also contribute to triggering acculturation processes. However, their role varies depending on the type of acculturation process that is prompted. As I have noted above, acculturation can occur essentially in two different ways: through either social or cognitive pressures. Acculturation through cognitive pressures hinges on the self-perceived identity and role of the state in its social environment and hence requires

[190] Goodman and Jinks (n 59).

shedding light on conducts at odds with such self-perceived status. Acculturation through social pressure is externally triggered by 'name and shame' strategies that seek to impose reputational costs on the state with a view to prompting conformity. Goodman and Jinks note that monitoring and reporting may be instrumental to fostering acculturation especially if associated with open criticism.[191] By exposing wrongdoings and pointing the finger at the state – or even at specific actors, including individuals, within the state – commissions of inquiry would be imposing reputational costs (social sanction) on the state, which in turn might be driven to conform to international norms.

While it may contribute to further public accountability and induce that state of dissonance that foreshadows acculturation, the 'politics of shame'[192] should be used judiciously. One obvious consideration is that 'naming and shaming' hinge on the sense of belonging of the target state to a social group that shares certain normative values. Hence, as Lebovic and Voeten put it, 'any commission that, within its membership, includes countries that are potential targets of the commission invites a political rather than an impartial resolution'.[193] The acculturation potential of such a resolution – or, for our purposes, inquiry – would be seriously undermined by the mere fact that several other members of the establishing body could be criticised on the same or worse grounds than the target state. In other words, insufficient consensus on the normativity of certain values – human rights – or partial internalisation of normative commitments among members of the social environment surrounding the target state would weaken social pressures on which acculturation relies. Moreover, 'shaming' techniques may not always be attuned to the specific purposes that some commissions of inquiry seek to achieve. In particular, Goodman and Jinks note that genuine commitment to activating accountability mechanisms may be signalled by a graduation of the criticism directed at the

[191] Ibid 696.
[192] This expression is borrowed from Lebovic and Voeten (n 142).
[193] Ibid 885.

state.[194] Since commissions of inquiry are often deployed at a very early stage of the accountability cascade, harsh criticism of the state may be incompatible with such a technique and may jeopardise the credibility of other strategies. Indeed, 'shaming' may polarise the constructive debate that underpins persuasion, thus triggering rejection instead of internalisation.

Moreover, since 'naming and shaming' could also be directed at individuals, advantages and disadvantages of this technique should be valued against the rights of such individuals and the potential adverse consequences that might consequently befall them. Advantages may include the possibility to better monitor domestic accountability processes, which may be relevant in light of the prospective intervention of international judicial mechanisms such as the International Criminal Court in cases of alleged international crimes. Or, the possibility for such judicial mechanisms to rely on specific leads provided by naming individuals. Conversely, disadvantages may include the impingement on the defence rights of the named alleged perpetrators, despite the fact that this is not a judicial setting, and the unavailability of sufficient resources to carry out this activity comprehensively vis-à-vis the legal implications of identifying alleged responsible individuals, in particular the need to establish, for international crimes, their *mens rea*.[195] In light of these considerations, 'naming and shaming' of alleged perpetrators seems to mirror two different approaches. On the one hand, it may signal a commitment to adopting coercive measures against nationals of the delinquent state, should domestic investigations and prosecutions of the individuals allegedly responsible for the violations not be carried out genuinely.[196] On the other hand, it may also be interpreted as an attempt at acculturation: in this sense, shaming individuals would amount to shaming the state

[194] Goodman and Jinks (n 63) 692.
[195] Carsten Stahn and Catherine Harwood, 'What's the Point of 'Naming Names' in International Inquiry? Counseling Caution in the Turn Towards Individual Responsibility' (2016) *EJIL: Talk!* <https://www.ejiltalk.org/whats-the-point-of-naming-names-in-international-inquiry-counseling-caution-in-the-turn-towards-individual-responsibility/> accessed 12 July 2018.
[196] See supra the discussion of 'naming and shaming' in the context of coercion, p 141.

not only in light of the violations perpetrated – in which case the individual should be part of the state structure – but also for its failure to prevent or suppress them.

Lastly, the relationship between commissions of inquiry and civil society organisations is also relevant under acculturation approaches. In fact, while they may assist in conveying the social pressure of the international community to conform to certain international norms, commissions of inquiry may also contribute to detecting forms of decoupling[197] in states that have formally committed to certain international norms but, in practice, continue to violate them. By spotlighting these situations and referencing studies and reports of domestic civil society organisations, which often document domestic practices inconsistent with the state's formal commitment to specific normative values, commissions of inquiry would legitimise the advocacy and litigation of such groups, thus bolstering their domestic leverage. However, the prospective benefits of these tactics should be measured against the state's perception of the strength of their domestic civil society organisations. States who foresee a long-term ability to control the political sphere, including by diminishing the pull of civil society organisations, would probably be less likely to reduce decoupling or be concerned with inquiry reports.[198]

Conclusion

In this chapter, I have introduced an alternative reading of international commissions of inquiry, which emphasises their role as agents of state socialisation rather than merely accountability instruments. I have shown that all intended goals of commissions of inquiry are geared towards achieving the ultimate purpose of international regime design, that is, states' obedience to international norms. Hence, I have posited that an overly legalistic and static analysis of the impact and effectiveness of international inquiries risks yielding predictable

[197] That is, inconsistencies between formal commitments and actual practice (see, for eg, Goodman and Jinks (n 151) 729-731; John W Meyer, John Boli, George M Thomas and Francisco O Ramirez, 'World Society and Nation-State' (1997) 103(1) *Am J Sociol* 144, 155).

[198] Goodman and Jinks (ibid) 735; Emilie M Hafner-Burton, Kiyoteru Tsutsui and John W Meyer, 'International Human Rights Law and the Politics of Legitimation' (2008) 23(1) *Int Sociol* 115, 123-126.

negative results due to the intrinsic weaknesses of such processes. However, if we account for process-based dynamic outcomes, including for example domestic bottom-up normative pressures to implement specific standards of conduct, we may come to different, probably more optimistic, conclusions. Therefore, I propose to de-construct overly legalistic understandings of international commissions of inquiry and re-interpret them in light of theories of state socialisation. By correlating mechanisms such as coercion, persuasion and acculturation with the institutional goals of international inquiries, we may be able to better account for the effects that they produce at the domestic level and understand their function within the above-mentioned international regimes and their engagement with domestic actors. Moreover, by reading inquiry processes through the lenses of the mechanisms of state socialisation we may be able to provide better relational explanations for the successes or failures that the scholarly debate often attributes entirely to either the commissions of inquiry, by dint of their alleged politicisation, or the domestic authorities, by dint of their alleged unwillingness to act upon allegations of human rights violations. This reading also favours the articulation of a debate that integrates both law and politics. From this standpoint, the law should be understood not so much as a technical instrument but as a rhetorical tool, employed to communicate, for example, the commitment of international actors to applying sanctions or punishment for certain conducts. However, the use of legal frames should also be commensurate with the preferred strategy of state socialisation. Indeed, language is capable of both defusing and stirring tensions. In addition, it can easily be manipulated, especially where it resorts to ambiguous frames, of which legal language is replete.

Moreover, I have shown the three above-mentioned mechanisms of state socialisation can be complemented by a third one, ie procedural fairness or legitimacy. Whether this is able to elicit in and of itself state obedience or not, it is also an essential pre-condition for the functioning of commissions of inquiry. Such mechanisms are, in fact, structurally weak and

differ substantially from more legalised tools because their pronouncements are neither binding nor enforceable. In addition, their ad hoc nature implies a cyclic strife for legitimacy – which some see as an end in itself – which, by contrast, international courts, for example, do not experience in the same manner due to their permanent nature or their anchorage to a statute. Furthermore, procedural quality control is also likely to influence domestic reaction to inquiry reports. Contestation, for example, is likely to be easier if a commission of inquiry is seen as procedurally illegitimate.

The resulting theoretical model guides the empirical analysis conducted in the second part of this dissertation. On the one hand, it facilitates the isolation of the causal processes of impact and effectiveness by identifying hypothesised parameters, actors and micro-processes. In this sense, it represents a hermeneutical construction for the remainder of the analysis. On the other hand, and in light of the following empirical analysis, it facilitates the identification of dystonic elements in the combination of different strategies or in the use of language – in particular, legal language – vis-à-vis the privileged socialisation strategies.

PART TWO

CHAPTER IV

PROCEDURAL FAIRNESS IN CONTEXT:

ISRAELI AND PALESTINIAN PERSPECTIVES ON THE LEGITIMACY OF INTERNATIONAL COMMISSIONS OF INQUIRY

Introduction

On 2 February 2015, in a letter addressed to Joachim Rücker, then-President of the UN Human Rights Council, Professor William Schabas, at the time Chair of the International Commission of Inquiry on the 2014 Gaza Conflict, communicated his resignation from his post to the Council. Schabas' decision followed a complaint filed by the State of Israel asking for his removal from the Commission due to a legal opinion he had prepared for the PLO in 2012.[1] Almost four years before, on 1 April 2011, Richard Goldstone, former Chair of the 2009 Fact-Finding Mission to the Gaza Conflict, had published an op-ed on *The Washington Post* where he reconsidered some of the findings of the famously known Goldstone Report.[2] While these two episodes do not seem to share many commonalities, beside the fact that they both concern UN-sponsored inquiries, there is more than meets the eye. On the one hand, Professor Schabas' decision to resign from his post was met by the President of the Human Rights Council with words of approbation when he stated, in his reply to the Middlesex-based academic, that 'in this way, even the appearance of a conflict of interest is avoided, thus preserving the integrity of the Commission of Inquiry in carrying out its work'.[3] On the other hand, Richard Goldstone's

[1] Letter addressed to the President of the Human Rights Council from Professor William Schabas (2 February 2015) <https://extranet.ohchr.org/sites/hrc/PresidencyBureau/BureauRegionalGroupsCorrespondence/Corresp2014DL/Letter%20of%20resignation%20from%20Prof%20Schabas%20tp%20President%202%202%2015.pdf> accessed 3 May 2018.

[2] Richard Goldstone, 'Reconsidering the Goldstone Report on Israel and war crimes' (1 April 2011) *The Washington Post* <http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/A Fg111JC_story.html> accessed 3 May 2018.

[3] Letter addressed to Professor William Schabas from the President of the Human Rights Council regarding his resignation as Chair of the Commission of Inquiry on the 2014 Gaza Conflict (3 February 2015) <https://extranet.o

op-ed insisted that the Goldstone Report would have looked quite different, had Israel cooperated with the Mission.

Both episodes are demonstrative of how certain structural characteristics of international commissions of inquiry may affect the fact-finding process by contributing to determining a state's choice to cooperate or not with the fact-finding mission, and by providing opportunities for undermining the inquiry process altogether. Goldstone's op-ed is replete with statements that underscore the importance of structural normative values such as even-handedness, impartiality and independence. For example, he points out that

> As I indicated from the very beginning, I would have welcomed Israel's cooperation. The purpose of the Goldstone Report was never to prove a foregone conclusion against Israel. I insisted on changing the original mandate adopted by the Human Rights Council, which was skewed against Israel … Something that has not been recognized often enough is the fact that our report marked the first time illegal acts of terrorism from Hamas were being investigated and condemned by the United Nations. I had hoped that our inquiry into all aspects of the Gaza conflict would begin a new era of evenhandedness at the U.N. Human Rights Council, whose history of bias against Israel cannot be doubted.

Copious scholarship has emphasised the centrality of sound rules of procedure and evidence, including on the status of fact-finders, as a means to maximise the effectiveness of international commissions of inquiry.[4] Some academic concerns have migrated into policy circles resulting in attempts to provide guidelines for fact-finding missions.[5] While none of these attempts has turned into binding regulations, there seems to be consensus about some general principles that

hchr.org/sites/hrc/PresidencyBureau/BureauRegionalGroupsCorrespondence/Corresp2014DL/Letter%20Professor%20Schabas.pdf> accessed 3 May 2018.

[4] See, in particular, Thomas M Franck and H Scott Fairley, 'Procedural Due Process in Human Rights Fact-Finding by International Agencies' (1980) 74(2) *AJIL* 308; Stephen Wilkinson, 'Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions' (Geneva Academy of International Humanitarian Law and Human Rights) 59 <https://www.geneva-academy.c h/joomlatools-files/docman-files/Standards%20of%20Proof%20in%20Fact-Finding.pdf> accessed 12 September 2017; Théo Boutruche, 'Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice' (2011) 16(1) *JC&SL* 105; Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Torkel Opsahl Academic EPublisher 2013); see also Chapter III, pp 125-127.

[5] See, in particular, M Cherif Bassiouni and Christina Abraham (eds), *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies* (intersentia 2013); Harvard Humanitarian Initiative, Program on Humanitarian Policy and Conflict Research, 'HPCR Advanced Practitioner's Handbook on Commissions of Inquiry: Monitoring, Reporting, and Fact-Finding' (2015); OHCHR, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law. Guidance and Practice* (2015).

should guide the establishment of fact-finding missions and the subsequent inquiry process. The 1991 UN Declaration on Fact-Finding generally recommends that 'fact-finding should be comprehensive, objective, impartial and timely'. As explained in Chapter III, the same Declaration and other sets of guidelines have contributed to detailing these general principles.[6]

Notwithstanding the acknowledged practical impossibility of providing an all-encompassing recipe, this "cookbook" aims at both controlling the quality of international inquiries[7] and conferring credibility, and ultimately legitimacy, to the fact-finding process.[8] In other words, there is an expectation that by ensuring that the fact-finding process is carried out according to certain pre-determined, sound procedural standards, its outcome is likely not only to be of better quality, but also to elicit wider consensus and acceptance by the targeted groups. That is to say that the impact and effectiveness of international commissions of inquiry on domestic constituencies cannot be isolated from an appraisal of the way in which domestic actors perceive the fairness and credibility – and, ultimately, the legitimacy – of the fact-finding process. An inquiry commission which is perceived as legitimate, fair and credible is likely to be more effective and produce a positive impact on the targeted constituencies, whereas an

[6] In particular, as explained in Chapter III, the UN Guidance and Practice on *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law* (ibid) lists several criteria that should direct parent bodies to select fact-finders. The two main principles in the list provided are independence and impartiality, and are followed by knowledge-based and technical competence, experience, personal integrity and moral standing, situation-based knowledge and other transferable skills. Further specifications are listed to guide the selection of the support staff who carries out most of the work behind the curtains. The UN Guidance and Practice also lists several methodological principles that commissions of inquiry are expected to abide by. These include the do no harm principle, independence, impartiality, transparency, objectivity, confidentiality, credibility, visibility, integrity, professionalism and consistency, and echo similar general principles identified by other sets of guidelines. In addition, specific guidelines seek to shed light on the most appropriate standard of proof to be adopted in order to deem a piece of information probative.

[7] In his foreword to the UN Guidance and Practice, the current UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussain, underscores that 'while there is no single format for the constitution and functioning of all such bodies, the methodological tenets that guide all fact-finding and investigations on human rights and international humanitarian law, as developed based on relevant norms, standards and principles, provide a common thread across the various models, and *ensure the production of sound analysis, reports and recommendations*' (emphasis added). Large part of the existing scholarship on international fact-finding missions has focused on the elaboration of methodological standards aimed at ensuring the quality of the fact-finding process. Arguably one of the most influential publication in point is Bergsmo (n 4).

[8] The importance of sound rules of procedure and evidence for providing commissions of inquiry with credibility and legitimacy has already been noted by Franck and Fairley (n 4) 309, in an oft-cited mantra which reads as follows: 'the prospects for fact-finding rest upon a fragile assumption of "fairness" and "credibility" that only a conscious vigilance can sustain'.

inquiry commission which is perceived as unfair, not credible and, ultimately, illegitimate is likely to be less effective and produce a negative impact.

Moreover, international commissions of inquiry do not operate in a vacuum. Their "ad-hoc-kery" is justified by the fact that they are deployed in different contexts and thus must be receptive to the surrounding environment. However, this implies that the meaning of terms such as impartiality, independence, objectivity, even-handedness, professionalism and others is partly context-dependent. This need not imply an utter disowning of the core significance of such values – which would otherwise lead to an irremediable state of relativism – but requires the external observer to understand how context-dependent nuances influence the normativity of such values.

From an empirical viewpoint, this calls for a contextualisation of the states' positions with respect to the deployment of international inquiry mechanisms within their broader understanding of and stance on specific international institutions. Indeed, specific criticism of an inquiry mechanism may be determined by both genuine concerns about the fairness of the inquiry process and a more generalised, and sometimes opportunistic, aversion to the mandate-giver institution. Hence, this chapter seeks to survey the positions of both the Governments of Israel and Palestine with regard to the establishment of the inquiry mechanisms considered in light of their general stance on the intervention of international law and institutions on matters related to the Israeli-Palestinian conflict.

The chapter is organised into three sections. First, I outline the context of the case study by juxtaposing Israel and Palestine's differing approaches to international institutions and international law. Both parties have exploited the international legal arena as a battlefield for eliciting the support of the international community of states but have done so in quite different fashions, and each by privileging different fora. Understanding this sets the stage for the

following analysis because the sample used in this study includes commissions of inquiry mandated by the UN Human Rights Council only, which is representative of a *specific* forum within the international legal system. Second, I systematically present the (legal) arguments put forward by Israeli and Palestinian policy- and decision-makers to discredit, criticise or praise the work of the sampled commissions of inquiry on procedural grounds. The units of analysis are presented in chronological order and for each unit the presentation is thematic. Third, I analyse the arguments presented and extrapolate their commonalities and differences with a view to providing an assessment of how structural factors impact on the reception of fact-finding missions' reports. I also provide an assessment of the genuineness or instrumentality of the arguments used. I conclude by foreshadowing the expected influence of the perceived (il-)legitimacy, (un-)fairness and (non-)credibility of international inquiries on the impact and effectiveness of their substantial findings and recommendations, and by underlining the importance of carefully devising fact-finding missions that are structurally capable of both accommodating context-specific conceptions of inquiry – or even justice – and ensuring high quality fact-finding processes.

1. Differing Approaches to International Institutions: Between Offensive and Defensive Lawfare

An understanding of the Israeli and Palestinian policy- and decision-makers' assessment of commissions of inquiry cannot dispense with a preliminary overview of their respective approaches to international institutions and international law more generally. In the context of the Israeli-Palestinian conflict, the international legal arena, arguably even more than the combat zone, has in fact become a battleground where competing narrations of the facts and interpretations of the law clash in an effort to garner international support and legitimacy.[9]

[9] See, for example, the insightful analysis of Orde F Kittrie, *Lawfare: Law as a Weapon of War* (OUP 2016) 197-328.

However, engagement with international legal institutions by the two conflicting parties is characterised by different priorities and driven by different motivations. This instrumental use of the law is commonly – and, admittedly, controversially – referred to as lawfare.[10]

Palestinian governments have regularly exploited the spaces offered by international legal institutions as a matter of strategy. This is confirmed by the words of Mahmoud Abbas, current President of the State of Palestine, who stated, in an op-ed published in *The New York Times* in 2011, that 'Palestine's admission to the United Nations would pave the way for the internationalization of the conflict as a legal matter, not only a political one. It would also pave the way for us to pursue claims against Israel at the United Nations, human rights treaty bodies and the International Court of Justice'.[11]

Orde F Kittrie has described the Palestinian National Authority (PNA) lawfare as a three-pronged strategy, which includes the campaign for the recognition of a Palestinian state outside the negotiations with the State of Israel, the accession to the Rome Statute of the International

[10] The term 'lawfare' was first coined in a working paper by US Colonel Charles J Dunlap, 'Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts' (29 November 2001) prepared for the Humanitarian Challenges in Military Intervention Conference held at the Carr Center for Human Rights Policy at Harvard University. Colonel Dunlap initially defined lawfare as 'a method of warfare where law is used as a means of realizing a military objective'. Further statements in this seminal paper seem to charge the term 'lawfare' with a negative acceptation. For example, Dunlap argues that 'the rule of law is being hijacked into just another way of fighting (lawfare), to the detriment of humanitarian values as well as the law itself'. However, in a later paper, Colonel Dunlop's position softened considerably as he defined lawfare as a 'strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective' (Charles J Dunlap, 'Lawfare Today: A Perspective' (2008) 3 *Yale J Int'l Aff* 146, 146). Dunlop reaffirmed the neutrality of the term in a later paper where he argued that 'the term was always intended to be ideologically neutral, that is, harking back to the original characterization of lawfare as simply another kind of weapon, one that is produced, metaphorically speaking, by beating law books into swords. Although the analogy is imperfect, the point is that a weapon can be used for good or bad purposes, depending upon the mindset of those who wield it. Much the same can be said about the law' (Charles J Dunlap, 'Does Lawfare Need an Apologia?' (2010) 43 *Case W Res J Int'l Law* 121, 122). Among the detractors of the usefulness of the term 'lawfare', features William A Schabas, 'Gaza, Goldstone, and Lawfare' (2010) 43(1) *Case W Res J Int'l Law* 307, 309. To be sure, Schabas' critique was aimed at defending Richard Goldstone, who had chaired the Fact-Finding Mission to the 2009 Gaza Conflict, from accusations of lawfare. Schabas rhetorical observation that 'Before charging Richard Goldstone and the Commission he chaired with "lawfare", critics might first explain the "operational objective" he was pursuing, and why he turned to the law "as a substitute for traditional military means"' is certainly reasonable. But that does not necessarily imply that states – or even non-state actors – cannot engage in some form of strategic litigation or use of the law aimed at weakening the operational capacity of an adversary or constraining its actions. I employ the term 'lawfare' in its neutral acceptation, that is to describe an instrumental use of the law and legal institutions.

[11] Mahmoud Abbas, 'The Long Overdue Palestinian State' (16 May 2011) *The New York Times* <https://www.nytimes.com /2011/05/17/opinion/17abbas.html> accessed 4 May 2018.

Criminal Court and the pursuit of its claims against Israel through procedures available under several international instruments.[12] According to Kittrie's construction, the type of lawfare the State of Palestine engages with could be described as offensive. It aims to achieve specific strategic objectives, which decades of negotiations with the State of Israel were not able to yield, by, on the one hand, excluding the counterpart – Israel – from the process and, on the other hand, "shifting the battlefield" from the domestic to the international arenas where support from other states can be exploited. However, there is also reason to read Palestine's accession to the Rome Statute of the International Criminal Court in particular as a partially defensive move. For example, Kittrie provides evidence that accession to the Statute was meant to deter any further offensive on the Gaza Strip and halt settlements construction.[13] The law of armed conflicts has provided additional leverage for Palestinian groups who have often sought to elicit the condemnation of Israeli warfare from UN bodies such as the UN General Assembly or the Human Rights Council.[14] Kittrie has also argued that international humanitarian law has been exploited by Palestinian armed groups in Gaza, in particular Hamas, in order to wage what he terms 'battlefield lawfare' or 'compliance-leverage disparity lawfare'. He describes this typology of lawfare as 'lawfare, typically on the kinetic battlefield, which is designed to gain advantage from the greater influence that law, typically the law of armed conflict, and its processes exerts over an adversary'.[15] Further, he argues that battlefield lawfare is typically deployed to achieve two main objectives: '(1) causing the more law-sensitive adversary to self-

[12] Kittrie (n 9) 197-237.
[13] Ibid 212. Kittrie cites Palestinian legal expert Mostafa Elostaz, who is reported to have stated that 'success at the ICC is likely to not only hold Israel responsible and accountable for its actions, but immediately produce the kind of deterrence that has been missing in the Palestinian arsenal of nonviolent weapons'.
[14] See, for example, UNGA, Protection of the Palestinian civilian population, Res No ES-10/20 (18 June 2018) UN Doc A/RES/ES-10/20; UNGA, Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories, Res No 72/85 (14 December 2017) UN Doc A/RES/72/85; UNHRC, Follow-up to the report of the independent international fact-finding mission on the incident of the humanitarian flotilla, Res No 17/10 (19 July 2011) UN Doc A/HRC/RES/17/10; UNHRC, Follow-up to the report of the independent international factfinding mission on the incident of the humanitarian flotilla, Res No 16/20 (12 April 2011) UN Doc A/HRC/RES/16/20.
[15] Ibid 11.

impose restraints that render its armed forces less effective and (2) eroding public and international support for the more law-sensitive adversary'.[16] While this type of lawfare may seem more relevant on the physical battlefield, its wielder must necessarily appeal to the international community of states to maximise its effectiveness. Hence, international legal institutions represent a means to an end. As a means, Palestinians have exploited them to curtail Israel's operational capacity on the battleground by eliciting condemnation from such institutions on legal grounds. The end is to halt or severely constrain Israel's warfare or, correspondingly, enhancing Palestinian groups' operational capacity on the ground.[17] However, given the reputational costs that such exploitative tactics may imply, the objective (2) can only be achieved within certain institutional settings that are more inclined to overlook the lawfare-waging party's own violations of the laws of war or, anyway, emphasise the adversary's violations.[18]

In contrast to Palestinian governments, the State of Israel has been much less proactive in waging so-called offensive lawfare against Palestinian groups and has not been so keen on internationalising[19] the conflict. From a purely legal viewpoint, the debates over the status of

[16] Ibid 285.

[17] This strategy, however, does not come scot-free. Some of the tactics allegedly employed by Hamas, for example, expose the group to counter-lawfare. Kittrie mentions the use of civilian locations for military purposes and the use of human shields, which both constitute violations of international humanitarian law, as a way to drive Israel into an irresolvable quandary: either to strike in the knowledge that this might constitute a violation of the laws of armed conflict or to refrain from striking thus renouncing to the military advantage that could otherwise accrue to Israel by striking the target. The fact that such tactics elicited the condemnation of the US, the EU and the UN, however, casts a shadow on the argument that Hamas intended to use them to wage 'battlefield lawfare' on Israel. While it may certainly be accurate to say that Hamas, or other Palestinian groups, intended to hamper Israel's operational capacity on the battlefield, it is also true that the tactics used would have exposed the group to equal or even harsher criticism. Thus, Hamas may have been able to halt some Israeli military strikes but, at the same time, it is also likely to have worsened its moral standing vis-à-vis the international community of states. Hence, Kittrie's construction of 'battlefield lawfare', specifically point (2) in the main text, may not be entirely accurate. Admittedly, though, he argues that, with reference to the possible intervention of the International Criminal Court, Hamas is likely to be much less preoccupied by a prospective investigation – and prosecution – of its own members, since they would likely exploit such an eventuality to show the role of the Court in entrenching Israel's colonial domination of the Palestinian territories (ibid 333).

[18] Otherwise, there is an actual risk that the attempt to provoke international criticism might entrench the existing power structures and support patterns that characterise the targeted international institution. Thus can be explained the State of Palestine's forum preference for Geneva-based UN agencies over the New York-based UN structures.

[19] The term 'internationalisation' here does not signal, as is common in international humanitarian law jargon, the shift from a non-international to an international armed conflict. Rather, it refers to the process by which domestic

the West Bank, East Jerusalem and the Gaza Strip, and settlements in the West Bank exemplify Israel's aversion to legal-political interference by supranational actors or foreign states. Despite the consolidated position of the UN and the International Committee of the Red Cross (ICRC), as well as that of the majority of states,[20] Israel does not consider the West Bank, East Jerusalem or the Gaza Strip as occupied territories. Alan Baker, a former legal advisor of the Israel's Ministry of Foreign Affairs, for example, stated that

> The expression 'Occupied Palestinian Territory' is nothing more than a political term that has been commonly and frequently used in non-binding political resolutions, principally in the UN General Assembly, but also by the ICRC, representing nothing more than the political viewpoint of the majority of states voting in favour of such resolutions. These political determinations have never constituted, nor can they or should they constitute an authority for any determination by the ICRC that the territories are Palestinian. Such determination is clearly partisan.[21]

Conversely, the ICRC position vis-à-vis Israel's settlement policy in the occupied Palestinian territories has been clear since 2001, when 'the ICRC [expressed] growing concern about the consequences in humanitarian terms of the establishment of Israeli settlements in the occupied territories, *in violation of the Fourth Geneva Convention*'.[22] More recently, the UN Security Council, in an unprecedented vote, has affirmed the illegality of the Israeli settlements in the West Bank with Resolution 2334 (2016).[23] Several media reports detailed attempts by the Israeli diplomacy to both avert a vote on the settlements prior to the passing of the

actors attempt to move the conflict from the domestic physical or political battleground to the international legal or diplomatic level.

[20] Alan Baker, 'International humanitarian law, ICRC and Israel's status in the Territories' (2012) 94(888) *IRRC* 1511; Peter Maurer, 'Challenges to international humanitarian law: Israel's occupation policy' (2012) 94(888) *IRRC* 1503.

[21] Baker (ibid) 1514.

[22] Conference of High Contracting Parties to the Fourth Geneva Convention: statement by the International Committee of the Red Cross (5 December 2001) <https://www.icrc.org/eng/resources/documents/article/other/5fldpj.htm> accessed 7 May 2018.

[23] UNSC Res 2334 (2016) (23 December 2016) UN Doc S/RES/2334 (2016). In the Resolution, the Security Council '*Reaffirms* that the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace' and '*Underlines* that it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations'.

Resolution and annul it afterwards.[24] This shows that even on matters upon which authoritative international agencies as well as the majority of states hold a well-established position, the State of Israel is not willing to defer to such pronouncements and deems all such statements an unjustified intrusion into its domestic affairs. Moreover, as Kittrie has shown, Israel has rarely openly deployed offensive lawfare against Palestinians and has done so mainly through private actors.[25] Kittrie argues that this public-private collaboration in deploying offensive lawfare has been aimed at avoiding setting precedents that could be used against Israel itself by its enemies.[26] Conversely, examples of defensive lawfare waged by Israeli public state structures abound. For example, in 2009, the Israeli Security Cabinet established a special office within the Ministry of Justice to deal with 'all international legal proceedings against Israel, Israeli soldiers or officials'.[27] The establishment of the Turkel Commission – which will be discussed in detail in the following chapter – itself could be seen as a form of defensive, and to some extent offensive, lawfare.[28] The Commission was established by the Israeli Government to investigate the factual circumstances of the Gaza flotilla incident in 2010, and the procedures

[24] Matt Spetalnick, 'Israel asked Trump to intervene to avert UN vote on settlements: Israeli official' (23 December 2016) *Reuters* <https://www.reuters.com/article/us-israel-palestinians-un-official-idUSKBN14C02X?mod=related&channelN ame=worldNews> accessed 7 May 2018; Barak Ravid, 'Britain Pulled the Strings and Netanyahu Warned New Zealand It Was Declaring War: New Details on Israel's Battle Against the UN Vote' (28 December 2016) *Haaretz* <https://www.haaretz.com/israel-news/.premium-britain-pulled-the-strings-netanyahu-threatened-nz-israel-s-un-vote-ba ttle-1.5479015> accessed 7 May 2018; Toi Staff, 'Israel and US to work to annul UN anti-settlement resolution' (7 June 2017) *The Times of Israel* <http://www.timesofisrael.com/israel-and-us-to-work-to-annul-un-anti-settlement-resolution/> accessed 7 May 2018; Itamar Eichner, 'Israel asks US to nullify UNSC settlement resolution' (5 November 2017) *ynetnews.com* <https://www.ynetnews.com/articles/0,7340,L-4960583,00.html> accessed 7 May 2018.

[25] Kittrie (n 9) 311-328. Kittrie's chapter on Israeli offensive lawfare analyses three case studies demonstrating how Israel has deployed lawfare strategies. Two of these cases concern private litigants – the Israeli NGO Shurat HaDin and private plaintiffs such as Tully Wultz, the father of a US citizen who was killed in a terrorist attack in Tel Aviv in 2006 – to whom the Government provided assistance in the form of legal aid and evidence. See also Yossi Gurvitz, 'The Israeli government's official 'lawfare' contractor' (19 October 2013) *+972* <https://972mag.com/the-israeli-governments-official-lawfare-contractor/80659/> accessed 9 May 2018; Barak Ravid, 'Foreign Ministry to Use Front Groups for PR Efforts in Europe' (31 May 2010) *Haaretz* <https://www.haaretz.com/1.5127138> accessed 9 May 2018. See also Israel's recently revealed strategy to pay international firms to countering the Boycott, Divestment and Sanctions (BDS) movement abroad, Jonathan Ofir, 'Revealed: Israeli Justice Ministry directly involved in international 'lawfare' activities against BDS movement' (24 April 2018) *Mondoweiss* <http://mondoweiss.net/2018/04/revealed-international-activities/> accessed 9 May 2018.

[26] Ibid 311.

[27] Ido Rozenzweig and Yuval Shany, 'Establishment of a Legal Department by the Israeli Security Cabinet to Deal with Issues of International Jusrisdiction' (2009) 12 *Terrorism & Democracy*.

[28] Interview with unnamed former staff member of the Turkel Commission, 9 May 2018.

to examine and investigate allegations of international humanitarian law violations in Israel.[29] The establishment of the Commission might be explained as an attempt to deflect criticism levelled against Israel for its actions during the boarding of the Comoros-registered vessel *Mavi Marmara* and, more generally, against its domestic complaints-handling machinery.[30] On a more substantive level, the Commission's assessment of the legality of the naval blockade on the Gaza Strip managed to persuade the Palmer inquiry, mandated by the UN Secretary-General, and hence might be seen as a form of offensive lawfare aimed at providing international legitimacy and traction to the Israeli position on this issue.[31] However, this interpretation must be taken with a grain of salt since the Turkel Commission was intended to be independent from the Israeli Government, and thus cannot be deemed to have simply conveyed or acquiesced to the Israeli official position on the naval blockade on the Gaza Strip.

This cursory examination of Palestinian and Israeli relationship with international legal institutions and the deployment of what has been termed lawfare suggests fundamentally different strategic approaches to international law. On the one hand, Palestinian governments have proven to be willing to appeal to international fora as an alternative to frequently stalled Israeli-Palestinian negotiations, dysfunctional domestic accountability mechanisms or simply to remove the adversary – Israel – from the equation. According to Kittrie's construction, Palestinian lawfare is mostly offensive but it also displays defensive features, especially when it is employed to deter or hamper Israeli military actions. For the purposes of this research this approach suggests a generally high level of trust in international legal institutions. On the other hand, Israel has proven reluctant to recur to international fora or wage extensive offensive

[29] Resolution No 1796 of the 32nd Government, *Appointment of an Independent Public Commission, Chaired by Supreme Court Justice (ret.) Jacob Turkel, to Examine the Maritime Incident of 31 May 2010* (6 June 2010).
[30] Interview with unnamed former staff member of the Turkel Commission, 9 May 2018. For example, the interviewee underlined that, when it established the Turkel Commission and decided on the content of its mandate, the Israeli Government must have been confident that its investigation system would live up to international standards and, hence, no major criticism would come from the Commission.
[31] Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (September 2011) paras 69-82; interview with unnamed former staff member of the Turkel Commission, 9 May 2018.

lawfare against Palestinians. Indeed, Israel has preferred to devise strategies to counter Palestinian lawfare (defensive lawfare) and has only timidly engaged in public-private collaborations to wage offensive lawfare, and only in foreign jurisdictions supposedly more sympathetic to Israeli interests such as the US. International legal institutions are generally frowned upon by Israeli policy- and law-makers, and external legal interference is often seen with disfavour.[32] This does not mean that international law has no place in the Israeli legal system. Rather, as Yuval Shany has shown, domestic institutions seek to anticipate international legal interference by applying international law.[33] Whether this is done in a way that conforms to international standards is a different question.

While it does not fall within the purview of this study to determine whether Israel and Palestine's recourse to international law and institutions is strategically – or perhaps even exploitatively – oriented and, hence, whether the notion of lawfare provides an accurate theoretical account of such relations, the discussion above sheds some light on how the Governments of Israel and Palestine perceive the intrusions of such institutions in conflict-related matters. Against this backdrop, criticism of or deference to inquiry mechanisms on legitimacy issues should be carefully scrutinised. It would simply be too naïve to understand such criticism as systematically motivated by genuine concerns about the integrity of the fact-finding process. At the same time, though, the possibility that this may be well founded cannot be ruled out. In other words, procedural fairness indicators may provide a blueprint for fair inquiry processes but, while states may have reason to criticise their implementation with regard to specific inquiries, they are not in themselves sufficient to shield such mechanisms from opportunistic criticism.

[32] For example, a former staff member of the Turkel Commission told me that, in Israeli institutional and legal culture, being compared to international institutions or assessed as meeting international standards does not necessarily carry a positive connotation. Interview with unnamed former staff member of the Turkel Commission, 9 May 2018.

[33] Yuval Shany, 'Decade in Review: The Convergence of Israeli and International Law' (30 January 2010) *The Israel Democracy Institute* <https://en.idi.org.il/articles/10224> accessed 9 May 2018.

2. Towards a Taxonomy of Rejection on Procedural Grounds

Theories on procedural legitimation provide a sort of blueprint for engineering legal institutions that are capable of eliciting public trust and engendering a perception of fairness.[34] Fact-finding missions are no exception. As Thomas Franck and Scott Fairley note:

> The prospects for fact-finding rest upon a fragile assumption of "fairness" and "credibility" that only a conscious vigilance can sustain. Lawyers know that there are few "pure" facts. The subjective perceptive set or belief system of the perceiver is but the most salient of the intrusions into the process. All the more reason to strive for its integrity … if 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.[35]

Absent these procedural requirements, international inquiries are likely to fall easy prey to instrumental criticism. As a consequence, their likely impact is almost certainly bound to be negative and their effectiveness greatly diminished.

Israeli authorities have systematically sought to undermine inquiries established by the UN Human Rights Council by denouncing their partisanship, or appearance thereof, lack of independence, lack of even-handedness, inconsistent application of evidentiary standards and precipitous and sloppy language. Furthermore, Israel's diplomacy is notoriously averse to the Human Rights Council, which it sees as tainted by an irremediable institutional bias against Israel. Despite the variety of fact-finding missions considered in this study, Israel's criticisms display some recurring patterns. Conversely, Palestinian governments have been much less critical of the procedural aspects of Human Rights Council-mandated commissions of inquiry. Hence, in this section, I address mainly Israel's criticisms of the fact-finding missions sampled for this study by presenting them objectively and trying to highlight recurring arguments.

[34] Niklas Luhmann, *Procedimenti giuridici e legittimazione sociale* (tr Alberto Febbrajo; Giuffré 1995); Thomas M Franck, *Fairness in International Law and Institutions* (OUP 1995).
[35] Franck and Fairley (n 4) 309.

2.1 A Systemic Criticism: The Alleged Institutional Bias of the UN Human Rights Council

It is a biblical maxim that 'The son shall not suffer for the iniquity of the father, nor the father suffer for the iniquity of the son'.[36] Yet, Israeli diplomatic and policy circles do not seem to heed this principle in their critique of Human Rights Council-mandated commissions of inquiry. When the Council has levelled criticism at Israel for its human rights record, oft-cited counter-arguments have been that a) the Council has inherited the politicised stance of its predecessor, the UN Commission on Human Rights, towards Israel, and b) the Council overly focuses on Israel's human rights record at the expenses of other countries' more problematic profiles. According to Israeli official sources, scholars and key informants, this institutional bias negatively reflects on the *professional* outlook of fact-finding missions established by the Council. In the eyes of both former and current Israeli decision-makers, the crux of the argument is not only that, by reason of the Council's politicisation, commissions of inquiry are likely to be politicised, but also that they are likely to lack *professionalism*.

Israel's strained relationship with the UN human rights machinery dates back to well before the establishment of the UN Human Rights Council in 2006. Reasons for complaint existed already under the Council's predecessor, the UN Commission on Human Rights, and are cursorily summarised in a position paper of the Israeli Ministry of Foreign Affairs (MoFA) published in 2005, during the UN reform process.[37] Under the sub-heading 'Human Rights Council', the paper underlined *inter alia* that 'the Council should not be overloaded by partisan requests using the human rights mechanism to achieve political gains'. More specifically, the MoFA suggested that measures should be taken for 'the prevention of agenda items devoted to one particular situation, as well as limiting the number of resolutions passed in any given year

[36] Ezekiel 18:20.
[37] Ministry of Foreign Affairs, The Division for UN and International Organisations, *United Nations Reforms – Position Paper of the Government of Israel* (1 July 2005) <http://mfa.gov.il/MFA/InternatlOrgs/Issues/Pages/United%20Nations%20Reforms%20-%20Position%20Paper%20of%20the%20Government%20of%20Israel%20-%20July%202005.aspx> accessed 2 May 2018.

concerning a particular state'. Surely, the Ministry had in mind the standing item, in the Commission's agenda, on the question of the violations of human rights in the occupied Arab territories, including Palestine, and the comparatively higher number of actions regarding Israel taken by the Commission during its lifetime.[38] In the 2005 position paper, the MoFA also underscored the importance that 'every state - including Israel - must have the option of full membership in a relevant regional group as far as the Council is concerned'. Once again, the recommendation was likely based on Israel's exclusion from the regional Asian Group, to which it belonged geographically. This rejection, strongly supported by the Arab states belonging to the group, seriously compromised Israel's ability to participate in the Commission's sessions in Geneva for decades and forced it to apply for membership with the Western European and Others Group.[39]

Some of Israel's concerns over the functioning of the former Commission on Human Rights remained topical even after the dismantling of the Commission and its replacement with the Human Rights Council in 2006. A first foundational critique of the Human Rights Council concerns its composition. According to an outspoken pro-Israel commentator, Anne Bayefsky, the regional distribution of the 47 members of the Council provides a clear advantage to what she terms 'Islamic countries'.[40] Furthermore, Bayefsky argues, somewhat deceptively, that election to the Council is not conditional on the actual human rights record of the state, which in turns undermines the credibility of the institution.[41] The same point is exploited by Israeli

[38] See, for example, James H Lebovic and Erik Voeten, 'The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR' (2006) 50 *Int Stud Q* 861, 865, which points out that 'Israel was consistently subject to multiple actions'.

[39] Michal Navoth, 'Israel's Relationship with the UN Human Rights Council: Is There Hope for Change?' (6 April 2014) *Jerusalem Center for Public Affairs* <http://jcpa.org/article/israels-relationship-un-human-rights-council/> accessed 2 May 2018.

[40] Anne Bayefsky, 'The Goldstone Report and its UN Fatherland' (2011) 48 *JUSTICE* 15. The current members of the Council can be found on the dedicated webpage of the Human Rights Council, *Current Membership of the Human Rights Council, 1 January - 31 December 2018 by regional groups* <http://www.ohchr.org/EN/HRBodies/HRC/Pages/Members ByGroup.aspx> accessed 9 May 2018.

[41] Ibid. However, note that while it is true that UNGA Resolution 60/251 does not seem to impose any specific requirement for membership in the Human Rights Council, its Paragraph 8 states that 'membership in the Council shall be open to all States Members of the United Nations; when electing members of the Council, Member States

Prime Minister Benjamin Netanyahu who, on 6 March 2011, addressed the Israeli Cabinet with the following words: 'Until recently , Libya was a member of the UN Human Rights Council, the same Council that condemned Israel for its actions during Operation Cast Lead, in the Goldstone report; thus the absurdity, the lies and the hypocrisy ran amok'.[42] Additionally, Resolution 5/1 of the Human Rights Council provides a standing agenda of 10 items. Item 7 focuses on the 'Human rights situation in Palestine and other occupied Arab territories'. In contrast, any other situation that might deserve the attention of the Council can be brought up under Item 4 of the agenda, formulated in general terms.[43] In the eyes of Israeli policy- and decision-makers, this provision fuels suspicions that the Council is intended to 'demonise' Israel.[44] This perception is further entrenched by the comparatively higher number of resolutions and decisions condemning Israel than other countries.[45] For example, commenting on the resignation of William Schabas from the International Commission of Inquiry on the 2014 Gaza War, the Israeli MoFA stated that

> Israel wholly rejects the notion of being investigated by a biased Commission of Inquiry, established by a Human Rights Council which has discredited itself with its disregard for human rights - for example, in 2014, the Council adopted more resolutions against Israel than against Iran, Syria and North Korea combined.[46]

shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto; the General Assembly, by a two-thirds majority of the members present and voting, may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights'. Moreover, the following paragraph states 'that members elected to the Council shall uphold the highest standards in the promotion and protection of human rights'. The Council went so far to recommend the suspension of Libya's membership under Paragraph 8, in 2011 (UNHRC Res S-15/1 (3 March 2011) UN Doc A/HRC/RES/S-15/1 para 14). Having said that, it is also true that, so far, these criteria have not barred states with questionable human rights records from being elected as members of the Council (see, for example, Maja Bova, *Il Consiglio Diritti Umani nel Sistema onusiano di promozione e protezione dei diritti umani: profili giuridici ed istituzionali* (G Giappichelli Editore 2011) 68-69.

[42] Prime Minister's Office, Weekly Cabinet Meeting 06.03.2011 (See the report of the Israeli MoFA <http://mfa.gov.il/MFA/PressRoom/2011/Pages/Cabinet-communique-6-Mar-2011.aspx> accessed 9 May 2018).

[43] UNHRC Res 5/1 (17 June 2007) UN Doc A/HRC/RES/5/1.

[44] Navoth (n 39); Bayefsky (n 40); interview with unnamed staff member of Human Rights Watch, 12 February 2018.

[45] Navoth (ibid); Bayefsky (ibid). I have not engaged in a comparative quantitative study of the number of resolutions and decisions condemning Israel. I merely rely on reasonably credible data provided by others.

[46] Israeli Ministry of Foreign Affairs, 'Behind the Headlines: Schabas' resignation from UNHRC Commission of Inquiry' (5 February 2015) <http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Schabas-resignation-from-UNHRC-Commission -of-Inquiry-5-Feb-2015.aspx> accessed 9 May 2018.

Similarly, during a weekly Cabinet meeting in 2009, Prime Minister Benjamin Netanyahu underlined that 'in recent years, [the Human Rights Council] has made more decisions against Israel than against all other 180 countries in the world'.[47]

Israel's tormented relationship with the Human Rights Council peaked when the Government decided to sever all ties with the Human Rights Council with an official letter dated 14 May 2012, stating that

> This decision was reached in light of the ongoing, unrelenting singling out of Israel in the Human Rights Council, which has been persistent since its inception in 2006, continued through the review process, and exists to this day. The Council and the Office of the High Commissioner for Human Rights, respectively, have become a political tool and a convenient platform, cynically used to advance certain political aims, to bash and demonize Israel.[48]

Eventually, diplomatic relations were resumed on 27 October 2013, when Netanyahu announced that Israel would participate to its Universal Periodic Review (UPR). The announcement came after intense diplomatic negotiations which resulted in two concessions made to Israel. First, the Western European states agreed to remain silent during Council discussions convened under Item 7 of the standing agenda. Second, the Western European and Others Group promised that they would grant full membership to Israel, which they later did.[49] Nonetheless, during his speech at the Council's 17th session on Israel's UPR, Israeli Ambassador Eviatar Manor did not lose the opportunity to once again underline the discriminatory treatment to which Israel had been subjected by the Council due to both Item 7 of the standing agenda and the high number of resolutions condemning Israel. Interestingly,

[47] Prime Minister's Office, Weekly Cabinet Meeting 01.10.09 <http://www.pmo.gov.il/English/MediaCenter/Spokesma n/Pages/spokestart011009.aspx> accessed 9 May 2018.
[48] Letter of the Permanent Mission of Israel to the UN in Geneva to the President of the UN Human Rights Council (14 May 2012) <https://extranet.ohchr.org/sites/hrc/PresidencyBureau/BureauRegionalGroupsCorrespondence/Corresp20112012DL/IsraeliAmblettertoPdtofHRC_14May2012.pdf> accessed 2 May 2018.
[49] Navoth (n 39); Barak Ravid, 'Ending a 1.5-year Boycott Israel: Resuming Cooperation With UN Human Rights Council' (27 October 2013) *Haaretz* <https://www.haaretz.com/israel-backs-off-un-council-boycott-1.5280580> accessed 10 May 2018.

Ambassador Manor added that 'Israel was subject to … more Fact-Finding Missions than any other single country in the world'.[50]

This alleged anti-Israeli bias, which according to pro-Israeli sources affects all activities of the Human Rights Council, acts as a delegitimising factor for Council-mandated fact-finding missions. Regardless of the content of any such missions' reports, the Israeli government – as most of the key Israeli informants I interviewed reported – exploits the opportunity to attack all Human Rights Council-mandated inquiries by arguing that no impartiality or even-handedness can be expected from a mission appointed by a fundamentally illegitimate body. From a more technical viewpoint, this argument presents several ramifications. First, the political nature of the Council negatively influences the formulation of mandates by emphasising Israeli violations over Palestinian violations and, sometimes, completely whitewashing the latter party's misbehaviours. Second, the choice of commissioners is reflective of the tainted nature of the Council not only in that appointed fact-finders are frequently notorious critics of Israel, but also in that they lack professionalism. Third, language choices, legal arguments and argumentative structures employed by commissioners are inescapably determined by this original bias.[51] Comparing the Goldstone Commission with the Palmer Inquiry, controversial Professor Gerald Steinberg, founder of NGO Monitor,[52] and Gidon Shaviv stated that the latter commission

[50] Mission of Israel to the UN in Geneva, *Amb Manor's Statement - Israel's UPR at the HRC - Israel's Universal Periodic Review (UPR) – 17th Session* (29 October 2013) <http://embassies.gov.il/UnGeneva/NewsAndEvents/Pages/Ambassador-Manor's-statement---Review-of-Israel's-Report-at-HRC.aspx> accessed 10 May 2018.

[51] Interview with unnamed official of the Israeli Ministry of Foreign Affairs, 26 February 2018. In particular, the consequent lack of professionalism in international inquiries was also stressed as a central point in interviews with Pnina Sharvit Baruch, former Head of the International Law Department of the Israeli Defence Forces (IDF), 5 March 2018; David Benjamin, former Chief Legal Officer of the Military Advocate General's Corps (MAG) and former Director of the Strategic and International Branch of the International Law Department of the IDF, 4 March 2018; Danny Efroni, former Chief Military Advocate General of the IDF, 18 March 2018.

[52] NGO Monitor is a not-for-profit Israeli organisation, funded in 2002, 'with the objectives of producing and distributing critical analysis and reports on the activities of the international and local NGO networks, for the benefit of government policy makers, journalists, philanthropic organizations and the general public. We document and publicize distortions of human rights and international law in the context of the Arab-Israeli conflict, as well as double standards and biased campaigns, and provide information and context on these issues and activities, in order to encourage informed public debate' (<https://www.ngo-monitor.org/about/> accessed 10 May 2018). The organisation has often been described as pro-Israel and extremist, and has been accused of seriously undermining the legitimacy of human rights organisations in Israel (see, for example, a letter addressed to former President of Israel, Shimon Peres, signed by several Israeli human rights organisations, denouncing the activities of NGO

presented several improvements on the former one. The first factor that – they argue – has determined the improved quality of the Palmer Inquiry has to be identified in the establishing body, the Human Rights Council for the Goldstone Commission and the Secretary-General for the Palmer Inquiry. They stated outright that 'the record shows that activities involving the [Human Rights Council] are invariably biased'.[53]

2.2 The Beit Hanoun Inquiry

The 2006 High-Level Fact-Finding Mission to Beit Hanoun was the first ad hoc commission of inquiry dispatched by the newly established UN Human Rights Council. Following military operation 'Autumn Clouds', which lasted from 1 to 7 November 2006,[54] on the morning of 8 November, the Israel Defence Forces (IDF) shelled the Gazan town of Beit Hanoun allegedly in response to intense launching of rockets at nearby Israeli municipalities by Palestinian groups.[55] The shelling claimed the lives of 19 individuals (all but one belonging to the Al-Athamna family) and resulted in the wounding of over 50 others.[56] In response to the military operation and the attack on Beit Hanoun, the representatives of Bahrein and Pakistan, on behalf of the Group of Arab States and the Organisation of the Islamic Conference, requested the

monitors as 'unbridled and incendiary', Letter to President Shimon Peres, 'Assault and delegitimization of human rights organizations in Israel – warning and request of meeting' (31 January 2010) <Assault and delegitimization of human rights organizations in Israel – warning and request of meeting> accessed 10 May 2018).

[53] Gerald Steinberg and Gidon Shaviv, 'Palmer vs Goldstone: Lessons Learned' (7 September 2011) *The Jerusalem Post* <https://www.jpost.com/Opinion/Op-Ed-Contributors/Palmer-vs-Goldstone-lessons-learned> accessed 10 May 2018.

[54] The Israeli MoFA provided on its website an account of the military operation titled 'Beit Hanoun: A hub of terrorist activity' (November 2006) <http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Palestinian/Pages/Beit%20Hanoun-%20a%20hub%20of%20terrorist%20activity%205-Nov-2006.aspx#endoperation> accessed 13 August 2018.

[55] Israeli Ministry of Foreign Affairs, 'Initial reaction to Palestinian claims of civilian casualties in Beit Hanoun' (8 November 2006) <http://mfa.gov.il/MFA/PressRoom/2006/Pages/Initial%20reaction%20to%20Palestinian%20claims%20of%20civilian%20casualties%20in%20Beit%20Hanoun%208-Nov-2006.aspx> accessed 13 August 2018.

[56] This number of casualties is reported by the High Level Fact-Finding Mission (UNHRC, 'Report of the high-level fact-finding mission to Beit Hanoun established under Council resolution S-3/1' (1 September 2008) UN Doc A/HRC/9/26 para 45), however, note that the Israeli MoFA provide the slightly different figure of 21 deaths (Israeli Ministry of Foreign Affairs, 'Military Advocate General concludes investigation of Beit Hanoun shelling' (26 February 2008) <http://mfa.gov.il/MFA/AboutIsrael/State/Law/Pages/Military%20Advocate%20General%20concludes%20investigation%20of%20Beit%20Hanoun%20shelling%2026-Feb-2008.aspx> accessed 13 August 2018.

President of the Council to convene a special session '"to consider and take action on the gross human rights violations emanating from Israeli military incursions in the Occupied Palestinian Territory, including the recent one in northern Gaza and the assault on Beit Hanoun'.[57] The Special Session was held on 15 November 2006 and resulted in the adoption of Resolution S-3/1, which established the High Level Fact-Finding Mission to Beit Hanoun.[58]

The Report of the Council on the Third Special Session specifies that the draft Resolution was amended orally at the request of the representative of Pakistan. In particular, for example, in preambular paragraph 5, the word 'targeting' was replaced with the word 'wilful killing'.[59] In his statement to the Council, Israeli Ambassador Itzhak Levanon, after accusing the Council of failing to heed its founding principles of universality, impartiality, objectivity and non-selectivity, called the resolution 'one-sided'.[60] Almost in parallel with the Council's resolution, on 17 November 2006, the UN General Assembly passed Resolution ES-10/16, which condemned the military actions undertaken by Israel, the shelling of Beit Hanoun and the launching of rockets by Palestinian groups.[61] The Resolution further requested the Secretary General to establish a fact-finding mission on the events. Notwithstanding the significantly less assertive language of the Resolution, the Israeli MoFA bashed the UN for passing an unbalanced and unfair resolution that, according to the Israeli official communiqué, failed to

[57] UNHRC, Report of the Human Rights Council on its Third Special Session (20 November 2006) UN Doc A/HRC/S-3/2.
[58] UNHRC, Human rights violations emanating from Israeli military incursions in the Occupied Palestinian Territory, including the recent one in northern Gaza and the assault on Beit Hanoun (15 November 2006) UN Doc A/HRC/S-3/L.1.
[59] UNHRC, Report of the Human Rights Council… (n 57).
[60] Permanent Mission of Israel to the United Nations in Geneva, Speech by Ambassador Itzhak Levanon, Permanent Representative of Israel, Before the 3rd Special Session of the Human Rights Council (15 November 2006) <http://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/3SpecialSession/Oral Statements/Israel.pdf> accessed 14 August 2018.
[61] UNGA, Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory (17 November 2006) UN Doc A/RES/ES-10/16.

address the 'ongoing terrorism against Israeli civilians by the Palestinian terrorist organizations, including the suffering this causes the population and the damage to its property'.[62]

2.2.1 Mandate

Human Rights Council Resolution S-3/1 established the High Level Fact-Finding Mission with the mandate to: '(a) assess the situation of victims; (b) address the needs of survivors; and (c) make recommendations on ways and means to protect Palestinian civilians against any further Israeli assaults'.[63] No criticism directed specifically at the mandate was voiced by either the Israeli or the Palestinian diplomats. It should be noted, however, that the wording of the mandate itself avoids making reference to notions such as accountability. Nor does it mention any specific legal framework that the commission should employ to select the relevant facts. Rather, the mandate prioritises the needs of the victims and, contrary to the remainder of the Resolution, appears to request that the Mission, rather than engaging in accountability-oriented activities, engage in a sort of advisory function. The lack of any mention of specific legal frameworks in the mandate also suggests that the Mission was not engineered to provide an assessment of what happened on the morning of 8 November 2006. This seems to imply a purely fact-finding activity finalised at determining the victims' expectations arising from the situation of severe distress caused by the shelling of Beit Hanoun. However, the mandate provides for the establishment of the 'high-level fact-finding mission, …. to travel to Beit Hanoun to, *inter alia*'[64] carry out the activities referred to above. This wording seems to suggest

[62] Israeli Ministry of Foreign Affairs, 'The UN General Assembly ignores terrorism' (19 November 2006) <http://www.mfa.gov.il/mfa/pressroom/2006/pages/the%20un%20general%20assembly%20ignores%20terrorism%2019-nov-2 006.asp x> accessed 14 August 2006; note, however, that preambular paragraph 7 of the General Assembly Resolution reads '*Deeply deploring further* the firing of rockets from Gaza into Israel' and that operative paragraphs 2 and 5 read respectively '*Calls for* the immediate cessation of military operations and all acts of violence, terror, provocation, incitement and destruction between the Israeli and Palestinian sides, including extrajudicial executions, bombardment against civilian areas, air raids and the firing of rockets, as was agreed in the Sharm el-Sheikh understandings of 8 February 2005' and '*Calls upon* the Palestinian Authority to take immediate and sustained action to bring an end to violence, including the firing of rockets on Israeli territory'.

[63] UNHRC Res S-3/1 para 7.

[64] Emphasis added.

that there may have been additional activities, possibly agreed among the commissioners, that the Missions could have pursued.

The Mission decided to interpret its mandate in the overall context of Resolution S-3/1 and to construe it by

> taking into account: (a) …. collective punishment; the killing of civilians as a gross violation of human rights law and international humanitarian law; international humanitarian law applicable to medical personnel; and the destruction of homes, property and infrastructure in Beit Hanoun.[65]

The formulation of this interpretive paragraph is not entirely clear as it does not specify whether the Mission decided that they would use the standards provided for by the bodies of law mentioned, whether they started from the assumption that the violations mentioned had been perpetrated in the course of the attack or whether these only constituted working hypotheses that would guide the investigation. However, in Paragraph 10 of the final report, the Mission stated that 'in construing its mandate and the facts presented to it, [it] *applied* an international law framework, in particular international human rights law and international humanitarian law'.[66]

2.2.2 Commissioners

The President of the Human Rights Council appointed Archbishop Desmond Tutu and Professor Christine Chinkin as members of the High-Level Fact-Finding Mission. There is no evidence that either Israel or Palestine perceived the two experts as biased or partial. On the contrary, in a speech to the Human Rights Council during its 5th regular session, Israeli Ambassador Itzhak Levanon stated that both commissioners were held in high esteem by the Israeli Government and that Israel's frustration at the pre-judicial nature of Resolution S-3/1

[65] UNHRC, Report of the high-level fact-finding mission to Beit Hanoun established under Council resolution S-3/1 (1 September 2008) UN Doc A/HRC/9/26 para 5(a).
[66] Emphasis added.

did not in any way reflect negatively on its members.[67] No Palestinian statement specifically concerned with the commissioners can be found, however, the words of appreciation of the Palestinian delegation for the inquiry carried out by the two commissioners seem to constitute conclusive evidence that the Palestinian leadership had no reservation about them.[68]

2.2.3 Procedural Standards

The High-Level Fact-Finding Mission to Beit Hanoun was not granted access to the territory of the Gaza Strip and Southern Israel by the Israeli Government. However, after three attempts to secure it, they decided to visit Beit Hanoun through the Rafah crossing, thanks to the cooperation of the Egyptian authorities. In consequence, the Mission could not hear testimonies from Israeli affected communities nor could it visits the sites where Palestinian rockets had struck.[69] The final report includes, under Section C, a brief discussion of the methodology employed throughout the inquiry. The Mission simply stated that, while adopting an inclusive approach to receiving evidence, it sought to rely on direct testimonies of victims and witnesses. No statement as to the standard of proof adopted can be found throughout the report, although some sparse statements as to how different pieces of information corroborate each other are included. However, the Mission does not account for how it weighed the reliability and credibility of the different sources. Despite the lack of transparency especially with regards to the way information and evidence were collected, Israeli diplomats did not raise any substantial or procedural challenge to the report.[70] Generic praise was voiced by the Palestinian delegation

[67] Permanent Mission of Israel to the United Nations in Geneva, Statement by HE Ambassador Itzhak Levanon, Permanent Representative, 5th Regular Session of the Human Rights Council Regarding Follow-up to Resolution S-3/1 (13 June 2007) <http://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/5thSession/OralStatements/130607/Tab/Tab/CC-Israel-S-3-1.pdf> accessed 15 August 2018.

[68] Statement of the Palestinian delegation to the United Nations in Geneva, 9th Regular Session of the Human Rights Council (18 September 2008) <http://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/9thSession/OralStatements/180908/Tab1h/Tab4/Palestine-180908.pdf> accessed 15 August 2018.

[69] See generally UNHRC, Report of the High-Level Fact-Finding Mission to Beit Hanoun established under resolution S-3/1 (18 June 2007) UN Doc A/HRC/5/20; UNHRC, Report of the High-Level Fact-Finding… (1 September 2008) (n 65) paras 7-9.

[70] See Permanent Mission of Israel to the United Nations in Geneva, Statement by HE Aharon Leshno Yaar, Permanent Representative, 9th Regular Session of the Human Rights Council, Agenda Item 7, Follow-up to S-3/1

to the UN, which simply commended the report for 'its fine quality'.[71] Legal scholars both in Israel and Palestine also appear to have ignored the report and its methodological shortcomings.

Only a publication authored several years later by Al-Haq[72] scholar Alessandro Tonutti commented extensively on the methodology employed by the Fact-Finding Mission. In particular, Tonutti commended the inclusive approach to evidence adopted by the Mission and applauded the efforts made by the Mission to mitigate Israel's lack of cooperation. In particular, the Al-Haq report stated that 'while the absence of testimonies from the Israeli side and the unavailability of Israel's intelligence information may have rendered the evaluation less balanced, the impossibility of obtaining direct Israeli sources is not something whose responsibility can be ascribed to the Mission'.[73] However, Tonutti also criticised the Mission's report for failing to 'specify the information and sources used to counteract the Israeli claim'.[74]

2.3 The Fact-Finding Mission on the 2009 Gaza Conflict

The Fact-Finding Mission on the 2009 Gaza Conflict – or more commonly known as the Goldstone commission – was set up by the UN Human Rights Council in the wake of Israeli military operation Cast Lead on the Gaza Strip, carried out between 27 December 2008 and 17 January 2009.[75] At the request of Egypt, on behalf of the Arab and African Groups, Pakistan,

(18 September 2008) <http://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/9thSession/OralStatements/180908/Tab1h/Tab4/Israel-180908.pdf> accessed 16 August 2018.

[71] Statement of the Palestinian delegation to the United Nations in Geneva (n 68).

[72] A Palestinian NGO based in Ramallah (see website <http://www.alhaq.org/> accessed 16 August 2018).

[73] Alessandro Tonutti, *International Commissions of Inquiry and Palestine: Overview and Impact* (2016 Al-Haq Center for Applied International Law) 54.

[74] Ibid.

[75] For a strategic analysis of the Israeli military operation, see Anthony H Cordesman, 'The "Gaza War": A Strategic Analysis' (3 March 2009) *Center for Strategic and International Studies*; for a factual account of the events, from the perspective of some of the Palestinian victims, see Musheir El-Farra, *Gaza: when the sky rained white fire* (Sheffield Palestine Solidarity Campaign 2012). Purely factual accounts of the events are rare in the literature and mostly partisan. Hence, probably the most reliable source of "pure facts" are news coverages by agencies such as Aljazeera (<https://web.archive.org/web/20090107095002/http://english.aljazeera.net/focus/war_on_gaza/> accessed 10 May 2018), rfi English (<http://www1.rfi.fr/actuen/pages/001/page_45.asp> accessed 10 May 2018), BBC NEWS (<http://news.bbc.co.uk/2/hi/middle_east/7812136.stm> accessed 10 May 2018), CNN (<http://edition.cnn.com/SPECIA LS/2008/news/gaza/> accessed 10 May 2018). However, a careful reader should approach also journalistic sources with caution, and be aware that language and focus choices are capable of influencing perceptions as much as legal analysis of the same facts.

on behalf of the Organisation of the Islamic Conference, and Cuba, on behalf of the Non-Aligned Movement, the Human Rights Council convened its 9th Special Session on 9 January 2009, while hostilities were still ongoing in the Gaza Strip.[76] At this stage, it is interesting to note that the requesting states termed the situation as 'The Grave Violations of Human Rights in the Occupied Palestinian Territory including the recent aggression on the occupied Gaza Strip'. The Council adopted a very similar language in the resulting Resolution S-9/L.1 on 'The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip'.[77] In his statement to the Council, Israel's representative, Aharon Leshno-Yaar, stated that 'The resolution proposed for this Special Session would only further erode the barely remaining objectivity and credibility of the Human Rights Council'.[78]

Resolution S-9/L.1, which established the Fact-Finding Mission on the 2009 Gaza Conflict, was harshly criticised by the Israeli MoFA which, on 12 January 2009, released a communication denouncing the one-sidedness of the Resolution.[79] The MoFA underlined that the Resolution was adopted following the fifth special session, out of nine since the inception of the Council, aimed at condemning Israel. It further pointed out that Western democratic states had not voted in favour of the Resolution and that, considering that this was the eighteenth resolution condemning Israel since the establishment of the Council, it 'exposed once again [the

[76] Note Verbale with request for special session from the Permanent Representative of Egypt as President of the Arab Group and Coordinator of the African Group, the Permanent Representative of Pakistan, as Coordinator of the Organization of the Islamic Conference and the Permanent Representative of Cuba as President of the Non-Aligned Movement (6 January 2009) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/SpecialSession/Session9/LetterRequestPMEgypt.pdf> accessed 10 May 2018.
[77] UNHRC Res S-9/L.1 (12 January 2009) UN Doc A/HRC/S-9/L.1.
[78] UNHRC Press Release, 'Human Rights Council Opens Special Session on Situation in Gaza Strip' (9 January 2009) <http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8697&LangID=E> accessed 10 May 2018.
[79] Israeli Ministry of Foreign Affairs, 'Israel rejects one-sided resolution of UN Human Rights Council in Geneva' (12 January 2009) <http://mfa.gov.il/MFA/PressRoom/2009/Pages/Israel_rejects_resolution_UN_Human_Rights_Council_12-Jan-2009.aspx> accessed 10 May 2018.

Council] as an organization that is being exploited by countries that are very far from the ideal of safeguarding human rights'.

2.3.1 Mandate

Paragraph 14 of Resolution S-9/L.1 established

> an urgent, independent international 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.

It comes as no surprise that the Israeli Government regarded the mandate of the Commission as one-sided. The Israeli MoFA contended that 'It ignor[ed] the terrorism against Israel and the responsibility of Hamas for the developments'.[80] Justice Richard Goldstone, appointed to head the Mission, accepted the role on condition that the Council would change the mandate to include also violations perpetrated by Palestinians.[81] Subsequently, the mandate was amended informally so as to entrust the Mission with investigating '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'.[82] Nonetheless, Israel decided to not cooperate with the Mission on mainly two grounds: a) the fact that the legal basis for the Mission, Resolution S-9/1, had already prejudged the issue by employing condemnatory

[80] Ibid.

[81] Haviv Rettig Gur, 'Goldstone: Israel Should Cooperate' (16 July 2009) *The Jerusalem Post* <https://www.jpost.com/Israel/Goldstone-Israel-should-cooperate> accessed 10 May 2018. The article reports that, in an email interview with Justice Goldstone, he stated: 'I am fully aware of the skepticism with which many Israelis view the Human Rights Council and of the objections to the council paying more attention to the Middle East than any other region of the world … It is for that reason that I initially found the terms of the Human Rights Council resolution to have been an inappropriate basis for launching a fact finding mission into Operation Cast Lead, and at first I was not prepared to accept the invitation to head the mission … It was essential [that] the sustained rocket attack on civilians in southern Israel, as well as other facts in the period preceding the military operation of December-January, such as the sustained closure of the Gaza Strip [be] an integral part of the investigation'.

[82] UNHRC, Human Rights in Palestine and Other Occupied Arab Territories. Report of the United Nations Fact-Finding Mission on the Gaza Conflict (25 September 2009) UN Doc A/HRC/12/48 para 131 (hereinafter 'Goldstone Report'); Tonutti (n 73) 38.

language that implied a determination on Israel's guilt; b) the lack of even-handedness in the original mandate.[83] In a further letter addressed to Justice Goldstone on 2 July 2009, the Israeli Ambassador clarified that, despite the informal amendment of the mandate, Israel could not accept that this represented an official restatement of the mandate since

> no statement by any individual, including the President of the Council, has the force to change the mandate of the Mission … This accords with the provisions of the UN General Assembly's Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security (A/RES/45/59) which provides that: "The decision by the competent United Nations organ to undertake fact-finding ***should always contain a clear mandate for the fact-finding Mission***" (para. 17, emphasis added). And indeed Resolution S-9/1 does contain a clear mandate, albeit one which is hard to reconcile with the Declaration on Fact-finding's requirement that "Fact-finding should be comprehensive, objective, impartial and timely"[84]

As regards the language used in Resolution S-9/1, it must be acknowledged that condemnatory expressions abound. For example, 'Recognizing that the massive ongoing Israeli military operation … has caused *grave violations of the human rights* of the Palestinian civilians' (emphasis added) or 'Recognizing that the Israeli siege imposed on the occupied Gaza Strip … constitutes *collective punishment* of Palestinian civilians' (emphasis added) or, further, 'Demands that the occupying Power, Israel, stop the *targeting* of civilians and medical facilities and staff and the *systematic destruction* of the cultural heritage of the Palestinian people, in addition to the *destruction* of public and private properties' (emphasis added). The use of this language cannot be merely symbolic. According to several Israeli former state officials, expressions such as 'grave violations', 'collective punishment', 'targeting' or 'systematic destruction' have specific legal meanings – mostly anchored to the language of international

[83] Letter of the Permanent Mission of Israel to the United Nations to Justice Richard Goldstone (7 April 2009) attached as Annex II to the Goldstone Report.
[84] Letter of the Permanent Mission of Israel to the United Nations to Justice Richard Goldstone (2 July 2009) attached as Annex II to the Goldstone Report.

humanitarian law or international criminal law -, which can be interpreted as evidence of a pre-judgment of Israel's conduct.[85]

Contrary to the Israeli Government, the Palestinian Authority promptly extended its cooperation with the Mission.[86] So did Hamas, referred to in the Goldstone Report as 'the Gaza authorities'. The news agency *Ma'an* reported that Hamas spokesperson Fawzi Barhoum had stated that '[Hamas is] ready to help these committees and encourage them to unveil the truth and bring out all the hidden details of what took place during the war, hoping to show the entire world the truth'.[87]

2.3.2 Commissioners

The President of the UN Human Rights Council appointed four members to the Commission: Richard Goldstone, former judge of the Constitutional Court of South Africa and former Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda (henceforth, ICTY and ICTR), as chair of the Mission; Christine Chinkin, professor of international law at the London School of Economics and formerly member of the high-level fact-finding mission to Beith Hanoun; Hina Jilani, Advocate of the Supreme Court of Pakistan and formerly UN Special Rapporteur of the Secretary-General on human rights defenders and member of the International Commission of Inquiry on Darfur; Desmond Travers, former Irish Army Colonel and a director of the Institute for International Criminal Investigations.

[85] Interviews with Pnina Sharvit Baruch, former Head of the International Law Department of the Israeli Defence Forces (IDF), 5 March 2018; David Benjamin, former Chief Legal Officer of the Military Advocate General's Corps (MAG) and former Director of the Strategic and International Branch of the International Law Department of the IDF, 4 March 2018.
[86] Goldstone Report, para 145.
[87] Ma'an News Agency, 'Spurned by Israel and welcomed by Hamas, UN war crimes investigators arrive in Gaza' (1 June 2009) <http://www.maannews.com/Content.aspx?id=210932> accessed 10 May 2018. The reader should bear in mind that Ma'an News Agency has occasionally been criticised for twisting reality by conveying narratives more favourable to Palestinians (for example, see NGO Monitor, 'The Maan Network: Promoting Understanding or a Radical Palestinian Agenda?' (13 March 2007) <https://www.ngo-monitor.org/reports/the_ma_an_network_promoting_understanding_or_a_radical_palestinian_agenda_/> accessed 10 May 2018).

Alan Dershowitz, an outspoken pro-Israel American lawyer and Harvard-based academic, summarised the Israeli critique of the four fact-finders in an academic paper, later republished by *The Jerusalem Post*.[88] He noted that Richard Goldstone, Hina Jilani and Desmond Travers, prior to their appointment, had all signed an open letter to the UN Secretary-General calling for an investigation into Israel's conducts, including claims of grave violations of international humanitarian law and crimes perpetrated against the civilian population.[89] Furthermore, Christine Chinkin had signed, prior to her appointment to the Mission, a letter appeared on the *Sunday Times* and titled 'Israel's bombardment of Gaza is not self-defence – it's a war crime', hence pre-judging the matter at hand.[90] In support of his argument, Dershowitz quotes Justice Goldstone who, in an interview on newspaper *Business Day*, stated that 'This is not a judicial inquiry. If it had been a judicial inquiry, that letter she'd signed would have been a ground for disqualification'.[91]

With these facts in mind, it is clear that the purpose of Israeli authorities was to further discredit the Mission by casting a shadow on its members' impartiality, as evidenced by the Israeli MoFA briefing to the foreign press on the Goldstone Report. MoFA Director General Yossi Gal stated:

> I think that we should also recall the fact that a number of members of the committee expressed their opinions - very clear opinions - before the committee even started its work. The first one that comes to mind is, of course, mission member Christine Chinkin, who signed an open letter published on the 11th of January, 2009 in The Sunday Times in which she wrote, "Israel's actions demonstrate aggression, not

[88] Alan Dershowitz, 'The Case Against the Goldstone Report: A Study in Evidentiary Bias' (2010) *Harvard Public Law Working Paper No 10-26*. See the re-publication of the paper on *The Jerusalem Post* <https://www.jpost.com/Israel/The-Case-Against-Goldstone-Report-Study-in-Evidentiary-Bias-167473> accessed 11 May 2018.
[89] Ibid 4-5; see also the open letter, Amnesty International, 'Gaza Investigators Call for War Crimes Inquiry', Open letter to the UN Secretary-General (16 March 2009) <http://www.amnesty.org.au/news/comments/20572/> accessed 11 May 2018. See also Bayefsky (n 40) 16.
[90] The text of the open letter, originally published on the *Sunday Times*, can now be found re-posted on several blogs such as <https://www.juancole.com/2009/01/this-letter-of-attorneys-and-academics.html> accessed 11 May 2018. I was unable to locate the original on the *Sunday Times*.
[91] Michael Bleby, 'Goldstone Walks a Fine Line in an Ancient War Zone' (8 April 2009) *Business Day* <https://www.pressreader.com/south-africa/business-day/20090804/textview> accessed 11 May 2018.

> self-defense." And this, in our opinion, does not really demonstrate any impartiality that is so badly needed in cases like this.[92]

2.3.3 Procedural Standards

Another set of criticisms levelled against the Goldstone Commission by the Israeli Government targeted its methodology. These criticisms can be classified in three typologies. First, the Government objected to the Mission's reliance on witnesses who had allegedly been pre-screened and selected. The Government clearly implies that this pre-screening and selection process must have been carried out by Hamas officials or supporters and substantiates this suspicion by highlighting that no question was asked to such witnesses about 'Palestinian terrorist activity or the location of weaponry and terrorists in civilian areas'.[93] It concludes that this selection process raises a serious suspicion that the witnesses were part of an orchestrated political campaign against Israel. Second, the Government criticised the apparent contradiction between the highly legalised conclusions drawn in the final report, which sometimes include determinations of guilt, and the openly non-judicial nature of the fact-finding process, as emphasised by both Justice Goldstone himself and the full panel of fact-finders in the report.[94] The Government further underlined that some legal conclusions were reached by the Mission notwithstanding its inability to examine sensitive information that the Israeli Government itself decided not to share due to its decision not to cooperate with the Mission. This point was further corroborated by interviews with current and former state officials.[95] In particular, a former legal officer with the Military Advocate General's Corps (MAG) stated that the Goldstone

[92] Israeli Ministry of Foreign Affairs, 'MFA Briefing to the Foreign Press on the Goldstone Report with Deputy Foreign Minister Danny Ayalon, MFA Director-General Yossi Gal and MFA Deputy Legal Adviser Daniel Taub' (1 October 2009) <http://mfa.gov.il/MFA/PressRoom/2009/Pages/MFA_briefing_foreign_press_Goldstone_Report_1-Oct-2009.aspx> accessed 11 May 2018.
[93] Israeli Ministry of Foreign Affairs, 'Israel's analysis and comments on the Gaza Fact-Finding Mission Report' (15 September 2009) <http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/pages/israel_analysis_comments_goldstone_mission_15-sep-2009.aspx> accessed 17 May 2018.
[94] Ibid.
[95] Interview with David Benjamin, former Chief Legal Officer of the Military Advocate General's Corps (MAG) and former Director of the Strategic and International Branch of the International Law Department of the IDF, 4 March 2018; unnamed official of the Israeli Ministry of Foreign Affairs, 26 February 2018.

Commission reached 'sweeping conclusions', uncorroborated by sufficient factual information.[96] Third, and related to the previous point, the Israeli Government bashed the Goldstone Commission for failing to apply a uniform evidentiary standard and for deliberately and selectively ignoring material that could have either disproved some of the findings reached or informed findings that did not make it into the final report. For example, the MoFA stated that

> astonishingly, despite the many widely reported instances in the international press of the abuse of civilian facilities by terrorist groups, and the statements of Hamas own leaders praising women and children who acted as human shields, the Report repeatedly stated that it could find no evidence of such activities. This, despite its admission that those interviewed were "reluctant to speak about the presence or conduct of hostilities by the Palestinian armed groups".[97]

This statement contains two main criticisms of the investigation conducted by the Goldstone Commission. On the one hand, it alleges that the Commission ignored evidentiary material that pointed to Hamas's responsibilities for misusing civilian infrastructures and human shields. On the other, it chastises the Commission for failing to properly assess the reliability and credibility of certain witnesses, especially those who could testify against Hamas and other Palestinian groups.

Some of these arguments have been re-proposed by Israeli scholars. For example, Yuval Shany, an international law professor at the Hebrew University of Jerusalem and current Chair of the UN Human Rights Committee, argued that the credibility of the Commission's factual findings was severely undermined by the lack of cooperation of the Israeli Government, which

[96] Interview with David Benjamin (ibid). Note that Benjamin was directly involved in the MAG international law department at the time of the 2009 Gaza War. The ICC Prosecutor, Luis Moreno-Ocampo, allegedly stated that, following reports of Benjamin's direct involvement in operation Cast Lead, the Office of the Prosecutor would consider opening an investigation into his conduct due to his dual, Israeli and South African, citizenship, South Africa being a state party to the Rome Statute. Furthermore, *Haaretz* reported that when Benjamin travelled to South Africa for a conference organised by the local Jewish community, pro-Palestinian groups asked a South African prosecutor to open an investigation into alleged war crimes committed by Benjamin during the 2009 Gaza War. He later left South Africa earlier than he had planned to in order to avoid confrontation with the local authorities (Yotam Feldman, 'ICC May Try IDF Officer in Wake of Goldstone Gaza Report' (24 September 2009) *Haaretz* <https://www.haaretz.com/1.5421148> accessed 17 May 2018).

[97] Israeli Ministry of Foreign Affairs (n 93).

prevented the Commission from acquiring crucial information regarding some of the incidents investigated. This lack of cooperation, he argued, could not be blamed on Israel since there is no legal duty to cooperate with such fact-finding missions. Nor would it excuse the Commission for reaching precipitous, if not baseless, conclusions on Israel's guilt.[98] Abraham Bell, a law professor at the Bar Ilan University, emphasised the alleged dismissive attitude of the Goldstone Commission towards the credibility of evidence that could inculpate Hamas or exculpate the IDF.[99]

2.3.4 A Comparator: The UN Board of Inquiry

In the immediate aftermath of Operation Cast Lead and in parallel with the establishment of the Human Rights Council-mandated Fact-Finding Mission, UN Secretary-General Ban Ki-moon decided to dispatch a Headquarters Board of Inquiry to investigate nine specific incidents occurred during the military operation, which involved UN personnel and premises located in the Gaza Strip.[100] A summary of the otherwise confidential report of the Board of Inquiry was published by the UN Secretary-General premised by a letter explaining in plain terms the purposes of the inquiry, the sources it relied on and a general appraisal of its findings. For the

[98] Yuval Shany, 'Opinion: Goldstone Notwithstanding, IDF Obligated to Investigate Conduct' (2 November 2009) *The Israel Democracy Institute* <https://en.idi.org.il/articles/9537> accessed 17 May 2018.

[99] Abraham Bell, 'A Critique of the Goldstone Report and Its Treatment of International Humanitarian Law' (2010) 104 *Proceedings of the Annual Meeting (ASIL)* 79, 85-86.

[100] Headquarters Boards of Inquiry are internal investigative mechanisms that the UN Secretary-General is authorised to dispatch in order to gather information about serious incidents typically affecting UN premises or personnel. Such investigations are factual in nature, do not discuss legal liabilities, although they may be required to identify responsible entities or individuals, and can be entrusted with providing recommendations as to how to prevent future similar incidents, ensure accountability and provide redress to victims. There is no set of procedural standards that they have to observe, however, established practice requires that their investigation is kept confidential and for internal purposes only. The Secretary-General may decide to publish or share summaries of the reports produced with the relevant actors. The legal basis underpinning the establishment of such Boards is uncertain. For example, they cannot be easily subsumed under the more general inquiry powers of the Secretary-General under Articles 98 and 99 of the UN Charter, because they are instrumental to internal review procedures. Therefore, the *International Peace Institute*, a Vienna-based think tank, has posited that the power to deploy such Boards stems directly from the administrative discretion of the Secretary-General implied in Article 97 of the UN Charter (see International Peace Institute, 'Evaluating Mechanisms to Investigate Attacks on Healthcare. Boards of Inquiry established by the UN Secretary-General' <https://www.ipinst.org/wp-content/uploads/2017/11/8_UN SG-BoI.pdf> accessed 21 August 2018).

purposes of this research project, it is worth reproducing in full the Secretary-General's words about the purposes of the Board.

> My purpose in taking this step was to develop a clear record of the facts of these serious incidents and their causes and of where, if anywhere, bearing in mind the complexities of the overall situation, responsibility for them might lie. This would make it possible for me, inter alia, to identify any gaps that might have existed in the procedures and policies of the Organization and to take any measures and put in place any arrangements that might be needed, with a view to preventing a recurrence of such incidents in the future or at least to mitigating their effects. It would also place me in a better position to determine what steps I might need to take to protect the property and assets of the Organization. These were my aims in establishing the present Board of Inquiry. I would emphasize in this connection that a Board of Inquiry is not a judicial body or court of law: it does not make legal findings or consider questions of legal liability.[101]

As the letter of the Secretary-General specifies, the Board of Inquiry was exclusively intended for internal review purposes and to allow the Secretary-General to take the most adequate steps to ensure that similar incidents would not occur in the future. The limitation to questions of fact is confirmed by an incredibly detailed mandate that not only indicates the specific incidents that the Board was entrusted with considering, but also directs it as to what activities it was expected to carry out and as to what facts the Secretary-General considered relevant. In particular, the summary of the report states that the Board was expected

> to produce a Headquarters report on the incidents, to include the following:
>
> (i) Findings on the facts of the incidents, including: the full names of deceased and injured persons; dates, times and places of their deaths or injuries; nature of their injuries; the causes of their deaths or injuries; whether those persons who were United Nations personnel were on duty at the time of the incidents; in the case of those persons who were not United Nations personnel, the reason for their presence at or in the immediate vicinity of the scene of the incident; and descriptions of losses of and damage to property of the United Nations and of the deceased and injured persons;
>
> (ii) Findings on the causes of the incidents;
>
> (iii) Findings on the responsibility of any individuals or entities for the incidents.[102]

[101] UNGA and SC, Letter dated 4 May 2009 from the Secretary-General addressed to the President of the Security Council (15 May 2009) UN Doc A/63/855–S/2009/250.

[102] Summary by the Secretary-General of the report of the United Nations Headquarters Board of Inquiry into certain incidents in the Gaza Strip between 27 December 2008 and 19 January 2009, para 2(d), annexed to ibid.

The Board went beyond its mandate by formulating recommendation 10 and 11, which related to incidents not included in it, however, the Secretary-Generally expressly stated that he would not take further investigative actions on these additional incidents.[103] This last move from the Secretary-General appears to have resulted from the combined efforts of an Israeli delegation, which allegedly participated in the drafting of the letter, and the lobbying of US Ambassador Susan E Rice, according to a WikiLeaks cable.[104] The methodology employed by the Board can only be inferred cumulatively from the letter of the Secretary-General and the first paragraphs of the summary of the report. In particular, the Board reviewed a large amount of evidential material, which included witness statements, NGO reports, medical records, investigative reports, video footages, photographs and others. The letter of the Secretary-General makes it clear that valuation methodologies employed by the Board are detailed in the report, although they do not appear in the published summary.

The Secretary-General appointed Ian Martin, a prominent human rights activist who served as Secretary General of Amnesty International and held several positions with the UN, as head of the Board. The other Board members were Larry D. Johnson, a US-based law professor with extensive experience within the UN, Sinha Basnayake, a Sri Lankan lawyer who also served in many UN Headquarters Boards of Inquiry, and Swiss Lieutenant Colonel Patrick Eichenberger. Both the Government of Israel and the Palestinian Authority cooperated with the Board. No major criticism was voiced against its mandate and composition. This may be due to the authoritativeness attached to the mandating authority, the UN Secretary-General. This is confirmed, for example, by a press release of the Israeli MoFA, which explicitly states that 'since the board of inquiry had been appointed by the Secretary-General, his comments are of

[103] Letter from the Secretary-General (n 101).

[104] Embassy USA, 'Ambassador Rice's May 4 Telcons with UN Secretary-General on Gaza Board of Inquiry Report' WikiLeaks cable: 09USUNNEWYORK460_a (5 May 2009) <https://wikileaks.org/plusd/cables/09USUNNEWYORK4 60_a.html> accessed 22 August 2018; see also Colum Lynch, 'Special Relationship' (18 April 2011) *Foreign Policy* <https://foreignpolicy.com/2011/04/18/special-relationship/> accessed 22 August 2018. For a discussion of the content of this cable, see *infra*, Chapter V.

particular importance'.[105] Another explanation may be that the mandate was not perceived as prejudicial, legally threatening or biased, as the MoFA emphasised in its communiqué.[106] Considerations regarding the impartiality and independence of the members of the Board may have played an equally important role. However, there is no evidence that the members of the Board were seen as partial.

Nonetheless, some sections of the Palestinian civil society strongly criticised some of the Secretary-General's remarks on the inquiry from both procedural and substantive viewpoints. In particular, in a letter co-signed by the Palestinian Center for Human Rights, Addameer Prisoner Support and Human Rights Association, Al Dameer Association for Human Rights, Gaza, Al-Mezan Center for Human Rights, Gaza, and Defence for Children International – Palestine Section (DCI-PAL), Ban Ki-moon was criticised for overemphasising the cooperation of Israeli authorities in facilitating the Board's travel to the Gaza Strip. The letter – which is no longer available online – is reported to have stressed that such overemphasis would legitimise the illegal blockade of the Gaza Strip.[107]

The Israeli Government voiced several criticisms against the Board's report. From a procedural viewpoint, the Israeli MoFA claimed that the Board had failed to consider facts presented to it by Israel.[108] Moreover, it criticised the temporal limitation in the mandate, which excluded the possibility for the Board to consider the context that preceded Operation Cast

[105] Israeli Ministry of Foreign Affairs, 'Behind the Headlines: Assessing the inspection' (5 May 2009) <http://www.mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Assessing_the_Inspection_UN_Report_5-May-2009.aspx> accessed 22 August 2018.

[106] The Israeli MoFA underlined that 'Secretary-General Ban Ki-moon stressed in his cover letter that the board is not a judicial body and is not authorized to examine legal issues. In a public statement (5 May), he noted that the board is "not a judicial body or court of law. It does not make legal findings and does not consider questions of legal liability." The board's interpretations of a legal nature are consequently of no standing' (ibid).

[107] Palestinian Center for Human Rights, 'Palestinian Human Rights Organizations Deliver Open Letter to Mr. Ban Ki-Moon Condemning His Failure to Uphold International Law and His Decision to Allow Political Considerations Take Precedence over the Protection of Victims' (2 June 2009) <https://pchrgaza.org/en/?p=2355> accessed 22 August 2018.

[108] Israel Ministry of Foreign Affairs, 'Israel's reaction to the UN Board of Inquiry report' (5 May 2009) <http://www.mfa.gov.il/mfa/pressroom/2009/pages/israel_reaction_un_inspection_committee%20report_5-may-2009.aspx> accessed 22 August 2018.

Lead. In particular, the Israeli MoFA stated that 'the report completely ignore[d] the eight years of attacks against Israel that preceded the decision to initiate the operation'.[109]

2.4 The Flotilla Inquiry

During the first hours of 31 May 2010, the Israeli Navy intercepted the Gaza Freedom Flotilla, a fleet of eight vessels headed towards the Gaza Strip to break the naval blockade imposed by Israel on the Strip so as to draw international attention to the situation in Gaza and to deliver humanitarian supplies. Six ships were boarded by the Israeli Navy with the support of helicopters. The Navy allegedly encountered violent resistance on one of the vessels, the *Mavi Marmara*. The subsequent clashes resulted in the killing of nine passengers and the wounding of several others.[110] An urgent debate on the military operation was requested at the Human Rights Council, which was then holding its 14th regular session, by the Organisation of the Islamic Conference and the Arab Groups.[111] The debate ended with the adoption of Resolution 14/1 which established an international fact-finding mission to investigate the boarding of the Flotilla.[112] While at face value the Israeli Government reacted with unusual restraint over the establishment of the Commission by the Council, several sources confirm that Israeli diplomats frowned at this decision. Indeed, the Government decided not to cooperate with the inquiry.

[109] Ibid.

[110] For a factual account of the events see, for example, Isabel Kershner, 'Deadly Israeli Raid Draws Condemnation' (31 May 2010) *The New York Times* <https://www.nytimes.com/2010/06/01/world/middleeast/01flotilla.html> accessed 20 May 2018.

[111] 'Introduction by Pakistan of the Draft Resolution A/HRC/14/L.1 on the Grave attacks by Israeli forces against the humanitarian boat convoy' <http://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/14thSession/DraftResolutions/AHRC14L.1/L1-Introd-Pakistan.pdf> accessed 20 May 2018; see also UNOHCHR, 'Human Rights Council holds urgent debate' (2 June 2010) <http://www.ohchr.org/EN/NewsEvents/Pages/HRCHoldsUrgentDeb ate.aspx> accessed 20 May 2018.

[112] UNHRC Res 14/1 (2 June 2010) UN Doc A/HRC/RES/14/1.

2.4.1 Mandate

Paragraph 8 of Resolution 14/1 provides the Commission with the mandate 'to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance'. The entire Resolution is replete with language strongly condemnatory of Israel's actions. For example, Paragraph 1 '*condemns* in the strongest terms the outrageous attack by the Israeli forces against the humanitarian flotilla of ships'.

Nonetheless, Israel's response to the establishment of the Commission and the formulation of the mandate was unusually mild. In his statement to the Council, Israeli Ambassador Aharon Leshno Yaar emphasised mainly substantial points concerning the legality of the naval blockade on the Gaza Strip, the circumstances that led the Israeli Navy to board the ships, the fact that the crew of the *Mavi Marmara* resisted violently the boarding and the measures taken by Israel to alleviate the consequences of the operation in its immediate aftermath.[113] No ink was wasted in the Israeli statement to comment directly on the wording of the mandate or of the Resolution. This may be due to the timing of the debate – only a few days after the event – and the consequent unpreparedness of the Israeli delegation or, more likely, to the involvement of foreign citizens in the incident. Indeed, it may be argued that while the Commission eventually engaged with a legal assessment of the status of the Gaza Strip, the subject matter of the inquiry was not the Israeli-Palestinian conflict in itself, but an event, collateral to the relationship between Israel and the Gaza Strip, which affected mainly foreign nationals.[114] The risk to Israel's diplomatic ties with other countries whose nationals were aboard the ships was probably

[113] Permanent Mission of Israel to the UN in Geneva, Statement by HE Aharon Leshno Yaar Permanent Representative of Israel to the United Nations, Geneva (2 June 2010) <http://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/14thSession/DraftResolutions/AHRC14L.1/L1-Israel.pdf> accessed 21 May 2018.

[114] Interviews with unnamed former legal advisor in the International Law Department of the IDF, 27 February 2018; unnamed former staff member of the Turkel Commission, 9 May 2018.

much greater than in other situations, as the deterioration of Israel-Turkey relations demonstrates.[115] Only in a letter addressed to the Chair of the Fact-Finding Mission did Israeli Ambassador Leshno Yaar explicitly bashed the Resolution in light of its 'prejudicial terminology …., which determines that there were "violations" of international law and that Israel "attacked" the flotilla before any fact-finding [had]even taken place'.[116] During the urgent debate at the Human Rights Council, Hillel Neuer, the Executive Director of UN Watch, an organisation notorious for its supportive stance towards Israel, intervened to strongly criticise the Resolution on its merit. He stated that, in light of the evidence that showed the allegedly bellicose attitude of the activists aboard the ships, the Resolution was to be considered 'an insult to the world's real humanitarians'.[117]

Interestingly, while Hamas leaders called for a mandate that would mirror the resolution that established the Goldstone Commission,[118] a few weeks later, it emerged that the PA had attempted to thwart the establishment of a Human Rights Council-mandated mission by allegedly backing a European proposal for a much softer resolution, which would not only avoid condemnatory language but also remit the responsibility to establish the fact-finding mission to the High Commissioner for Human Rights in cooperation with the UN Secretary-General. *The Electronic Intifada*, an authoritative news agency that brings in a Palestinian perspective to the conflict,[119] allegedly received leaked documents that show proposed amendments to the draft

[115] See, for example, Taha Özhan, 'Turkey, Israel and the US in the Wake of Gaza Flotilla Crisis' (2010) 12(3) *Insight Turkey* 7. Note, however, that the deterioration of the Israel-Turkey diplomatic relations cannot be attributed solely on the Flotilla incident.

[116] Letter, dated 18 August 2010, from His Excellency Mr Aaron Leshno Yaar addressed to HE Ambassador Sihasak Phuangketkeow, President, Human Rights Council, annexed to UNHRC, Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance (27 September 2010) UN Doc A/HRC/15/21 (hereinafter 'UNHRC Flotilla Inquiry').

[117] UN Watch, 'Resolution sponsored by countries such as Iran, Libya and Sudan is political, designed to deflect attention from their own abuses' (2 June 2010) <https://www.unwatch.org/u-n-human-rights-council-voting-now-flotilla-resolutio n/> accessed 22 May 2018.

[118] Roee Nahmias, 'Mashaal wants "Goldstone report" on sail' (1 June 2010) *ynetnews.com* <https://www.ynetnews.com/a rticles/0,7340,L-3897620,00.html> accessed 22 May 2018.

[119] The reliability of *The Electronic Intifada* as a news provider has been acknowledged also in the Jerusalem Post. See Hannah Brown, 'Virtual War' (23 September 2003) *The Jerusalem Post*.

Resolution put forward by the Turkish delegation to the Council. According to these documents, a PA-backed proposed amendment sought to introduce the following wording into the Resolution: 'Requests the UN Secretary-General to ensure a prompt, impartial, credible and transparent investigation conforming to the [sic] international standards'. *The Electronic Intifada* described a further proposal introduced by the EU as tuning down the condemnatory wording proposed by Turkey and including mentions of the violence allegedly employed by some of the activists aboard the *Mavi Marmara*. While these proposals were only backed by the PA delegation, it appears, from an earlier leaked document attributable to a PA diplomat, that the delegation sought to amend the wording originally proposed by Turkey – 'Decides to dispatch an independent international fact finding mission ….' – with the following formulation: 'Calls upon the High Commissioner for Human Rights, in cooperation with the Secretary-General, to dispatch a fact finding mission ….'.[120]

2.4.2 Commissioners

Three high-profile individuals were appointed to the Mission: Judge Karl T Hudson-Phillips QC, a retired International Criminal Court judge, Desmond de Silva QC, a British lawyer and formerly Chief Prosecutor of the UN-backed Special Court for Sierra Leone, and Mary Shanthi Dairiam, a Malaysian former member of the Committee on the Elimination of Discrimination against Women.[121]

No major criticism was levelled against the appointment of these individuals to the Mission either from Israeli or Palestinian authorities. However, the Israeli Government refused to cooperate with the Mission. In a statement rendered by Israeli Ambassador Leshno Yaar to the Council, upon presentation of the report of the Fact-Finding Mission, some general claims were

[120] Asa Winstanley, 'Exclusive: Leaked documents show PA undermined Turkey's push for UN flotilla probe' (22 June 2010) *The Electronic Intifada* <https://electronicintifada.net/content/exclusive-leaked-documents-show-pa-undermined-turkeys-push-un-flotilla-probe/8888> accessed 22 May 2018.
[121] UNHRC Flotilla Inquiry para 2.

made against the Council's selection process to appoint members of commissions of inquiry. The Ambassador stated, referring to the Council, that it is 'a revolving door of membership on a committee when respected jurists decide to recluse themselves and others named and then withdrawn when it is clear that they have spoken out publicly against Israel'.[122] The statement is not crystal-clear but, in the absence of specific references to the work of the commissioners appointed to the Flotilla inquiry, it seems reasonable to assume that it was meant as a general criticism. Ambassador Leshno Yaar also complained about the non-participatory process that led to the appointment of the fact-finders.[123]

2.4.3 Procedural Standards

On 27 September 2010, the Flotilla Inquiry presented its report to the Human Rights Council, during its 15th regular session. In its statement to the Council, Israeli Ambassador Leshno Yaar strongly criticised the Council-sponsored Flotilla Inquiry for its alleged disregard for the basic international law principle of complementarity, which would dictate that involved states be allowed to carry out their domestic investigations before any international organisation could step in to replace state authorities.[124] This statement was motivated by the then ongoing Turkel Inquiry, a domestic inquiry established by the Israeli Government to investigate *inter alia* the boarding of the *Mavi Marmara*.[125] In seeking to convince other delegations to reject the report of the Fact-Finding Mission, Ambassador Leshno Yaar highlighted some problems in the way the commissioners assessed some evidence available to them. For example, he stated that the Mission, while drawing on some of the testimonies gathered by the Turkel Inquiry, failed to put them in context by quoting parts thereof in isolation. He also bashed the Mission for its

[122] Permanent Mission of Israel to the United Nations in Geneva, 'Statement by HE Aharon Leshno Yaar, Permanent Representative of Israel to the United Nations, Geneva' (27 September 2010) <http://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/15thSession/OralStatements/270910/Tab1/Tab3/Item1-7-ID-Concerned%20countries-Israel.pdf> accessed 22 May 2018.
[123] Ibid.
[124] Ibid.
[125] The Turkel Commission, its establishment, significance and main findings are discussed in the following chapter.

dismissive attitude towards the findings of a parallel inquiry established by the Secretary-General, admittedly more favourable to Israel, and for its disregard of 'contrary information in the public domain'.[126]

Further criticisms were levelled against the Fact-Finding Mission by the notoriously pro-Israel organisation NGO Monitor. In particular, Professor Gerald Steinberg, President of the organisation, criticised the lack of transparency of the Flotilla Inquiry on the ground that this failed to disclose details about its sources of information, including witnesses. Furthermore, he criticised the reliance of the Inquiry on the testimonies of controversial individuals, including a Member of the Knesset hostile to the idea of a Jewish state and who was aboard one of the ships of the Flotilla, and a member of the Muslim Brotherhood who was allegedly associated with anti-normalisation campaigns with Israel. The organisation further claimed that 'by not releasing the names of NGOs, all individuals involved, or their allegations, the UN and the NGO community [were] again violating basic requirements of due process and good government'.[127]

2.4.4 A Comparator: The Palmer Inquiry

Following an unusual statement by the UN Security Council that endorsed the Secretary-General's call for an investigation into the boarding of the flotilla of ships,[128] the UN Secretary-General established, on 2 August 2010, a Panel of Inquiry on the 31 May 2010 Flotilla Incident.[129] The Secretary-General appointed Sir Geoffrey Palmer, former New Zealand Prime Minister, as Chair of the Panel and then outgoing President of Colombia, Alvaro Uribe, as Co-

[126] Statement by HE Aharon Leshno Yaar… (n 122).
[127] NGO Monitor, 'UN Flotilla Report Lacks Credibility and Transparency' (29 September 2010) <https://www.ngo-monitor.org/press-releases/un_flotilla_report_lacks_credibility_and_transparency/> accessed 22 May 2018.
[128] UNSC, 'The situation in the Middle East, including the Palestinian question' (1 June 2010) UN Doc S/PV.6326; UNSC, 'The situation in the Middle East, including the Palestinian question' (1 June 2010) UN Doc S/PV.6325.
[129] UNSG, Statement on the establishment of the Panel of Inquiry on the flotilla incident of 31 May 2010 (2 August 2010) <https://www.un.org/sg/en/content/sg/speeches/2010-08-02/statement-establishment-panel-inquiry-flotilla-incident-31-may-2010> accessed 23 August 2018.

Chair. The Secretary-General secured the cooperation of both Israel and Turkey. There may be multiple explanations for the Israeli Government's decision to cooperate with the Panel notwithstanding the sensitiveness of the events to be investigated. First, such decision may be explained by the strong diplomatic pressure exerted by the UN and other states. In particular, one should recall the Security Council's presidential statement, which read as follow:

> The Security Council deeply regrets the loss of life and injuries resulting from the use of force during the Israeli military operation in international waters against the convoy sailing to Gaza. The Council, in this context, *condemns* those acts, which resulted in the loss of at least 10 civilians and many wounded, and expresses its condolences to their families.[130]

Such clear condemnations of the Israeli Government by the Security Council are rather uncommon. In addition, on 2 June 2010, the UN Human Rights Council had passed Resolution 14/1 establishing a fact-finding mission on the incident.[131] Another important diplomatic factor may have been the fact that US citizens had been involved in the incident, the US being a historically strong ally of Israel.[132] Second, and most importantly for the present purposes, the Government's decision may have been determined by the specific composition, terms of reference and method of work of the Panel. This is confirmed by a statement of the Israel MoFA that specified that the decision was taken 'following consultations with the seven-member ministerial forum …. in the wake of diplomatic contacts that have been held in recent weeks in order to ensure that this was indeed a panel with a balanced and fair written mandate'.[133] Similarly, in an official response to the release of the Panel's report, the Israel MoFA explained that the decision to cooperate had been taken 'due to Israel's deep respect for the Secretary-

[130] UN Doc S/PV.6326 (n 128) (emphasis added).
[131] UNHRC Res 14/1 (n 112).
[132] Interview with unnamed former staff member of the Turkel Commission, 9 May 2018; note, however, that there is no other source confirming the suggestion of the respondent, who was not involved in nor had any knowledge of the decision-making process that led to decision to cooperate.
[133] Israel Ministry of Foreign Affairs, 'Israel to participate in UN panel on flotilla events' (2 August 2010) <http://mfa.gov. il/MFA/PressRoom/2010/Pages/Israel-to-Participate-in-the-UN-Panel-on-the-Flotilla-Events-2-Aug-2010.aspx> accessed 23 August 2018.

General and the credibility of the process developed for the work of the panel'.[134] This may also be evidence of the fact that Israel regarded the Secretary-General as authoritative and, therefore, was not willing to challenge his decision. Furthermore, the composition of the Panel included one expert appointed by the Israeli Government, Joseph Ciechanover Itzhar, and one expert appointed by the Turkish Government.

The Secretary-General provided the Panel with the following mandate:

> 2. The panel:
>
> (a) will receive and review interim and final reports of national investigations into the incident;
>
> (b) may request such clarifications and information as it may require from relevant national authorities.
>
> 3. In the light of the information so gathered, the panel will:
>
> (a) examine and identify the facts, circumstances and context of the incident; and
>
> (b) consider and recommend ways of avoiding similar incidents in the future.
>
> 4. The panel will prepare a report including its findings and recommendations and submit it to the Secretary-General.[135]

Thus, the inquiry based its conclusions and recommendations on the reports shared by the national authorities and further clarifications obtained by the Israeli and Turkish points of contact. It is worth underlining that the Panel went to great lengths to make clear that it was not a court of law and that its findings were not to be attributed any more authority than those produced by the Governments of Israel and Turkey. The Report specifies that the Panel's members could not verify first-hand the witness statements presented to them by the domestic inquiry mechanisms and that their findings were no definitive either in fact or in law. It is of

[134] Israel Ministry of Foreign Affairs, 'Palmer Report-Response of Israel Mission to the UN' (2 September 2011) <http://mfa.gov.il/MFA/InternatlOrgs/Issues/Pages/Palmer_report_Response_Israel_Mission_UN_2-Sep-2011.aspx> accessed 23 August 2018.

[135] Terms of Reference of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident in Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (September 2011) 11.

particular significance that the Panel felt the urgency to stress the reasons for not engaging in legal analyses.

> The Panel will not add value for the United Nations by attempting to determine contested facts or by arguing endlessly about the applicable law. Too much legal analysis threatens to produce political paralysis. Whether what occurred here was legally defensible is important but in diplomatic terms it is not dispositive of what has become an important irritant not only in the relationship between two important nations but also in the Middle East generally. The Panel has been entrusted with some policy responsibilities and that was not the case with the domestic investigations whose reports we have received.[136]

This statement shows that the Panel of Inquiry intended not so much to point the finger at someone for the events, but rather to avoid an escalation in the ensuing diplomatic tensions and to facilitate a peaceful settlement of the dispute. From this standpoint, the view of the Panel seems to have been that the crux of the inquiry was to ensure that the parties could come to a mutual agreement, regardless of the veracity of the facts presented by one or the other party. If facts were to some extent secondary, then their legal implications would also be of diminished importance.

While the Panel's approach to the inquiry has not received significant criticism from Palestinians, who were largely unaffected by the specific events under investigation, the Report's conclusions on the legality of the blockade of the Gaza Strip were resoundingly rejected and caused a Hamas official to call the report 'unjust and unbalanced'.[137]

2.5 The Settlements Inquiry

Differently from the inquiries overviewed so far, the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements did not focus on a specific event or a series of events occurred in a limited time span. The Mission was deployed by the

[136] Report of the Secretary-General's Panel of Inquiry (ibid) para 15.
[137] Al-Qassam, 'Abu Zuhri: Palmer report "unfair, unbalanced"' (4 September 2011) <https://qassam.ps/news-4884-Abu_Zuhri_Palmer_report_unfair_unbalanced.html> accessed 24 August 2018; the substantive issues relating to the blockade of the Gaza Strip are discussed *infra* in Chapter V.

Human Rights Council, during its 19th Regular Session, probably in response to announcements of the Israeli Government that it would approve the construction of new homes in the West Bank and around Jerusalem.[138] However, its focus was much broader as the proposing countries, among which was Palestine, were concerned with overcoming the technical difficulties encountered by other UN mechanisms entrusted with reporting on *inter alia* Israel's settlement policies in the Occupied Palestinian Territories. This emerges clearly from the last preambular paragraph of Resolution 19/17, which expressed concern 'at the failure of the Government of Israel to cooperate fully with the relevant United Nations mechanisms, in particular the Special Rapporteur on the situation of human rights in the Palestinian Territories occupied since 1967'.[139]

The Fact-Finding Mission was established during a particularly favourable period, especially within the EU. Just a few years before, on 8 December 2009, the Council of the European Union had issued its conclusions on the Middle East Peace Process, which included *inter alia* specific declarations regarding settlement activities, such as the following:

> The Council reiterates that settlements, the separation barrier where built on occupied land, demolition of homes and evictions are illegal under international law, constitute an obstacle to peace and threaten to make a two-state solution impossible. The Council urges the government of Israel to immediately end all

[138] In particular, operative Paragraph 3 of UNHRC, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan (10 April 2012) UN Doc A/HRC/RES/19/17 '*Condemns* the recent Israeli announcements of the construction of new housing units for Israeli settlers in the West Bank and around occupied East Jerusalem, as they undermine the peace process, constitute a threat to the two-State solution and the creation of a contiguous, sovereign and independent Palestinian State, and are in violation of international law, and calls upon the Government of Israel to reverse immediately its decisions, which would further undermine and jeopardize the ongoing efforts by the international community to reach a final settlement compliant with international legitimacy, including relevant United Nations resolutions'. One such announcement may have been The Associated Press, 'West Bank Settlement of Shiloh Gets Initial Approval for 600 New Homes' (23 February 2012) *Haaretz* <https://www.haaretz.com/1 .5189245> accessed 17 August 2018.

[139] For a timeline of the Israeli settlement policies, see UNHRC, Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem (7 February 2013) UN Doc A/HRC/22/63, Annex I; see also the important work conducted by the movement Peace Now at <http://peacenow.org.il/en/category/settlements> accessed 17 August 2018; for an understanding of the infrastructural and architectural policies of Israel in the Occupied Palestinian Territories since 1967, see Eyal Weizman, *Hollow Land: Israel's Architecture of Occupation* (Verso 2007).

> settlement activities, in East Jerusalem and the rest of the West Bank and including natural growth, and to dismantle all outposts erected since March 2001.[140]

These conclusions, reiterated later in 2011, had been followed by a resolution of the European Parliament that deplored the abuse of the terms of the EU-Israel Association Agreement by some private companies due to the failure of the Israeli authorities to clearly indicate the origin – whether from the internationally recognised Israeli territory or from the territories illegally occupied by it – of the traded products.[141] Only a few months after the establishment of the Fact-Finding Mission, the European Parliament would pass a resolution detailing the EU policy on the West Bank and East Jerusalem where it stressed the illegality of the settlements.[142]

The Israeli Government's criticism of the Resolution, although not voiced during the Council's session, emerges from the sceptical declarations of Ambassador Ron Prosor before the UN Security Council.[143] But, most importantly, from the decision of the Israeli Government to sever ties with the Human Rights Council, communicated with a letter to the President of the Council by Ambassador Aharon Leshno Yaar on 14 May 2012.[144] Israeli Ambassador Alan Baker, in an editorial written for the *Jerusalem Center for Public Affairs* shortly after the publication of the Mission's report, criticised both the title of the Mission and the preambular language of Resolution 19/17 for pre-determining the illegality of the Israeli settlements, and he claimed that these factors coupled with the alleged long-held bias of the establishing body

[140] Council of the European Union, Council Conclusions on the Middle East Peace Process, 2985th Foreign Affairs Council meeting Brussels (8 December 2009) para 6 <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/wgme/dv/201/201012/20101215_5_council_conclusions_en.pdf> accessed 17 August 2018.
[141] European Parliament resolution 2012/2519(RSP) of 16 February 2012 on the proposal for a Council decision on the conclusion of the regional Convention on pan-Euro-Mediterranean preferential rules of origin, Text Adopted P7_TA(2012)0060.
[142] European Parliament resolution 2012/2694(RSP) of 5 July 2012 on EU policy on the West Bank and East Jerusalem, Text Adopted P7_TA-PROV(2012)0298.
[143] Israel Ministry of Foreign Affairs, 'Statement by Amb Prosor to the UN Security Council' (23 April 2012) <http://mfa.gov.il/MFA/InternatlOrgs/Speeches/Pages/Amb_Prosor_UN_Security_Council_23-Apr-2012.aspx> accessed 17 August 2018.
[144] Permanent Mission of Israel to the United Nations in Geneva, Letter to the President of the Human Rights Council by Ambassador Aharon Leshno Yaar (14 May 2012) <https://extranet.ohchr.org/sites/hrc/PresidencyBureau/BureauRegionalGroupsCorrespondence/Corresp20112012DL/IsraeliAmblettertoPdtofHRC_14May2012.pdf> accessed 17 August 2018. The letter openly links the decision of the Israeli Government with the 19th Regular Session of the Council.

detracted from the credibility and reliability of the mission.[145] NGO Monitor accused the Human Rights Council of yielding to the lobby of NGOs who, according to the organisation, pressured the Council to adopt the Resolution and establish the Fact-Finding Mission as a way to wage 'political warfare and discrimination against Israel'.[146]

2.5.1 Mandate

Operative paragraph 9 of Resolution 19/17 provided for the establishment of

> an independent international fact-finding mission, to be appointed by the President of the Human Rights Council, to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, with a mandate ending on submission of a report to the Council, and calls upon Israel, the occupying Power, not to obstruct the process of investigation and to cooperate fully with the mission.

The Israeli Government does not seem to have specifically reacted to the mandate, however, the Government's position can reasonably be inferred from Ambassador Baker's criticism of both Resolution 19/17 and the mandate that it assigned to the Fact-Finding Mission.[147] Much like for the preambular part of the Resolution, Baker's criticism was directed at the use of certain words, in particular the qualification of the West Bank as 'Occupied Palestinian Territories', for the reasons described above. In a submission to the Fact-Finding Mission, NGO Monitor criticised the choice of the Council to confer a one-sided mandate upon the Mission. It implied that, while the mandate called for the investigation of only Israeli practices, the Mission should have amended this mandate, as it is in its power to do so, so as to broaden the scope of

[145] Alan Baker, 'Biased, Prejudiced, and Unprofessional: The UN Human Rights Council Fact-Finding Report on Israeli Settlements' (2013) 13(7) *Jerusalem Center for Public Affairs*. Specifically, Ambassador Baker claimed that the words 'Occupied Palestinian Territories' contradict both reality and previous UN statements, given that there has never been a Palestinian sovereign entity with a territorial claim to the West Bank and the Gaza Strip, and that there exists no formal determination within the UN to the effect that the West Bank constitutes 'Palestinian Territory'.

[146] NGO Monitor, 'European-Government Funded NGOs Lobby for Latest UNHRC Investigation' (27 March 2012) <https://www.ngo-monitor.org/reports/european_government_funded_ngos_lobby_for_latest_unhrc_investigation/> accessed 20 August 2018.

[147] Ibid.

the investigation to the right of self-defence, terrorism and the rights of the settlers.[148] Furthermore, NGO Monitor's submission highlights that, by reading the mandate in the broader context of Resolution 19/17, one could only be lead to conclude that certain human rights violations had already been conclusively pre-established by the Council. This amounted – according to NGO Monitor – to a pre-determination of the matter to be investigated, which in turn detracted from the credibility, authoritativeness and impartiality of the Mission. In contrast, NGO Monitor submitted that the Council should have employed a less conclusive language, such as 'all alleged violations'.[149]

2.5.2 Commissioners

The President of the Human Rights Council appointed three members to the Fact-Finding Mission. Christine Chanet, a French lawyer who had been actively involved in several UN mechanisms, including the Human Rights Committee, would become its chair. She would be assisted by Asma Jahangir, a prominent Pakistani human rights lawyer, and Unity Dow, a judge from Botswana. While no Israel's official statement regarding the commissioners can be retrieved, the position of the Government can reasonably be inferred from a paper of Israeli Ambassador Alan Baker and the official statements of organisations close to, or funded by, the Israeli Government.

Ambassador Baker criticised the appointment of, in particular, Asma Jahangir, because Pakistan had been one of the main co-sponsor of Resolution 19/17 and several other resolutions highly critical of Israel. He claimed that Pakistan's hostility to Israel would hamper the independence of the Pakistani commissioner, thus compromising the independence of the entire

[148] NGO Monitor, 'NGO Monitor Submission to the UN Human Rights Council Independent International Fact-finding Mission on the Israeli Settlements in the Occupied Palestinian Territory including East Jerusalem Pursuant to HRC Resolution 19/7' (30 October 2012) 8 <https://www.ngo-monitor.org/data/images/File/NGO_Monitor-Submission_to_th e_Settlements_Fact_Finding_Committee.pdf> accessed 20 August 2018.
[149] Ibid 9.

Mission.[150] UN Watch criticised both Jahangir, for allegedly failing to act against allegations of anti-Semitic claims in Saudi and Egyptian schoolbooks while condemning promptly alleged Islamophobic illustrations in a Danish newspaper, and Chanet, for some comments she had made in 2010 in her capacity as member of the Human Rights Committee.[151] These included statements that the Israeli policies were discriminatory and that it was difficult to establish a dialogue with Israel.[152] The organisation also implied that commissioner Jahangir, being sister to Hina Jilani, who had been a commissioner in the Goldstone Commission, could suffer from her sister's same alleged bias against Israel. No criticism was voiced by Palestinian diplomats who, on the contrary, commended the work of the Fact-Finding Mission.

2.5.3 Procedural Standards

The Fact-Finding Mission explicitly acknowledges that, in order to reach its conclusions, it relied on information received through an open call for submissions and 'from more than 50 people affected by the settlements and/or working in the Occupied Palestinian Territory and Israel'. Moreover, the report explains that the Mission 'met with victims of human rights violations, officials from the Ministry of Foreign Affairs of Jordan, officials from the Palestinian Authority, and representatives of international and non-governmental organizations and United Nations agencies'.[153]

In a brief response to the publication of the report, the Israeli Government simply stated that 'the Human Rights Council has sadly distinguished itself by its systematically one-sided and biased approach towards Israel. This latest report is yet another unfortunate reminder of such

[150] NGO Monitor, 'European-Government Funded…' (n 146).
[151] UN Watch, 'Issue 372: U.N. names 3 commissioners for new probe against Israel' (6 July 2012) <https://www.unwatch .org/issue-372-u-n-names-3-commissioners-new-probe-israel/> accessed 20 August 2018; Christine Chanet was also criticised by NGO Monitor in their submission to the Fact-Finding Mission (see NGO Monitor Submission (n 148) 11-12).
[152] Christine Chanet's statements can be found in Reuters, 'U.N. rights body tells Israel to end Gaza blockade' (30 July 2010) <https://www.reuters.com/article/us-rights-israel/u-n-rights-body-tells-israel-to-end-gaza-blockade-idUSLDE66T 0KY20100730> accessed 20 August 2018.
[153] UNHRC, Report… (n 139) paras 6 and 8.

approach'.[154] An insight into the reasons behind Israel's criticism of the methodology adopted by the Mission, in particular of its reliance on the sources mentioned above can be inferred from a short position paper published by NGO Monitor.

> Of 133 footnotes, 31 cite NGOs, and an additional 12 cite the UN's Office for the Coordination of Humanitarian Affairs (OCHA), which generally also relies on NGOs for its claims. Many of these NGOs are funded by European governments and the New Israel Fund (NIF).
>
> The document also cites to a single media source, *Ha'aretz*, which in turn often quotes NGOs. The reference to an opinion article from the paper's editors, also demonstrates the lack of substantive research. Many other references are to other UNHRC documents, which are also heavily reliant on NGOs and newspaper articles.
>
> In these respects, the latest UNHRC Fact-Finding report again blatantly violated best practices in human rights investigations, such as the Lund-London guidelines that mandate reports be "clearly objective and properly sourced."[155]

In other words, pro-Israel sources, including Ambassador Alan Baker,[156] claimed that the Mission's uncritical reliance on NGOs' reports and Palestinian narrative unveils their lack of credibility, impartiality, independence and professionalism. Moreover, the International Association of Jewish Lawyers and Jurists claimed that the Mission failed to consider their submission.[157] Whether the Mission maliciously disregarded the Association's submission or not, there is no mention of it either in the Appendixes or in the footnotes of such report. This may have corroborated the conviction that the Fact-Finding Mission had adopted a biased approach to evidence. It should be noted that, before the publication of the report, NGO Monitor

[154] Israeli Ministry of Foreign Affairs, 'Israel's Response: Counter-Productive Report of the Human Rights Council' (31 January 2013) <http://embassies.gov.il/UnGeneva/NewsAndEvents/MediaStatements/Pages/Israel's-Response-to-the-UNHCR-Press-Release.aspx> accessed 20 August 2018.
[155] NGO Monitor, 'UN Human Rights Council and NGO Allies Produce Another Politicized Report' (31 January 2013) <https://www.ngo-monitor.org/reports/un_human_rights_council_and_ngo_allies_produce_another_politicized_report/> accessed 20 August 2018.
[156] Baker (n 145).
[157] The International Association of Jewish Lawyers and Jurists, 'Human Rights Council 22nd Session, Item 7 – ID with FFM on Israeli Settlements' (18 March 2013). The Association's submission could not be retrieved online.

had made its own submission to the Mission drawing their attention to the most appropriate way to weigh NGO-supplied information.[158]

In its submission, NGO Monitor criticised the lack of transparency of the Mission. In particular, the organisation stated that the Mission failed to provide reasons why submissions to it would be treated confidentially and not be made public. This, according to NGO Monitor, would hamper the possibility to independently verify the source of the information and make the process less transparent.[159] Furthermore, both NGO Monitor and Ambassador Baker raise the problematic issue of how the Mission corroborated information provided by NGOs.[160] Ambassador Baker provided an example of how information sourced through NGO reports only may be misleading. He claims that the Mission's statement that the first settlement established by Israel in occupied land was Kefar Ezyon, in paragraph 24 of the Report, is false since the land was legally purchased in 1927.[161] However, in order to contrast the Mission's claim, Baker states that they could have simply cross-checked the information by consulting a Wikipedia entry regarding this settlement.[162] He does not provide alternative, more reliable and credible, sources than this.

2.6 The Independent Commission of Inquiry on the 2014 Gaza Conflict

On 23 April 2014, while hostilities were still ongoing, the UN Human Rights Council voted 'to urgently dispatch an independent, international commission of inquiry' to investigate the events, with Resolution S-21/1.[163] An escalation of violence between Israel and Hamas,

[158] NGO Monitor, 'NGO Monitor Urges UNHRC to Comply with Fact-Finding Standards' (1 November 2012) <https://www.ngo-monitor.org/press-releases/ngo_monitor_urges_unhrc_to_comply_with_fact_finding_standards/> accessed 20 August 2018; NGO Monitor Submission (n 148).
[159] NGO Monitor Submission (ibid) 14.
[160] Ibid 17-19; Baker (n 145).
[161] Baker (ibid).
[162] There are also substantive arguments that contradict Baker's claim, such as the fact that the international community considers the settlement of Kfar Etzion illegal under international law, but I do not address them here. On the issue of parcels of land the property of which was acquired by Jews before even the establishment of the State of Israel, see Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2009) 240-241.
[163] UNHRC Res S-21/1 (24 July 2014) UN Doc A/HRC/RES/S-21/1.

commenced on 12 June with the abduction and murder, allegedly by Hamas affiliates, of three Israeli teenagers in the West Bank,[164] had turned into a full-fledged military confrontation on 8 July, with the launching, by the IDF, of a military campaign on the Gaza Strip known as operation 'Protective Edge'. The hostilities lasted fifty days, effectively coming to an end with a ceasefire agreed by the parties on 26 August.[165] In a letter dated 18 July, the representatives of the Group of Arab States, the Group of African States, the Organization of Islamic Cooperation and the Movement of Non-Aligned Countries requested the President of the Human Rights Council to hold a special session on the military escalation in Gaza.[166] The Special Session was convened by the President of the Council on 23 July. This time, the Council adopted a more cautious language in providing the Session with a title by referring to simply 'the human rights situation in the Occupied Palestinian Territory, including East Jerusalem'.[167] Arguably, an even more balanced formulation was adopted in Resolution S-21/1, which reads, 'ensuring respect for international law in the Occupied Palestinian Territory, including East Jerusalem'. None of these formulations seems to suggest a pre-judgment of the situation on the

[164] Jack Khoury, 'Hamas Claims Responsibility for Three Israeli Teens' Kidnapping and Murder' (21 August 2014) *Haaretz* <https://www.haaretz.com/hamas-admits-kidnap-murder-of-3-teens-1.5260283> accessed 17 May 2018; it is important to stress that the abduction and subsequent murder of the three Israeli teenagers was only one determinant of the subsequent violent escalation. Indeed, the military operation occurred in the context of the protracted Israeli occupation of the West Bank, which saw an increase in the settlement activities carried out by the occupying power especially in the few months preceding Operation Protective Edge. Moreover, the political juncture in the Palestinian territories immediately before the commencing of the military operation was unfavourable to Israel as the two main Palestinian political factions, the PLO and Hamas, had sought to establish a government of national unity, which was declared by President Abbas on 2 June 2014. At the same time, the security of Israeli communities living on the border with the Gaza Strip was being threatened by increasingly hostile actions carried out by Hamas operatives, including the construction of tunnels that allowed Palestinian fighters to cross into Israel.

[165] For a timeline and account of the events that took place during the escalation that led to operation 'Protective Edge' and the military operation itself, see Zvi Bar'el, Khaled Diab, Amos Harel, Amira Hass, Judy Maltz, Anshel Pfeffer, Chemi Shalev and Jillian Jones, *The Forgotten War: A Year Since Gaza* (Haaretz 2015); International Institute for Counter-Terrorism, 'Operation "Protective Edge": A Detailed Summary of Events' (2014) <https://www.ict.org.il/Article/1262/Operation-Protective-Edge-A-Detailed-Summary-of-Events#gsc.tab=0> accessed 17 May 2018; Israel's Operation Protective Edge – Timeline (5 August 2014) *RTE* <https://www.rte.ie/news/special-reports/2014/0729/633788-israel-gaza-timeline/> accessed 17 May 2018.

[166] Letter dated 18 July 2014 from the coordinators of the Group of Arab States, the Group of African States, the Organization of Islamic Cooperation, the Movement of Non-Aligned Countries and the State of Palestine addressed to the President of the Human Rights Council (18 July 2014) annexed to UNHRC, Report of the Human Rights Council on its twenty-first special session (9 September 2014) UN Doc A/HRC/S-21/2.

[167] UNHRC, 21st special session of the Human Rights Council on the human rights situation in the Occupied Palestinian Territory, including East Jerusalem (23 July 2014) <http://www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Session21/Pages/21stSpecialSession.aspx> accessed 18 May 2018.

ground. Nonetheless, Israeli Ambassador Eviatar Manor bashed the decision of the Council to hold the Special Session alleging that it was 'misguided, ill-conceived and counter-productive to efforts made …. to end hostilities' and followed in the footsteps of previous sessions held by the Council exclusively to name and shame Israel.[168]

Despite the Israeli Government's opposition, Resolution S-21/1 was passed with 29 votes in favour, 17 abstentions and only the US vote against. The Israeli ambassador criticised the resolution as 'totally unbalanced, asymmetric and destructive'.[169] Foreign Minister Avigdor Liberman went so far to define the UN Human Rights Council as the 'Terrorist Rights Council' and rebuffed its actions by stating that 'when states like Cuba, Venezuela and their like, which do not even understand the term "human rights," vote against Israel, that is a sign that we are doing the right things'.[170]

2.6.1 Mandate

The mandate of the Independent Commission of Inquiry on the 2014 Gaza Conflict is provided for in Paragraph 13 of Resolution S-21/1, which reads as follows:

> to investigate all violations of international humanitarian law and international human rights law in the Occupied Palestinian Territory, including East Jerusalem, particularly in the occupied Gaza Strip, in the context of the military operations conducted since 13 June 2014, whether before, during or after, to establish the facts and circumstances of such violations and of the crimes perpetrated and to identify those responsible, to make recommendations, in particular on accountability measures, all with a view to avoiding and ending impunity and ensuring that those responsible are held accountable, and on ways and means to protect civilians against any further assaults, and to report to the Council at its twenty-eighth session.

[168] Israeli Ministry of Foreign Affairs, 'Amb Manor addresses the Human Rights Council' (23 July 2014) <http://mfa.gov.il/MFA/InternatlOrgs/Speeches/Pages/Amb-Manor-addresses-the-Human-Rights-Council-23-Jul-2014.aspx> accessed 18 May 2018.
[169] Ibid.
[170] Israeli Ministry of Foreign Affairs, 'UNHRC decision should be rejected by decent people everywhere' (23 July 2014) <http://mfa.gov.il/MFA/PressRoom/2014/Pages/UNHRC-decision-should-be-rejected-by-decent-people-everywhere-23 -Jul-2014.aspx> accessed 18 May 2018.

The Israeli Government's position on the formulation of the mandate can be inferred from a communiqué of the Prime Minister's Media Advisor, which reads as follows:

> Like the investigation that led to the infamous Goldstone report, a report which was ultimately renounced by its own author, this investigation by a kangaroo court is a foregone conclusion.
>
> The predictable result will be the libeling of Israel and even greater use of human shields in the future by Hamas. Those who will pay the price will be not only Israelis but also Palestinians who Hamas will redouble its efforts to use as human shields in the future.[171]

This statement encloses three main criticisms levelled against the establishment of the Commission and its mandate. First, explicitly mindful of the Goldstone Report and its legacy, it criticises the Council's decision to allegedly use a commission of inquiry as a tool to exact a judgment on Israel's conduct in the Gaza Strip. The argument is subtle and alludes to an alleged misuse of commissions of inquiry by the Council to reach legal rather than factual determinations.[172] Moreover, it hints at the lack of adequate procedural guarantees in non-judicial inquiries such as the one dispatched by the Human Rights Council. Second, it condemnatorily anticipates the outcome of the Commission of Inquiry by arguing that it would find Israel guilty of international human rights and humanitarian law violations. Such foregone conclusions were to be anticipated not in light of the mandate, whose formulation seemed reasonably even-handed, but in light of the condemnatory language used elsewhere in Resolution S-21/1.[173] For example, Pnina Sharvit Baruch, former Head of the International Law Department of the IDF, pointed out that, by condemning Israel's conduct as constituting 'widespread, systematic and gross violations of international human rights and fundamental freedoms', Paragraph 2 of the Resolution had pre-judged the matter at hand, 'thus generating serious concerns about whether the COI [Commission of Inquiry] was indeed meant to be an

[171] Ibid.
[172] Interview with unnamed official of the Israeli Ministry of Foreign Affairs, 26 February 2018.
[173] Interview with Pnina Sharvit Baruch, former Head of the International Law Department of the Israeli Defence Forces (IDF), 5 March 2018.

independent and objective body of inquiry'.[174] Third, the statement remarks that, by dint of the one-sidedness of the Resolution and, hence, of the mandate, the Commission was likely to yield a report that would not only condemn Israel and whitewash Hamas but also encourage Palestinian groups to persevere in their alleged use of tactics that are abusive of international humanitarian law.

2.6.2 Commissioners

The President of the Human Rights Council appointed three members to the Commission: William Schabas, a professor of international criminal law and human rights, Mary McGowan Davis, former Justice of the Supreme Court of the State of New York and formerly Chair of the UN Committee of Independent Experts mandated to follow up on the recommendations of the Goldstone Commission, and Doudou Diène, former UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance.[175]

The day after the appointment, Israeli Ambassador Ron Prosor sent a letter to the UN Secretary-General to denounce the appointment of William Schabas as Chair of the Commission.[176] The allegations levelled by the Israeli Government against Schabas concerned his supposed anti-Israel agenda. The letter quoted a statement that Schabas had made some time before his appointment regarding his opinion that Israeli Prime Minister Benjamin Netanyahu should be tried by the International Criminal Court.[177] On 30 January 2015, Israeli Ambassador Eviatar Manor sent another letter to the President of the Human Rights Council to inform him that the Israeli Government had retrieved evidence that Schabas had had a contractual

[174] Pnina Sharvit Baruch, 'The Report of the Human Rights Council Commission of Inquiry on the 2014 Operation in the Gaza Strip – A Critical Analysis' (2016) 46 *Isr YB Hum Rts* 29, 30.
[175] For the profiles of the three fact-finders, see UNHRC, 'Biographies of Commissioners' <http://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/Commissioners.aspx> accessed 18 May 2018.
[176] Israeli Ministry of Foreign Affairs, 'Letter to UN Sec-Gen on appointment of William Schabas' (12 August 2014) <http://mfa.gov.il/MFA/InternatlOrgs/Issues/Pages/Letter-to-UN-Sec-Gen-on-appointment-of-Schabas-12-Aug-2014.as px> accessed 18 May 2018.
[177] The statement referred to in the letter of Israeli Ambassador Prosor can be heard in its context at <https://www.youtube.c om/watch?v=0EgykgqpgQY> accessed 18 May 2018.

relationship with the Palestine Liberation Organisation (PLO) over a consultancy he had been requested to make.[178] The letter specified that 'such shocking evidence of conflict of interest, if presented before any legal organ, whether national or international, or before any fair-minded observer, would be cause for immediate disqualification and dismissal of the person involved' and insisted that Schabas be dismissed. In order to avoid any hindrance to the Commission's work due to the Israeli allegations, William Schabas resigned from his post on 2 February 2015.[179] Schabas's resignation was hailed by Israeli Foreign Minister Avigdor Liberman as a victory of Israeli diplomacy.[180] However, Prime Minister Benjamin Netanyahu as well as the MoFA argued that the episode was only a symptom of a more deeply rooted disease consisting of an inherent bias of the Commission which affected the mandate as well.[181]

Interestingly, in a commentary on the final report of the Commission, Hamas stated that Schabas's resignation had influenced the structure of the report and its findings.[182] This was also the opinion of a Palestinian interviewee, who regarded Schabas's resignation as partially undermining the report and possibly negatively reflecting on the language used.[183] This may indicate either that Schabas was regarded by Palestinians as an indispensable element of the Commission for his professionalism and impartiality or that Israeli Government's suspicions

[178] Letter of the Permanent Mission of Israel to the UN in Geneva to the President of the UN Human Rights Council (30 January 2015) <https://extranet.ohchr.org/sites/hrc/PresidencyBureau/BureauRegionalGroupsCorrespondence/Corresp2014DL/Letter%20from%20Israel%20to%20HRC%20President%20Amb%20Ruecker%2030%2001%2015%20(2).pdf> accessed 18 May 2018.
[179] Letter from Professor William Schabas (n 1).
[180] Israeli Ministry of Foreign Affairs, 'FM Liberman on the resignation of William Schabas' (3 February 2015) <http://mfa.gov.il/MFA/PressRoom/2015/Pages/FM-Liberman-on-the-resignation-of-William-Schabas-3-Feb2015.aspx > accessed 18 May 2018.
[181] Prime Minister's Office, 'PM Netanyahu's Statement Following the Resignation of William Schabas' (3 February 2015) <http://www.pmo.gov.il/English/MediaCenter/Spokesman/Pages/spokesChaves030215.aspx> accessed 18 May 2018; Israeli Ministry of Foreign Affairs, 'Behind the Headlines: Schabas' resignation from UNHRC Commission of Inquiry' (5 February 2015) <http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Schabas-resignation-from-UNHRC-Commission-of-Inquiry-5-Feb-2015.aspx> accessed 18 May 2018.
[182] The Islamic Resistance Movement (Hamas), 'Press Release: Commentary on the report of the Human Rights Council Fact-Finding Committee' (29 June 2015) (translated from Arabic).
[183] Interview with unnamed staff member of Human Rights Watch, 12 February 2018.

were well founded. Be that as it may, both sources seem to draw a direct link between Schabas's resignation and the final report's watered-down language, as it has been described by both.

The other commissioners did not attract much criticism by either the Israeli Government or the Palestinian authorities. Quite to the contrary, more than one Israeli interviewee stated that Mary McGowan Davis was not perceived as biased[184] and, as a result, it seems that the Israeli Government worked much more towards mobilising – or even encouraging – private individuals to provide information to the Commission of Inquiry, despite the official non-cooperative position taken by the Israeli Government. This strategy appears to have been aimed at persuading the Commission to use a more cautious formulation of its findings in contrast to one of its predecessors, the Goldstone Commission, in light of the inevitable *information gap* caused by the Israeli Government's lack of cooperation, and to convince the commissioners that parties who – according to Israeli sources – are not equally committed to the rule of law (*morality gap*) should not be held to the same standards.[185]

2.6.3 Procedural Standards

The Commission did not have access to either the Occupied Palestinian Territories or Israel due to the Israeli Government's decision to not cooperate with the inquiry.[186] On this basis, several Israeli sources criticised some of the factual findings included in the final report, although they conceded that the inaccuracies could not be compared with the factual

[184] Interview with David Benjamin, former Chief Legal Officer of the Military Advocate General's Corps (MAG) and former Director of the Strategic and International Branch of the International Law Department of the IDF, 4 March 2018; Pnina Sharvit Baruch, former Head of the International Law Department of the Israeli Defence Forces (IDF), 5 March 2018.

[185] Interview with unnamed official of the Israeli Ministry of Foreign Affairs, 26 February 2018; the *morality gap* was brought up also in an interview with David Benjamin, former Chief Legal Officer of the Military Advocate General's Corps (MAG) and former Director of the Strategic and International Branch of the International Law Department of the IDF, 4 March 2018.

[186] Human Rights Council, 'Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1' (24 June 2015) UN Doc A/HRC/29/CRP.4 (hereinafter 'McGowan Davis Report'), para 8.

baselessness that, in their view, characterised the Goldstone Report.[187] For example, Pnina Sharvit Baruch criticised the report for failing to sufficiently acknowledge the Commission's inability to access intelligence belonging to the military that could have shed light on some of the factual circumstances examined in the report. This – she claimed – cannot be blamed on Israel for having failed to provide the Commission with the relevant information, but should be reflected in a more cautious formulation of the factual findings.[188] She further criticised the Commission's assessment of the reliability of certain witnesses and pointed out that, despite the likely risk faced by such witnesses had they revealed information which could negatively reflect on Hamas, the Commission failed to discard such evidence or diminish its probative value. Furthermore, she bashed the Commission for having inferred the *mens rea* of some IDF commanders from the testimonies of some Palestinians resident in Gaza, despite the fact that 'witnesses cannot attest to the intention of IDF commanders'.[189] In addition, she negatively assessed the lack of military expertise in the Commission – even though the Commission consulted a military expert[190] – which she infers from the sweeping conclusions as to the precautions that the IDF should have taken during combat and the use of force and certain weapons.[191] More generally, she took issue with how the Commission treated direct evidence and official statements of both Israeli and Palestinian – especially Hamas – officials. The former type of evidence – she claimed – was often uncorroborated when indicative of IDF misconducts, while a more cautious approach was adopted for witness statements that badly reflected on Hamas. Similarly, she objected to the Commission's in-depth search for incriminating

[187] Interview with David Benjamin, former Chief Legal Officer of the Military Advocate General's Corps (MAG) and former Director of the Strategic and International Branch of the International Law Department of the IDF, 4 March 2018; Pnina Sharvit Baruch, former Head of the International Law Department of the Israeli Defence Forces (IDF), 5 March 2018; Danny Efroni, former Chief Military Advocate General of the IDF, 18 March 2018; unnamed official of the Israeli Ministry of Foreign Affairs, 26 February 2018.
[188] Baruch (n 174) 69.
[189] Ibid.
[190] McGowan Davis Report, para 18.
[191] Baruch (n 174) 71-72.

statements of Israeli officials, while ignoring those that could support Israeli claims, and almost blind-eye approach to Hamas' statements that could unveil their wrongdoings.[192]

Pnina Sharvit Baruch's paper does not represent the official position of the Israeli Government, which at the 29th session of the Human Rights Council – when the McGowan Davis Report was submitted – refrained from commenting on the content of the Report.[193] However, some statements by the Israeli MoFA and other sources close to the Israeli Government appear to have been reflected in Sharvit Baruch's paper. For example, the MoFA spokesperson, in a communiqué released on 22 June 2015, expressed its concern at the lack of military expertise within the Commission.[194] UN Watch and NGO Monitor, organisations known for being close to the Israeli Government and critical of what they see as anti-Israel positions, held a side event to the Human Rights Council 29th session, on 29 June 2015, during which several of the arguments so well spelled out in Sharvit Baruch's paper had already been discussed.[195]

Hamas too levelled criticism at the Commission's treatment of open source information. In particular, it bashed the Commission for having relied on some media coverages without verifying them, as sound rules for inquiries would require. As a result, claimed Hamas, the Report ended up replicating the narrative of 'the Occupier'.[196] However, Hamas conceded – and regretted – that the Commission could not verify the magnitude of the effects of the Israeli military operation on the Gaza Strip due to its inability to travel there because of the restrictions

[192] Ibid.
[193] Permanent Mission of Israel to the United Nations in Geneva, Statement on behalf of the State of Israel – UN Human Rights Council 29th session (June 2015) <http://embassies.gov.il/UnGeneva/HumanRightsCouncil/RegularSessions/Documents/HRC29/HRC29_Item%201_COI%20Resolution_Israel%20Statement.pdf> accessed 20 May 2018.
[194] Israeli Ministry of Foreign Affairs, 'Israeli response to the UNHRC Commission of Inquiry' (22 June 2015) <http://mfa.gov.il/MFA/PressRoom/2015/Pages/Israeli-response-to-the-UNHRC-Commission-of-Inquiry-22-Jun-2015.aspx?utm_content=buffer7cb89&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer> accessed 20 May 2018.
[195] UN Watch, 'Response to the Commission of Inquiry on Gaza: UNHRC Expert Panel' (29 June 2015) <https://www.yo utube.com/watch?v=18t2E4kCNHU&feature=youtu.be> accessed 20 May 2018.
[196] The Islamic Resistance Movement (Hamas), 'Press Release: Commentary on …' (n 182).

imposed by the Israeli and Egyptian Governments.[197] The Independent Commission for Human Rights, the Palestinian national human rights body, in its statement to the 29th session of the Human Rights Council, criticised the Commission for having failed to strongly reflect the hard evidence of international crimes allegedly perpetrated by the IDF in the final Report. It also objected to what it saw as an insufficient acknowledgement, in the Report, of the barriers to access to evidence imposed by the Israeli authorities.[198] These arguments seem to be concerned more with the language of the Report than with the evidentiary standards applied. However, they may also indicate that Palestinian authorities were dissatisfied with the way the Commission assessed the reliability of and probative value attached to the information available to it.

2.6.4 A Comparator: The UN Board of Inquiry

In a move similar to its earlier decision in 2009, the UN Secretary-General decided, on 10 November 2014, to dispatch a Headquarters Board of Inquiry to investigate a number of incidents affecting schools of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) during Israeli Operation Protective Edge. The Board was mandated:

> (a) To gather and review all available investigation reports and other relevant source materials, including any available reports from national investigations;
>
> (b) To identify and interview relevant witnesses and others who can help the investigation and make a record of their statements;
>
> (c) To visit the sites where the incidents occurred; and
>
> (d) To produce a Headquarters report on the incidents including:
>
> (i) Findings on the facts and circumstances related to the incidents (to include the full names of the deceased and injured persons and the dates, times, places of deaths or injuries; if these persons were UN personnel whether they were on duty at the time of the incidents, if these persons were not UN personnel, the reason for their

[197] Ibid.

[198] The Independent Commission for Human Rights, Oral Statement – Human Rights Council 29th Session (29 June 2015) <https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/29thSession/OralStatements/Palestinian%20Independent%20Com%20HR_ID_COI_Gaza.pdf> accessed 20 May 2018.

> presence at or in the vicinity of the scene of the incident, descriptions of losses of and damage to property of the United Nations and of the deceased and injured persons and, in the case of Incidents (h) to (j), the nature, state and location of the weaponry);
>
> (ii) Findings on the causes of the incidents;
>
> (iii) Findings on the attributability of the incidents to any individuals or entities;
>
> (iv) Recommendations concerning any action that, in the opinion of the team, should be taken by the United Nations, including any actions or measures that should be taken to avoid recurrence of such incidents.[199]

As shown, the mandate clearly defined the scope of the investigation by specifying the relevant factual circumstances and the tasks that the Board was expected to undertake. Much like for the 2009 Board of Inquiry, the UN Secretary-General explicitly stated that the investigation was aimed at developing 'a clear record of the facts of these serious incidents and their causes and to which persons or entities they might be attributable' in order to elaborate strategies to ensure that UN facilities are effectively protected. In addition, the Secretary-General underlined that the Board was 'not a judicial body or court of law: it [would] not make legal findings and [would] not consider questions of legal liability'.[200]

The main difference between the 2014 Board of Inquiry and its 2009 predecessors lies in its composition. The Secretary-General appointed retired Major General Patrick Cammaert, a former Military Advisor in the Department of Peacekeeping Operations, as Chair of the Board and Ms Maria Vicien-Milburn, a former General Counsel of the United Nations Educational, Scientific and Cultural organization (UNESCO), Ms Lee O'Brien, a former Senior Political Officer in the Department of Political Affairs who, for medical reasons, later resigned from the Board, Mr Pierre Lemelin, United Nations Mine Action Service (UNMAS) Programme Manager in Côte d'Ivoire and a former Chief Ammunition Technical Officer in the Canadian Forces, and Mr Kovvurichina Reddy, a former Chief of Security for a number of United Nations

[199] UNSG, 'Summary by the Secretary-General of the report of the United Nations Headquarters Board of Inquiry into certain incidents that occurred in the Gaza Strip between 8 July 2014 and 26 August 2014' (27 April 2015).
[200] Letter of the UN Secretary-General to the President of the UN Security Council (27 April 2015).

field presences. In particular, the different professional background of the Chair of the Board was praised by Israeli commentators. In an op-eds referenced on the website of the Israeli MoFA, Pnina Sharvit-Baruch, former Head of the International Law Department of the IDF, and Keren Aviram, former member of the Israel Police, praised the appointment of a former military as Chair stating that

> deep, hands-on familiarity with war-like situations and the shifting challenges emerging from the nature of war helped to create a better and more accurate understanding of military activity. Thus, the second report is further proof of the great importance of including skilled, experienced military personnel in bodies of inquiry of this type.[201]

Sharvit Baruch and Aviram also praised the Board's balanced approach to the information received. In particular, they underlined that the Report conveys a narrative that extensively accounts for Israel's position, strictly limited to questions of fact. They also commended the Board's strict adherence to their mandate, which directed them not to make legal determinations or recommend actions as to compensation or legal liability.[202] Besides referring to the composition of the Board, the two authors try to explain the differences in approach between the 2009 and 2014 Boards of Inquiry in the following way:

> while the definitive reason for the essential differences between the two reports is uncertain, they are likely the result of hard behind-the-scenes work of Israelis in the political and legal arenas. Close cooperation and coordination between IDF units, especially the Coordinator of Government Activities in the Territories, and UN units during the fighting also made a significant contribution. Cooperation with the Board of Inquiry and the ability to present Israel's positions backed by reliable, concrete information, such as video clips documenting fire from UN facilities, as well as investigations carried out by the IDF's legal system, likewise affected the report's formulation and findings.[203]

This would suggest not only a more proactive engagement of Israeli officials with the Board, which had been made clear already by the Israeli MoFA in a statement following the publication

[201] Pnina Sharvit Baruch and Keren Aviram, 'Report of the UN Secretary-General Board of Inquiry on Damage to UN Facilities during Operation Protective Edge: Balanced and Unbiased' (7 May 2015) *INSS Insight No 695* <http://www.inss.org.il/publication/report-of-the-un-secretary-general-board-of-inquiry-on-damage-to-un-facilities-during-operation-prot ective-edge-balanced-and-unbiased/> accessed 28 August 2018.
[202] Ibid.
[203] Ibid.

of the Report,[204] but also, probably, an increased receptiveness by the members of the Board who, having been extracted from a more mixed professional background than their predecessors in other inquiries, may have been more sensitive to Israel and, in particular, the IDF's positions. No statements were found to have been issued regarding the formation, composition or rules of procedure of the Board of Inquiry by Palestinian officials or commentators.

3. Unpacking Rejection: Between Meaningful Criticism and (Convenient) Prejudiced Approach

The reactions of both the Israeli and the Palestinian Governments to the establishment, mandate, composition and mode of operation of the commissions of inquiry considered in this study show both substantial differences and recurring patterns. Preliminarily, it is worth noting that the position of the Israeli Government on legitimacy and procedural issues is much more articulated and accessible than that of the Palestinian Government. There are several ways to explain this.

First, the Israeli Government may have engaged in a systematic critique of each commission of inquiry, not simply on points of substance but also on points of procedure, as a way to maximise the persuasiveness of its rejection strategies. Not surprisingly, the intensity of the Israeli criticisms of procedural issues increases with the extent and severity of the foreseen or actual substantive criticism formulated by the commissions. A partially similar pattern can be detected also in the limited responses issued by the Palestinian authorities. The timing of such criticisms is therefore important to determine whether they were likely exclusively motivated by the need to reject the substantive findings made by the commissions. In this regard, the

[204] Israel Ministry of Foreign Affairs, 'Israel receives summary of UN report on Gaza conflict' (27 April 2015) <http://mfa.gov.il/MFA/PressRoom/2015/Pages/Israel-receives-summary-of-UN-report-on-Gaza-conflict-27-Apr-2015. aspx> accessed 29 August 2018. In particular, the MoFA stressed that 'As noted in the Secretary General's letter, Israel cooperated fully with this inquiry and facilitated the work of the BOI in fulfilling its mandate. This cooperation demonstrates once again that, when asked to assist in a professional and unbiased inquiry, Israel responds in a collaborative, open and forthcoming manner, notwithstanding some reservations it may have concerning certain aspects of the process and as well as some of the report's findings and conclusions'.

Israeli Government systematically voiced its concerns before the publication of the reports, generally at the constitutive stage of the inquiry procedures. However, while this rules out that Israel decided on a de-legitimation campaign to deflect *actual* substantive criticism, it does not exclude the possibility that it sought to prevent such criticism, given its prior awareness of the violations perpetrated on the ground. Moreover, it is to be noted that Israel's remarks about the composition of the commissions and the perceived impartiality, independence and professionalism of the commissioners can be retrieved also in responses to inquiries presumably more favourable to Israel, as the reaction of Israeli commentators and diplomats to the establishment of the 2014 Secretary-General Board of Inquiry show. Hence, while one may reasonably claim that criticism targeting mandate-givers, commissioners, mandates or procedural rules may be only instrumental to delegitimising the entire inquiry process, a principled and honest commitment to best fact-finding practices by Israeli authorities cannot be dismissed altogether. Less principled and more opportunistic may be, in particular, Hamas's criticism of some procedural issues. For example, the Gaza authorities' remarks about the use of uncorroborated open source information by the 2014 Commission of Inquiry on the Gaza War may stem from the attempt at rejecting the substantive findings of the Commission. However, the fact that, in similar prior circumstances – that is, after the publication of the Goldstone Report, which harshly criticised Hamas's launching of rockets –, Hamas had not engaged in any attempt at delegitimising the inquiry from a procedural standpoint might suggest an increase in the expertise among the ranks of Hamas officials.

Second, one may explain the scarcity of official Palestinian statements simply in light of the technological disadvantage of Palestinian online infrastructures. However, the Human Rights Council's records of the sessions during which the commissions of inquiry were established do not show any substantial engagement of Palestinian diplomats with questions of formation, mandate or composition of these commissions. One should bear in mind that this remark only

concerns Palestinian Authority officials and not Hamas officials who are not accredited as state representatives and, thus, cannot participate in these meetings.

Be that as it may, in the case of Israel and Palestine, there is no doubt that perceptions about the procedural fairness of international inquiries have triggered rejection or acceptance among state or quasi-state authorities, which has subsequently led to either obstructionist or collaborative attitudes towards the inquiries themselves. Cooperation with international commissions of inquiry is of the utmost importance for the fact-finding process because it facilitates access to primary sources of information and to competing factual and interpretive views about the same events, especially in scenarios of armed conflicts. It is often said that the first casualty of war is truth. Competing reconstructions of the reasons that led, for example, to a strike of a specific civilian building may include claims that the building was used by enemy combatants to store weapons, that civilians in that building were not informed of the strike and thus were not given the possibility to escape, or that specific large-impact weapons were used. Most of these circumstances can only be proved with reasonable confidence by assessing confidential files retained by both parties to the conflict, hearing witnesses and victims, accessing medical records or visiting sites. These activities can only be comprehensively carried out with the cooperation of the parties involved. While lack of cooperation cannot justify unwarranted definitive conclusions about the events scrutinised by the commissions of inquiry, failure to provide such inquiries with the information and logistical support they require may backfire against the authority denying such cooperation, as I show in Chapter V.[205] Thus, procedural fairness is a pre-condition that is capable of conditioning both the inquiry itself and the response of the actors involved with repercussions on the legitimacy of the fact-finding process and on its domestic impact. At the same time, though, criticism directed at the

[205] See also Yuval Shany, 'The Goldstone Retraction: Better Late than Never, and an Opportunity to Reconsider' (6 April 2011) *The Israel Democracy Institute* <https://en.idi.org.il/articles/6960> accessed 3 September 2018.

procedural standards employed may be not so much motivated by a sincere commitment to sound inquiry procedures but rather be used instrumentally to attack the fact-finding process in order to delegitimise its substantive findings and conclusions.

In this section, I assess the significance of the arguments put forward by the relevant domestic actors in response to the deployment of international commissions of inquiry in Israel and Palestine and provide an early impact assessment of the commissions' structural and procedural features. I analyse in turn the impact of the mandate-giver, the formulation of the mandate in its context, the selection of fact-finders and the procedural standards adopted.

3.1 Does 'Who' Matter? The Responsibility for the Establishment of International Commissions of Inquiry between Institutional Competence and *Realpolitik*

This Chapter has shown that perceptions about the mandate-givers in international inquiry processes reflect on the legitimacy of the commissions of inquiry themselves. The Israeli Government has systematically denied cooperation to every international commission of inquiry established by the UN Human Rights Council. The Israeli narrative suggests, on the one hand, a perceived diplomatic monopoly of countries hostile to Israel over the Council and, on the other hand, the Council's past-dependency on its institutional predecessor, the Commission on Human Rights. This two-fold argument is both political and technical. It is political insofar as it targets a bloc of member states of the Human Rights Council for their predatory exploitation of the Council to diplomatically isolate Israel. It is technical because it criticises the inability of the Council to renew itself and its procedures in order to counter these exploitative techniques.

Already in 2004, a High-Level Panel established by the UN Secretary-General to assess how the UN had responded so far to threats to international peace and security and how it could be reformed noted that the former UN Commission on Human Rights had lost its credibility and

authoritativeness, having yielded to the exploitative tactics of member states who had failed themselves to prove their sincere commitment to human rights.[206] This critique was shared both by academics and diplomatic circles,[207] including Israeli diplomats as several of their statements demonstrate.[208] Hence, when draft proposals to replace the Commission with a Human Rights Council were put forward, the Israeli Government proposed specific procedural amendments, which included the following:

> the Council should not be overloaded by partisan requests using the human rights mechanism to achieve political gains. There are other fora for political debate, and procedural measures should be taken to prevent political agendas from undermining the effectiveness of its work. Such measures could include the prevention of agenda items devoted to one particular situation, as well as limiting the number of resolutions passed in any given year concerning a particular state.[209]

The Israeli Government was clearly concerned that the Human Rights Council would replicate the same dynamics of its predecessor. These included a disproportionate focus on Israeli practices vis-à-vis Palestinians and the inclusion in the agenda of the Council of a standing item on the Israeli-Palestinian conflict similar to item 8 of the former Commission on Human Rights.

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[206] For example, the Panel noted that 'in recent years, the Commission's capacity to perform these tasks has been undermined by eroding credibility and professionalism. Standard-setting to reinforce human rights cannot be performed by States that lack a demonstrated commitment to their promotion and protection. We are concerned that in recent years States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. The Commission cannot be credible if it is seen to be maintaining double standards in addressing human rights concerns' (UN, 'A more secure world: Our shared responsibility', Report of the High-level Panel on Threats, Challenges and Change (2004) 88); on the process that led to the establishment of the Human Rights Council, see Bova (n 41) 56-62.

[207] See, for example, Paul Gordon Lauren, '"To Preserve and Build on Its Achievements and to Redress Its shortcomings": The Journey from the Commission on Human Rights to the Human Rights Council' (2007) 29(2) *Hum Rts Q* 307. On more recent mixed reviews of the former UN Commission on Human Rights see Rosa Freedman, *The United Nations Human Rights Council: A critique and early assessment* (Routledge 2013) 17-37 who identifies five factors that led to the demise of the Commission, including the exploitation by certain states of country-specific issues for political purposes, including the disproportionate focus of the Commission on Israeli practices; Philip Alston, 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council' (2006) 7 *Melb J Int'l L* 185, 186-188.

[208] See, for example, Israel Ministry of Foreign Affairs, 'Remarks by MFA Deputy Dir-Gen Leshno Yaar to UN Human Rights Commission' (17 April 2005) <http://mfa.gov.il/MFA/InternatlOrgs/Speeches/Pages/Remarks%20by%20MFA%20DDG%20Leshno%20to%20UN%20Human%20Rights%20Commission%2017-Mar-2005.aspx> accessed 5 September 2018.

[209] Israel Ministry of Foreign Affairs, The Division for UN and International Organizations, 'United Nations Reforms-Position Paper of the Government of Israel' (1 July 2005) <http://mfa.gov.il/MFA/InternatlOrgs/Issues/Pages/United%20Nations%20Reforms%20-%20Position%20Paper%20of%20the%20Government%20of%20Israel%20-%20July%20200 5.aspx> accessed 5 September 2018.

The establishment of five international commissions of inquiry on Israel and Palestine in only eight years, and some follow-up mechanisms, coupled with the several resolutions concerning Israel passed over the same time period, constituted clear evidence for the Israeli Government that the Human Rights Council had in fact followed in the footsteps of the Commission. This is evidenced by the repeated reference, in the statements of Israeli diplomats, to the Council's practice of singling out Israel. Such interpretation of the number of international inquiries established by the Human Rights Council may be seen as both genuine and opportunistic. Indeed, a mere glance at the list of commissions of inquiry established by the Council in this time period shows that Israeli practices were targeted more than those of any other state.[210] However, the establishment of such a high number of commissions of inquiry by the Council may have been the result of Palestine's effective diplomatic engagement within the Council and intense pressures by pro-Palestinian civil society organisations as a way to remedy the unavailability of alternative redress mechanisms. Israel's claim regarding the Council may thus be seen as an attempt to thwart the only available mechanism for redress for Palestinians, whether or not such claim was supported by a sincere belief that the Council had exceedingly focused on Israel.

These observations can be better contextualised by highlighting that all the commissions of inquiry established by the Human Rights Council were sponsored by the same blocs of states, namely the Arab and African Groups and the Organisation of the Islamic Conference. Palestine

[210] Apart from the international inquiries analysed in this study, between 2006 and 2014, the Council deployed a Commission of Inquiry on Lebanon (2006), a High Level Mission on the situation of Human Rights in Darfur (2006), a Mission on the situation of Human Rights in Honduras (2009), a Fact-Finding Mission to Syria (2011), an International Independent Commission of Inquiry on the Situation of Human Rights in Côte d'Ivoire (2011), International Commission of Inquiry on Libya (2011), an Independent International Commission of Inquiry on Syria (2011) whose mandate has been extended or updated eight times until 2017, a Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (2013), a Fact-finding mission to Central African Republic (2013), a Fact-finding mission on the situation of human rights in Mali (2013), an Investigation on Sri-Lanka (2014), a Commission of Inquiry to investigate all alleged violations of human rights in Eritrea (2014) and an Investigation mission to Iraq (2014). Data have been extracted from the United Nations Library Research Guide on international commissions of inquiry and fact-finding missions <http://libraryresources.unog.ch/factfinding/chronolist> accessed 6 September 2018.

seems to have either leveraged its strategic alliances within the Council or exploited enmities between Israel and some of these countries to further its political claims and the Palestinian victims' need for redress. In other words, the establishment of such a high number of international inquiries should be regarded as the outcome of the successful politicisation[211] strategy pursued by both Palestine and its allies within the Council.[212] In light of this observation, it is reasonable to conclude that Israel's argument that the repeated establishment of international inquiries to investigate Israeli-Palestinian issues is evidence of the Council's disproportionate focus on Israeli practices vis-à-vis Palestinians and of the Council's politicisation is predominantly genuine, even though Israel might have exploited it to maximise its chances to jeopardise the inquiry process by refusing to cooperate with the commissions and, ultimately, deflect the inquiry's results.

Conversely, Israel showed almost absolute deference to the decisions of the UN Secretary-General to establish inquiry panels into three situations, two of which affected UN personnel and premises, and one that concerned fundamentally an inter-state dispute. There are several possible explanations for such deference. One may be that Israel perceived the Secretary-General, an essentially administrative body of the UN, as non-biased and immune from the political pressures that certain states could exert on the Human Rights Council. However, such explanation, as much as it may provide comfort to the argument made in this sub-section, is at best insufficient to explain Israel's deference to the Secretary-General. Indeed, this may be ascribed to the fact that Israel regarded the Secretary-General, one of the main organs of the UN, as more authoritative than the Human Rights Council. One may also argue that Israel's

[211] The term 'politicisation', in this context, can be understood in all three different ways identified by Gene M Lyons, David A Baldwin and Donald W McNemar, 'The "Politicization" Issue in the UN Specialized Agencies' (1977) 32(4) *Proceedings of the Academy of Political Science* 81, 84-88. According to these authors, 'politicisation' can be understood as an organization defect when the purposes of the politicised organization are distorted, or as an indicator of the environment within which the agency operates, or, lastly, as a bargaining situation, that is, as a mechanism that allows states to register their protest.

[212] Freedman (n 207) 128-133 concurs with the argument that the Council has been politicised against Israel.

deference was motivated by the functioning of the inquiry procedures established by the Secretary-General, by the type of incidents investigated or by the fact that some fundamental Israeli interests tied to the Israeli-Palestinian conflict would not reasonably be investigated by the inquiries.

The analysis is limited to the Israeli position because it is clear that the Palestinian Authority had simply neither reason nor interest in criticising the Human Rights Council. Even the Hamas Government, when it responded to some of the adverse findings of the Independent Commission of Inquiry on the 2014 Gaza War, criticised some evidentiary methodological issues only. This clearly does not prove in itself that the Council was in fact politicised, but it certainly indicates that Palestinian actors regarded it not only as a legitimate agency, but one that could serve their interests. Indeed, both the Palestinian Authority and Hamas cooperated to all inquiries considered in this study.

3.2 Words Matter! Entrenching Bias Perceptions

If the identity and track-record of the Human Rights Council as the agency most active in the deployment of international commissions of inquiry into the situation of Israel and Palestine were not enough to instil a doubt as to the fairness of such inquiry mechanisms, the Israeli Government repeatedly slammed the Council for its infelicitous word choice in the construction of the commissions' mandates. The argument put forward most frequently by Israeli diplomats is again two-fold. On the one hand, they often claimed that the mandate was selective in that it addressed only Israeli actions and not those of Palestinians. On the other hand, they criticised the use of legally, politically and morally charged terminology, such as 'violations of international human rights law and international humanitarian law'. This latter criticism, in particular, implied for Israeli officials that the Council had already pre-established – or, worse, pre-judged – some of the matters for the commissions to investigate.

This two-pronged argument touches on two fundamental quality control issues: selectivity and bias. Selectivity refers to the equal consideration afforded to the human rights records of all states without focusing on one state in particular.[213] The notion of bias may be referred to individuals or institutions and indicates that the entity entrusted with taking a certain decision is prejudiced with regards to the situation concerned by that decision so that, prior to the collection of all relevant information, they have already pre-determined to some degree the issue at hands. As regards selectivity, it is difficult not to agree with the Israeli Government position on some of the commissions of inquiry established by the Human Rights Council. The most striking example is the 2009 Fact-Finding Mission on the Gaza Conflict whose mandate as originally drafted requested the commissioners to exclusively focus on Israeli practices and was only orally amended following a request by Justice Richard Goldstone. Nonetheless, such an amendment was deemed insufficient by the Israeli Government because it signalled not so much that the commission would be biased – although this was argued as a necessary consequence of some prior statements of the commissioners – but that the mandating body, the Human Rights Council, was only or predominantly interested in singling out Israeli practices. Hence, it is not surprising that Israel would even see a remedial interpretation of an unbalanced mandate by the commissioners as insufficient to set the record straight by making up for the unfortunate wording of the mandate. This argument cannot even be branded as not genuine since the Israeli Government refrained from inferring selectivity from other mandates, including those that guided the Beit Hanoun Inquiry and the Independent International Commission of Inquiry on the 2014 Gaza Conflict. Israeli protests at the mandate of the 2012 Settlement Inquiry constitute perhaps an exception in that they reproached the absence in the mandate of any direction to take into account the settlers' right to self-defence. This was patently beyond the

[213] See, for eg, Théo Boutruche, 'Selectivity and Choices in Human Rights Fact-finding: Reconciling Subjectivity with Objectivity?' in Christian Henderson (ed) *Commissions of Inquiry: Problems and Prospects* (Hart Publishing 2017) 290.

purpose of the Mission, which was not meant to address the legitimacy of the settlement policy – to which the issue of self-defence might be linked – but rather its implications on the human rights of the Palestinian population. However, while it is reasonable that such position was shared by the Israeli Government, this cannot be asserted with certainty since the statement was read by NGO Monitor representatives.

While the issue of selectivity is predominantly specific to the mandate, bias can be detected both in the mandate and in the entire text of the resolutions establishing the inquiries. In their diverse responses to the establishment of the commissions of inquiry considered, the Israeli diplomats have highlighted the instances in which the Council failed to formulate the mandating resolutions in neutral language. Despite Israel's consistent criticism of the wording of most such resolutions, it is remarkable that the Council failed repeatedly to address the issue of bias perception and language formulation. Most mandates of Human Rights Council-mandated fact-finding missions do in fact contain expressions such as 'violations of international human rights and humanitarian law' or 'attack',[214] which presuppose either the ascertained violation of specific normative standards or moral – or even legal – liability for some of the actions scrutinised. Significantly, the most zealous attempt to tune down the condemnatory language normally contained in such resolutions came from the Palestinian Authority delegation in the course of the establishment of the Council's Gaza Flotilla Inquiry in 2010. While there may be several explanations for such move, including, for example, the lesser importance attributed by Palestinian delegates to the issues under scrutiny or the pressure of European governments, it may also be interpreted as an attempt to favour the formal cooperation of the Israeli Government with an inquiry that would probably fail to trigger the interest of the Palestinian public.[215]

[214] The term 'attack' presupposes a determination of a party's liability under *jus as bellum*.
[215] Given that the victims of the incident were not Palestinian themselves and that the mandate of the inquiry did not concern a direct Palestinian interest.

However, in the absence of conclusive evidence in favour of one or the other explanation, it is not possible to draw a definite conclusion.

The use of legally, politically and morally charged language is a distinctive feature of 'naming and shaming' techniques that can be employed in the context of both coercive and acculturative efforts. However, recourse to criticism should normally be graduated in coercive enterprises where the coercer wants to signal a credible commitment to impose material costs on the alleged rule-breaker. Conversely, acculturation scholars posit that 'naming and shaming' can be an effective trigger to mobilise psychological processes of realignment to one's self-perceived identity. Resolutions establishing international commissions of inquiry, however, normally recommend that targeted governments ensure their cooperation with the investigative mechanisms deployed. In this sense, they seem geared towards establishing a dialectic exchange between the commissions and the states whose practices are to be investigated. While strong legal terminology may be able to prompt immediate remedial action by a state willing to prove its commitment to the normative regime whose norms it is alleged to have violated, it has been demonstrated that the same kind of language may also induce ambiguous human rights policies and perhaps rejection.[216] Thus, it seems that such strong language at this very early stage of the inquiry procedure may jeopardise the prospects for cooperation and provide an additional argument for the targeted state to reject the entire fact-finding enterprise. Indeed, as the experience of the commissions considered show, Israel exploited the condemnatory language employed in the Resolutions both to delegitimise the inquiry and as proof of the Human Rights Council's institutional bias against Israel.

A useful counterfactual is provided by the experience of the two Headquarters Boards of Inquiry and the Palmer Inquiry whose mandates were drafted in both a much less condemnatory

[216] See, for eg, Emilie M Hafner-Burton, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem' (2008) 62(4) *Int'l Org* 689.

and much more precise language. This may be explained in light of the purpose of these inquiries, which was not to establish whether relevant international norms had been violated, but rather to determine what had happened with a view to devising strategies to better protect the UN premises and personnel, for the two Boards of Inquiry, and to defusing the Israel-Turkey diplomatic tensions ensued to the Flotilla incident, for the Palmer Inquiry. The cooperation of the Israeli Government was thus essential for all three endeavours and the spaces for rejection had to be minimised by issuing carefully constructed mandates. In all three cases, the Secretary-General avoided reference to any legal qualification and carefully directed the commissioners as to what factual issues they were to establish. This cautious approach managed to elicit the cooperation of the Israeli Government and to pre-empt any procedural criticism directed at the inquiries either by Israel or Palestine.

3.3 The Case for a Strict Interpretation of the Rules of Impartiality and Independence of Fact-Finders

The Israeli Government went to great lengths to expose the alleged lack of impartiality and independence of the several commissioners that were appointed as members of the fact-finding missions considered in this study. By way of reminder, impartiality refers to the capacity of fact-finders to avoid leaning, or appearing to lean, towards one or the other party to a dispute. Independence refers to the absence of all external influence on the commissioners or appearance thereof. In the context of international human rights inquiries, these two notions require some clarification. Indeed, human rights investigations are rarely concerned with disputes between different actors. Rather, their chief concern are the rights of the individuals. At the same time, situations of internal disturbances or armed conflicts are often characterised by the interplay of several different actors. The same norms that attribute rights to individuals and those that regulate the use of force in situations of armed conflicts can be formulated in relatively vague terms in an attempt to strike a balance between competing values, needs and interests. Thus,

the notion of impartiality refers both to the capacity of the commissioners to both be, and appear to be, neutral with regards to the different parties involved in the investigation and to their ability to 'adopt and implement a methodology that allows [them] to gather facts and draw conclusions in an objective manner',[217] having regards to the different interests, needs and values at stake. Conversely, the notion of independence largely retains its meaning in the context of human rights fact-finding.

From this viewpoint, some of the criticisms voiced by Israeli diplomats against some fact-finders appear opportunistic, while others seem to deserve more credit. The cases of Professors William Schabas and Christine Chinkin are both emblematic because they demonstrate how the impartiality and independence of commissioners can be effectively questioned regardless of whether they actually miss these qualities. In other words, what the Israeli Government managed to do in these cases was not so much to demonstrate, but rather to cast doubts as to the fact that Professors Schabas and Chinkin were not impartial or independent. Professor Schabas' paid consultancy for the PLO and occasional recorded statements regarding Israeli Prime Minister had compromised both his independence and impartiality. While there is no universally accepted standard of impartiality and independence for fact-finders, according to arguably the most influential judicial test, formulated by the House of Lords in *Pinochet (No 2)*,[218] the appointment of Professor Schabas to the Commission of Inquiry on the 2014 Gaza Conflict would have probably failed. The test is thus formulated by Lord Browne-Wilkinson:

> If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a Director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions if Lord Hewart's famous dictum is to be observed: it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".[219]

[217] M Cherif Bassiouni and C Abraham (eds) *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies* (Intersentia 2013) 43.
[218] *Reg v Bow Street Magistrate, Ex parte Pinochet Ugarte (No 2)* [1999] 2 WLR 272. The reasons for applying this test are extensively discussed *infra* in Chapter VI.
[219] Ibid 284 (Lord Browne-Wilkinson) citing *R v Sussex Judges, Ex parte McCarthy* [1924] KB 256 at 259.

In light of this test, while Professor Schabas could not be said to have had a financial interest in the outcome of the inquiry, he could certainly be perceived as having promoted a cause aligned with the interests of one of the parties involved. The case of Professor Chinkin is perhaps less ambiguous because it involves a statement that she had made with regard to the situation to be investigated, which constituted a pre-judgment of Israel's conduct. In turn, this substantiated the claim that she could not impartially approach the situation to be investigated, because, based on selective information, she had already concluded that the conducts of the IDF constituted potential war crimes. The profiles of these commissioners determined an absolute unwillingness of the Israeli authorities to entertain any contact with the two commissions of inquiry. Nonetheless, Professor Schabas's resignation from his post and the subsequent appointment of Justice Mary McGowan Davis as Chair of the Commission seems to have motivated a more proactive behind-the-curtains engagement of Israeli agencies with the Commission.

Much less justified seem the criticisms moved against the commissioners appointed to the Inquiry on the Israeli Settlements and the other two members of the Goldstone Commission. Israeli commentators objected that the commissioners appointed to the 2012 Inquiry on Settlements either held nationalities of countries hostile to Israel or were personally related to other experts who had been critical of Israel within the context of previous inquiry mechanisms. In neither of these cases, could the impartiality and independence of fact-finders be reasonably questioned. Indeed, neither of them seem to plausibly imply the existence of a financial interest in the outcome of the inquiry, a commitment to a specific cause or the influence of external actors. Not even the fact that one of the commissioners, Christine Chanet, in her capacity of member of the Human Rights Committee, had previously branded the policies of Israel as discriminatory and claimed that it had been difficult to cooperate with the Israeli authorities could be interpreted as a pre-judgment of the matter under investigation, simply because, by

dint of her role, she was expected to draw some conclusions and report on her institutional activities. Similarly, attacks on the impartiality and independence of Richard Goldstone, Hina Jilani and Desmond Travers do not seem credible since what they had signed was only a petition *to investigate claims* of international human rights and humanitarian law violations in the course of Operation Cast Lead. Unlike the op-ed subscribed by Christine Chinkin, this call for action did not include any definite conclusion as to the nature of the acts to be investigated.

In sum, the identity and track record of the commissioners is liable to have heightened attempts at delegitimising the fact-finding procedures. However, the choice of fact-finders who meet the highest standards of impartiality and independence is not in itself a guarantee that they will be accepted as such. Opportunistic criticisms directed at the fact-finders are obviously geared towards maximising the chances to successfully reject an unfavourable inquiry. This may be due to the fact that commissioners do not normally benefit from a sufficient level of institutional support by the mandate-givers. Moreover, while a formal or official policy of non-cooperation does not equate with the suspension of all contacts between the commission of inquiry and the targeted government, the identity and track record of a commissioner has determined, at least in one documented case, the decision of the Israeli Government not to engage in any contact with the inquiry procedure.

3.4 Diverging Interpretations of Professionalism

Another important point that emerges from the analysis conducted so far is the understanding of the notion of professionalism. The UN Guidance and Practice advise that fact-finders should possess the following attributes:

> Recognized competence and proven substantial knowledge and experience in international human rights law, including women's rights and gender issues, international humanitarian law, and/or international criminal law, as relevant

> Substantial knowledge of human rights fact-finding and investigations principles, standards and methodology, and proven experience in this field. This includes, as relevant, specialized issues such as sexual violence or war crimes.
>
> Substantial international experience in human rights
>
> Commitment to upholding all human rights and ensuring gender equality.[220]

Indeed, all of the fact-finders appointed to the Human Rights Council-sponsored inquiries considered in this study are or were internationally recognised experts in human rights, humanitarian law and international criminal law. Nonetheless, Israeli former army officers and diplomats stressed that their profiles did not make the inquiry professional. A respondent who served as Chief Legal Officer of the Military Advocate General's Corps (MAG) and Director of the Strategic and International Branch of the International Law Department of the IDF stated the following with regard to the notion of professionalism:

> People entrusted with investigating military operations must have the relevant military and legal knowledge and experience or at least consult with experts who do have. A glaring example of a lack of professional understanding is the following paragraph from the "Goldstone Report" [Para 61]. It basically concludes that because the Israeli military is so advanced - all civilian casualties must have been caused deliberately. Any person with military experience will tell you that this is a non-sequitur.[221]

In order to better grasp how Israeli officials, in particular IDF personnel, understand the notion of professionalism, it is worth stepping back to the substantive content and ratio of the laws of war. In the introduction of his most recent book, Yishai Beer, a former IDF major general and Corps commander, states that the book

> instead of introducing declarative humanitarian provisions, seeks to phrase effective rules to guide actual performance, which in turn will lead to a reduction in war's hazards. It tries to replace visionary, but in some cases impractical, rules with more workable ones based on a professional examination of what militaries can realistically— yet maximally— do to reduce human suffering.[222]

[220] UN Guidance and Practice (n 5) 19.
[221] Email exchange with David Benjamin, former Chief Legal Officer of the Military Advocate General's Corps (MAG) and former Director of the Strategic and International Branch of the International Law Department of the IDF, 25 May 2018.
[222] Yishai Beer, *Military Professionalism and Humanitarian Law: The Struggle to Reduce the Hazards of War* (OUP 2018) 18.

Later in the book, Beer explains that professionalism serves as a constraining principle on modern armies. He argues that 'constraining the brute force of a military is in its own self-interest and enhances its operational effectiveness. Effectiveness and efficiency in operation is a recognized professional military requirement. All belligerent activities ought to be professionally necessary or otherwise avoided'.[223]

Beer's definition of professionalism emphasises the normativity of the necessary balance between human values and military needs. Humanitarian law provisions, he argues, should not simply be constructed with the exclusive utopian goal of safeguarding humanitarian values, no matter how unrealistic the expectations placed on militaries are. Rather, they should be crafted so as to account for the actual capacity of professional armies to carry out their functions. This, he argues, not only would likely elevate the humanitarian protection but would also clarify the boundaries of the law so as to make an army's conduct more amenable to scrutiny, including by courts.[224] Thus, for the fact-finding community, the notion of professionalism, especially in the context of inquiries into military operations, would entail that the commissioners are sensitive to the operational needs of the army, its guiding doctrines and war principles and the humanitarian interests protected by the relevant laws of war and by human rights. This expertise is unlikely to be found in one individual only, even less so in a human rights scholar or expert. The very requirement that the individual appointed as commissioner is committed to upholding all human rights might conceal a cognitive bias in favour of humanitarian values over military needs. From this standpoint, it is not surprising that all human rights inquiries mandated by the Human Rights Council to investigate situations of concern or individual events failed to meet this standard of professionalism. The 2014 Headquarters Board of Inquiry constitutes a valuable counterfactual given that it included experts with more varied expertise than other inquiries.

[223] Ibid 35.
[224] Ibid 214.

An additional challenge from the viewpoint of professionalism is the coexistence, in the mandates of several of the commissions of inquiry considered, of terms of reference drawn from different bodies of law. In particular, all the fact-finding missions considered either were entrusted with an international human rights and humanitarian law mandate or, on their own motion, decided to analyse the facts in light of these two bodies of law. While there may have been good reasons for adopting such an approach and despite the observation that these two bodies of law may overlap under certain circumstances, one cannot overlook the fact that international human rights law and international humanitarian law answer to different rationales and methodologies.[225] In turn, this calls for different expertise in the composition of fact-finding missions. The inclusion of only – or predominantly – human rights experts in the Council-mandated commissions of inquiry has exposed them to fierce criticism by Israeli authorities and commentators.

The notion of professionalism must also be read in the context of the UN human rights architecture, given that the commissions of inquiry considered were all established by the Human Rights Council. The progressive development of a fact-finding community, normatively committed to human rights, from which fact-finders are routinely selected by an organisation that is intrinsically devoted to the promotion and protection of human rights cannot but influence the notion of professionalism in a certain way. Indeed, professionalisation is generally regarded as one factor that contributes to the establishment of an epistemic community.[226] Such community commitment to human rights norms and values shapes and perpetuates the epistemic practices of fact-finding and, while there exist several training programmes that aim to administer fact-finders with interdisciplinary expertise, these cannot – and perhaps should not – alter the practitioners' allegiance to that human rights commitment

[225] See, for example, Thilo Marauhn, 'Sailing Close to the Wind: Human Rights Council Fact-Finding in Situations of Armed Conflict – The Case of Syria' (2013) 43 *Cal W Int'l L J* 401, 448-452.
[226] Corinne Heaven, 'A Visible College: The Community of Fact-finding Practice' in Henderson (n 242) 350-353.

that characterises not only their community of peers but also their sponsoring body. Of course, given this commitment to human rights norms and values, we should question the seemingly given-for-granted assumption that Human Rights Council inquiries should deal with questions of both international human rights and international humanitarian law. Perhaps a solution to this problem might be to entrust fact-finding missions with mandates more clearly focused on either body of law and to appoint fact-finders accordingly. Or, alternatively, one may think about a division of labour between the Human Rights Council and other institutional venues, such as – but not limited to – the IHFFC.

In the present case study, the perceived lack of professionalism has likely reduced the spaces for a valuable exchange of positions on the practical application of humanitarian law norms and has impacted the language employed by commissioners in the final reports, in turn attracting more domestic criticism. Furthermore, it has also engendered (more or less sincere) perceptions of a cognitive bias intrinsic to the identity and professional affiliation of the fact-finders.

3.5 The 'Legitimate Difference' Argument

The expression 'legitimate difference' refers to a book chapter authored by Larissa van den Herik and Catherine Harwood where the authors seek to provide a justification for the divergences in the application and interpretation of international criminal law by commissions of inquiry in comparison with international criminal courts.[227] While the expression refers to the interpretation and application of the substantive law, it can be borrowed to describe the difference in the procedural standards applied by commissions of inquiry in comparison with international criminal investigations. Indeed, oft-times, the mode of operation of commissions of inquiry is compared with that of criminal investigators. This parallel is probably motivated

[227] Larissa van den Herik and Catherine Harwood, 'Commissions of Inquiry and the Charm of International Criminal Law: Between Transactional and Authoritative Approaches' in Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (OUP 2016) 233, 244-247.

by the type of conclusions and findings included in the final reports, which increasingly often mirror determinations of criminal liability whether with regards to the *actus reus* of the offence only or also including assessments of the alleged perpetrators' *mens rea*.

Most of the procedural criticisms voiced against the international commissions of inquiry considered so far focused on the standard of proof they employed to make factual determinations. Commissioners were criticised for failing to properly assess the credibility and reliability of the sources of information they relied on, consider the whole body of evidence available and account for the missing evidence in the formulation of the factual findings. The first two sets of criticism target the actual practice of commissions of inquiry by alleging that their methodology is flawed in comparison with what a criminal investigator would do. Conversely, the last criticism is one of language and it targets the formulation of the reports. What several critics of the different Human Rights Council-mandated inquiries highlighted was the failure of the commissioners to nuance their findings so that they mirrored the degree of certainty with which these could be formulated.

The practice of the commissions of inquiry considered in this study with regards to evidentiary issues is varied. Some, such as the Goldstone Mission, approached methodology in a seemingly more transparent way than others, such as the Beit Hanoun Inquiry.[228] Yet, despite more or less elaborate explanations of the methodology used, the identification of the standard of proof adopted and the assessment of the reliability and credibility of the sources of information relied on, including, for example, how contextual factors might have influenced witnesses, the tone of the factual findings does not seem to reflect the epistemological shortcomings of the fact-finding process. This is particularly evident, for example, in the Goldstone Report, where certain conclusions including regarding the reliability and credibility of witnesses who testified in the presence of Hamas officials are clearly at odds with statements

[228] See above at pp 134-135 and 189-190.

about the reluctance of the same witnesses to testify in regard to Palestinians' violations in the presence of such officials. In the same Report, conclusions about targeting decisions are formulated with a relatively high degree of confidence despite the lack of crucial information held by the IDF.

A similar, yet less sophisticated, criticism was put forward by Palestinian actors in response to the report of the Independent Commission of Inquiry on the 2014 Gaza Conflict. Both Hamas officials and the Palestinian Independent Commission for Human Rights criticised the fact that the Commission had ignored open-source material, especially media reports, when verifying allegations of international crimes and that, as a result, the language of the Report did not mirror the dire consequences of the Israeli strikes on the Gaza Strip.

While there may be some merit in this type of criticism, whether it is appropriate or not for a commission of inquiry to use assertive language in the formulation of factual findings depends on what the commission seeks to achieve. It is clear from the cases analysed above that conclusions on points of fact that do not flow logically from, and do not account for the shortcomings of, the epistemological process that led to formulate them have engendered resistance and facilitated contestation by the targeted actors. Regardless of the plausibility of such findings, their methodological weaknesses are likely to jeopardise the overall legitimacy of the inquiry process as a tool for accountability and to reinforce perceptions of bias about mandating bodies who are willing to endorse such conclusions. However, if one understands commissions of inquiry as acculturation tools and, thus, legitimises their use of 'naming and shaming' techniques to provoke psychological disassociation in the target state, then what matters is the outcome of the fact-finding process, while the process itself only needs to be sufficiently persuasive – but not necessarily methodologically sound – to even minimally support claims of conducts at odds with international normative standards. The use of politically and morally charged legal terminology seems to be particularly fit for this purpose.

These observations point towards the purpose and identity of international commissions of inquiry in relation to both the use of legal standards and the specific objective that each commission is entrusted with by their parent body or sets for themselves. While courts of law are bound by strict rules of procedure and evidence, there are no such strict standards for commissions of inquiry. This allows for a diversified evidentiary practice. Against this background, the epistemological process to reach certain conclusions regarding violations may be simplified. While such an approach does not violate any strict rule of procedure and evidence, it may negatively influence the perception that the addressees of the final report may form of the inquiry mechanism. Or, even in cases where such perception is specious or unjustifiably pre-formed, the evidentiary simplifications of a fallacious inferential process may offer an argument for rejection and delegitimisation of the inquiry all together. In turn, this may affect negatively all socialisation attempts pursued by the commission.

Another aspect that deserves some attention is confidentiality. The Israeli Government in particular has proved much more willing to cooperate with Headquarters Boards of Inquiry established by the Secretary-General, which carried out their tasks in a confidential manner by *inter alia* avoiding publishing their final reports. It is clear, though, that these inquiries were intended for internal purposes and did not purport to promote accountability. Yet, the seriousness of the incidents addressed, which in some cases entailed the responsibility of Israel, could have deterred Israel from cooperating with the commissioners, especially if information provided by the Government were to be made public. Thus, confidentiality is likely to have constituted the main determinant for the Israeli Government's choice to cooperate with these Boards.

A degree of deference to domestic fact-finders on questions of fact appears to have been an additional factor for the domestic acceptance of the reports. This holds true for both Israeli and Palestinian actors and it emerged from both official documents or statements and interviews.

Such deference, however, seems to be, at least to a certain degree, opportunistic, since it was raised when the factual accounts included in the reports did not meet the expectations of the actors involved. It also unveils a fundamental difference of opinions between Israelis, Palestinians and the NGO sector with regards to the usefulness of Human Rights Council-mandated international commissions of inquiry. While Israeli officials and commentators often dismissed these inquiries as pointless not only with reference to their factual reconstruction of the events but also with regards to their application and interpretation of the substantive law, Palestinian officials and NGO representatives claimed ownership over the fact-finding process and outcomes while valuing the commissions' legal analyses of the facts gathered.

Conclusion

This Chapter has shown that the procedural legitimacy of Human Rights Council-mandated commissions of inquiry is an essential ingredient for their effectiveness. The domestic decision to cooperate with such mechanisms is largely dependent on whether they are perceived as fair by the targeted states and actors. However, retrievable perceptions about the (un-)fairness of international inquiries are not necessarily genuine. On the contrary, criticisms directed at the procedural aspects of fact-finding processes may be partly, or even purely, motivated by the willingness to deflect unfavourable reports.

Existing guidelines on how to structure human rights fact-finding missions and best practices that seek to identify model rules of procedure and evidence have proven, at least in the Israeli-Palestinian context, largely ineffective. While such ineffectiveness can be largely ascribed to the political implications of human rights investigations into the situation in Israel and Palestine, valuable counterfactuals, including internal inquiries deployed by the UN Secretary-General have been able to elicit the cooperation of both the Israeli and Palestinian authorities. To a certain extent, the comparatively higher success of such inquiries can be explained in light of the authoritativeness of the Secretary-General, the internal relevance of the inquiry and the type

of incidents investigated. However, it emerges clearly that procedural factors, including the more precise and circumscribed formulation of the mandate, the fact-finders' professionalism, an increased deference to domestic accounts of the events and procedural confidentiality made the inquiry more readily acceptable to the actors involved, both at the pre-inquiry stage, that is, when the domestic authorities decided whether to cooperate, and at the outcome stage, that is, once the final report was published.

Eventually, however, both the fact-finders and the mandate-givers should carefully consider who their main addressees are. Despite the burgeoning of human rights treaties, bodies and courts, international scrutiny of human rights domestic practices is still perceived by states as a threat to their sovereignty and a tool to meddle in domestic politics. It is thus inevitable that inquiries perceived as unfavourable either *ex ante* or *ex post* by state or quasi-state authorities or other groups will likely be the objective of ruthless delegitimization campaigns by those same actors in an effort to deflect their substantive findings. Hence, the fundamental question that every fact-finder should address is: who is supposed to read the final report? And for what purpose? A constructivist approach would require mandate-givers and fact-finders to negotiate with the targeted actors the best way to carry out human rights inquiries. Indeed, while the implementation of strict procedural standards may legitimise commissions of inquiry in the international arena, this may not be sufficient to shield the same commissions from domestic criticisms. If the purpose of such commissions is to directly catalyse domestic change or mobilise domestic support, it is of the utmost importance that they establish a collaborative relationship with domestic actors. Ad hoc inquiries are particularly well placed to trigger these dynamics. However, "ad-hoc-kery" must be supported by flexible procedural standards. Conversely, commissions of inquiry that seek to indirectly catalyse domestic change by mobilising international actors, including inter-governmental bodies or international courts and

tribunals, should act according to standards that secure their substantive findings from procedural criticisms emanating from international interlocutors.

Thus, while procedural quality control is crucial regardless of the intended addressees of international inquiries, how it should be understood essentially depends on the socialisation strategies that the mandate-givers and fact-finders seek to deploy in each specific case.

CHAPTER V

THE EFFECTIVENESS AND IMPACT OF COMMISSIONS OF INQUIRY IN ISRAEL AND PALESTINE: A THEMATIC ANALYSIS

Introduction

While in Chapter IV I have analysed the domestic perceptions of the procedural fairness of five Human Rights Council-mandated commissions of inquiry, this chapter addresses the domestic effectiveness and impact engendered by such commissions. The scope of the international inquiries considered is such that an assessment of their overall impact would either require to focus on broad overarching trends or to delve into an analysis that goes well beyond the ambitions of this study. Hence, this chapter only covers five emblematic examples that show how strategic argumentative choices have been able to produce institutional, policy, jurisprudential or legislative change at the domestic level, while also revealing how processes of change need to be adequately sustained in the long term. Indeed, this is due to possibly the main shortcoming and, at the same time, strength of commissions of inquiry. Such mechanisms only possess "smoothed teeth" as their ability to inflict damage, that is to directly exert coercion, largely depends on their synergy with other actors. In other terms, the international inquiries' lack of enforcement powers and the non-binding effect of their reports determine that their ability to produce meaningful change within domestic systems is largely based on their strategic use of argumentative techniques and, more importantly, on their ability to mobilise other domestic or international actors.

Hence, while focused on the domestic effects engendered by individual findings and recommendations of international inquiries, this chapter considers the broader institutional environment in which commissions of inquiry operate. Not only is this approach required by the very nature of such inquiries, but it also allows us to trace how strategic arguments are

sustained by concrete action. Moreover, considering how the recommendations of international commissions of inquiry are translated into actions perpetuated through time also provides reasons for why certain strategic arguments do not elicit consistent domestic change. This chapter also shows that, despite commonly held perceptions, the veil of formal non-cooperation that states – in this case study, Israel in particular – oppose to international inquiries can be easily pierced by a sound inquiry process. In other words, while a state may officially refuse to cooperate with an international fact-finding mechanism, they may nonetheless take into account the report of such inquiries in order to avoid incurring in reputational or material costs, or simply because the inquiry was able to induce a process of internalisation of international standards. This is the case, for example, of the Goldstone Report, which managed to elicit far-reaching domestic responses despite the controversies that it fuelled and that I have outlined in Chapter IV.

In short, this chapter seeks to answer the most pressing questions at the heart of this research. How do commissions of inquiry seek to achieve their goals? Have institutional, legislative, jurisprudential and policy changes occurred *as a result of* the commissions of inquiry considered? What argumentative strategies do commissions of inquiry employ to engender domestic change? What processes have such commissions been able to engender? Why some strategies work better than others? What is the broader impact of international commissions of inquiry?

This chapter systematically analyses five thematic issues by emphasising the argumentative strategies pursued by the commissions of inquiry that formulated the relevant recommendations, tracing the official follow-up to such recommendations, considering the influence exerted by prior and intervening factors, and assessing the overall effectiveness and impact of the commission in turn considered. The thematic issues employed are: the IDF's use of white phosphorus during military operations in densely populated areas; Israeli domestic

investigations into human rights and humanitarian law violations perpetrated during military operations; Israeli settlements in occupied territories; Palestinian domestic human rights violations; human rights defenders in Israel. The emphasis is not so much on the substantive issues raised for each of these themes, but rather on reconstructing through narrative, evidence and indicators the causal link that allows to trace change to the relevant commissions of inquiry. Nonetheless, where appropriate, an overview of the legal aspects underlining some of the thematic issues considered is provided in order to allow the reader to assess the significance of the changes occurred at the domestic level. Moreover, for each example, a description of the relevant strategic argumentative choices is included.

1. White Phosphorous: The Persuasive Potential of Accurate Evidentiary Records

Operation Cast Lead is often remembered for the images of what seemed to be some sort of rain of fire. These pictures captured the release of inflamed wedges released by explosive bombs loaded with white phosphorus. Indeed, the use of white phosphorous during this military operation caused extensive debate and criticism due to the nature of the conflict, which involved one of the most densely populated areas in the world, the Gaza Strip. The Goldstone Report extensively documented the use of white phosphorous weapons during Operation Cast Lead and recommended that the Israeli Government considered implementing a permanent ban on this type of weapon and that the international community considered outlawing it altogether. Subsequent military operations on the Gaza Strip show that, despite an increase of the intensity of the fighting especially during Operation Protective Edge, the IDF has refrained from deploying white phosphorous weapons. Is this factual situation a result of the Goldstone process? Are there other factors that alone could have determined such change or have contributed to it?

This Section addresses these questions and shows that the meticulous factual reconstruction undertaken by the Goldstone Mission played a fundamental role in determining a decisive policy shift in the IDF's operational policy.

1.1 International and Domestic Legal Frameworks

White phosphorus is a chemical substance[1] that can be used in military contexts to illuminate, produce smokescreens, mark targets, 'flush out' combatants taking cover into confined spaces or as an incendiary to set objects or persons on fire.[2] It can be delivered in different forms and projectiles.[3] The Goldstone Mission reported that, in the context of Operation Cast Lead, white phosphorus was deployed through either exploding munitions used as mortar shells by both ground and naval forces or as smoke projectiles containing felt wedges dipped in the chemical that were fired as canister shells by 155-mm howitzers.[4]

Stian Nordengen Christensen identifies three legal frameworks to assess the legality of the use of white phosphorus under international law: the 1993 Chemical Weapons Convention; the 1980 Convention on Certain Conventional Weapons; and customary international humanitarian law.[5]

Under the 1993 Chemical Weapons Convention, which outlaws the use of chemical weapons in all circumstances, white phosphorus should fall within the scope of the definition of chemical weapon provided for in Article II(1)(a), which states that a chemical weapon is any 'toxic

[1] Loai Nabil Al Barqouni, Sobhi I Skaik, Nafiz R Abu Shaban and Nabil Barqouni, 'Case Report: White Phosphorus Burn', (2010) 376(9734) *The Lancet* 68 reports that 'White phosphorus is a smoke-producing, waxy, yellow transparent ombustible solid, which is used mainly in military and industrial settings. In the presence of oxygen, it spontaneously ignites with a yellow flame and produces dense smoke; it extinguishes only when deprived of oxygen or totally consumed. On contact with exposed skin, white phosphorus produces painful chemical burns'.

[2] Stian Nordengen Christensen, *Regulation of White Phosphorus Weapons in International Law* (2016 Torkel Opsahl Academic EPublisher – Occasional Paper Series No 6) 7-8; Iain J MacLeod and APV Rogers, 'The Use of White Phosphorus and the Law of War' (2007) 10 *YIHL* 75, 76-79; James T Cobb, Christopher A LaCour and William H Hight, 'TF 2-2 in FSE AAR: Indirect Fires in the Battle of Fallujah' (March-April 2005) *Field Artillery* 23 as quoted in Roman Reyhani, 'The Legality of the Use of White Phosphorus by the United States Military during the 2004 Fallujah Assaults' (2007) 10 *JLASC* 1, 4-5.

[3] Christensen (ibid) 6.

[4] Goldstone Report, paras 888-889.

[5] Christensen (n 2).

chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes'.[6] By dint of both its chemical properties and the effects it can cause on the human body, white phosphorus can be classified as both a toxic chemical and a precursor of a toxic chemical[7] as defined respectively under Article II(2)[8] and (3).[9] Nonetheless, most scholars aver that white phosphorus is not a chemical weapon by dint of Article II(9)(c), which defines the expression 'purposes not prohibited under this Convention' in Article II(1)(a) as *inter alia* those 'military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare'. This means that for it to be classifiable as a chemical weapon under the Convention, the military purposes of a white phosphorus weapon should be connected to, or dependent on, the toxic properties of the chemical as a method of warfare. While whether the use of white phosphorus to 'flush out' enemy combatants is dependent on the toxic properties of the chemical or not is debatable,[10] the most common purposes for the use of white phosphorus – illuminating, producing smokescreens, target-marking or setting on fire – are not dependent on its toxic properties. Hence, the logical conclusion would be to exclude that white phosphorus is a chemical weapon for the purposes of the Convention. This is further confirmed by the absence of white phosphorus in the Annex

[6] Christensen (n 2) 14 argues that while the definition of chemical weapons ca be found in Article II(1)(a) to (c), 'the definitions in article II(1)(b) and (c) state that for the toxic chemical to fall under the definition of a chemical weapon, it must be "specifically designed" to cause harm or death as a result of the chemical component. One would be hard pressed to say that WP weapons are specifically designed for such purposes, and it thus falls outside the definition in (b) and (c)'; MacLeod and Rogers (n 2) 87 reach the same conclusion.

[7] Christensen (ibid) 14-17.

[8] According to Article II(2) '"toxic chemical" means: any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere'.

[9] According to Article II(3) '"precursor" means: Any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multicomponent chemical system'.

[10] Christensen (n 2) 18-19; Reyhani (n 2) 32.

on Chemicals attached to the Convention.[11] In any case, it must be noted that while Israel is a signatory of the Convention, as of September 2018, it has not yet ratified it.

White phosphorus weapons can be employed to set persons or objects on fire. Hence, they may fall within the category of incendiary weapons as defined under Protocol III of the 1980 Convention on Certain Conventional Weapons. Article 1(1) of the Protocol defines the concept of 'incendiary weapons' as including 'any weapon or munition which is *primarily designed* to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target' (emphasis added). The expression 'primarily designed', which seems to entail that the weapon has to have been designed for the primary purpose of setting persons or objects on fire and not what the actual use of the weapon on the battlefield is, coupled with the exclusionary clause under Article 1(b)(i), which states that '(b) incendiary weapons do not include: (i) munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems', has caused disagreement among scholars as regards the classification of white phosphorus as an incendiary weapon.[12] Essentially, this is due to a lack of clarity as to who decides what the primary purpose of a weapon is and whether dual-use weapons could fall within this category.[13] Hence, it is doubtful whether white phosphorus could fall within the scope of Article 1(1) of Protocol III. However, it should be recalled, first, that the purpose of Protocol III is not to outlaw the use of incendiary weapons but to limit their use against military

[11] Note, however, that the list contained in the Annexes is not exhaustive.
[12] Reyhani (n 2) 43-44, for example, argues that the use of white phosphorus weapons in the context of the US military operation in Fallujah could fall within the scope of Protocol III, given that white phosphorus weapons were used by the US military for their incendiary properties; differently, MacLeod and Rogers (n 2) 92-95 argue that white phosphorus weapons are normally devised to exploit the incendiary properties of the chemical to crate smoke and yet, should the purpose of the military deployment of such weapons be that of using white phosphorus as an incendiary for setting on fire persons or objects, then it would fall within the category of 'incendiary weapons' as defined in Protocol III; finally, Christensen (n 2) 24-27 does not take a final position but suggests that a test should be devised to clarify the reasons behind the distribution among military personnel of the weapon in order to determine whether its incendiary properties are taken into account in this decision, in which case the weapon should be considered incendiary for the purposes of Protocol III.
[13] Christensen (ibid).

objectives that are located within a 'concentration of civilians'.[14] Second, Israel is not a party to Protocol III, even though it has ratified the Convention on Certain Conventional Weapons.

Finally, white phosphorus must be assessed against the relevant rules of customary international humanitarian law. These have been usefully summarised by MacLeod and Rogers: 'weapons must not be of a nature to cause unnecessary suffering or superfluous injury; must not be indiscriminate in their effects; must not be treacherous in their nature; and must not be abhorrent to ordinary people'.[15] None of these rules provide a clear basis for asserting the illegality per se of white phosphorus weapons. Whether a weapon is of a nature to cause unnecessary suffering or superfluous injury[16] is an empirically difficult question to answer.[17] According to some criteria, it may be possible to argue that certain uses of white phosphorus cause unnecessary suffering or superfluous injuries[18] but it is difficult to determine that this

[14] Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Article 2, which states that '1. It is prohibited in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons.
2. It is prohibited in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons.
3. It is further prohibited to make any military objective located within a concentration of civilians the object of attack by means of incendiary weapons other than air-delivered incendiary weapons, except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.
4. It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives'.

[15] MacLeod and Rogers (n 2) 83.

[16] This customary principle is derived from Rule 70 of the International Committee of the Red Cross (ICRC) Study on Customary International Humanitarian Law, which states that 'The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited' (Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law. Volume I: Rules* (CUP 2005)); the principle was also reaffirmed by ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinions (8 July 1996) ICJ Reports, para 78.

[17] Christensen (n 2) 29-33 summarises a number of interpretations of the expression 'of a nature to cause superfluous injury or unnecessary suffering'. These include: a) the SIrUS project, an ICRC-led proposal of four tests to determine when a weapon should be considered to cause superfluous injury or unnecessary suffering by its nature (Robin M Coupland, *The SIrUS Project: Towards a determination of which weapons cause "superfluous injury or unnecessary suffering"* (ICRC 1997)); b) state practice (for, example, Christensen shows that the UK Manual of the Law of Armed Conflict considers white phosphorus to cause superfluous injury or unnecessary suffering); c) Rule 85 of the ICRC Study, which states that 'The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person *hors de combat*', thus implying to some extent that incendiary weapons, including white phosphorus, might be more likely to cause superfluous injury or unnecessary suffering than other alternative weapons (however, this is a question that has to be answered in concrete, and not in the abstract).

[18] In particular, for example, Christensen (ibid) 31 argues that white phosphorus can be deemed to cause unnecessary suffering or superfluous injuries according to the first of the four tests provided for in the SIrUS

refers to the nature of white phosphorus weapons. Under the principle of distinction,[19] it may be argued that some uses of white phosphorus are prohibited because they do not discriminate between civilians and civilian objects on the one hand and combatants and military objects on the other hand.[20] However, it is not possible to consider white phosphorus weapons illegal per se by dint of this principle. MacLeod and Rogers argue that treacherousness is the principle that probably inspired the outlawing of poison, poisonous gas, chemical and biological weapons.[21] Hence, as under the Chemical Weapons Convention, it would probably be difficult to argue that white phosphorus is treacherous by its nature. Under the last customary rule of international humanitarian law, which probably refers to the 'Martens clause',[22] one would have to show that white phosphorus causes general revulsion or abhorrence as a method of warfare in order to declare its illegality. Christensen argues that it would be difficult to deem white phosphorus illegal under this principle because many of the uses of white phosphorus – for example, as an illuminant or for marking purposes – are unlikely to be seen as abhorrent.[23]

Study, that is, if the weapon causes 'specific disease, specific abnormal physiological state, specific abnormal psychological state, specific and permanent disability or specific disfigurement'.

[19] This principle is derived from Rule 71 of the ICRC Study, which states that 'the use of weapons which are by nature indiscriminate is prohibited' (Henckaerts and Doswald-Beck (n 16)), the ICJ Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (n 16) para 78, Articles 48, 51(2) and 52(2) of the Additional Protocol I to the 1949 Geneva Conventions.

[20] Christensen (n 2) 33-36.

[21] MacLeod and Rogers (n 2) 85.

[22] See Christensen (n 2) 38-40; the 'Martens clause' is a sort of mission statement of international humanitarian law, which states that 'until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience' (Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (29 July 1899) Preamble; Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (18 October 1907) Preamble). Protocol (I) Additional to the Geneva Conventions (12 August 1949) Article 1(2), provides a modern version of the 'Martens clause', which states: 'In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'.

[23] Christensen (ibid).

In conclusion, it is difficult to argue for the illegality of white phosphorus per se under international law. However, specific principles of international humanitarian law may render certain uses of white phosphorus illegal.

1.2 Relevant Findings in the Goldstone Report

In the aftermath of Operation Cast Lead, the Goldstone Report documented four main incidents whereby white phosphorus is reported to have been used by the IDF.[24] The four incidents are:

- the shelling of the UNRWA compound in the neighbourhood of Rimal in Gaza City;
- the shelling of al-Quds hospital in the neighbourhood of Tel el-Hawa in Gaza City;
- the shelling of al-Wafa hospital in the neighbourhood of al-Shujaeiyah in Gaza City;
- the shelling of the Abu Halima family house in the neighbourhood of al-Atatra in Gaza City.

The shelling of the UNRWA compound

The Mission meticulously reconstructed the factual circumstances of the first incident, on the basis of information received from eyewitness testimonies, UNRWA personnel and the UN Secretary-General Headquarters Board of Inquiry.[25] It was also able to retrieve some container shells of white phosphorus and to obtain the assessment of military experts.[26] Furthermore, the Mission was able to rely on the detailed reconstructions of the incident provided by Human Rights Watch and Amnesty International and to find confirmation regarding the use of white phosphorus ammunitions by the Israeli Government itself, which, in its investigation into the incident, admitted to having used it to produce a smokescreen to protect its troops from

[24] White phosphorus is alleged to have been used in other incidents as well but its use in these contexts is largely irrelevant for the findings formulated by the Mission.
[25] Goldstone Report, para 544.
[26] Ibid para 543.

Palestinian combatants' fire.[27] The facts regarding the multiple strikes on the UNRWA compound were thus established with a 'high degree of certainty'.[28] Hence, the Mission sought to focus on 'what was known by the Israeli armed forces at the time, what steps were feasible to reduce the massive risk to civilian life and why were these steps not taken'.[29]

The Report includes a short assessment of the risk to civilians and civilian objects associated with the strikes on the UNRWA compound and a detailed reconstruction of the communication between the United Nations Department of Safety and Security (DSS) and the Coordinator of Government Activities in the Territories (COGAT) in the Israeli Ministry of Defence. The Mission was presented with the log of such communication. While the strikes were carried out between 8 am and 12 noon of 15 January 2009, the Mission was able to show that the DSS had made several phone calls to the COGAT between 8.14 am and 1.45 pm. Moreover, it reported that a high-level UNRWA official had repeatedly contacted the Israeli Humanitarian Coordination Centre (HHC) in Tel Aviv. These calls were aimed, initially, at warning the IDF that the shelling was taking place in the near proximity of the UNRWA compound and, subsequently, at informing them that white phosphorus had landed within the perimeter of the compound. The Mission was able to show that at 10.30 am at the latest IDF officers on the ground had been made aware of the situation and that UNRWA officials had received repeated reassurances that the shelling would stop. Nonetheless, further shells hit the UNRWA premises. Thus, the Mission correctly stated that

> In all the circumstances the Mission rejects the Israeli armed forces' assertion to the effect that it was not anticipated that the shells would land in the compound. The Israeli armed forces were told what was happening. It no longer had to anticipate it. The Israeli armed forces' responses in Tel Aviv and in COGAT/CLA indicate quite clearly that they understood the nature and scale of what was happening. Their responses in particular indicate that orders had been given to stop the firing.[30]

[27] Ibid paras 545, 570 and 573.
[28] Ibid para 551.
[29] Ibid para 546.
[30] Ibid para 585.

While the Mission did not explicitly discuss the international criminal law implications of these factual findings, it is however clear that its extensive assessment of the information available to the IDF prior, during and after the shelling was aimed at determining the *mens rea* of the Israeli commanders who ordered and supervised the shelling of the UNRWA compound. Indeed, the Mission approvingly recalled a passage included in the Israeli investigation report on Operation Cast Lead, which in turn cited the relevant test for determining whether a military commander could be deemed to have had the relevant *mens rea* for the offence of unlawful attack on civilian objects under Article 3 of the ICTY Statute.[31] This passage determined that the *mens rea* required for such an attack was intent or recklessness. Thus, having established that an unlawful attack against civilian objects or against the civilian population could be carried out not only with intent but also with recklessness, the Mission concluded that

> Having been fully alerted not to the risks but to the actual consequences of the course of action, Israeli armed forces continued with precisely the same conduct as a result of which further shells hit the compound. Such conduct, in the Mission's view, reflects a *reckless* disregard for the consequences of the choice of the means adopted in combating the anti-tank fire the Israeli authorities claim they were facing.[32]

Despite this factual finding, the Mission concluded in law that

> on the basis of the information it received and in the absence of any credible refuting evidence that Israeli armed forces violated the customary international law requirement to take all feasible precautions in the choice of means and method of attack with a view to avoiding and in any event minimizing incidental loss of civilian life, injury to civilians and damage to civilian objects as reflected in article 57 (2) (a) (ii) of Additional Protocol I to the Geneva Conventions.[33]

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[31] Ibid para 587. The cited passage reads as follows: 'Attacks which are not directed against military objectives (particularly attacks directed against the civilian population) and attacks which cause disproportionate civilian casualties or civilian property damage may constitute the actus reus for the offence of unlawful attack under article 3 of the ICTY Statute. The mens rea for the offence is intention or recklessness, not simple negligence. In determining whether or not the mens rea requirement has been met, it should be borne in mind that commanders deciding on an attack have duties:
(a) To do everything practicable to verify that the objectives to be attacked are military objectives;
(b) To take all practicable precautions in the choice of methods and means of warfare with a view to avoiding or in any event to minimizing incidental civilian casualties or civilian property damage; and
(c) To refrain from launching attacks which may be expected to cause disproportionate civilian casualties or civilian property damage'.

[32] Ibid para 594 (emphasis added).

[33] Ibid para 595.

In short, despite its assessment of the *mens rea* of the Israeli military commanders that supervised the shelling of the area adjacent to the UNRWA compound, the Mission refrained from making legal determinations in criminal law but merely foreshadowed the potential consequences of such conducts in terms of criminal liability.

The shelling of al-Quds and al-Wafa hospitals

The Mission further reported the facts of two incidents that involved the shelling, with white phosphorus, of al-Quds and al-Wafa hospitals.[34] In both cases, the Mission relied on eyewitness testimonies, on-site visits and open source material. Differently from the previous incident, the Mission focused on the issues of warnings, proportionality and the damage caused by the Israeli strikes. It could not access information held by the IDF nor could it find any specific mention of these incidents in the investigative reports published by the Israeli Government.

Proportionality is the frame that the Mission employed to qualify the use of white phosphorus by the IDF. With regards to the attack on al-Quds hospital, the Mission found that

> on the morning of 15 January the hospital building and the administrative building were struck by a number of shells containing white phosphorous and by at least one high explosive shell. The fires these caused led to panic and chaos among the sick and wounded, necessitated two evacuations in extremely perilous conditions, caused huge financial losses as a result of the damage and put the lives of several hundred civilians including medical staff at very great risk.[35]

It further found that the strikes, which caused several fires within the premises of the hospital and the ambulance depot, severely impaired the operational capacity of the hospital to attend to the wounded in the area. Having heard eyewitnesses of the strikes who excluded the presence of Palestinian combatants in the premises of the hospital and having observed the destruction brought upon the areas adjacent to the hospital by the IDF, the Mission concluded in fact that

[34] Ibid. For the shelling of al-Quds hospital, see paras 596 to 629; for the shelling of al-Wafa hospital, see paras 630 to 652.
[35] Ibid para 615.

> there are reasonable grounds to believe that the hospital and the ambulance depot, as well as the ambulances themselves, were the object of a direct attack by the Israeli armed forces in the area at the time and that the hospital could not be described in any respect at that time as a military objective.[36]

This factual conclusion led the Mission to consider whether the strike on the al-Quds hospital had been intentional. It concluded that the weapons used indicated intent to strike the hospital and, even if such strikes had not been intentional, the IDF had failed to ensure that the damage caused to civilians or civilian infrastructures would not be excessive in relation to the concrete military advantage anticipated. Therefore, it concluded in law that

> Taking into account the weapons used, and in particular the use of white phosphorous in and around a hospital that the Israeli armed forces knew was not only dealing with scores of injured and wounded but also giving shelter to several hundred civilians, the Mission finds, based on all the information available to it, that in directly striking the hospital and the ambulance depot the Israeli armed forces in these circumstances violated article 18 of the Fourth Geneva Convention and violated customary international law in relation to proportionality.[37]

As regards the shelling of al-Wafa hospital, the Mission considered the damage caused to civilians and civilian infrastructures but could not establish the reasons for the strike. It appears to have inferred, from the testimonies of some eyewitnesses, that the strikes might have been motivated by the proximity of the hospital to the boarder with Israel, by the presence of armed resistance combatants in the premises of the hospital or in its proximities or by Israel's belief that a prominent Hamas militant, whom the IDF had tried to kill in the past, was being treated in the hospital. While the Mission could not confirm the reasons behind the strikes, it discarded, based on the same eyewitness testimonies, the presence of armed groups within the premises of the hospital. It thus concluded in law that

> 648. …. the choice of deploying white phosphorous shells in and around such a building, where patients receiving long-term care and suffering from particularly serious injuries were especially vulnerable, was not acceptable in the circumstances …. Even if there was some degree of armed resistance in the area (which the Mission cannot confirm), commanders in deploying such weaponry must take into account all the facts and circumstances.

[36] Ibid para 623.
[37] Ibid para 629.

> 649. The Mission considers the use of white phosphorous in such an area as reckless and not justifiable in relation to any military advantage sought in the particular circumstances.
>
> ….
>
> 652. As such the Mission considers that, from all the information available to it, the Israeli armed forces violated articles 18 and 19 of the Fourth Geneva Convention as well as customary international law as reflected in Additional Protocol I, articles 57 (2) (b) and (c).[38]

In both instances, it can be observed that the Mission, despite hinting at issues relevant under criminal law, including generic considerations of the *mens rea* of the relevant IDF commanders, refrained from invoking criminal liability.

The shelling of Abu Halima family house

The investigation of the shelling of Abu Halima family house[39] was not used to criticise specifically the use of white phosphorus explosive ammunitions. In fact, no specific finding was made as to the legal implications of the use of white phosphorus in this case. The case was rather employed to demonstrate the devastating effects of this chemical and, in particular, the injuries it caused to individuals.[40]

The four episodes detailed in the Goldstone Report were used by the Mission to demonstrate, on the one hand, the difficulty in discriminating between civilians and combatants when using white phosphorus in built-up areas and, on the other hand, the disastrous consequences it could cause on the human body.[41] Thus, the Mission concluded 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' and that it was concerned by the 'damage [white phosphorus] caused in fact'.[42] Furthermore, it found that even though white phosphorus is not prohibited per se under international law its 'use is,

[38] Ibid paras 648, 649 and 652.
[39] Ibid paras 788 to 801.
[40] Ibid; see, in particular, paras 792 and 797.
[41] Ibid paras 887 to 901.
[42] Ibid paras 894 and 895.

however, restricted or even prohibited in certain circumstances by virtue of the principles of proportionality and precautions necessary in the attack'.[43]

In light of these findings, the Mission recommended specifically that 'the Government of Israel should undertake a moratorium on the use of such weapons in the light of the human suffering and damage they have caused in the Gaza Strip'.[44]

Strategies deployed

Factual findings on the use of white phosphorus by the IDF substantiate both the legal argument that the IDF failed to take all feasible precautions in launching attacks and the recommendation that its use in urban settings should be halted because of the hazards it poses in such circumstances.

The Mission privileged using the international humanitarian law frames of precautions and proportionality to legally describe the events investigated. The choice to use them as the most appropriate legal frames to analyse the facts could have easily backfired in the absence of hard evidence such as the logs of the conversations between the UN personnel and the IDF contact point, the medical records of those injured and the white phosphorus shells retrieved from the sites where the alleged strikes had taken place. Indeed, both proportionality and precautions are ambiguous legal frames,[45] whose breadth of meaning can easily be disputed, as an early statement by the Israeli MoFA demonstrates.[46] The statement specifically addressed the issue of proportionality by emphasising that 'while the principle is clear, in practice weighing an expected military advantage against possible collateral damage can be an extremely complex calculation to make, especially in the heat of an armed conflict'. It further quoted with

[43] Ibid para 1924.
[44] Ibid para 1971(d).
[45] See Pascal Vennesson, 'War under transnational surveillance: framing ambiguity and the politics of shame' (2014) 40 *Rev Int Stud* 25, 42-43 and 45-46.
[46] Israel Ministry of Foreign Affairs, 'Responding to Hamas Attacks from Gaza – Issues of Proportionality Background Paper' (29 December 2009) <http://www.mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/Responding_to_Hamas_Attacks_from_Gaza_december_2008.pdf> accessed 20 September 2018.

approbation a passage of the *Final Report to the Prosecutor by the Committee established to review NATO bombings in Yugoslavia* that reads as follows: 'it is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants.… It is suggested that the determination of relative values must be that of the "reasonable military commander"'.[47] Against this backdrop, the availability of hard evidence was crucial because it minimised the spaces for contesting the application of the legal frames of proportionality and precaution. In particular, the scale of the damage caused by the white phosphorous strikes as documented by the Mission, coupled with the proof that the IDF had knowledge of the position of important civilian infrastructures and thus of the likelihood that they might have been hit, made it difficult for Israel to dispute the concrete application of the two principles. In concrete, this means that Israel would have had to demonstrate that, in spite of the knowledge they possessed of the conditions on the ground, they still deemed that the military advantage anticipated outweighed the prospect of civilian collateral damages. Moreover, the availability of information that demonstrated that the IDF had been made aware of the situation on the ground *in the course* of the strikes meant for Israel that, in order to successfully dismiss the Mission's finding, they would have had to demonstrate that they had consequently taken additional precautions to minimise the risk to civilians and civilian infrastructure. In other words, the Mission appears to have successfully "cornered" Israel on this point.

[47] *Final Report to the Prosecutor by the Committee established to review NATO bombings in Yugoslavia*, para 50 <http://w ww.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal> accessed 20 September 2018. It should be noted that the Israeli MoFA omitted to quote the following statements contained in the Report at the same Paragraph: 'Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases …. Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to noncombatants or the damage to civilian objects was clearly disproportionate to the military advantage gained'. The effect of such omission is to emphasise the relative dimension of proportionality and to downplay the fact that reasonable commanders would still probably agree on the disproportionate character of certain attacks.

The Mission refrained from explicitly drawing a direct link between the use of white phosphorus in urban settings and the perpetration of war crimes, as Human Rights Watch did.[48] It hinted at that by discussing the *mens rea* of the IDF commanders who, despite repeated warnings that white phosphorus was being fired on protected premises at least in one case, continued to shell the area with the same ammunitions. While the communication log, coupled with the repeated use of white phosphorus in the same area for a prolonged time period, constitutes fairly hard evidence of the state of mind of the IDF commanders who oversaw the military operations, the Mission stopped short of stating that the intentional or reckless use of white phosphorus on densely populated areas amounted to a war crime.[49] This may have several explanations. For a start, findings of criminal liability require a high standard of proof, which the Mission was conscious it could not purport to have attained, although it could have nuanced such a claim by employing tentative language. Further, such a specific finding in criminal law made by a non-judicial inquiry would have certainly exposed the Mission to harsh procedural criticism, which in turn would have overshadowed the international humanitarian law implications of the evidence gathered.

The presumably conscious preference for humanitarian law rather than criminal law language underscores a technical approach to white phosphorus-related incidents, rather than one aimed at highlighting the moral implications of the strikes. It is clear that, in this specific case, the Mission was speaking to qualified interlocutors who would understand the meaning of terms such as proportionality and precautions and who would be able to judge, based on the factual findings, whether these had been fully respected. This is confirmed by the reference, in the Report, to the lack of a prohibition on the use of white phosphorus per se under international law, coupled with the explicit recommendation that the IDF considered halting the use of white

[48] See infra.

[49] This is the conclusion reached by Human Rights Watch in its report on the use of white phosphorus during operation Cast Lead (see Human Rights Watch, *Rain of Fire: Israel's Unlawful Use of White Phosphorus in Gaza* (2009) 65).

phosphorus in densely populated areas. In other words, the Mission clearly addressed the Israeli authorities with hardly disputable factual information, an assessment of the legal implications of those facts in light of specific international humanitarian law principles, and technical advice on the future use of white phosphorus.

Translated in the language of state socialisation, the Mission sought to cue[50] the Israeli authorities, in particular the IDF, into changing their policy regarding the use of white phosphorus by framing[51] the factual circumstances of the incidents considered in a language familiar to professional circles, while avoiding morally charged terminology.[52] According to the persuasion model, actors are persuaded into conforming to international norms by presenting them with new information so as to lead them to re-think their practices and, or, by framing information in an already accepted language. It would be naïve to qualify the factual findings presented by the Mission as new information, especially in light of prior reports[53] and of the likelihood that the IDF already had knowledge of them. However, the novelty lies in the fact that, despite Israel's best efforts to delegitimise it, the Goldstone Report represented an authoritative document with a wider international resonance than any other report produced so far.[54] The publicity element, coupled with substantiated allegations of humanitarian law violations, also contribute to injecting an element of acculturation into the strategy employed

[50] By way of reminder, 'cuing' means strategically presenting states with new information in order to persuade them into re-thinking a specific understanding or practice and engaging them in an argumentative discourse regarding that practice or understanding (Chapter III, pp 142-143); see also Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54(3) *Duke LJ* 621, 637.

[51] By way of reminder, 'framing' means strategically presenting a message by using a language that is already normatively accepted in the target state (Chapter III, pp 142-143); see also Vennesson (n 45) 31.

[52] On the psychological and cognitive processes engendered by the use of 'hot' legal terminology, such as 'war crimes', see Shiri Krebs, 'The Legalization of Truth in International Fact-Finding' (2017) 18(1) *Chi J Int'l L* 83,130-131.

[53] See infra.

[54] The international resonance of the Goldstone Report is confirmed, for example, by Dore Gold and Jonathan Dahoah Halevi, *The UN Gaza Report: A Substantive Critique. An Expanded Text of Ambassador Dore Gold's Presentation During an Exchange with Justice Richard Goldstone at Brandeis University on November 5, 2009* (Jerusalem Center for Public Affairs 2009). Such perception of the Report was also confirmed to me by some respondents I interviewed including Pnina Sharvit Baruch, former Head of the International Law Department of the Israeli Defence Forces (IDF), 5 March 2018; David Benjamin, former Chief Legal Officer of the Military Advocate General's Corps (MAG) and former Director of the Strategic and International Branch of the International Law Department of the IDF, 4 March 2018.

by the Mission. Indeed, international humanitarian law and in particular its basic principles of precautions and proportionality are legal frames that resonate with both the international community of states at large and the IDF in particular. Given the availability of compelling evidentiary records, Israel's only available strategy was to reject the applicability of the principles of precautions and proportionality in the way the Mission had applied them. But rejecting the application of such principles in the way the Mission applied them would have meant for Israel, on the one hand, placing itself outside the circle of states that abide, or claim to abide, by the principles of international humanitarian law and, on the other hand, neglecting its own commitment to such principles.

1.3 Precedents

Allegations of misuse of white phosphorus had been formulated before the publication of the Goldstone Report both in the context of Operation Cast Lead and prior to it. The Report of the 2006 Commission of Inquiry on Lebanon mentioned the use of white phosphorus by the IDF in a number of localities in Southern Lebanon during the 2006 Lebanon War.[55] The Report did not mention any legal standard against which the use of white phosphorus should be assessed but only reported accounts of episodes in which white phosphorus had allegedly been used against civilians. It also quoted an article by the *Guardian*, which reported the words of Jacob Edery, a then-cabinet minister of the Israeli Government, who admitted to the use of white phosphorus by the IDF and specified that this was done in conformity with international law, that is, against military targets in open field only.[56] The Commission did not make any specific recommendation with regard to the use of white phosphorus.

[55] UNHRC, Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1 (23 November 2006) UN Doc A/HRC/3/2, paras 258-262.
[56] Conal Urquhart, 'Israel admits it used phosphorus weapons' (23 October 2006) *The Guardian* <https://www.theguardian.com/world/2006/oct/23/israel> accessed 21 September 2018.

During Operation Cast Lead, photos of white phosphorus shelling on civilians made the frontpages of several news outlets in Europe and across the world, causing shock and outrage.[57] Shortly after the conclusion of the hostilities, some prominent NGOs published their findings regarding the military operation in the Gaza Strip, lingering on the use of white phosphorus in civilian densely populated areas. One particularly damning report that focused exclusively on the use of white phosphorus during Operation Cast Lead was published by Human Rights Watch in March 2009.[58] The organization focused on a number of incidents in which white phosphorus had allegedly been used on civilians, provided an analysis of such incidents in light of the international legal standards applicable to white phosphorus and concluded that the use of white phosphorus, even as an obscurant, indicated the commission of war crimes.[59] Human Rights Watch also published a letter they had addressed to the IDF with general and incident-related questions, to which the IDF replied in mid-February stating that they had established an

[57] For example, on 15 January 2009, a number of MPs of the House of Commons in Britain tabled an Early Day Motion to discuss the use of white phosphorus in the context of Operation Cast Lead (Early Day Motion 477, 'Use of White Phosphorus in the Gaza Strip' (15 January 2009) <https://www.parliament.uk/edm/2008-09/477> accessed 21 September 2018). The Motion read as follows: 'That this House expresses alarm about the use of white phosphorus by the Israeli defence forces in the current conflict with Gaza; understands that although the chemical is not illegal under international law, its purpose is primarily intended for smokescreens and signalling on the battlefield; therefore believes it is ill-suited to densely populated areas like the Gaza Strip; recognises that white phosphorus is indiscriminate in its target and will therefore not distinguish between militants and civilians; is seriously concerned that due to medical shortages and a severe shortage of water, medics within the Gaza Strip lack the capabilities to alleviate the suffering of civilians who may have been affected; is concerned that external monitors and medics are prohibited from entering the Gaza Strip; further recognises that world leaders have condemned the use of the chemical; calls on the Government to clarify its policy on white phosphorus; and urges the Government to do all it can to persuade the Israeli government to stop the bombardments and use of white phosphorus and to allow full humanitarian access to the Palestinians'.

[58] Human Rights Watch (n 49).

[59] Ibid 65-66. In particular, Human Rights Watch concluded that 'even if intended as an obscurant rather than as a weapon, the IDF's firing of air-burst white phosphorus shells from 155mm artillery into densely populated areas was indiscriminate or disproportionate, and indicates the commission of war crimes.
The IDF's deliberate or reckless use of white phosphorus munitions is evidenced in five ways. First, to Human Rights Watch's knowledge, the IDF never used its white phosphorus munitions in Gaza before, despite numerous incursions with personnel and armor. Second, the repeated use of air-burst white phosphorus in populated areas until the last days of the operation reveals a pattern or policy of conduct rather than incidental or accidental usage. Third, the IDF was well aware of the effects white phosphorus has and the dangers it can pose to civilians. Fourth, if the IDF used white phosphorus as an obscurant, it failed to use available alternatives, namely smoke munitions, which would have held similar tactical advantages without endangering the civilian population. Fifth, in at least one of the cases documented in this report – the January 15 strike on the UNRWA compound in Gaza City – the IDF kept firing white phosphorus despite repeated warnings from UN personnel about the danger to civilians. Under international humanitarian law, these circumstances demand the independent investigation of the use of white phosphorus and, if warranted, the prosecution of all those responsible for war crimes'.

investigative team in the Southern command.[60] Amnesty International published its report on Operation Cast Lead in July 2009, where it focused *inter alia* on allegations of use of white phosphorus in a number of incidents mostly coinciding with those described by Human Rights Watch.[61] However, it did not go so far to explicitly qualifying the use of white phosphorus as a war crime.

Echoes of these reports reached both the international and the domestic public opinions through the coverage of some major newspapers.[62] Hence, even before the deployment of the Goldstone Mission by the Human Rights Council, transnational advocacy networks and international pressure had been mobilised. In fact, in its investigation into Operation Cast Lead, the Israeli Government stated that, already

> on 7 January 2009, although not required under international law, it was decided as a precautionary measure, in order to minimise the risk to civilians, that the IDF would cease to use such exploding munitions during the Gaza Operation. IDF forces fighting in Gaza were instructed to act accordingly.[63]

Presumably, the decision to halt the use of white phosphorus exploding munitions in the context of the military operation had been made as a result of international criticism, as the Goldstone Mission seemed to assume.[64]

[60] See letter exchange attached to ibid 68-71.
[61] Amnesty International, *Israel/Gaza. Operation 'Cast Lead': 22 Days of Death and Destruction* (July 2009) in particular at 27-36.
[62] See, for example, Repubblica, 'Gaza, "ritiro completo entro domani". Amnesty: "Trovato il fosforo bianco"' (19 January 2009) <http://www.repubblica.it/2009/01/sezioni/esteri/medio-oriente-48/gaza-ritiro-obama/gaza-ritiro-obama.html> accessed 22 September 2018; Rory MecCarthy, 'Israel accused of indiscriminate phosphorus use in Gaza' (25 March 2009) *The Guardian* <https://www.theguardian.com/world/2009/mar/25/israel-white-phosphorus-gaza> accessed 22 September 2018; Haaretz, 'Rights Group: Israel Made Illegal Use of Phosphorus Shells in Gaza' (25 March 2009) <https://www.haaretz.com/1.5027108> accessed 22 September 2018; Haaretz, 'Human Rights Watch: Israel Using White Phosphorus Munitions in Gaza' (10 January 2009) <https://www.haaretz.com/1.5061099> accessed 22 September 2018.
[63] The State of Israel, *The Operation in Gaza, 27 December 2008 – 18 January 2009: Factual and Legal Aspects* (July 2009) para 408 (*Factual and Legal*... hereinafter).
[64] Goldstone Report, para 888.

1.4 The Israeli Position on the Use of White Phosphorus in the Context of Operation Cast Lead Prior to the Goldstone Report

While Operation Cast Lead was still ongoing, on multiple occasions, senior Israeli officers stated publicly that the IDF was not using white phosphorus.[65] However, the Israeli Government's position changed before the publication of the Goldstone Report, as the IDF admitted to having used white phosphorus in Gaza. In the internal investigation report published by the Israeli Government in July 2009, it was stated that, in the context of Operation Cast Lead, the IDF had used both exploding munitions containing white phosphorus for marking purposes and in non-populated areas only and smoke projectiles containing white phosphorus for camouflaging purposes also in urban areas. Furthermore, the Report highlighted that, with regards to exploding munitions, Israel had observed the Convention on Certain Conventional Weapons and its Protocol III relating to incendiary weapons, even though it was not a state party to this Protocol.[66] In addition, with regards to the use of white phosphorus projectiles for producing smokescreens, the Report stated that, while this use may produce collateral incendiary effects, this does not make such projectiles incendiary weapons.[67]

In a footnote of the Report, it was reported that, despite the decision of the IDF to halt the use of exploding munitions made on 7 January 2009,

> the investigation discovered that exploding munitions containing phosphorous were used after 7 January 2009 on two occasions, by ground forces and the Israel Navy, for marking purposes. The investigation of these two exceptions found that, while there was a deviation from the IDF precautionary instruction, in neither incident had there been a breach of international law.[68]

[65] See, for example, Amnesty International (n 61) 35-36. Statements of the sort were rendered in the Knesset and to the press.
[66] *Factual and Legal*… paras 407-408.
[67] Ibid paras 409-410.
[68] Ibid at footnote 278.

It is unclear whether these two exceptions correspond to the two senior IDF officers that were reprimanded later, as reported in the second update of the Israeli investigation into Operation Cast Lead.[69]

The Report also discussed the use of white phosphorus in light of the international humanitarian law principles of distinction, precaution and proportionality.[70] In particular, it challenged the facts gathered by NGOs such as Human Rights Watch and Amnesty International with regards to the IDF's compliance with such standards in the use of white phosphorus weapons. It put specific emphasis on rebutting accusations that the use of white phosphorus had been disproportionate and that the IDF had failed to take all feasible precautions to avoid damaging civilians or civilian infrastructures. For example, the Report argued that the IDF had acted in full compliance with proportionality when, on 15 January 2009, they fired white phosphorus projectiles in the vicinity of the UNRWA Field Office compound, in the neighbourhood of Tel al-Hawa. The Report argued that the IDF had to create smokescreen to advance from a topographically unfavourable position towards a group of Hamas combatants who were firing on them with anti-tank missiles. By juxtaposing the military imperative to protect IDF troops from Hamas fire and the anticipated damage that the deployment of white phosphorus would have caused to civilians and civilian infrastructures as opposed to continuing the fighting in the neighbourhood, the IDF decided that using white phosphorus to create a smokescreen, thus forcing the Hamas fighters to move, was the best option to minimise civilian casualties. Moreover, it added that white phosphorus munitions where fired so as to explode several hundred meters from the compound and that any wedges landed within its perimeters were a collateral, unwanted and unforeseen effect of the operation, which – the Report claims

[69] See *infra*.
[70] *Factual and Legal*… paras 411-428.

– was terminated as soon as the IDF received reports from UN personnel that such material had landed on the compound.[71]

From a legal viewpoint, the Report challenged the assumption that white phosphorus munitions employed to produce smokescreens are indiscriminate by their nature. In particular, it argued that the fact that 'smoke projectiles are not designed or intended to be lethal or destructive, and as a result they are not used for targeting purposes' excludes their classification as indiscriminate weapons.[72]

1.5 Domestic and Transnational Advocacy Networks

In the discussion of white phosphorus-related incidents, the Goldstone Report references the factual accounts provided by international NGOs such as Amnesty International and Human Rights Watch only once and in passing.[73] Indeed, most of the information recounted in the Report were gathered through on-site visits and eyewitness testimonies heard directly by the Mission. This approach probably allowed, on the one hand, the Mission to assert its independence with regards to the information it relied on and, on the other hand, the NGOs to claim that their investigations into Operation Cast Lead were corroborated by a high-level international independent inquiry.[74]

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[71] Ibid paras 341-347. The Report concludes that 'the incident took place during intense fighting, which involved Hamas' deployment of anti-tank units equipped with advanced anti-tank missiles north of the UNRWA compound. Hamas thus placed the compound between themselves and the IDF forces. The IDF implemented an effective smokescreen as a protective measure in response to this threat. The operational advantage of using the smokescreen was significant. *The IDF anticipated that the risk to civilians and civilian objects was limited in relation to this operational advantage*. Unfortunately, however, three individuals were injured and U.N. facilities were damaged' (emphasis added). It is significant that, in a footnote, the Report sought to respond to the assessment of the incident formulated by the Secretary-General Headquarters Board of Inquiry by highlighting that 'The U.N. Board of Inquiry reached its "conclusions" on the incident without fully weighing this critical fact. It acknowledged that — as with all of the incidents covered by its report — "it was not within its scope to assess general allegations or denials" regarding "possible military activity close to United Nations premises and possible military use of nearby buildings" (at footnote 266).

[72] Ibid paras 415-416.

[73] Goldstone Report, para 545 at footnote 366.

[74] See, for example, the public statement signed by Association for Civil Rights in Israel, Adalah, Bimkom, B'Tselem, Gisha, HaMoked, Physicians for Human Rights - Israel, The Public Committee Against Torture in Israel and Yesh Din, 'Human Rights groups in Israel in response to Goldstone Report: Israel Must Investigate 'Operation Cast Lead' (15 September 2009) <https://www.btselem.org/press_releases/20090915> accessed 22 September 2018, which included the following observations: 'Already it is clear that the findings of the report - written after

However, regardless of the inquiry deployed by the Human Rights Council, domestic civil society organisations had already started to press the Israeli authorities to investigate and, if appropriate, prosecute the IDF officers who had been responsible for the shelling with white phosphorus of, in particular, the UN compound.[75] When an update report on Israeli investigations into Operation Cast Lead sent to the UN in January 2010 in response to the Goldstone Report seemed to suggest that two IDF officers had been disciplined for violating the rules of engagement by authorising the firing of explosive shells in a populated area,[76] B'Tselem further pressed the Israeli authorities to open a criminal investigation into the incident, given its severity and the risk that it posed to civilians.[77]

In particular, B'Tselem contested the facts as presented by the Israeli Government by highlighting that the IDF was fully aware, on the one hand, of the intrinsic risks that white

gathering extensive information and testimonies from Israeli and Palestinian victims - will join a long series of reports indicating that Israel's actions during the fighting in Gaza, as well as the actions of Hamas, violated the laws of combat and human rights law …. The groups expect the Government of Israel to respond to the substance of the report's findings and to desist from its current policy of casting doubt upon the credibility of anyone who does not adhere to the establishment's narrative'. The same suggestion seems to be implied in an editorial of Human Rights Watch Executive Director, Kenneth Roth, 'Gaza: the Stain Remains on Israel's War Record Human Rights Watch and the Goldstone Report' (5 April 2011) <https://www.hrw. org/news/2011/04/05/gaza-stain-remains-israels-war-record> accessed 22 September 2018, which stated that 'Goldstone has not retreated from the report's allegation that Israel engaged in large-scale attacks in violation of the laws of war. These attacks included Israel's indiscriminate use of heavy artillery and white phosphorus in densely populated areas, and its massive and deliberate destruction of civilian buildings and infrastructure without a lawful military reason. This misconduct was so widespread and systematic that it clearly reflected Israeli policy'. This is confirmed by interviews with Omar Shakir, Israel and Palestine Director at Human Rights Watch (12 February 2018) and an unnamed Human Rights Watch researcher (12 February 2018).

[75] For example, already on 12 May 2009, B'Tselem had written to the Judge Advocate General to request 'that the military completely cease[d] its use of munitions containing phosphorus, for any purpose, including as camouflage' and 'that all cases in which the military used phosphorus during Operation Cast Lead be investigated, in accord with the relevant provisions of international humanitarian law' (Letter from B'Tselem to Judge Advocate General, Brig-Gen Avichai Mandelblit, Re: Use of phosphorus during Operation Cast Lead (12 May 2009) <https://www.btselem.org/download/2009 0512_letter_to_jag_about_use_of_white_phosphorous_in_gaza_eng.pdf> accessed 22 September 2018).

[76] The State of Israel, *Gaza Operation Investigations: An Update* (January 2010) para 100. While the Paragraph does not specifically mention that the incident involved the shelling with white phosphorus munitions, however, the press reported that the two IDF officers had indeed been disciplined for exceeding their authority in authorizing the shelling of an urban area with white phosphorus munitions endangering the life of others, although the IDF attempted to deny the facts (Anshel Pfeffer, 'IDF Denies Disciplining Top Officers Over White Phosphorous Use in Gaza War' (1 February 2010) *Haaretz* <https://www.haaretz.com/1.5049712> accessed 25 September 2018).

[77] Letter from B'Tselem to Judge Advocate General, Maj Gen Avichai Mandelblit, Re: Disciplinary prosecution of Brig Gen Eyal Eizenberg and Col Ilan Malka (1 February 2010) <https://www.btselem.org/download/20100201 _letter_to_jag_on_disciplinary_action_against_officers_for_shelling_un_compound_eng.pdf> accessed 25 September 2018.

phosphorus presented to civilians and civilian infrastructures and, on the other hand, of the situation on the ground given that they had received repeated phone calls from UN personnel alerting them as to the fact that white phosphorus shells were landing within the UN compound. Moreover, the organisation disputed the Israeli Government's legal assessment of white phosphorus smoke projectiles as non-incendiary weapons based on the fact that they are devised for camouflaging purposes by stating that the purpose of a weapon should be established not according to the design of that weapon but in light of the actual purpose for what it is deployed. Finally, they contested the lack of clarity for the decision of the IDF to simply discipline two of its officers and not open a full-fledged criminal investigation that would also involve the civilian personnel who participated in defining the policy of the IDF.[78]

Domestic Litigation

In January 2010, exactly one year after the termination of Operation Cast Lead, Israeli human rights lawyer Michael Sfard met with representatives of the Israeli NGO Yesh Gvul,[79] an organisation that supports army refuseniks and conscientious objectors to discuss the possibility to seek an order to check on the IDF policy vis-à-vis the use of white phosphorous weapons during military operations. In May 2011, jointly with over 100 other petitioners, the organisation submitted a petition concerning the IDF's use of white phosphorus munitions to the Israeli High Court of Justice. The petitioners asked the Court to instruct the IDF to introduce a clear and unequivocal prohibition on the use of white phosphorus munitions for any purpose in populated areas and other civilian locations and to forbid any use of white phosphorus

[78] See letters of B'Tselem to the Judge Advocate General of 12 May 2009 (n 75) and of 1 February 2010 (ibid).
[79] The expression 'yesh gvul' literally means 'there's a limit' and it clearly refers to the philosophy of the organization, according to which 'every citizen in a democratic state, when serving in the military, must decide what their red lines are, and which actions cross those lines' (About Yesh-Gvul <http://www.yesh-gvul.org.il/english> accessed 25 September 2018.

munitions in any situation where alternative weapons are available that pose a lesser danger to persons and are capable of achieving the same or a similar military advantage.[80]

It is significant that, for its factual part, the petition extensively relied on information collected by Amnesty International, Human Rights Watch and the Goldstone Mission. In particular, the petitioners attached relevant excerpts from the Goldstone Report, which included both the description of the individual incidents during which white phosphorus had allegedly been deployed and the section of the Report that is concerned with the implications of the use of white phosphorus.[81] Moreover, the petitioners backed their legal analysis with the Goldstone Report's assessment of the use of white phosphorus in light of the principles of precaution[82] and proportionality.[83] Following the submission of the petition, the State of Israel informed the Court that, despite the absence of any compelling legal reason to this effect, it had decided to suspend temporarily the use of white phosphorus with two exceptions that were presented to the justices in camera proceedings by dint of their confidentiality.[84]

On 9 July 2013, the Court dismissed the petition because it deemed that it lacked relevance in light of the Israeli Government's recent change in policy.[85] In particular, the Court argued that the new guidelines adopted by the IDF and communicated to the court in closed proceedings constituted a sufficient reassurance that the army would refrain from deploying white phosphorus munitions on densely populated areas in the future. As regards the two exceptions communicated by the State to the judges but unknown to the petitioners, the Court

[80] Petition submitted to the Supreme Court sitting as High Court of Justice (HCJ 11/) (in Hebrew) <https://www.btselem.or g/download/20110531_hcj_4146_11_white_phosphorus_petition.pdf> accessed 25 September 2018.
[81] Annexes 2 and 6 to the petition (obtained directly by Advocate Michael Sfard, counsel for the petitioners, email exchange 9 April 2018).
[82] Petition (n 80) paras 85 and 151.
[83] Ibid para 138.
[84] B'Tselem, 'Petition dismissed after military pledges to stop using white phosphorus, with two classified exceptions' (14 July 2013) <https://www.btselem.org/firearms/20130717_white_phosphorus_ruling> accessed 25 September 2018.
[85] Israel High Court of Justice, *Yoav Hass and others v Chief of Staff*, Case No 4146/11 (9 July 2013) (in Hebrew) <http://elyon1.court.gov.il/files/11/460/041/b10/11041460.b10.htm> accessed 25 September 2018.

argued that it was convinced that they were sufficiently narrow not to frustrate the general direction not to use white phosphorus munitions on built-up areas and that they would make such use exceptional.[86] Significantly, the Court acknowledged the unclear nature of the guidelines issued by the IDF, namely whether they constituted binding and final directives, and, in consequence, recommended that the IDF conduct an internal review of its policy with regards to the use of white phosphorus, the risks that it poses and the damages that it causes. It further suggested that such a review should take place promptly and that any changes should be communicated promptly to the petitioners without waiting that they be submitted for further judicial scrutiny in an emergency situation.[87]

Reactions to the court judgment were mixed. B'Tselem welcomed the decision of the IDF to terminate the use of white phosphorus in built-up areas but expressed concerns for the lack of binding and unequivocal directives to this effect.[88] In contrast, four Palestinian NGOs condemned the decision of the High Court by stating that, having dismissed the petition despite the existence of two exceptions to the new guidelines on the use of white phosphorus, the Court had provided 'legal cover' to the actions of the IDF, and they called upon the international community to pressure the State of Israel into implementing a total ban on white phosphorus weapons in populated areas.[89]

1.6 Policy Change in IDF Practice After the Goldstone Report

Following the conclusion of Operation Cast Lead and almost in parallel with the Secretary-General's Board of Inquiry, the Israeli Government launched its own internal investigation into the military operation, which resulted in the publication of a first report in July 2009, that is,

[86] Ibid paras 7-8.
[87] Ibid para 8.
[88] B'Tselem (n 84).
[89] Al Haq, Al-Mezan Center for Human Rights, Al Dameer Association for Human Rights, Palestinian Center for Human Rights, 'Human Rights Organizations Condemn Israeli Supreme Court's Reply Concerning Israeli Forces' Use of White Phosphorous in Built-up Areas' (23 July 2013) <https://pchrgaza.org/en/?p=1765> accessed 25 September 2018.

before the publication of the Goldstone Report.[90] The Israeli Report addressed two episodes where white phosphorus shells had allegedly been deployed: the incident on the UNRWA Field Office Compound on 15 January 2009[91] and the incident on the UNRWA Elementary School in the neighbourhood on Beit Lahia on 17 January 2009.[92] Both incidents were investigated also by the UN Board of Inquiry deployed by the Secretary General. Thus, it is reasonable to infer that Israeli authorities had specifically opened these two investigations following confidential information exchange and coordination with the Board of Inquiry. However, neither the summary of the report of the UN Board of Inquiry nor the Israeli Report made any reference to the communication that had taken place, while the hostilities around the UNRWA Field Office Compound were still ongoing, between the UN personnel and their counterparts in the IDF, in contrast to, for example, the report of Human Rights Watch.[93] The Goldstone Report discussed at length the communication exchange between the Israeli army and the UNRWA personnel with a view to uncovering what the IDF knew at the time of the strikes on the UNRWA compound.[94]

As a result of the publication of the Goldstone Report, the Israeli authorities broadened the scope of their internal investigation by including, in their Update Report, a section on the incidents reported by the Goldstone Mission.[95] In this first Update Report, the Israeli authorities communicated the results of their investigations with regards to *inter alia* the incident of the UNRWA Compound. Specifically, the Report states that the IDF had concluded that there was no basis to open a criminal investigation into the incident and that, instead, two officers had been disciplined 'for exceeding their authority in a manner that jeopardized the lives of

[90] *Factual and Legal Aspects* … (n 63).
[91] Ibid paras 341-347.
[92] Ibid paras 359-364.
[93] *Rain of Fire* … (n 49) 45.
[94] See supra at p 261.
[95] *An update* (January 2010) (n 76).

others'.[96] With regards to allegations of misuse of white phosphorus munitions in general, the Report states that the Military Advocate General (MAG) had concluded that exploding munitions had been used consistently with Israel's international law obligations and that smoke projectiles were not prohibited under international law because they could not be classified as incendiary weapons for they were not designed for such purpose.[97]

In July 2010, the State of Israel published a second Update Report,[98] whereby it confirmed the results of the investigation into the shelling of the UNRWA compound and, at the same time, acknowledged that

> the actual damage to the compound as a result of the smoke-screening shells was more extensive than the IDF had anticipated. Following reports of the damage, the IDF immediately imposed revised restrictions on the use of smoke-screening munitions containing white phosphorous near sensitive sites (including the requirement of a several hundred meters buffer zone). These restrictions were in place through the remainder of the Gaza Operation.
>
> ….
>
> 97. The use of smoke-screening munitions containing phosphorus during the Gaza Operation was also addressed in a special command investigation dedicated to the issue. This investigation determined that the policy of using such munitions was consistent with Israel's obligations under the Law of Armed Conflict. Nonetheless, following that investigation, the Chief of the General Staff ordered the implementation of the lessons learned from the investigation, particularly with regard to the use of such munitions near populated areas and sensitive installations. As a consequence, the IDF is in the process of establishing permanent restrictions on the use of munitions containing white phosphorus in urban areas.[99]

The main development as compared to the January update consisted in the consideration that the IDF afforded to the possibility of permanently restricting the use of white phosphorus munitions by reason of the extensive damage that they caused on civilians and civilian infrastructures. In the absence of alternative explanations, it may well be that the decision to implement a permanent moratorium on the use of white phosphorus munitions had been

[96] Ibid para 108.
[97] Ibid paras 117-120.
[98] The State of Israel, *Gaza Operation Investigations: An Update* (July 2010).
[99] Ibid paras 96-97.

triggered by the resonance of the Goldstone Report with international and domestic public and expert opinion. While the Israeli investigation did not explicitly mention the other incidents documented by the Goldstone Report,[100] it must be stressed that the shelling of the UNRWA compound was arguably the best documented white phosphorus-related incident in the Report, and one in which the IDF recklessness had been amply proved by the Mission. Indeed, given the level of details with which the Mission was able to show that the IDF had been informed about the landing of white phosphorus wedges within the UN compound and carried on with the shelling nonetheless, it would have been difficult for the IDF to exculpate themselves. Hence, they may have sought to remedy their wrongdoings by implementing the Goldstone Mission's recommendation that a moratorium be put in place on the use of such munitions.

Since the conclusion of Operation Cast Lead, the IDF has ceased all uses of white phosphorus munitions, as several observers have confirmed.[101]

1.7 Analysis

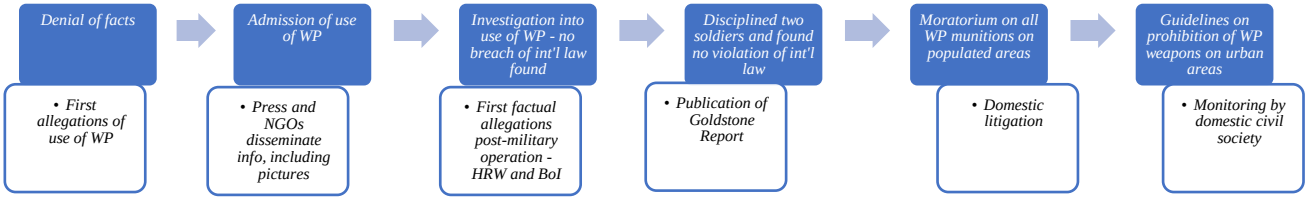
In conclusion, it is clear that the Israeli policy with regards to the use of white phosphorus munitions has changed significantly as a result of the combined efforts of several actors. Quite obviously, the first responders to allegations of misuse of white phosphorus have been the press and international and domestic NGOs operating on the ground. Only at a later stage, when the IDF had already started its internal investigations, did the UN report on the incidents, initially,

[100] Although a later UN follow-up report stated that an internal investigation had taken place on the shelling of Abu Halima family house and that 'an apparently extensive investigation into allegations that earlier on the same day the family home had been hit by a white phosphorous shell, killing five and injuring four – which included interviews with family members present at the time of the alleged shelling, consultations with technical experts, and a review of medical records – ended with the determination that "it was unclear what ammunition had hit the house and who had launched it"' (HRC, Report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9 (5 May 2011) UN Doc A/HRC/16/24 para 25).

[101] Yonah Jeremy Bob, 'Sfard: IDF did not use white phosphorus during war following int'l pressure' (29 September 2014) *The Jerusalem Post* <https://www.jpost.com/Arab-Israeli-Conflict/NGO-IDF-did-not-use-white-phosphorous-in-Operati on-Protective-Edge-376545> accessed 26 September 2018; see also Idan Landau, 'Israel gives up white phosphorus, because 'it doesn't photograph well' (28 April 2013) *+972 Magazine* <https://972mag.com/israel-gives-up-white-phosphorus-because-it-doesnt-photograph-well/70063/> accessed 26 September 2018.

with a confidential inquiry procedure, the Secretary-General Board of Inquiry and, later, with a public inquiry, the Human Rights Council Fact-Finding Mission on the Gaza War. It is difficult to single out the discrete contribution of the Goldstone Mission to this change in policy, however, it appears that, despite the intense delegitimisation campaign the Mission and its Report were subjected to, it managed to "corner" Israel on the issue of white phosphorus munitions.

Figure 1 IDF Policy Change re the Use of White Phosphorus Munitions



As can be seen in Figure 1, concrete steps towards accountability for and prevention of white phosphorus-related incidents were taken only after the publication of the Goldstone Report. While the hostilities were still ongoing, and the first allegations of white phosphorus shelling had started to surface, the IDF attempted to deny the facts. Such denial ceased to be a viable option when photos of the shelling started to appear on international and domestic outlets and more precise allegations were being formulated by domestic and international NGOs, such as B'Tselem and Human Rights Watch. The Israeli Government had no option but to admit to the allegations, however, at this stage, it was able to justify the IDF's employment of white phosphorus exploding munitions by stating that such use was in compliance with international law. Moreover, it was also able to argue that white phosphorus-loaded smoke projectiles were used for merely camouflaging purposes. This was likely due to a still lacking factual account of the events. With the conclusion of the hostilities in the Gaza Strip, prominent human rights organisations, in particular Human Rights Watch and Amnesty International, began working towards gathering evidence related to the alleged incidents and produced the first legal analysis

of the established facts. At the same time, the UN Secretary-General deployed a Board of Inquiry to investigate incidents involving UN premises, which worked in a confidential manner by cooperating both with the UN offices on the ground and the Israeli Government. This forced the State of Israel into initiating domestic investigations into some of the incidents detailed by civil society organisations and focused on by the UN Board of Inquiry. However, such domestic investigations were still vaguely reported and generally reached the conclusion that the IDF had acted according to international law principles in deploying white phosphorus weapons. Yet, for the first time, the Government was forced to argue in light of specific international humanitarian law principles, including proportionality, distinction and precaution and to acknowledge that, at a certain point of the military operations, they had become aware of the collateral effects of certain white phosphorus munitions.

However, only the publication of the Goldstone Report, with its detailed reconstruction of the facts and, specifically, of the information available to the IDF at the time of the shelling on the UNRWA Field Office Compound, appears to have prompted the Israeli authorities to take more concrete measures to address the incidents, including the disciplining of two officers who had authorised the shelling of the Compound and, later on, the implementation of a moratorium on the use of all white phosphorus weapons. Most importantly, it is only after the publication of the Goldstone Report that the IDF had to admit that also the smoke projectiles had caused collateral damages that the IDF had allegedly not foreseen. Nonetheless, the Israeli Government never explicitly discussed the details of the communication exchange between the UN personnel and the IDF during the shelling of the UNRWA compound in the neighbourhood of Tel al-Hawa, but it decided to implement the main recommendation of the Goldstone Mission with regards to white phosphorus munitions likely in an attempt to quench the discussion. Domestic civil society organisations exploited the momentum created by the Goldstone Report – and, partially, its findings – to check on the IDF practices by asking the High Court of Justice

to ensure that the moratorium be permanent. While they were only able to receive a general reassurance to this effect, so far, the IDF has refrained from using white phosphorus in urban warfare.

The State of Israel has not yet signed Protocol III of the 1980 Convention on Certain Conventional Weapons nor has it implemented binding rules that prohibit the use of white phosphorus munitions. Nonetheless, throughout the military escalations that have succeeded Operation Cast Lead, the IDF has refrained from deploying white phosphorus weapons. This may not be an optimal result because any future illegal use of white phosphorus weapons will have to be demonstrated in light of the basic principles of international humanitarian law, rather than by simply showing that it contravenes a clear prohibition. However, almost ten years after Operation Cast Lead, the IDF has ceased *de facto* all use of white phosphorus weapons. The immense domestic and international pressure put on the Israeli Government during Operation Cast Lead and its aftermath is clearly responsible for such change in policy.

Against this backdrop, the specific causal contribution of the Goldstone Mission to this success cannot be underplayed. While the Mission may not have been entirely responsible for changing the Israeli Government's position, it certainly played a fundamental part in it. Its success must be attributed to a combination of availability of hard evidence of the facts and an effective deployment of persuasion techniques. The Goldstone Report presented the facts of, in particular, the shelling of the UNRWA Field Office Compound in a compelling manner by focusing, in particular, on the information available to the IDF in relation to the duration of the shelling. The factual account was backed by evidence – such as the log of the communication between the UN and the IDF – that could hardly be rebutted. Furthermore, while hinting at criminal liability by discussing the *mens rea* of the officers responsible for the incident, the Mission refrained from framing its findings in international criminal law language. Whether consciously or not, in this way, the Mission was able to prevent any methodological criticism

directed specifically at this part of the Report. Instead, it opted for concluding that the strikes had likely been in breach of customary international humanitarian law, thus signalling its intention to enter into a constructive dialogue with qualified military and legal personnel while, at the same time, avoiding stigmatising the IDF with morally and politically charged language. Its recommendation that the IDF imposed a moratorium on white phosphorus weapons provided an escape route for the Israeli Government, had it proved willing to tackle these specific allegations as it later did. Hence, the Mission was able to provide an authoritative account and analysis of the facts that added up to the existing non-governmental investigations of the events, to build momentum for civil society organisations to join forces in pressing the Government on this specific issue and to "corner" the Government on the facts of the case forcing it to admit to and act on them.

Was the Goldstone Mission effective in the way it handled allegations of misuse of white phosphorus? Given the likelihood that the IDF's choice to implement a permanent moratorium on the use of white phosphorus weapons on densely populated areas is attributable to the findings and recommendations of the Goldstone Mission, the answer must be positive. As I have shown, many other factors contributed to this shift in policy, but the decisive contribution of the Goldstone Mission should be found in its ability to authoritatively and effectively corroborating claims that, up to the publication of its Report, had gone somewhat unnoticed. This also demonstrates the importance of an accurate and sound reconstruction of the facts on the ground. One thing that emerges clearly from this Section is the fact that it was not the legal analysis of the facts, but rather the compelling evidentiary record in light of the relevant legal principles that persuaded, or forced, Israel to take concrete steps to address the issue of the use of white phosphorous on densely populated areas.

2. Domestic Investigations into Allegations of International Human Rights and Humanitarian Law Violation: An Example of Incomplete Internalisation

The Israeli system of investigations into allegations of international human rights and humanitarian law has repeatedly come under the scrutiny of international commissions of inquiry with the purpose of showing the inadequacy of the domestic machinery for accountability. Such finding would be used to, on the one hand, urge the Government to take steps to ensure compliance with the internationally recognised principles governing such investigations and, on the other hand, strengthen the argument for foreign judicial intervention, be it by the International Criminal Court or by third states through the principle of universal jurisdiction.

However, because common wisdom suggests that justice is better served at the domestic level and states tend to be jealous of their sovereignty especially in matters related to the investigation and prosecution of their subjects,[102] it is not surprising that precedence is often given to ensuring that domestic systems comply with the relevant principles of international law.[103] For this reason, international inquiries' efforts to ensure that the Israeli domestic system of investigations comply with the relevant international law principles represent an interesting example of socialisation attempt.

Considerations about the Israeli military justice system appeared in the 2006 Beit Hanoun Inquiry Report, the 2009 Goldstone Report, the 2010 Flotilla Inquiry Report and the 2014 McGowan Davis Report to varying degrees. The Beit Hanoun inquiry highlighted in particular the lack of transparency and independence of the investigative process following the strikes of 8 November 2006 on Beit Hanoun.[104] Specifically, the Mission criticised the decision of the

[102] See, for example, the principle of complementarity under the Rome Statute of the International Criminal Court, which attributes primary responsibility for the prosecution of international crimes to the states and a subsidiary role only to the Court, in particular at Article 17.
[103] See, for example, *infra* the Goldstone Report and the subsequent, lengthy follow-up process aimed at monitoring the proceedings initiated at the domestic level.
[104] HRC, Report of the high-level fact-finding mission to Beit Hanoun established under Council resolution S-3/1 (1 September 2008) UN Doc A/HRC/9/26, paras 37, 51, 67-71.

Military Advocate General (MAG) not to take legal action against the military officials involved in the strike, which was communicated through the Israeli MoFA website.[105] The Mission noted that the MAG had failed to publish both the report of the committee established to investigate the incident and his own determinations. While this criticism was specifically referred to the events investigated by the Mission, the commissioners, who had been entrusted with recommending how to tackle the needs of the victims, noted that

> one of the most effective and immediate means of protecting Palestinian civilians against any further Israeli assaults is to insist on respect for the rule of law and accountability. We have seen that even the flawed Israeli investigation into the Beit Hanoun shelling resulted in a decision to discontinue use of artillery in Gaza, one of the main causes of civilian death and injury in the territory. The knowledge that their actions will be scrutinized by an independent authority would be a powerful deterrent to members of the Israeli military against taking risks with civilian lives.[106]

However, this Commission had a limited resonance in Israel. Before the Commission published its first report, the IDF launched an internal probe into the incident, which concluded that civilian buildings had been hit due to a 'rare and severe failure in the artillery fire control system operated at the time of the incident'.[107] As a result, the internal inquiry concluded that it was not possible to find 'a legal circumstantial connection, between the behaviors of the people involved in the incident and the result of the incident'. Thus, the MAG decided to exclude any legal action against the soldiers involved.

Israel's domestic inquiry into the shelling of Beit Hanoun epitomises several problems that subsequent international fact-finding missions highlighted: on the one hand, the unavailability of an investigation mechanism ensuring compliance with the basic guarantees of independence

[105] Israel Ministry of Foreign Affairs, 'Military Advocate General concludes investigation of Beit Hanoun shelling' (26 February 2008) <http://www.mfa.gov.il/MFA/AboutIsrael/State/Law/Pages/Military%20Advocate%20General%20concludes%20investigation%20of%20Beit%20Hanoun%20shelling%2026-Feb-2008.aspx> accessed 1 October 2018.
[106] Ibid para 80.
[107] Israel Ministry of Foreign Affairs, 'Military Advocate General concludes investigation of Beit Hanoun shelling' (26 February 2008) <http://www.mfa.gov.il/mfa/aboutisrael/state/law/pages/military%20advocate%20general%20concludes%20investigation%20of%20beit%20hanoun%20shelling%2026-feb-2008.aspx> accessed 10 October 2018.

and impartiality and, on the other hand, a devious application of the rules of international humanitarian law.

In this Section, I show the long-term effects of, in particular, the Goldstone Mission and the subsequent checks operated by other international inquiries on the Israeli system of investigations into allegations of human rights and humanitarian law violations.

2.1 An Overview of the Israeli Military Investigation System Before the Turkel Commission

In order to fully grasp the significance of the process of reform of the Israeli military justice system prompted by, in particular, the Goldstone Mission, this section outlines in broad terms the different articulations of the Israeli military investigation system as described by the Israeli Government in its reports following Operation Cast Lead.[108] In particular, I will refer to the first update of January 2010, which specifically describes the functioning of the investigation system. The purpose of this sub-section is not to provide a detailed account of the Israeli military justice system but rather to show to what extent the general principles that the State of Israel purports to abide by are realised *in concreto* through specific institutional and inter-institutional arrangements.

The Israeli military justice system is regulated by the Military Justice Law 1955[109] and it includes three main components: the Military Advocate General's Corps (MAG), the Military Police Criminal Investigation Division (MPCID) and the Military Courts. The MAG, appointed by the Minister of Defence upon recommendation of the Chief of the General Staff of the IDF, is often metaphorically said to 'wear two hats'.[110] In fact, the MAG is both responsible for providing the Chief of the General Staff and all IDF divisions with legal advice on military,

[108] *Factual and Legal…* (n 63) and *An Update* (January 2010) (n 76).
[109] Military Justice Law, 4715-1955, Laws of the State of Israel [LSI] 184 (1956).
[110] Michelle Lesh, 'The Israeli military justice system in the context of the Turkel Commission' in Alison Duxbury and Matthew Groves (eds), *Military Justice in the Modern Age* (CUP 2016) 256-258.

domestic and international law, and for enforcing the rule of law within the IDF.[111] Comprised of professionally trained lawyers, all MAG departments[112] are placed outside the military chain of command and they are only subject to the law, except in non-legal matters, in which cases they respond to the Chief of the General Staff.[113] The decisions and legal opinions of the MAG are binding on all IDF divisions.[114] Within the Military Prosecution department, the MAG established in 2007 the Office of the Military Advocate for Operational Affairs, specifically tasked to investigate and prosecute all alleged violations of the laws of armed conflict.[115] The MPCID, formed of trained investigators, is responsible for conducting investigations into alleged crimes committed by IDF soldiers.[116] They regularly consult with the prosecutors from the MAG Corps and a legal officer appointed by the MAG among MAG Corps' officials provide the MPCID with legal advice.[117] The MPCID reports to the prosecutors of the MAG who decide whether to bring a prosecution against alleged perpetrators.[118] The Military Courts, including the Military Court of Appeals, adjudicate charges against soldiers for military or other criminal offences.[119] Military judges are only subject to the law and are placed outside the chain of command.[120] Professional military judges are appointed by an independent commission composed by the Minister of Defence, the Minister of Justice, members of the Israeli Supreme Court and the Military Court of Appeals, and a representative of the Israeli Bar Association.[121]

[111] Military Justice Law 1955, section 178.
[112] In particular, the MAG is composed of five different departments: the Military Prosecution, the International Law Department, the Legal Advice and Legislative Affairs Department, the Department of the Legal Advisor to the Region of Judea and Samaria and the Military Defense (see IDF, 'About the MAG Corps' <https://www.idf.il/en/minisites/military-advocate-generals-corps/about-the-mag-corps/> accessed 21 October 2018).
[113] IDF Supreme Command Order 2.0613(9)(A).
[114] Israeli High Court of Justice, *Avivit Atiyah v Attorney General* (29 July 1997) HCJ 4723/96, para 11.
[115] *An Update* (January 2010) para 20.
[116] Ibid para 21.
[117] Ibid para 24.
[118] Ibid para 25.
[119] Ibid para 26.
[120] Military Justice Law 1955, section 184.
[121] Ibid Section 187(a).

Civilian oversight over the military justice system is channelled through either the Attorney General of the State of Israel or the Supreme Court. The Attorney General can review any decision of the MAG not to initiate a criminal investigation or not to file an indictment, upon request of individual complainants or non-governmental organisations.[122] The Supreme Court can hear any appeal that concerns 'an important, difficult, or innovative legal question' from judgments of the Military Court of Appeals.[123] Moreover, sitting as the High Court of Justice, it can review decisions of the MAG or the Attorney General not to investigate or file an indictment concerning alleged wrongdoings of IDF soldiers.[124] Finally, the Supreme Court, sitting as the High Court of Justice, can also be petitioned by any interested party or person on a claim that an action is *ultra vires*, unlawful or substantially unreasonable.[125] The decisions of the Supreme Court are final and binding on all governmental agencies, including the IDF.[126]

The cornerstone of the Israeli military investigation system is the MAG who receives complaints from a variety of sources, including alleged victims or their relatives, commanders or soldiers who witnessed the incident, NGOs or news reports, letters from international organisations, journalists or embassies, and any Israeli law enforcement agency.[127] Following the receipt of the complaint, the MAG can order the opening of either a command investigation or, if a criminal conduct has been alleged, a criminal investigation.[128] For complaints concerning alleged violations of the laws of armed conflict that might imply the criminal liability of the alleged wrongdoers, the MAG normally assesses whether the details of the incident signal a reasonable suspicion that the alleged perpetrator had the requisite *mens rea*, that is whether the incident does indeed seem to imply the criminal liability of the individual.[129] This can be done

[122] *An Update* (January 2010) para 31.
[123] Military Justice Law 1955, section 440I(a) and (b).
[124] *An Update* (January 2010) para 34.
[125] Ibid para 35.
[126] Ibid.
[127] Relevant information can also be received by other actors belonging to the military justice system, including for example the MPCID. See ibid paras 46-49.
[128] Ibid para 50.
[129] Ibid para 51.

either by a direct assessment of the evidence available or on the basis of the results of command investigations.[130] Command investigations, also known as operational debriefings, are inquiries 'held in the army, in accordance with IDF orders, regarding an event which occurred during training or operational activity, or in relation to them'.[131] They are routinely employed by the IDF to reduce future operational errors. In addition, command investigations can be ordered by the MAG.[132] The records of command investigations must be transmitted to the commander who commissioned the investigation and to the MAG upon request or, in certain serious cases, automatically.[133] This allows the MAG to decide whether to order a criminal investigation into the incident or simply take further disciplinary action or close the filing. The Military Prosecution, within the MAG Corps, refers automatically any allegation of criminal conduct to the MPCID for direct criminal investigation.[134] The Military Prosecution assesses whether the complaint received deserves a criminal investigation based on the evidence available or on the results of a command investigation. The MPCID notifies the complainant of their decision to open or not a criminal investigation and the reasons thereof.[135] At the end of a criminal investigation, the Military Prosecution reviews the evidence gathered and decides whether to file an indictment. Such decision is subject to the review of the Attorney General and the Supreme Court.[136]

2.2 The Goldstone Inquiry

It was only after the publication of the Goldstone Report and the establishment of its follow-up mechanisms that the Israeli Government started to seriously consider reviewing its domestic

[130] Ibid para 52.
[131] Military Justice Law 1955, section 539A(A).
[132] *An Update* (January 2010) para 55.
[133] Ibid para 56.
[134] Ibid para 63.
[135] Ibid para 65.
[136] Ibid para 67.

investigation system.[137] The Goldstone Report highlighted a number of serious shortcomings in the Israeli military justice system. After reviewing the international obligations of the State of Israel as regards investigations and prosecutions of international humanitarian law and human rights law violations,[138] the Mission distilled the fundamental principles that should guide such investigations: independence, impartiality, effectiveness and promptness.[139] Significantly, the Mission cited the Israeli Government's domestic commitment to the international duty to independently investigate allegations of international human rights and humanitarian law violations.[140] It found that the Israeli military justice system in place at the time fell short of the requirements under international law in essentially seven regards:

- the 'dual hat' of the MAG is not a sufficient guarantee of independence and impartiality;
- the IDF command investigation procedures were deemed ineffective in that they were abused by some IDF commanders to shield their units and conceal the truth;

[137] The Public Commission to Examine the Maritime Incident of 31 May 2010, The Turkel Commission, 'Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law' (February 2013) paras 3-5; Lesh, (n 110) 238.

[138] In particular, the Mission held that 'Both international humanitarian law and international human rights law establish a clear obligation for States to investigate and, if appropriate, prosecute allegations of serious violations by military personnel whether during military operations or not. This rule finds expression in articles 49 of the First Geneva Convention, article 50 of the Second Geneva Convention, article 129 of the Third Geneva Convention and article 146 of the Fourth Geneva Convention; in articles 2 and 6 of ICCPR and article 6 of the Convention against Torture. The Mission considers the obligations on States to investigate and, if appropriate, to prosecute war crimes and other crimes allegedly committed by their armed forces or in their territory as a norm of international customary law' (Goldstone Report, para 1804); the Mission further recalled the relevant international jurisprudence, including Human Rights Committee, General Comment 31 (2004), paras 8 and 15 (Goldstone Report, para 1806), Human Rights Committee, *Bautista de Arellana v Colombia*, Communication No 563/1993 (13 November 1995) UN Doc CCPR/C/55/D/563/1993, para 8.6 (Goldstone Report, para 1807), European Court of Human Rights, *Isayeva v Russia*, Application No 57950/00, Judgment of 24 February 2005, para 209 (Goldstone Report, para 1808) and Inter-American Court of Human Rights, *The Ituango Massacres v Colombia*, Judgment of 1 July 2006, Series C No 148 (Goldstone Report, para 1810).

[139] Goldstone Report, para 1814; the Mission also relied on the ECOSOC, *Principles on the Effective Prevention and Investigation of Extrajudicial, Arbitrary and Summary Executions*, Resolution 1989/65 (24 May 1989) UN Doc E/RES/1989/65, Annex, and the UNGA, *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Resolution 55/89 (22 February 2001) UN Doc A/RES/55/89, Annex.

[140] Israel High Court of Justice, *The Public Committee against Torture in Israel et al v Government of Israel et al*, Case No 769/02 (13 December 2006) (*Targeted killings* case) para 40 <http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf> accessed 1 October 2018; *Factual and Legal*… para 283.

- criminal investigations into such incidents ordered by the MAG fell short of the requirement of promptness in that they often had to start *de novo* due to the fact that the scene of the crime would often be spoiled during the operational debriefing stage;
- in the aftermath of Operation Cast Lead, in spite of the serious allegations brought by individuals or organisations, only 13 out of more than 100 military investigations had proceeded to the criminal investigation stage with a delay exceeding six months, which constituted an undue delay in the opinion of the Mission;
- despite an increase in the number of criminal investigations following the establishment of the Office of the Military Advocate for Operational Affairs, information about how many of those had resulted in an indictment or conviction and for what criminal offence were unclear, contradictory or misleading;
- criminal investigations were held to be conducted unprofessionally due to the alleged investigators' resistance to interviewing witnesses and victims of the incidents;
- the dependence of criminal investigations on the completion of operational debriefings was held to be in violation of the principle of independence.[141]

The Goldstone Mission formulated an ultimatum to Israel with regards to the Israeli military justice system by recommending the Security Council to

> require the Government of Israel, under Article 40 of the Charter of the United Nations:
>
> (i) To take all appropriate steps, within a period of three months, to launch appropriate investigations that are independent and in conformity with international standards, into the serious violations of international humanitarian and international human rights law reported by the Mission and any other serious allegations that might come to its attention;
>
> (ii) To inform the Security Council, within a further period of three months, of actions taken, or in process of being taken, by the Government of Israel to inquire into, investigate and prosecute such serious violations.[142]

[141] Goldstone Report, paras 1793 and 1815-1832.
[142] Ibid para 1969(a).

The Mission further suggested that, because both *de jure* and *de facto* elements proved the unwillingness of the State of Israel to carry out genuine investigations into the incidents occurred in the course of Operation Cast Lead, the Prosecutor of the International Criminal Court, who had received from the Government of Palestine a declaration accepting the jurisdiction of the Court, should consider opening an investigation into the situation in Palestine.[143] Clearly, the Mission used its technical assessment of the Israeli military justice system to dialectically intercept, specifically, the UN Security Council and the Prosecutor of the International Criminal Court under the complementarity principle. In the language of coercion theories, this amounted to a threat of material sanction. A failure by the Israeli Government to investigate the alleged wrongdoings within the timeframe provided would have potentially resulted in its own officials being investigated by the International Criminal Court. At the same time, though, the Mission employed persuasion techniques including the reference to the domestic commitment to investigate independently human rights and humanitarian law violations as underscored by the Israeli High Court of Justice in the *Public Committee against Torture* case. Hence, the Mission sought, on the one hand, to exploit international accountability mechanisms to prompt domestic investigations and prosecutions into the specific events of Operation Cast Lead and, on the other hand, to leverage domestic perceptions of conformity with international standards to trigger a process of revision of the military justice system.

However, once the Goldstone Report was handed over to the Human Rights Council, it fell prey of political scheming. In particular, the credibility of the threat of external judicial scrutiny was weakened by the Palestinian Authority's sustained efforts to delay a vote of the Human Rights Council to endorse the Report. A series of cables made public as part of the *Al Jazeera*-led *Palestine Papers* project showed that Palestinian Authority diplomats had met with their Israeli and US counterparts to discuss the Goldstone Report and its follow-up. It appears that

[143] Ibid paras 1832-1835.

the Palestinian Authority agreed to delaying such vote at the Human Rights Council in order to allow Israel and Hamas to conduct their domestic investigations. While the official justification for this move provided by the Palestinian establishment was that they wanted to avoid jeopardising peace talks with the Hamas Government in Gaza, which would have allegedly been spoiled by an investigation into the conducts of Hamas militias, the cables tell a different story.[144] It seems that the Palestinian Authority initially yielded to US diplomatic pressures in exchange for the promise that the US would back renewed negotiations between Israel and the Palestinian Government.[145] Nonetheless, after Palestinian diplomats backtracked by requesting that the Council held a special session, the Report was eventually endorsed on 15 October 2009.[146] This U-turn by the Palestinian Government was likely triggered by the backlash caused by their agreement to delay a vote at the Human Rights Council, and it was accompanied by renewed Palestinian efforts to seek the support of the European Union and other states.[147] A few weeks later, the General Assembly too endorsed the Report and urged both the Palestinian and Israeli Governments to conduct credible investigations within three months.[148] On 26 February 2010, the General Assembly reviewed the status of the domestic investigations in Israel and Palestine, and it decided to give the parties five additional months to comply with the recommendations of the Goldstone Report.[149] At this point, despite the 15 October vote at the General Assembly, it appears that the Palestinian Authority was still willing to trade their

[144] Jared Malsin, 'Whither Goldstone? Did the PA kill the UN's Gaza report?' (27 October 2010) *Foreign Policy* <https://foreignpolicy.com/2010/10/27/whither-goldstone-did-the-pa-kill-the-uns-gaza-report/> accessed 1 October 2018.
[145] Meeting Minutes: Saeb Erekat and George Mitchell (24 September 2009) *The Palestine Papers* <http://transparency.aljazeera.net/en/projects/thepalestinepapers/2012182110131633.html> accessed 6 October 2018; Meeting Minutes: Saeb Erekat and George Mitchell (2 October 2009) *The Palestine Papers* <http://transparency.aljazeera.net/en/projects/thepalestinepapers/20121821919875390.html> accessed 6 October 2018.
[146] UNHRC, The human rights situation in the Occupied Palestinian Territory, including East Jerusalem, Res No S-12/1 (21 October 2009) UN Doc A/HRC/RES/S-12/1.
[147] Meeting Minutes: Marc Otte and Saeb Erekat (12 October 2009) *The Palestine Papers* <http://transparency.aljazeera.net/en/projects/thepalestinepapers/20121821102429664 5.html> accessed 6 October 2018.
[148] UNGA, Follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict, Res No 64/10 (1 December 2009) UN Doc A/RES/64/10.
[149] UNGA, Second follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict, Res No 64/254 (25 March 2010) UN Doc A/RES/64/254.

support for the Goldstone Mission in exchange for a US commitment to impulse renewed peace talks with Israel on condition that the Israeli Government would grant a settlement freeze.[150] Indeed, the matter was not raised again before the General Assembly.

The Israeli Government's Initial Response

The Israeli Government had launched domestic investigations into several incidents occurred in the course of Operation Cast Lead already before the publication of the Goldstone Inquiry. Details about such investigations were made public with periodic reports published by the Israeli Government over the course of one year.[151] Significantly, the second of these reports, published in January 2010, extensively referenced the Goldstone Report. The January 2010 Report addressed specifically the Israeli investigation system by outlining the layers of review provided in Israeli law to ensure the impartiality and independence of such investigations. Moreover, the Report includes an overview of the systems of investigation into violations of the laws of armed conflict adopted by the United Kingdom, the United States, Australia and Canada to demonstrate their similarities with that provided under Israeli law. From an argumentative viewpoint, it is worth noting that the Report emphasises the lack of specific guidance as to the 'precise manner or pace at which a state should investigate alleged violations of the Law of Armed Conflict' and the broad discretion enjoyed by states in this regard.[152] The Report also noted that 'the investigative systems in Israel and other democratic states (in particular, those based on the Common Law tradition) appear to have several similarities' and that 'when investigating high profile or other alleged incidents of soldier misconduct, these countries, like Israel, have sometimes encountered criticism concerning the pace at which their

[150] Meeting Minutes: Saeb Erekat - George Mitchell and Saeb Erekat - Hillary Clinton (20 October 2009) *The Palestine Papers* <http://transparency.aljazeera.net/en/projects/thepalestinepapers/201218211139656276.html> accessed 6 October 2018.
[151] *Factual and Legal*… (n 63); *An Update* (January 2010) (n 76); The State of Israel, *Gaza Operation Investigations: Second Update* (July 2010) (hereinafter 'Second Update (July 2010)).
[152] *An Update* (January 2010) (ibid) para 72.

investigations or prosecutions have proceeded'.[153] Clearly, by emphasising the lacking framework offered by international law and the similarities with Common Law countries, the Israeli Government was leveraging its identity as a *democratic* state and affinity with established democracies to underline the genuineness of its investigation system.

The Report also sought to specifically rectify some misrepresentations included in the Goldstone Report. In the Executive Summary of the January 2010 Report, for example, footnote 2 states explicitly that

> Numerous assertions made by the Human Rights Council's Report of the U.N. Fact-Finding Mission on the Gaza Conflict – for example, that criminal investigations must await the completion of a military command investigation or that all command investigators are within the direct chain of command – are incorrect.[154]

While it did not purport to be a direct response to the Goldstone Report, the January 2010 Report clarified these *de jure* aspects of the Israeli investigation system that had been allegedly misunderstood by the Goldstone Mission in order to further corroborate its independence and impartiality.

Finally, the January 2010 Report provided an update on the actual investigations that had been initiated by the State of Israel. In particular, the Report claimed that, even before the publication of the Goldstone Report, of the 34 incidents detailed by the Goldstone Mission, 22 were already being investigated, while the remaining 12 had been referred to the MAG after the publication of the Goldstone Report.[155] Furthermore, the January 2010 Report reveals that, following the publication of the Goldstone Report, the MAG recommended the Chief of the General Staff to open a special command investigation to specifically address three incidents investigated by the Goldstone Mission.[156]

[153] Ibid paras 73-74.
[154] Ibid para 7, at footnote 2.
[155] Ibid para 11.
[156] Ibid paras 124-127.

The Follow-up Process to the Goldstone Inquiry

On 25 March 2010, the Human Rights Council, acting on the recommendation of the General Assembly, established a 'committee of independent experts …. to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, …. including the independence, effectiveness, genuineness of these investigations and their conformity with international standards'.[157] During the Fifteenth Session of the Human Rights Council, the Committee presented its first report.[158] While acknowledging that some progresses had been made by the Israeli Government,[159] the Committee opined that the Israeli investigation system was not entirely consistent with the international standards of promptness, independence and impartiality.[160] Moreover, it underlined its inability to assess the effectiveness of the domestic proceedings due to Israel's lack of cooperation but pointed to some factors, including the involvement of Palestinian victims and witnesses and the statistical data about the number of investigations initiated and those concluded with a conviction, which were symptomatic of ineffectiveness.[161] Of particular significance are the Committee's remarks with regards to the double role of the MAG as both legal advisor of the IDF and authority responsible for the prosecution of all alleged misconducts perpetrated by military personnel. The Committee noted that the Goldstone Mission's conclusion that those who designed, planned, ordered and oversaw Operation Cast Lead were to be considered complicit created a conflict of interest that objectively affected the ability of the MAG to act impartially.[162] Moreover, the Committee noted that the Israeli justice system

[157] UNHRC, Follow-up to the report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict, Res No 13/9 (14 April 2010) UN Doc A/HRC/RES/13/9.
[158] UNHRC, Report of the Committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards (23 September 2010) UN Doc A/HRC/15/50.
[159] Ibid para 42.
[160] Ibid paras 51-56.
[161] Ibid paras 44-50 and 57-64.
[162] Ibid para 91.

did not ensure the full participation of victims in the proceedings, which affected the thoroughness and effectiveness of the investigations.[163] Finally, it underlined that no proceedings had been initiated against the designer of Operation Cast Lead.[164]

The Human Rights Council renewed the mandate of the Committee of experts on 29 September 2010 with Resolution 15/6.[165] A second report was presented during the Sixteenth Session of the Council.[166] The Committee registered an overall increase in the number of command investigations initiated by the IDF but noted that, considering the gravity of the allegations contained in the in Goldstone Report and other sources, it was concerning that only few of these investigations had resulted in criminal cases.[167] Moreover, the Committee reiterated its concern over the double role of the MAG and, for example, reported that the decision of the MAG to open a criminal investigation into some events documented by the Goldstone Report[168] had been opposed by the Head of the IDF Southern Command.[169] It further reasserted that Israeli investigations likely fell short of the requirements of promptness and transparency.

2.3 Bottom-Up Pressures: Civil Society

Calls for a review of the Israeli investigation system pre-dating the publication of the Goldstone Report were not limited to the Beit Hanoun Inquiry but also came from civil society organisations. In one of its most influential publications relevant for the Israeli-Palestinian context, later cited by the Goldstone Mission itself, Human Rights Watch analysed the IDF's failure to investigate its own wrongdoings.[170] Significantly, the Human Rights Watch Report

[163] Ibid paras 92-93.
[164] Ibid para 95.
[165] UNHRC, Follow-up to the report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9, Res No 16/6 (6 October 2010) A/HRC/RES/15/6.
[166] UNHRC, Report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9 (5 May 2011) UN Doc A/HRC/16/24.
[167] Ibid paras 24-29.
[168] The events investigated concerned the killings of Ateya and Ahmad al-Samouni, the attack on the Wa'el al-Samouni house and the shooting of Iyad Samouni (Godstone Report, paras 706-735).
[169] Report of the Committee of independent experts (2011) para 27, in particular at footnote 8, and paras 40-41.
[170] Human Rights Watch, *Promoting Impunity: The Israeli Military's Failure to Investigate Wrongdoing* (June 2005).

attempted to define a set of general, internationally recognised, principles that should inform investigative practices in every country. It stated that 'if investigations are to promote accountability, they must meet international standards of thoroughness, timeliness, and impartiality'.[171] Having surveyed the case law of several human rights bodies and courts, and having emphasised the importance of the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, the Report listed a number of best practices – mostly drawn from the UN Principles – that would make for an effective system of investigations. From the list and the importance attributed to it by the Report, it can be inferred that Human Rights Watch regarded the principles of independence and publicity as important as the three principles mentioned above.

The scale of destruction ensued to Operation Cast Lead in the Gaza Strip emerged soon after Israel and Hamas agreed to a ceasefire and so did public calls for accountability.[172] In February 2009, the Israeli NGO, B'Tselem, called for 'a comprehensive investigation that examine[d] the information that was available to the military and its modes of operation'. It further specified that such an investigation should 'be independent and effective, open to public review, and conducted within a reasonable time',[173] thus anticipating the criteria laid down in the Goldstone Report. It also provided a list of factual questions that, if answered genuinely, would have allowed to determine whether the actions of the IDF during Operation Cast Lead needed a closer scrutiny.

[171] Ibid 25.

[172] Among many others, the call for a public inquiry into the events in the Gaza Strip by military correspondent, Ron Ben-Yishai, 'Who Really Destroyed Gaza?' (20 January 2009) *Ynet* as reported in B'Tselem, 'Guidelines for Israel's Investigation into Operation Cast Lead' (February 2009) 23, where the author stated that 'among many sectors of Israeli society too, a fervent argument is developing on the question whether the killing and destruction in the Gaza Strip were proportionate and necessary. This will compel the government and the IDF to prove, with facts and figures, before the nations of the world, that the use of force was proportionate to the threat and to methods of warfare of Hamas, and was used, having no other option, after all other means had been exhausted to safeguard the civilians'.

[173] B'Tselem (ibid).

Previously, in January 2009, B'Tselem had joined seven other Israeli organisations in petitioning the Attorney General

> **to initiate an <u>independent and effective</u> investigation into cases in which there are suspected violations of humanitarian law by its officers and soldiers, for which they are criminally liable**. The obligation to conduct an investigation is drawn from international humanitarian law that obligates the investigation of claims concerning the execution of war crimes, international human rights law, and Israeli law.
>
> …. These investigations must also address the legality of the actual orders and directives given to forces in the field, both during their training and during the action itself. It is essential that neutral parties be appointed to this investigating body, including those whose expertise and independence is beyond doubt.
>
> …. the involvement of JAG personnel and the JAG himself during stages of decision-making does not allow for the JAG's appointment as an investigating figure. Appointment of the JAG would conflict with the need for independence and neutrality, criteria that a proper investigation must meet.[174]

The need for improving the independence and impartiality of the Israeli system of investigations, especially in light of the 'double hat' worn by the MAG, had already surfaced in the past. For example, the Winograd Commission had recommended that investigations into the Lebanon War should be 'conducted or completed under the supervision of and together with a body *external* to the systems regarding whose action the complaint is made'.[175] Reports published by organisations such as Human Rights Watch and B'Tselem itself had evidenced serious shortcomings into the way Israel would conduct such investigations.[176]

[174] Letter from the Association for Civil Rights in Israel and other organisations to Mr Meni Mazuz, Attorney General of the State of Israel (20 January 2009) paras 16-18 <https://law.acri.org.il/pdf/Gaza200109.pdf> accessed 18 October 2018 (emphasis in the original text); the Attorney General responded by dismissing, in particular, the argument that the 'double hat' worn by the Military Advocate General would hinder the independence and neutrality of the investigations (see Letter from the Attorney General of the State of Israel to Mr Limor Yehuda, Association for Civil Rights in Israel (24 February 2009) <https://law.acri.org.il/pdf/Gaza240209.pdf> accessed 18 October 2018).

[175] Report of the Winograd Commission (30 January 2008) Chapter 14 on 'The Conduct of Israel in Light of International Law' [unofficial translation] available on ICRC, *How Does Law Protect in War?*, 'Israel, Report of the Winograd Commission' <https://casebook.icrc.org/case-study/israel-report-winograd-commission> accessed 18 October 2018. The Winograd Commission was a Israeli-Government-appointed commission of inquiry to investigate the Lebanon Campaign of 2006 (see Jewish Virtual Library, 'Second Lebanon War: The Winograd Commission' <https://www.jewishvirtuallibra ry.org/the-winograd-commission> accessed 18 October 2018).

[176] Letter from the Association of Civil Rights in Israel…. (n 174).

In 2003, B'Tselem had filed a petition to the Israeli High Court of Justice requesting that the IDF clarified its 'duty …. to order a Military Police investigation in cases of the deaths of Palestinian civilians who are killed in the course of IDF operations in the Occupied Territories'.[177] Specifically, the petitioners challenged a policy, introduced by the MAG since the outbreak of the Second Intifada, not to open a Military Police Investigation into every civilian death caused by IDF soldiers, but only in cases where a suspicion emerged that the soldier had perpetrated a criminal conduct. While the case was mainly concerned with the different articulations of the duty to investigate civilian casualties caused by IDF soldiers, some guidance as to the characteristics of such investigations can be inferred from both the petition and the final judgment. The petitioners seemed to argue that an investigation should be timely, serious, effective and independent. However, these criteria were not listed systematically; nor did the petitioners clarify their content in detail. The Court dismissed the petition based on the fact that it held the 2011 MAG's decision to change its policy in point of investigations satisfactory.[178] In the judgment, the Court seemed to acknowledge two of the principles mentioned in the petitioners' filing: independence and timeliness. In particular, the Court acknowledged that investigating allegations of soldiers' misdeeds through operational debriefings could give rise to well-founded suspicions of bias of the sort raised by the petitioners.[179] This observation seems to refer implicitly to the principles of independence and impartiality and to the problems arising from situations in which investigations into the conducts of soldiers are entrusted to personnel belonging to the same military unit of the alleged wrongdoers. Moreover, the Court considered a reporting procedure enacted by the MAG in

[177] *B'Tselem and Association for Civil Rights in Israel v Military Advocate General*, HCJ 9594/03, Petition for Order Nisi <https://www.btselem.org/eng/legal_documents/hc9594_03_investigations_appeal.pdf> accessed 18 October 2018.
[178] *B'Tselem and Association for Civil Rights in Israel v Military Advocate General* HCJ 9594/03, Israel Supreme Court sitting as High Court of Justice, Judgment of 21 August 2011; on the change of IDF policy with regards to investigations into allegations of civilian deaths, see Yaël Ronen, 'Correspondents' Reports – Israel' (2011) 14 *YIHL* <http://www.asser. nl/media/1439/israel-yihl-14-2011.pdf> accessed 18 October 2018.
[179] Ibid para 12.

November 2005. According to such procedure, in all cases in which a Palestinian 'who was not involved in life-threatening hostilities' was killed or injured, a report of the incident would be submitted to the Chief of General Staff and the MAG within 48 hours, together with the details and circumstances of the incident and any relevant material. Additionally, the new procedure required that an operational inquiry be conducted in the incidents promptly, and that the ensuing report be filed to the Chief of Staff and the MAG within 21 days. This new procedure purported to allow the MAG to oversee the conduct of the inquiry and decide whether a Military Police Investigation should be opened, however, it did not provide for a specific timeframe within which the MAG should formulate its decision.[180] The Court held such lack of a timeframe necessary to allow a professional and thorough examination of the information available, while at the same time recognizing that the MAG should act within a reasonable time.[181] This pronouncement implicitly acknowledged the principles of effectiveness and timeliness but only tied them to the activities of the MAG.

2.4 Palestine at the International Criminal Court: An Unfaithful Commitment

On 21 January 2009, the Palestinian Minister of Justice, Ali Khashan, lodged a declaration with the ICC Registrar under Article 12(3) of the Rome Statute, thus accepting the jurisdiction of the Court since 1 July 2002.[182] Given its timing, it is obvious that the PA decided to lodge the declaration in response to the events in Gaza during Operation Cast Lead. However, this move may also have been the result of political calculations by the PA to reaffirm its leadership after it had simply witnessed the onslaught in Gaza, amid civil society-led protests in the West

[180] On the new procedure enacted by the MAG, see B'Tselem, *Void of Responsibility: Israel Military Policy Not to Investigate Killings of Palestinians by Soldiers* (October 2010) 16.
[181] *B'Tselem and Association for Civil Rights in Israel v Military Advocate General* (n 178) para 14.
[182] Palestinian National Authority, Ministry of Justice, Office of Minister, 'Declaration recognizing the Jurisdiction of the International Criminal Court' (21 January 2009) <https://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf> accessed 19 October 2018. Article 12(3) of the Rome Statute of the International Criminal Court provides that 'If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9'. It allows a State that is not a party to the Rome Statute to accept the jurisdiction of the Court at any time with retroactive effects.

Bank.[183] As pointed out previously, the Goldstone Mission followed up on Palestine's application when it recommended that the Prosecutor of the ICC decided on it as expeditiously as possible.[184] In this way, the Mission sought to mobilise the coercive apparatus of complementarity under the International Criminal Court system. This may be inferred from some of the remarks and conclusions included in the Goldstone Report. In particular, the Mission emphasised the importance of 'accountability for victims and' of 'the interests of peace and justice' and concluded that 'there are serious doubts about the willingness of Israel to carry out genuine investigations in an impartial, independent, prompt and effective way as required by international law'.[185] This was a clear reference to the admissibility criteria under Article 17 of the Rome Statute and, possibly, a "nudge" to consider fulfilled the 'interests of justice' requirement under Article 53(1)(c) of the Statute. If this strategy was bound to succeed, pending the PA's application, the Israeli Government should have been expected to take substantial steps to ensure that the misdeeds of the IDF would be genuinely investigated by its domestic justice system. Indeed, as I show below, the Israeli Government appointed the Turkel Commission to review its domestic system of investigations. While no mention of the declaration lodged by the PA with the ICC Registrar can be found in the Turkel Report, it is likely that the distant yet looming possibility that the Prosecutor would open a preliminary examination into the situation of Palestine and, in particular, Operation Cast Lead determined, at least in part, the choice of the Government to review its investigation practices.[186]

Eventually, the ICC Prosecutor decided that it could not accept the declaration lodged by the PA because it was not in the position to determine whether Palestine qualified as a state under Article 12(3) of the Rome Statute. While it left the door open to future scrutiny of the crimes

[183] Michael G Kearney, 'Why Statehood Now: A Reflection on the ICC's Impact on Palestine's Engagement with International Law' in Chantal Meloni and Gianni Tognoni (eds), *Is There a Court for Gaza? A Test Bench for International Justice* (Asser Press 2012) 401.
[184] Goldstone Report, para 1970.
[185] Ibid paras 1970 and 1961.
[186] Interview with unnamed former staff member of the Turkel Commission, 9 May 2018.

allegedly perpetrated on Palestinian soil, it unequivocally stated that it was for the competent UN bodies, including the Security Council and the General Assembly to determine whether Palestine could be considered a state.[187] Before the Prosecutor's decision, Michael Kearney, a qualified commentator of the accountability process ensued to the Goldstone Report, argued that there were only few legal obstacles to the Court accepting jurisdiction over the situation in Palestine, but that the 'lack of PA advocacy toward ensuring full acceptance of the declaration suggest[ed] that the legal question of the status of Palestine that the declaration ha[d] prompted jar[ed] with the politico-diplomatic approach to negotiations that the PA favour[ed], and [was] best left unanswered in the short to medium term'.[188] The ambiguity in approach of the PA is further compounded by the quid pro quo between the PA and the USA that followed the publication of the Goldstone Report, which eventually derailed due to civil society-led protests against the Palestinian establishment.[189] It seems clear that the PA was not fully committed to pursuing a legal remedy to the damage caused by the IDF during Operation Cast Lead. In turn, if confirmed by a dismissal of the PA's declaration, this lack of commitment would have reflected on the credibility of the threat formulated in the Goldstone Report, thus greatly diminishing the coerciveness of a prospective complementarity exercise under the Rome Statute. Indeed, Kearney argued that the rejection of the declaration lodged by the PA would have undermined 'the role that the ICC can play in the promotion of peace and in ensuring accountability for the victims of war crimes everywhere'.[190] Whether the decision did undermine the ICC's role in the promotion of peace and in ensuring accountability *everywhere* is a likely unanswerable question given the juncture at which the Court has found itself for reasons not necessarily related to the Israeli-Palestinian conflict. But it certainly seems to have

[187] ICC, Office of the Prosecutor, *Situation in Palestine* (3 April 2012) <https://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf> accessed 19 October 2018.
[188] Kearney (n 183) 402.
[189] See supra; see also ibid 403-405.
[190] Kearney (ibid) 403.

signalled to the relevant Israeli authorities not only that the Court would not venture into the politically treacherous territory of the Israeli-Palestinian conflict, but also that the PA was not willing to go all the way down the road of legal remedies at the expenses of a negotiated solution to the conflict.[191]

2.5 The Turkel Commission: Formal Internalisation

While the PA's application to the ICC was pending and following the Human Rights Council's decision to establish a fact-finding mission to investigate the circumstances surrounding the incident of the Gaza Flotilla of 31 May 2010, Israel initiated an in-depth review process of its domestic investigation system. On 14 June 2010, the Israeli Government established a committee of inquiry to investigate the circumstances of the maritime incident that involved the Gaza Flotilla on 31 May 2010.[192] Paragraph 5 of the Resolution requested that the Commission assessed

> whether the mechanism for examining and investigating complaints and claims raised in relation to violations of the laws of armed conflict, as conducted in Israel generally, and as implemented with regard to the present incident, [the maritime incident of 31 May 2010], conforms with the obligations of the State of Israel under the rules of international law.

The Commission's Report makes it clear that the decision to broaden the scope of the inquiry to include a general assessment of the investigation mechanisms available in Israel was determined by the international criticism levelled at Israel with regards to such mechanisms. The Report refers in particular to the Goldstone Report and its follow-up committees established by the Human Rights Council.[193]

[191] Interview with unnamed former staff member of the Turkel Commission, 9 May 2018; interview with Nimrod Karin, former Legal Advisor with the International Law Department (MAG Corps), 27 February 2018.
[192] Government of Israel, Resolution No. 1796, Appointment of an Independent Public Commission, Chaired by Supreme Court Justice (ret.) Jacob Turkel, to Examine the Maritime Incident of 31 May 2010 (14 June 2010) (in Hebrew) <https://www.gov.il/he/Departments/policies/2010_des1796> accessed 11 October 2018.
[193] The Public Commission to Examine the Maritime Incident of 31 May 2010 (The Turkel Commission), Second Report, *Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law* (February 2013) paras 1-5.

The Turkel Report has been hailed as the first major study of the duty to investigate under international law and it has resonated both domestically and internationally.[194] The Commission conducted an in-depth assessment of Israel's system of investigations into alleged violations of human rights and international humanitarian law in light of four guiding principles under international law: independence, impartiality, effectiveness and thoroughness, and promptness.[195] The identification of these four core principles constitutes a departure from the case law of the Israeli High Court of Justice, which in 2006 had acknowledged the existence of a duty to investigate in the *Targeted killings* case but had failed to identify precise requirements as to the nature of that investigation beyond independence. It stated that

> after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent.[196]

While there is no explicit reference to the Goldstone Report itself, the analysis of the content of the four principles of independence, impartiality, effectiveness and thoroughness, and promptness often refers to the Tomuschat and McGowan Davis follow-up Reports, in particular when discussing the application of the general principles governing investigations to situations of armed conflicts. Most importantly, however, the Commission relied on the recognition of these requirements as universal principles and their subsequent applicability to situations of armed conflict, which had been carried out in a systematic way *for the first time* by the Goldstone Mission.[197] The importance of the Goldstone Report in this regard is confirmed in

[194] Lesh (n 110) 244.
[195] Turkel Commission, Second Report, para 63.
[196] *Targeted killings* case, para 40.
[197] The principles of impartiality, thoroughness, effectiveness and promptness had already been established in the UNGA, Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Violations of International Human Rights and Serious violations of International Humanitarian Law, Res No 60/147 (21 March 2006) UN Doc A/RES/60/147, for example, in Section II(3)(b), which states that 'The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to …. (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law'; they are also evoked in the ECOSOC, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Res No 1989/65 (24 May 1989) UN Doc

the relevant scholarship that followed the publication of the Report. For example, in a seminal and oft-quoted article on investigations of violations of international law in armed conflict, Michael Schmitt argued that 'the Goldstone Report identified four "universal principles" of investigations – independence, effectiveness, promptness, and impartiality'.[198] Similarly, Amichai Cohen and Yuval Shany argued that 'the principles governing the duty to investigate under [international human rights law] appear to have become generally accepted and the 2009 report of the UN Fact Finding Mission on the Gaza Conflict (the Goldstone Report) termed them ''universal principles'' of investigation'.[199]

Nonetheless, the Turkel Commission went a greater length than any of its predecessors in reconstructing the duty to investigate under international law. Not only did it examine the relevant sources under international human rights law, the laws of armed conflict, international criminal law and the law of state responsibility, but it also provided an in-depth analysis of the content of each requirement under international law. Moreover, the Commission cared to emphasise that it went beyond what the Goldstone Mission considered the minimum requirements for an effective investigation by considering the principle of transparency.[200] In this way, the Commission sought to "speak" directly to the Human Rights Council and deflect the criticisms levelled at Israel by the Goldstone Mission and its follow-up mechanisms by signalling the thoroughness of the inquiry. At the same time, it purported to dispel all doubts about the willingness and ability of the Israeli justice system to genuinely tackle allegations of international crimes and thus to prevent the International Criminal Court from stepping in.[201]

E/RES/1989/65, Annex, and in the UNGA, Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Res No 55/89 (4 December 2000) UN Doc A/RES/55/89, Annex. The merit of the Goldstone Report, as it is shown above, lies in its recognition of their universal status.

[198] Michael N Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 *NSJ* 31, 55.

[199] Amichai Cohen and Yuval Shany, 'Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations
of International Law Governing Armed Conflicts' (2011) 14 *YIHL* 37, 60.

[200] Turkel Commission, Second Report, para 91 at footnote 254.

[201] Interview with unnamed former staff member of the Turkel Commission, 9 May 2018.

In sum, the Turkel Commission concluded that

> the examination and investigation mechanisms in Israel for complaints and claims of violations of international humanitarian law and the methods they practice, generally comply with the obligations of the State of Israel under the rules of international law. However, the Commission is of the opinion that in several of the areas examined there are grounds for amending the examination and investigation mechanisms and that in several areas there are grounds for changing the accepted policy …. where the Commission saw a need for amendments or changes to the mechanisms and operating methods, it does not necessarily indicate essential flaws, but rather it is a blueprint for optimal improvement.[202]

Nonetheless, the Commission formulated 18 recommendations, some of which, relevant for this study, are listed below in short:

- Recommendation No 1: that the Knesset introduced international 'war crimes' legislation, including by adapting existing legislation to the principles enshrined in the Rome Statute of the International Criminal Court;
- Recommendation No 2: that the Knesset introduced command responsibility legislation;
- Recommendation No 3: that a reporting procedure introduced in 2005 be enacted in a Supreme Command Order and applied to all IDF forces;
- Recommendation No 4: that the MPCID's policy to initiate a criminal investigation when a reasonable suspicion that an offence has been committed arises be properly enacted in rules and guidelines;
- Recommendation No 5: that an independent fact-finding body be created within the IDF to replace all command investigations/operational debriefings to form the basis of the MAG's decision to open a criminal investigation;
- Recommendation No 6: that the MAG be required to decide whether to open an investigation within a fixed timeframe, without the need to consult the commander of the unit involved, and to provide reasons for their choice;

[202] Turkel Commission, Second Report, para 29.

- Recommendation No 7: that the MAG be appointed by the Minister of Defence, upon recommendation of a professional body presided over by the Attorney General, in order to reinforce the civilian accountability of the MAG, and that the MAG be appointed for a fixed, limited and non-renewable time limit;
- Recommendation No 8: that the role of the Chief Military Prosecutor, within the MAG, be strengthened in order to reinforce the separation between advisory and enforcement functions of the MAG Corps;
- Recommendation No 9: that a Department for Operational Matters be established within the MPCID, composed on Arabic-speakers and based in the sites where the incidents occurred;
- Recommendation No 10: that a clear time limit be established for investigations;
- Recommendation No 11: that appropriate documentation procedures be established for investigations into allegations of international humanitarian law violations and duties of information for criminal proceedings be extended to persons injured by law enforcement operations by the security forces if investigated by the MPCID;
- Recommendation No 12: that a unit specialised in international humanitarian law be established within the Ministry of Justice to strengthen the civilian oversight of the Attorney General over the MAG;
- Recommendation No 13: that a clear procedure be established to appeal the decisions of the MAG to the Attorney General.

As can be noted, many of the recommendations formulated by the Turkel Commission addressed crucial issues initially raised in the Goldstone Report, namely the independence and impartiality of the MAG Corps and the timeliness of investigation procedures. Two observations are in order. First, while the Turkel Commission claimed that the Israeli investigation system generally complied with the relevant norms under international law, some

of the changes suggested, if implemented, would have radically altered the investigation system. Probably one of the most obvious ones is the recommendation to establish a standing, independent and professional body within the IDF to conduct post-operation fact-finding assessment, which would replace the command investigation routinely carried out within the same unit investigated. Equally impactful would be the recommendations dedicated to strengthening the civilian oversight of the Attorney General over the MAG, which notably also include the establishment of a body, within the Ministry of Justice, with expertise in the specific field that, up to that point, had been the almost exclusive domain of the MAG Corps, international humanitarian law. Second, it should be emphasised that while the Turkel Commission dealt with structural issues in the investigation system, while also trying to propose solutions that would minimise the possibility of deviation in practice, it did not comprehensively address the practical misapplication of the principles governing sound investigations into violations of international humanitarian law raised by the Goldstone Report and civil society organisations.

The Follow-up to the Turkel Commission

Acting on Recommendation No 18 of the Turkel Commission, on 5 January 2014, the Israeli Government appointed a Team to oversee the implementation of the Second Turkel Report.[203] The Team met with all relevant agencies in Israel to ensure that the recommendations formulated by the Turkel Commission were implemented as far as possible. The Team released their Report in August 2015.[204] The Report details the steps taken by Israeli agencies to

[203] Resolution 1143 of the 33rd Government, 'Appointment of the Team for the Review and Implementation of the Second Report of the Public Commission for the Examination of the Maritime Incident of May 31st 2010 (Regarding Israel's Mechanisms for Examining and Investigating Complaints and Allegations Concerning Claims of Violations of the Laws of Armed Conflict under According to International Law)' (5 January 2014) (in Hebrew).
[204] Report of the Team for the Review and Implementation of the Second Report of the Public Commission for the Examination of the Maritime Incident of May 31st 2010 Regarding Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Law of Armed Conflict According to International Law (August 2015) (hereinafter, the 'Ciechanover Report' from the name of its chairman).

implement the recommendations of the Turkel Commission. However, the Report presents serious shortcomings.

The Team skated over the issues of, in particular, war crimes legislation and command responsibility. In particular, the Team sanctioned the minimalist approach to war crimes legislation adopted by the Israeli Government. In other words, it deemed broadly satisfactory the Government's position that international war crimes need not be incorporated into domestic law because the Israeli penal legislation already covers the offences provided for under international law, in particular, the Geneva Conventions and their Additional Protocols, and the Rome Statute of the International Criminal Court.[205] However, while some war crimes provided for under international law may be prosecuted under domestic criminal law in a way that reflects the main elements of the international criminal offence, the Israeli organisation Yesh Din showed that there remain significant gaps in the domestic legislation with regard to several offences provided for under international law.[206] Moreover, Yesh Din argued that the prosecution of conducts constituting war crimes under international law as ordinary offences under Israeli penal law would ignore their exceptional gravity for being perpetrated against especially protected persons or goods.[207] Instead, the Team focused on draft bills to introduce the criminal offence of torture and crimes against humanity.[208] Moreover, the Team dodged all together the issue of command responsibility leaving it to the relevant domestic authorities to decide how to adapt domestic legislation to the relevant international law provisions.[209] As noted by Yesh Din, besides raising serious doubts as to Israel's ability to successfully challenge a potential jurisdictional claim by the International Criminal Court under the complementarity

[205] Ibid para 20. However, it must be acknowledged that the Team also recommended that the Israeli Government continued to consider the need for legislative amendments to bring Israeli penal law in line with international war crimes law.
[206] Yesh Din, *Lacuna: War Crimes in Israeli Law and Court-Martial Rulings* (July 2013) 27-30 <http://files.yesh-din.org/userfiles/file/Reports-English/Yesh%20Din%20-%20Lacuna%20Web%20-%20English.pdf> accessed 24 October 2018.
[207] Ibid 22.
[208] Ciechanover Report, para 21.
[209] Ibid para 26.

test provided for in the Rome Statute, the approach of the Team to the two issues of war crimes legislation and command responsibility signals its unwillingness to contrast the most common type of wrongdoings perpetrated by IDF soldiers in the West Bank and Gaza.[210]

Moreover, while the Team noted the action taken by the several agencies it consulted with to start implementing the recommendations of the Turkel Commission, it failed to properly address the practical issues that such initiatives would entail and thus did not propose any substantive measure to tackle them. Nonetheless, the Report offers a window on the legislative or regulatory measures enacted by the relevant Israeli agencies to implement the recommendations formulated by the Turkel Commission. While an analysis of such measure goes beyond the purposes of this study, it is worth outlining some of the most notable improvements.

The Team welcomed the issuance of a standing order by the Operations Division in compliance with Recommendation No 3 of the Turkel Report, which 'determines the events to which the reporting requirement applies, the method of providing the report and the relevant timeframes …. [and] sets the outline for monitoring the status of the various reports and their handling'.[211] In particular, the Team praised the broadening of the IDF's duty to report in situations of routine, combat or emergency to arise from

i. An event where there is a reasonable suspicion of serious cases of violations of Israeli law or serious violations of the rules of international law, including deliberate targeting of civilians, of hors de combat and those with special protections; injury to a person on a sexual basis; deliberate targeting, causing

[210] Yesh Din, 'The Ciechanover Report – dodging the criminalization of war crimes and practical steps toward implementation', Position paper (1 October 2015) <http://files.yesh-din.org/userfiles/Ciechanover%20Eng.pdf> accessed 24 October 2018.
[211] Ciechanover Report, para 29.

irreversible damage to civilian property, not for operational purposes, including looting; and the use of weapons in serious violation of the rules of use.

ii. An event in which civilians were killed on a large scale; physical injury was caused to UN personnel or peacekeeping forces; physical injury was caused to media personnel; or injury to sensitive sites, including medical facilities, religious buildings and UN facilities, even if there is no suspicion of violation of the law in their respect.

iii. An event that the commander believes may have broad public implications.

iv. Any unusual incident that occurred during combat. Reporting on such an event will be carried out at the cessation of combat.[212]

Moreover, the Order imposes a duty to routinely report in cases of death of or serious injury to a person, inadvertent large-scale damage to property or inadvertent damage to properties of significant value, use of unreasonable force against a person during an arrest and complaints directly made to the IDF by civil organisations alleging prohibited activities perpetrated by the IDF.[213]

Such duty is to be complied with no later than 48 hours after the event reported according to the modalities described in the Order. The Order requires the MAG, to which the report is to be transmitted, to decide within one week whether this warrants a criminal investigation, a further operational assessment or no further action. While noting the importance to ensure that appropriate enforcement procedures be put in place to ensure that IDF commanders comply with the Order, the Team failed to identify avenues to this effect and deferred to the future determinations of the MAG.[214] Connected to this is the establishment of a General Staff Mechanism for Fact-Finding Assessments, subordinate to the Chief of the General Staff and

[212] Ibid para 30.
[213] Ibid.
[214] Ibid para 31.

mandated to assist the MAG in carrying out its factual assessments to determine whether reported incidents warrant a criminal investigation.[215] In this regard, the Team recommended that 'whenever an investigation of an event that raises suspicion of a violation of the rules of international humanitarian law is needed, the Head of the permanent mechanism will form, at the recommendation of the Military Advocate General and the order of the Chief of General Staff, an assessment team' to conduct an independent, effective, impartial, thorough and prompt assessment to secure factual information and evidence about such events.[216] The Team further recommended that the members of the assessment teams be properly briefed by the MAG about the information required and be requested to complete their assessment within 30 days, with the possibility of multiple extensions of 45 days maximum each authorised by the Chief of the General Staff. The MAG was recommended to decide whether to open a criminal investigation within 30 days from the receipt of the assessment.[217] The Team also recommended that, on overall, the MAG should take no longer than 14 weeks from the receipt of the complaint to make a decision as to whether to open a criminal investigation so as to comply with the principle of promptness in investigations.[218] However, it acknowledged that this timeframe should be flexible after combat situations, should the MAG receive an unusually large number of complaints.[219]

The Team showed substantial deference to the determinations of the MAG as regards its independence and impartiality. Following Recommendation No 7 of the Turkel Report, the Ministry of Justice published a new directive of the Attorney General to clarify the legal status of the MAG, but refrained from introducing fresh legislation to the same effect.[220] In order to

[215] Ibid para 49, see also IDF, 'Decisions of the IDF Military Advocate General regarding Exceptional Incidents that occurred during Operation 'Protective Edge' – Update No. 1 (Part 1)' <https://www.idf.il/en/minisites/wars-and-operations/mag-corps-press-release-initial-release-sept-2014/> accessed 24 October 2018.
[216] Ibid paras 50-51.
[217] Ibid para 53.
[218] Ibid paras 57-59.
[219] Ibid paras 60-61.
[220] Ibid paras 73-76; see also Legal Public Service General, 'The Military Advocate General', the Attorney General's Directive No 9.1002 (5760) (unofficial translation from the Hebrew).

further entrench the principle of impartiality in investigations, the MAG Corps communicated that they would amend the High Command Order by stipulating that

> The Chief Military Prosecutor is in charge of implementing the values of the rule of law, order and justice in the IDF and in the territories held by it through law enforcement with respect to those subject to military jurisdiction. The Chief Military Prosecutor is the commander of all military advocates and military prosecutors, and has overall responsibility for their professional work. In exercising his powers as enforcer of law, the Chief Military Prosecutor operates independently in accordance with the policy outlined by the Military Advocate General and his decisions.[221]

Further reforms were developed to change the mode of appointment, tenure and rank of the Chief Military Prosecutor.

Following up on Recommendation No 10 of the Turkel Commission, the Team saw it fit to further recommend that a timeframe of no longer than 18 months be established for an MPCID investigation to be completed and a decision whether to file an indictment be finally reached by a military prosecutor. According to the Team's directions, a criminal investigation should take no longer the nine months to be completed, while a prosecutor should reach a final determination as to whether to press charges within nine months from the receipt of the results of the criminal investigation. For complex cases – including incidents involving death or serious injury – the Team recommended that the prosecutor be allowed three additional months to reach a final determination, thereby bringing the maximum timeframe for an investigation to reach the indictment phase to one year and nine months.[222] The MAG Corps also decided to include in the Chief Military Prosecutor's Draft Guidelines a chapter detailing the office's duties of transparency and documentation of the case-files.[223] In addition, the MAG decided to periodically publish online updates about the office's decision with regards to individual cases.[224]

[221] High Command Order 2.0613 as reported in Ciechanover Report (ibid) para 86.
[222] Ciechanover Report (ibid) paras 95-98.
[223] Ibid paras 103-106.
[224] Decisions of the IDF Military Advocate General… (n 215).

2.6 Incomplete or Insincere Internalisation? The Gap Between the Law and the Facts on the Ground

While the Turkel Commission certainly represents an important acknowledgement of the need to reform the Israeli military investigation system, despite the apparently lenient judgment formulated by the Commission with regards to it, both civil society organisations and other international inquiries have documented a substantial gap between the letter of the law and the facts on the ground.

In this regard, the enduring oversight of civil society organisations has been of fundamental importance. B'Tselem, for example, one of the most prominent Israeli NGOs, in welcoming the findings of the Turkel Commission, reported that while the investigation system appears to be fully operational in that complaints are filed, investigations opened, and decisions reached, if one looks at the substance of the complaints, the process is clearly dysfunctional. As of May 2013, out of 130 complaints filed by B'Tselem with the military authorities, 44 – 38 of which occurred before December 2012 – were still awaiting a decision of the MAG whether to open an investigation; 26 complaints regarding incidents occurred before December 2012 had been investigated and were awaiting a decision of the MAG whether to file an indictment; 61 cases – 54 of which occurred before December 2012 – were still being investigated.[225] Of significance is also the low number of investigations that normally lead to an indictment. Yesh Din, another prominent Israeli NGO, reported that between 2011 and 2016, of the 948 MPCID investigation files opened into cases of soldiers' offences against Palestinians, only 3.4% had resulted in an indictment. 79% of the 78 complaints received by the MAG Corps during 2016 for which a decision was reached were closed without a criminal investigation. For complaints filed by

[225] B'Tselem, *Promoting Accountability: The Turkel Commission Report on Israel's Addressing Alleged Violations of International Humanitarian Law* (August 2013) 11 <https://www.btselem.org/download/position_paper_on_turkel_repor t_eng.pdf> accessed 25 October 2018.

Palestinians represented by Yesh Din between 2014 and 2017, the MAG Corps employed on average 25 weeks to reach a decision about whether to open a criminal investigation.[226]

The Committee of experts established by the Human Rights Council to monitor the implementation of the recommendations formulated by the Goldstone Mission reported that, as of May 2011, of the 36 incidents documented in the Goldstone Report, six, all of them concerning allegations of indiscriminate or deliberate killings, were being still investigated by the MPCID; 13, variously concerning allegations of indiscriminate or deliberate killings and attacks on governmental and economic infrastructures, were concluded at the stage of command investigations with a finding that no violation had occurred; 4, relating to allegations of indiscriminate or deliberate killings and use of human shields, were concluded at the stage of MPCID investigations with a finding that no violation had occurred; 3 had concluded with disciplinary action; the remaining allegations had either been discontinued for lack of evidence, concluded with an apology and, in one case, with compensation, or their status was unclear.[227] Given the seriousness of the allegations contained in the Report, it is striking that none of the cases had reached the indictment stage, despite the fact that over two years had passed from the conclusion of Operation Cast Lead.

While the Turkel Commission has tackled some of the pathologies documented by civil society organisations and international agencies by proposing principled solutions that would seemingly mitigate the shortcomings of the Israeli investigation system, both the Ciechanover Report and the statistics concerning investigations after the review process show that the implementation process did not live up to the expectations that the Turkel Commission had generated. In particular, one can see how the Israel's Implementation Team's deference to the

[226] Yesh Din, 'Law Enforcement on Israeli Soldiers Suspected of Harming Palestinians' Data Sheet (March 2018) <https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/March+2018+MPCID+datasheet/YeshDin+-+Data+3.18+-+E ng.pdf> accessed 25 October 2018.
[227] Report of the Committee of Experts… (5 May 2011) (n 165) Annex II.

measures taken or planned to be taken by the Israeli agencies involved in the review process, in particular the MAG, was largely oblivious of the civil society's pleas. The often-laudable recommendations to continue implementing the recommendations of the Turkel Commission are not complemented with advice as to the logistical arrangements that their implementation require with regards to, for example, funding, human resources and professional training.[228] More fundamentally, the outcome of the large majority of the complaints filed against Israeli soldiers does not even reach the indictment stage. For example, only in 2016, the MAG Corps received 302 complaints regarding alleged soldiers' offences against Palestinians. Only 5 – that is, 1.6% – of these complaints resulted in an indictment being filed.[229] This "state of the art" engender the perception that substantial steps are being taken, albeit slowly, to bring the Israeli investigation system in line with the international standards of independence, impartiality, effectiveness and promptness, when in reality most of such purported changes are merely cosmetic and not accompanied by an entire re-structuring of the domestic investigation system and by the establishment of effective civilian mechanisms for overseeing that justice be done and mitigate the flaw intrinsic to a system where the military still investigates itself. In other words, there seems to be the intent to create a veil of formal compliance with the law, which however masks a series of fundamental and, at the same time, more practical shortcomings with the effect of shielding IDF soldiers from real accountability.

[228] See, for example, Yesh Din, 'The Ciechanover Report…' (n 210), where the organisation lamented that 'The lack of reference to the practical aspects involved in implementing the Turkel recommendations raises concern that the various agencies involved will not be able to carry them through'. With regard to the specific recommendations contained in the Turkel Report, Yesh Din mentioned, for example, Recommendation No 10 relating to the establishment of a timeframe for the conduct of investigations. The Israeli organisation noted that 'while the Chief Military Prosecutor is preparing draft guidelines that would cap investigations at nine months, the Ciechanover Commission report does not address the critical question of whether this new timeframe can, in fact, be met with the number of Arabic speaking investigators currently serving in the Military Police Criminal Investigations Division, or whether more staff should be recruited and more investigators should be trained. The Commission also failed to address the length of time required to train investigators and the budgetary implications of these measures. Effective investigations within reasonable timeframe clearly require enough staff who are able to handle the workload. Investigations, which are currently inordinately protracted, sometimes taking years, cannot reasonably be expected to become more expeditious without the allocation of suitable resources'.

[229] Yesh Din, Data Sheet (March 2018) (n 226) 17-18.

2.7 Operation Protective Edge and the McGowan Davis Inquiry

Operation Protective Edge, in the summer of 2014, represented the first real test bench for measuring the progresses made by Israel with regards to its investigation system. The post-operational stage saw the implementation of one of the key recommendations of the Turkel Commission, that is, the creation of a General Staff Mechanism for Fact-Finding Assessments, as noted by the Ciechanover Implementation Team.[230] The Mechanism was initially headed by General Noam Tibon, who had not been involved in the military activities in the course of Operation Protective Edge. Fact-finding assessments into exceptional incidents occurred during the military operation were ordered by the MAG as early as September 2014, that is, immediately after the Operation, or presumably even while it was still ongoing.[231] In what constitutes one of the most visible improvements with regards to the commitment to transparency, the MAG decided to regularly publish updates about the investigations undertaken. Starting in September 2014, the MAG regularly published on the IDF website short updates about the complaints investigated and the status of the respective investigation processes.[232]

While the recommendations of the Turkel Commission concerning the independence of the MAG had not been implemented at the time of Operation Cast Lead, a degree of civilian oversight over the decisions of the MAG was exercised in alternative manners. After intense pressure by the Association for Civil Rights in Israel,[233] then Attorney General, Yehuda

[230] See supra p 315.
[231] IDF, 'Decisions of the IDF Military Advocate General regarding Exceptional Incidents that occurred during Operation 'Protective Edge' – Update No. 1 (Part 1) (10 September 2014) <https://www.idf.il/en/minisites/wars-and-operations/mag-corps-press-release-initial-release-sept-2014/> accessed 25 October 2018.
[232] The first update was published on 10 September 2014 (IDF, 'Decisions of the IDF Military Advocate General regarding Exceptional Incidents that occurred during Operation 'Protective Edge' – Update No. 1 (Part 1) (10 September 2014) <https://www.idf.il/en/minisites/wars-and-operations/mag-corps-press-release-initial-release-sept-2014/> accessed 25 October 2018) and the last, so far, on 15 August 2018 (IDF, 'Decisions of the IDF Military Advocate General Regarding Exceptional Incidents that Allegedly Occurred During Operation 'Protective Edge'-Update No. 6' (15 August 2018) <https://www.idf.il/en/minisites/wars-and-operations/mag-corps-press-release-update-6/> accessed 25 October 2018.
[233] Association for Civil Rights in Israel, 'Hannibal Protocol – Endangering the Lives of Soldiers and Civilians' (15 February 2015) <https://law.acri.org.il/en/2015/02/15/hannibal-protocol/> accessed 26 October 2018.

Winstein, acknowledged the existence of the so-called 'Hannibal Protocol'[234] and, while he claimed that such Protocol did not contravene international law, he ordered that an investigation into its deployment, especially during the military operations on infamous 'Black Friday', be conducted by the MAG, contrary to some declaration of then Defence Minister Moshe Yaalon.[235] Moreover, the State Comptroller[236] decided to investigate some aspects of the military and political decision-making process in the context of Operation Protective Edge.[237] Such improvements were also noted by Professor Amichai Cohen in his submission to the McGowan Davis Commission of Inquiry on behalf of the Israeli Democracy Institute.[238] Interestingly, Cohen concluded his submission by urging the McGowan Davis Commission to 'conduct itself with extreme care when intervening in the operation of the Israeli investigative mechanisms'. He further argued that

[234] The 'Hannibal Protocol' or 'Hannibal Directive' or 'Hannibal Procedure' is the coded name of a military order allegedly elaborated in 1986 after two IDF soldiers had been captured by Hezbollah militants in Southern Lebanon, and that allegedly requires the following: 'during an abduction, the major mission is to rescue our soldiers from the abductors even at the price of harming or wounding our soldiers. Light-arms fire is to be used in order to bring the abductors to the ground or to stop them. If the vehicle or the abductors do not stop, single-shot (sniper) fire should be aimed at them, deliberately, in order to hit the abductors, even if this means hitting our soldiers. In any event, everything will be done to stop the vehicle and not allow it to escape' (Sara Leibovich-Dar, 'The Hannibal Procedure' (21 May 2003) *Haaretz* <https://www.haaretz.com/1.5342898> accessed 26 October 2018). It is claimed that the directive has evolved over the years. For example, in the context of Operation Cast Lead, an infantry battalion commander stated that 'under no circumstances should a soldier be taken hostage. Our soldiers do their utmost to prevent this from happening - they [are ordered] to fire at a group of abductors even if that means their IDF comrade would be killed. And the soldiers understand this fully: They cannot become another Gilad Shalit' (Anshel Pfeffer, 'IDF Warns Soldiers of Kidnappings Ahead of Gilad Shalit's Release' (18 October 2011) *Haaretz* <https://www.haaretz.com/1.5200445> accessed 26 October 2018); the issuance of this directive in the context of Operation Protective Edge surfaced following the leak of some recordings that proved it (in Hebrew <https://www.haaretz.co.il/st/inter/Hheb/images/rafa2.pdf> accessed 26 October 2018).

[235] Yoav Zitun, 'AG: Hannibal Directive forbids killing kidnapped soldier' (12 January 2015) *ynetnews* <https://www.yne tnews.com/articles/0,7340,L-4614378,00.html> accessed 26 October 2018.

[236] The State Comptroller is the Supreme Audit Institution in Israel and its functions are regulated by the Basic Law: The State Comptroller (1988). According to Article 2(A) of the Basic Law, 'the State Comptroller shall audit the economy, property, finances, obligations and administration of the State, of Local Authorities and of other bodies or institutions which are by law subject to audit by the State Comptroller'. Article 2(B) provides that 'the State Comptroller shall examine the legality, integrity, good governance, efficiency and economy of the audited bodies, as well as any other matter which he deems necessary'. Moreover, Article 4 endows the State Comptroller to examine public complaints as 'Ombudsman'. See, The State Comptroller and Ombudsman of Israel, 'The foundations of the State Audit' <http://www.mevaker.gov.il/En/About/Pages/yesodot.aspx> accessed 26 October 2018.

[237] <http://www.mevaker.gov.il/he/publication/Articles/Pages/2015.1.20-Tzuk-EItan.aspx> (in Hebrew) accessed 26 October 2018.

[238] Amichai Cohen, 'Submission to the United Nations International Commission of Inquiry on the 2014 Gaza Conflict by Prof. Amichai Cohen, Senior Researcher at the Amnon Lipkin Shahak Program on National Security and Democracy' (11 February 2015) *The Israeli Democracy Institute*.

> This principle of respect is justified for two reasons: first, the correct division between state sovereignty and respect for the basic principles of international law requires that states receive precedence over international institutions in investigating suspicions of crimes committed by their citizens, provided that they demonstrate their ability to conduct such investigations. Moreover, and secondly, the cause of promoting international law application would be damaged were international institutions to intervene in matters that domestic institutions are capable of coping with.
>
> In order to understand why this second claim is correct, it is important to note that DABLA lawyers in the IDF, as well as the justices of the Israeli Supreme Court and members of the international law unit at the Ministry of Justice, are all agents of the internalization of international law. They contribute to embedding international law into the Israeli domestic legal system and support that development. By employing a variety of claim and mechanisms, they convince the Israeli government and armed services to adopt international standards.
>
> …. deference should be given to the Israeli system of investigation. Any other result would cast aspersions on the legitimacy of IHL norms, and possibly initiate a backlash against all the progress that, as shown above, has been achieved in this area over the past decade. After all, it might be argued, why should Israel support and buttress a domestic system of investigation and legal operational advice if the international system itself does not recognize its efficacy?[239]

Nonetheless, the McGowan Davis Inquiry noted some of the enduring shortcomings of the Israeli investigation system. In particular, it focused on the following issues:

- it criticised the apparent lack of independence of the MAG in light of the office's involvement in policy discussions regarding the hostilities and the advisory role of legal advisers belonging to the MAG Corps. The latter reason is compounded by the military commanders' increased deference to the lawyers' advice, which might hinder a genuine investigation into the operational conduct of soldiers and commanders who acted according to the legal advice provided by the MAG Corps;[240]
- it warned that, regardless of such institutional frictions, the MAG does not always seem to robustly apply the laws of armed conflict. In other words, whether or not the existing institutional arrangements ensure the independence of the MAG, the substantive

[239] Ibid.
[240] UNHRC, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1 (24 June 2015) UN Doc A/HRC/29/CRP.4, para 619.

application of the rules of international humanitarian law determines whether a criminal investigation will be opened. Hence, the scrutiny cannot simply be limited to the institutional and inter-institutional aspects of the investigation system, but must also extend to the content given to the norms applied;[241]

- it noted that the civilian oversight of the Supreme Court, sitting as the High Court of Justice, is diminished by its overwhelming deference to the MAG's decisions;[242]
- it noted a substantial delay in the investigations into most of the incidents occurred during Operation Protective Edge, despite the MAG's confidence that they were proceeding speedily;[243]
- it noted that the MAG had provided insufficient information to allow a real scrutiny on the genuineness of their decision to close several cases.[244]

The findings of the McGowan Davis Commission concerning the actual conduct of the investigations and application of international humanitarian law find partial confirmation in several updates published by the MAG following operation Protective Edge. For example, as regards the insufficiency of the information provided in the updates, the MAG reported that in an incident occurred on 8 July 2014, which involved the death of eight civilians in Khan Younis, the Fact-finding Assessment had found that the strike carried out by the IDF had been aimed at destroying a residential building allegedly used for military purposes. The Fact-finding Mechanism had found that adequate precautions had been taken in that the army had first made phone calls to advise the civilians living in the building to leave the premises and then had fired a knock-on-the-roof bomb to warn the residents. The inquiry claimed that the residents had been monitored leaving the building and that 'subsequently' some of them had been seen returning to their premises for unknown reasons. However, at that point the bomb had been

[241] Ibid.
[242] Ibid para 623.
[243] Ibid paras 624-625.
[244] Ibid para 629.

released and could not be diverted from its target. For this reason, the MAG decided to close the case.[245] The MAG failed to reveal the meaning of 'subsequently', thus leaving the external viewer wondering how much time had passed from the moment the residents had left the building and the moment in which the bomb was released. This detail is of crucial importance as residents in Gaza have claimed in the past that it was not uncommon for strikes not to occur after phone calls warning them to leave their premises. Depending on the meaning of the word 'subsequently', it may have not been unreasonable for a resident to think that the strike was not going to occur. In a later update, the MAG slightly amended the prior update, by claiming that the bomb had been dropped 'subsequent' to the residents leaving their building, and that 'shortly after' civilians had been seen returning to the premises.[246] While the amended version seems to clarify that civilians had been seen returning to the building shortly after the bomb had been dropped, it does not clarify how much time had passed between the moment the civilians had left their house and the moment in which the bomb had been dropped. Such detail may affect the assessment concerning the adequacy of the precautions taken by the IDF to minimise the risk of civilian casualties.

As regards the application of international humanitarian law, as the McGowan Davis Commission pointed out, in one case, the MAG reversed the presumption of civilian status by assuming that certain targets that the IDF had not been able to identify with precision were to be considered military targets. The incident involved the death of four children who were playing in the vicinities of the Gaza port on 16 July 2014 and were thought to be Hamas combatants. In another case, the MAG failed to disclose the rationale for his assessment of the

[245] IDF, 'Decisions of the IDF Military Advocate General regarding Exceptional Incidents that occurred during Operation 'Protective Edge' – Update No. 1 (Part 2)' (7 December 2014) <https://www.idf.il/en/minisites/wars-and-operations/conti nuation-of-mag-corps-press-release-initial-release-sept-2014/> accessed 26 October 2018.
[246] IDF, 'Decisions of the IDF Military Advocate General regarding Exceptional Incidents that occurred during Operation 'Protective Edge' – Update No. 2' (2 December 2014) <https://www.idf.il/en/minisites/wars-and-operations/mag-corps-press-release-update-2-dec-2014/> accessed 26 October 2018. Note that the date of this update is prior to the date of the update ibid, despite the fact that this update is classified as 'Update No. 2'.

proportionality of a strike against a militarily sensitive site that was being allegedly used by Palestinian groups to store weapons. The strike resulted in damage and harm caused to a nearby Red Crescent station's vehicles and personnel. While the MAG specified the precautions that had been taken by the IDF to avoid harm to civilians and civilian infrastructures, he failed to comprehensively explain how the incidental civilian damage would not be excessive in relation to the military advantage anticipated, especially in light of the fact that the location of the Red Crescent station was known to the IDF prior to the attack.[247]

Recently, on 15 August 2018, the MAG published the results of the investigation into the events following the alleged kidnapping of an Israeli officer which led to a military offensive by the IDF on the south-eastern part of Rafah and came to be known as 'Black Friday'. The offensive resulted in the death of several dozens of Palestinians, both combatants and civilians. Following the kidnapping of the Israeli officer, the IDF ordered the entry into effect of the General Staff Directive for Contending with Kidnapping Attempts, also known as 'Hannibal Directive', which is thought to allow for the indiscriminate and disproportionate use of force despite the risk to civilians and soldiers of the IDF itself, and which, on the contrary, the IDF army claims 'does not address the rules of engagement (except with respect to the kidnappers in hold of the kidnapped soldier) or attacks on targets, both of which are addressed in other IDF Directives'.[248] The 1 August attack on Rafah is also extensively documented in the McGowan Davis Report,[249] which reaches the conclusions that the attack may have been conducted in

[247] Ibid; note that the MAG stated that 'After reviewing the factual findings and the material collated by the FFAM, the MAG found that the targeting process accorded with Israeli domestic law and international law requirements, and included significant efforts to minimize harm to civilians. *The MAG further found that the damage caused to the Red Crescent station was unavoidable considering the proximity of the rockets placed by the Palestinian terror organizations only a few tens of meters from the station*' (emphasis added). As can be seen, the MAG did not provide any explanation as to why the military advantage anticipated would justify the strike in light of the unavoidable consequences for the Red Crescent premises.

[248] IDF, 'Decisions of the IDF Military Advocate General Regarding Exceptional Incidents that Allegedly Occurred During Operation 'Protective Edge'- Update No. 6' (15 August 2018) <https://www.idf.il/en/minisites/wars-and-operation s/mag-corps-press-release-update-6/> accessed 27 October 2018.

[249] McGowan Davis Report, paras 349-374.

violation of the principles of proportionality, precaution and distinction and, in light of the fact that incidental civilian damage and injury could have been expected that would be grossly excessive in relation to the anticipated military advantage, may constitute war crimes.[250] The MAG decided to close its investigation into the events, which was articulated in a broad investigation into the overall operation and several assessments of individual incidents. While it is not the purpose of this section to analyse the details of the MAG's update, it is to be noted that several crucial questions were left unanswered, including how the emergency action taken in response to the abduction of the Israeli officer had impacted on the proportionality calculation made by the military commanders in conducting the subsequent military offensive in Rafah, and the quality of the intelligence relied on by the IDF in relation to the precautions adopted to avoid incidental civilian casualties.[251]

In March 2018, the State Comptroller published its report on Operation Protective Edge.[252] The State Comptroller audited several aspects concerning the decision-making progress during Operation Cast Lead, including how the 'Hannibal Directive' had been interpreted and applied in the course of the operation and whether the principles of international law had been taken in due account by the political echelons of the Israeli Government in planning the military operation. Moreover, the State Comptroller reported on the status of the implementation process of the recommendations of the Turkel Commission and the ensuing Ciechanover Implementation Team.

[250] Ibid paras 370-373.

[251] For a preliminary, yet more in-depth, analysis of the MAG's decision see Amichai Cohen and Yuval Shany, 'Israel's Military Advocate General Terminates 'Black Friday' and Other Investigations: Initial Observations' (27 August 2018) *Lawfare* <https://www.lawfareblog.com/israels-military-advocate-general-terminates-black-friday-and-other-investigati ons-initial> accessed 27 October 2018.

[252] The State Comptroller and Ombudsman of Israel, 'Operation "Protective Edge" IDF Activity from the Perspective of
International Law, Particularly with Regard to Mechanisms of Examination and Oversight of Civilian and Military Echelons' (March 2018) <http://www.mevaker.gov.il/he/reports/pages/622.aspx> accessed 27 October 2018.

With regards to the so-called 'Hannibal Directive', the State Comptroller reviewed the amendments to the General Staff Order in which the Directive was embedded prior to Operation Protective Edge and, according to information received including from the Fact-finding Mechanism, determined that the interpretation of the Order by the ground troops in Gaza was in part incompatible with the formulation of the General Staff Order. It also noted that, after a review of the military operation in Gaza, the Chief of the General Staff had instructed the rescission of the 'Hannibal Directive' in August 2016 and that by January 2017 the update of all orders concerned with situations in which soldiers or civilians are abducted had been updated.[253] With regards to the political echelons of the State of Israel, the State Comptroller's report represents a novelty as it assesses the minutes of a series of Cabinet meetings convened during Operation Protective Edge to show that the rules of international law had been taken into account by the relevant political leaders in planning the military operations, and that the Ministers had received the legal advice of the MAG and the Attorney General throughout the operation. It further shows that discussions had been held to ensure that civilian casualties be avoided as much as possible and thus seeks to dispel claims to the contrary.[254]

Moreover, the Report assessed the implementation status of certain recommendations formulated by the Turkel Commission and the Ciechanover Implementation Team with regards to investigations. It noted that neither the recommendation to enact 'war crimes' legislation nor the recommendation to adopt provisions concerning command responsibility had been fulfilled.[255] It criticised the formulation of the reporting duty, already examined under Recommendation No 3 by the Turkel Commission, since it did not extend to incidents of unintentional harm to civilians except in cases of extensive harm, and recommended that it be rephrased to include also such scenario. Most importantly, it found flaws in the Fact-finding

[253] Ibid 55-62.
[254] Ibid 66-74.
[255] Ibid 91-94.

Mechanism implemented by the IDF immediately after Operation Protective Edge. First, while acknowledging that the format of the Fact-finding Mechanism subject to the Chief of the General Staff but acting separately from the chain of command was consistent with international law, the State Comptroller recommended that the Mechanism be entirely separated from other operational debriefing mechanisms in order to ensure that it would not be diverted from its fact-finding function.[256] It further noted that the training of the fact-finders had been sub-optimal and that the teams should be integrated with investigators and experts in international law in order to ensure the professionalism of the assessments, also in light of the need to preserve the evidence for future criminal investigations.[257] In addition, it criticised the inclusion, in some fact-finding teams, of soldiers that had taken part in the military operations under scrutiny, in violation of the principle of impartiality.[258] Moreover, the State Comptroller criticised the manner in which some assessment had been carried out, especially in relation to the failure of the fact-finders to attach all relevant documentation, including for the purpose of corroborating the findings of the fact-finding teams, and noted that this may have resulted in delays.[259] As regards the timeframe for the conduct of fact-finding assessments, the State Comptroller noted the necessity to shorten the time required by the fact-finding teams to complete their assessments in order to minimise the risk that the evidence collected be hampered and, as a consequence, a prospective MPCID investigation compromised.[260] The State Comptroller also noted the delay in formalising the timeframe for reaching a decision whether to open a criminal investigation and advised that 'the MAG should consider determining that in significant cases that are liable to arouse broad public criticism or to generate media or public interest, an MPID investigation be opened immediately, without

[256] Ibid 125-128, 136-139 and 145-147.
[257] Ibid 139-144.
[258] Ibid 148-150.
[259] Ibid 150-159.
[260] Ibid 159-162.

transferring the incident to the examination of the [Fact-finding Assessment] Mechanism'.[261] Moreover, it recommended that the timeframe between the opening of a criminal investigation and the decision whether to file an indictment, start disciplinary proceedings or close the case should also be incorporated in the relevant guidelines.[262]

2.8 Analysis

It is difficult to claim a direct causal link between the findings and recommendations of the international commissions of inquiry mentioned in the previous paragraphs and the substance of the reforms of the military investigation system undertaken in Israel since the establishment of the Turkel Commission. However, while the urge to investigate the IDF's actions especially in the aftermath of controversial military operations Cast Lead and Protective Edge pre-existed any international inquiry as some correctly pointed out,[263] there are outcomes that can be undeniably attributed to the international commissions of inquiry considered. In general, both the Goldstone Mission and the McGowan Davis Commission drew the attention of the Israeli Government to some major incidents and urged the relevant domestic authorities to investigate them, which they did. The shortcomings of such investigations are a partially different matter, one that touches on the existing gap between the legislative or regulatory framework and the practical application of the rules embedded in it.

Most importantly, though, the extensive review of the Israeli military investigation system initiated with the establishment of the Turkel Commission must be attributed in large part to the Goldstone Mission. One of the merits of the Goldstone Report is to have drawn the attention of its main interlocutors, Israel and Palestine, and the international community to some general principles provided for under international law for the conduct of investigations into alleged

[261] Ibid 101-103.
[262] Ibid 114-116.
[263] Yuval Shany, 'Goldstone Notwithstanding, IDF Obligated to Investigate Conduct' (2 November 2009) *The Israeli Democracy Institute* <https://en.idi.org.il/articles/9537> accessed 27 October 2018.

violations of international humanitarian law and human rights law. As I have shown, the Mission engaged the Israeli authorities in a dialogue on the compliance of the Israeli military investigation system with the principles of independence, impartiality, effectiveness and promptness. It did so by relying on information disseminated by the Israeli Government itself and by Israeli civil society organisations, and, on the one hand, by appealing to Israel's self-proclaimed commitment to investigate human rights and humanitarian law violations and, on the other hand, by alerting other international actors, in particular the Security Council and the Prosecutor of the International Criminal Court about the shortcomings of the domestic system. The response of the Israeli Government was graduated and articulated. First, it clarified the functioning of its military justice system and later, pending a decision of the Prosecutor of the International Criminal Court on a declaration accepting the Court's jurisdiction submitted by the Palestinian Authority, which certainly contributed to keeping some Israeli officials on their toes,[264] it decided to establish a committee to *inter alia* review its military investigation system, the Turkel Commission. The reasons for establishing such Commission were compounded by the establishment of two international inquiries into the Flotilla incident, with one of which Israel cooperated, and, possibly, by the prospect that Israeli officials might be prosecuted by foreign states under the principle of universal jurisdiction.[265]

Would the Israeli military investigation system have come under such extensive domestic scrutiny in the absence of the Goldstone Report or had the Goldstone Mission failed to dedicate an entire chapter of their inquiry to it? While the question may seem speculative, in-text references in several publications and domestic reports, including the Turkel Report, the chain

[264] See, for example, Yotam Feldman, 'ICC May Try IDF Officer in Wake of Goldstone Gaza Report' (24 September 2009) *Haaretz* <https://www.haaretz.com/1.5421148> accessed 29 October 2018.
[265] See, for example, Sarah Ramler, 'NGOs: Try S. African IDF Troops for War Crimes' (6 August 2009) *The Jerusalem Post* <https://www.jpost.com/Israel/NGOs-Try-S-African-IDF-troops-for-war-crimes> accessed 29 October 2018; Ian Black and Ian Cobain, 'British court issued Gaza arrest warrant for former Israeli minister Tzipi Livni' (14 December 2009) *The Guardian* <https://www.theguardian.com/world/2009/dec/14/tzipi-livni-israel-gaza-arrest> accessed 29 October 2018.

of events as documented in this section and the opinion of some of the respondents in this research seem to suggest that the answer would have probably been negative, at least in the short term. Certainly, sooner or later, the factors considered in the preceding section would have stimulated a broad domestic reflection on the investigation system, at least to prevent international criminal investigations, whether brought by the International Criminal Court or by foreign states. However, it seems reasonable to assume that this would have happened later in time than it actually did. While the Flotilla Inquiries established by the Human Rights Council and the Security Council may seem to have provided the trigger for the establishment of the Turkel Commission, its mandate suggests that the second question – to review the Israeli military investigation system – would not have been asked in the absence of the Goldstone Report and its follow-up mechanisms. Thus, it seems fair to identify the principal cause for the domestic review process initiated with the Turkel Commission in the Goldstone Inquiry. While all other factors strengthened the need for reviewing the system, the Goldstone Mission spotlighted the issue in conjunction with serious allegations of human rights and humanitarian law violations.

Was the Goldstone Inquiry effective with regards to the issue of domestic military investigations? As I have shown, the Mission engaged in a review of the Israeli military investigation machinery in order to show that its structural shortcomings made it unlikely that the allegations of human rights and humanitarian law violations documented throughout the Report would be thoroughly investigated. As a result, it triggered a monitoring process at the UN level, which was conducted by the two Committee of experts appointed ad hoc by the Human Rights Council. Thus, a systematic review of the Israeli investigation system was not within the purview of the Mission. Indeed, the Goldstone Report does not contain any recommendation to the Israeli authorities specifically requesting them to conduct investigations into Operation Cast Lead. The domestic review process initiated after the publication of the

Report and concomitantly with the establishment of a UN inquiry to investigate the incident of the Gaza Flotilla can only be considered a spill-over effect of the Report and it thus account as a manifestation of impact rather than effectiveness.

The socialisation process engendered by the Mission was thus incidental. The Mission successfully triggered a domestic review of the Israeli military justice system in a process akin to internalisation. This process appears to have been triggered by a combination of persuasion and coercion strategies, that is by the appeal to both Israel's self-proclaimed values and abidance by the laws of war and human rights, and by the engagement of the international community. However, it cannot go unnoticed that the socialisation process is, at best, incomplete or, one may argue, insincere. As I have extensively shown, there exists a substantial gap between the norms and regulations enacted in the last few years and their practical application. Despite the hundreds of complaints filed yearly with the MAG, only a small part reaches the indictment stage and just a handful of them results in convictions. Obviously, the dysfunctionality of a system cannot be measured quantitatively only but requires a qualitative analysis to unveil the causes and reasons for, in this case, the small number of cases that results in convictions. After all, Israeli military courts may have good reasons to find even most of the accused not guilty, and Israeli military investigators and prosecutors, including the MAG, may have good reasons to dismiss cases. Moreover, one should bear in mind that this section has addressed the investigation system, that is, the pre-trial stage within the broader legal accountability machinery. However, while an analysis of the Israeli military court system does not fall within the purview of this section, there are studies that show the existence of a 'pathology' of the military trial system.[266] What is of interest, though, for the purposes of this study is that this gap between normative framework and practical application of the norms

[266] See, for example, the recent contributions of Valentina Azarova, 'The Pathology of a Legal System: Israel's Military Justice System and International Law' (2017) 44 *QIL Zoom-in* 5; and Luigi Daniele, 'Enforcing Illegality: Israel's Military Justice in the West Bank' (2017) 44 *QIL Zoom-in* 21.

signals an incomplete internalisation, which in turn would lead to concluding that the Goldstone Inquiry has been ineffective, should one adopt a static definition of effectiveness akin to compliance.

However, there may be reasons to argue that the internalisation process is still ongoing. Even at the purely normative and regulatory level, the implementation of the recommendations of the Turkel Commission has not been completed. Follow-up mechanisms, including the Ciechanover Implementation Team and, to an extent, the audit of the State Comptroller signalled, albeit timidly, how the system still fell short of the requirements laid down by the Turkel Commission, while at the same time noting the improvements made. Moreover, from a more practical viewpoint, it appears that the MAG has committed to, at the very least, ensuring a higher level of transparency than in the past; controversial investigations, while unsuccessful in bringing the alleged perpetrators to justice, have at least resulted in other measures, such as the amendments of command orders or lessons-learned exercises; the State Comptroller has even ventured into scrutinising the decision-making process at the political level in the course of Operation Protective Edge. Whether this corresponds to an overall improvement of the quality of domestic justice is debatable but, at least, the bar for assessing such quality is progressively being set higher than in the past.

3. Settlements: A Legally Intractable Issue

On the face of it, the 2012 independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem[267] offers a striking example of ineffectiveness. The data sets available online show that, since 2012, despite an overall decrease in planned housing units per year,[268] the settlers'

[267] Hereinafter the 'Settlements Inquiry'.

[268] Peace Now, 'Data – Construction' <http://peacenow.org.il/en/settlements-watch/settlements-data/construction> accessed 30 October 2018.

population has increased steadily,[269] the construction of outposts has resumed despite the zero growth that characterised the preceding quinquennial[270] and both construction starts in settlements and tenders for settlement construction per year have registered an overall increase.[271] These statistics clearly contradict the main recommendation of the Settlements Inquiry to 'cease all settlement activities without preconditions' and 'initiate a process of withdrawal of all settlers from the Occupied Palestinian Territory'.[272]

It would be naïve to ask why this recommendation was unable to catalyse domestic change. After all, Israel's position with regards to settlements is crystal-clear: Article 49 of the Fourth Geneva Convention, which prohibits the deportation or transfer of an occupant's population into the territory of the state it has occupied by means of armed force, does not apply to Israeli settlements in the West Bank, and competing Israeli and Palestinian claims over the West Bank should be resolved through negotiations.[273] If persuading Israel to change its overall settlements policy with a stroke of a pen was indeed the aspiration of the Settlements Inquiry, then its enterprise was doomed to failure. Authoritative pronouncements of international agencies on the illegality of Israeli settlements in the West Bank have succeeded one another for years with no effect on the reality on the ground.[274] Moreover, quite predictably, Israel adopted a position

[269] Peace Now, 'Data – Population' <http://peacenow.org.il/en/settlements-watch/settlements-data/population> accessed 30 October 2018; for data concerning population trends by settlement, see Jewish Virtual Library, 'Israeli Settlements: Settlements Population in the West Bank' <https://www.jewishvirtuallibrary.org/israeli-settlements-population-in-the-west-bank> accessed 30 October 2018.
[270] Peace Now (ibid).
[271] Peace Now (n 268).
[272] UNHRC, Report of the independent international factfinding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem (7 February 2013) UN Doc A/HRC/22/63, para 112.
[273] Israel Ministry of Foreign Affairs, 'Israeli Settlements and International Law' (30 November 2015) <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israeli%20settlements%20and%20international%20law.aspx> accessed 30 October 2018.
[274] UNSC, Res No 446 (1979) (22 March 1979) UN Doc S/RES/446 (1979); UNSC, Res No 452 (1979) (20 July 1979); UNSC, Res No 465 (1980) (1 March 1980) UN Doc S/RES/465 (1980); UNSC, Res No 471 (1980) (5 June 1980) UN Doc S/RES/471 (1980); UNSC, Res No 476 (1980) (30 June 1980) S/RES/476 (1980); ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* (9 July 2004) ICJ Reports 136; UNGA, Advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* , including in and around East Jerusalem, UNGA Res ES-10/15 (2 August 2004) UN Doc A/RES/ES-10/15; UNHRC, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem and the occupied Syrian Golan, Res No 2/4 (27 November 2006).

of absolute non-cooperation with the Mission, which was preceded by the severance of all ties with the Human Rights Council, immediately after the establishment of the Mission. In other words, settlements are a political issue for Israel and no soft legal or quasi-legal mechanism has so far successfully established a constructive dialogue about them with Israeli authorities.

As a result, the Mission deployed a peculiar combination of coercive strategies that involved international judicial mechanisms, in particular the International Criminal Court, third states and private actors. However, for both institutional and probably political reasons, such strategies have not been effectively followed up on yet. Thus, at this stage, the more interesting question is how the Mission purported to socialise Israel into complying with the relevant international obligations, what processes it sought to engender and whether the strategy adopted is likely to succeed.

3.1 The Settlements Inquiry

Differently from other commissions of inquiry considered in this study, the Settlements Inquiry was not deployed to investigate a large-scale military campaign or simply a law enforcement operation. It was mandated with investigating the consequences of a policy, the factual aspects of which were not in dispute. On the contrary, one may argue that the Israeli settlements policy is carried out in the open. What is contested, though, is the legality of such policy also in light of its repercussions on the basic rights of Palestinians. The Mission was thus mandated to investigate how the settlements enterprise encroached on such rights. It is clear that the Mission interpreted its mandate so as to include the power to make recommendations to the relevant actors in order try and mitigate the consequences of the settlements policy. In light of the long-term argumentative deadlock that has characterised the debate over the Palestinian territories, in particular with regards to the applicability of the law of belligerent occupation, in order for the Mission not to repeat the work of other international agencies, it

had to come up with a different strategic argument that could add to the multiple solutions proposed in other international fora.

The Settlements Inquiry's main contribution is encapsulated in its two final recommendations, which are reproduced below:

> 116. The mission calls upon all Member States to comply with their obligations under international law and to assume their responsibilities in their relations with a State breaching peremptory norms of international law, and specifically not to recognize an unlawful situation resulting from Israel's violations.
>
> 117. Private companies must assess the human rights impact of their activities and take all necessary steps – including by terminating their business interests in the settlements – to ensure that they do not have an adverse impact on the human rights of the Palestinian people, in conformity with international law as well as the Guiding Principles on Business and Human Rights. The mission calls upon all Member States to take appropriate measures to ensure that business enterprises domiciled in their territory and/or under their jurisdiction, including those owned or controlled by them, that conduct activities in or related to the settlements respect human rights throughout their operations. The mission recommends that the Working Group on Business and Human Rights be seized of this matter.[275]

From a purely legalistic perspective, these recommendations address the responsibilities of third-party states and private business actors with regards to business activities, but from a strategic perspective, and read in conjunction with the other recommendations of the Inquiry, they seem to be aimed at leveraging third actors to impose material costs, in the form of economic sanctions, on the occupant, Israel.

The novel approach of the Settlements Inquiry is reflected in its definition of settlements, which include 'all physical and non-physical structures and processes that constitute, enable and support the establishment, expansion and maintenance of Israeli residential communities beyond the Green Line of 1949 in the Occupied Palestinian Territory'.[276] Proceeding from this definition, the Mission goes on to clarify the applicable law, that is international humanitarian

[275] Settlements Inquiry Report, paras 116-117.
[276] Ibid, para 4. One of the merits of the Commission is to have provided the first and only definition of 'settlements' in an authoritative international document (see Alessandro Tonutti, *International Commissions of Inquiry and Palestine: Overview and Impact* (Al-Haq 2016) 33).

law, international human rights law, international criminal law and the law of state responsibility for internationally wrongful acts, and, based on the pronouncements of several international bodies, assumes that a situation of belligerent occupation persists in the West Bank, which determines the applicability of the Hague Regulations of 1907 and the Fourth Geneva Convention.[277]

After outlining the context and the impact of settlements on a number of human rights, the Mission turns to the impact of businesses, noting that 'business enterprises have, directly and indirectly, enabled, facilitated and profited from the construction and growth of the settlements'.[278] It follows a list of business-related activities that have an impact on human rights.[279] All these activities – the Mission argues – have been conducted in 'full knowledge of the current situation and the related liability risks that business enterprises unfold their activities in the settlements and contribute their maintenance, development and consolidation'.[280] Moreover, the Mission was concerned with Israel's practice to label its export products as originating from 'Israel', regardless of whether they are actually produced within the internationally recognised boundaries of the State or in the settlements, which hinders the traceability of products for states willing to comply with international obligations and

[277] Settlements Inquiry Report, paras 10-17; for a critique of the legal frameworks applied by the Mission, see Federica Favuzza, 'Gli insediamenti israeliani nei Territori occupati e i diritti del popolo palestinese (in margine al rapporto della fact-finding mission del Consiglio dei diritti umani)' (2013) 7(3) *Diritti Umani e Diritto Internazionale* 799.
[278] Settlements Inquiry Report, para 96.
[279] Ibid; the activities identified by the Mission are the following: 'The supply of equipment and materials facilitating the construction and the expansion of settlements and the wall, and associated infrastructures; the supply of surveillance and identification equipment for settlements, the wall and checkpoints directly linked with settlements; the supply of equipment for the demolition of housing and property, the destruction of agricultural farms, greenhouses, olives groves and crops; the supply of security services, equipment and materials to enterprises operating in settlements; the provision of services and utilities supporting the maintenance and existence of settlements, including transport; banking and financial operations helping to develop, expand or maintain settlements and their activities, including loans for housing and the development of businesses; the use of natural resources, in particular water and land, for business purposes; pollution, and the dumping of waste in or its transfer to Palestinian villages; captivity of the Palestinian financial and economic markets, as well as practices that disadvantage Palestinian enterprises, including through restrictions on movement, administrative and legal constraints; use of benefits and reinvestments of enterprises owned totally or partially by settlers for developing, expanding and maintaining the settlements'.
[280] Ibid, para 97.

consumers.[281] The Mission concludes by formulating the recommendations reproduced in full above.

Moreover, as regards the mere establishment of settlements, the Mission concluded that

> Israel is committing serious breaches of its obligations under the right to self-determination and certain obligations under international humanitarian law, including the obligation not to transfer its population into the Occupied Palestinian Territory. The Rome Statute establishes the jurisdiction of the International Criminal Court over the deportation or transfer, directly or indirectly, by the occupying Power of parts of its own population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside that territory. Ratification of the Statute by Palestine may lead to accountability for gross violations of human rights law and serious violations of international humanitarian law and justice for victims.[282]

While it is not formulated in the form of a recommendation, the reference to the International Criminal Court in the conclusions of the Report evokes a threat of sanction in the form of prosecutions of Israeli citizens under the Rome Statute of the International Criminal Court, as the Chair of the Mission, Christine Chanet remarked at a news conference.[283] It is important to note that, at the time, Palestine's acceptance of the Court's jurisdiction had been rejected and no new application had yet been made.

Strategy Deployed

According to the coercion model, socialisation occurs through the imposition of material sanction or threat thereof. Material sanctions must be able to shift the cost-benefit calculation of the targeted actor so as to induce a behavioural change. In addition, the purported sanction can also consist of a reputational damage as long as this is likely to translate into some form of

[281] Ibid, para 99.
[282] Ibid, para 104.
[283] The Associated Press, 'UN report is a "weapon" against Israel because Palestinians could take grievances to criminal court, panel says' (31 January 2013) *National Post* <https://nationalpost.com/news/world/israel-middle-east/un-report-is-a-weapon-against-israel-because-palestinians-could-take-grievances-to-criminal-court-panel-says> accessed 30 October 2018.

material detriment for the targeted actor. For example, reputational damages may translate into economic losses for business enterprises who suffered such damages.

The Settlements Inquiry leveraged this strategy on two different but interconnected levels. First, by emphasising the role of businesses in sustaining the settlements policy of the Israeli Government and exposing the legal and economic liabilities these may incur by continuing their trade agreements with the settlements, the Mission sought to prompt a process that would eventually cause a reputational damage to such business enterprises. Successful advocacy actions of the sort undertaken in Europe and the United States by civil society organisations must have been key to revealing the economic implications of such strategies for targeted businesses. Second, by inducing states to divest from the settlements, the Mission sought to alter the cost-benefit calculation associated to the maintenance of the settlements in Palestine. In other words, the argument leveraged by the Mission shifted from a purely legal one – the illegality of the settlements under international law – to a mixed one, which included a legal element – the obligation for third-party states not to recognise an unlawful situation – and an economic one – the economic losses that business enterprises and, ultimately, Israel would incur as a result of the legal principle.

Clearly, the Mission envisioned a sort of 'snowball' effect that would start with a re-assessment by the affected companies of their trade relations and the economic implications that these may have on their budgets and, eventually, would determine an economic loss for the settlements' economy. Strategic partnership with other similar endeavours led by the European Union and civil society organisations was key for this argument to work properly. Indeed, I show below that the Settlements Inquiry's approach is by no means unique.

3.2 The EU and Its Member States

The EU has played an important role in ensuring that business relations with Israel would be regulated under the frameworks of consumer protection and import tariffs. The position of the

EU with regards to Israeli settlements in the West Bank was clear even before the establishment of the Settlements Inquiry.[284] However, while the action of the EU vis-à-vis the Israeli settlements has been largely determined by internal pressures, there may be reasons to believe that recent steps to ensure the accuracy of the indication of origins of import products may have been determined, at least in part, by the developments at the UN level.

Already in 2012, the European Commission had issued a notice reminding importers that 'products produced in the Israeli settlements located within the territories brought under Israeli administration since June 1967 are not entitled to benefit from preferential tariff treatment under the EU-Israel Association Agreement'. In order to facilitate importers to assess whether the products for which they intend to apply for preferential treatment under the Agreement, the Commission decided to publish a list of non-eligible locations, identified by post codes, subject to regular updates.[285]

In November 2015, the European Commission published an interpretative notice on the labelling of goods from the settlements.[286] The notice specifies that labels such as 'product from Israel' for goods produced in the settlements in the Golan Heights and the West Bank are misleading and, therefore, should be replaced with a label that not only indicates the geographical area of origin (for example, West Bank), but also specifies that the good has been produced in a settlement. According to the text of the notice and the attached fact sheet, this move constituted a response to calls from Member States, the European Parliament and civil society organisations in the EU, and it ensured that the EU would comply with its obligations under international law not to recognise an unlawful situation. Indeed, by the time of the publication of the notice, several European Member States had already published domestic

[284] See, for example, Council of the European Union, Council Conclusions on the Middle East Peace Process (MEPP)(17 November 2014) 5542/14 COMEP 21 COMAG 104 PESC 1179.
[285] European Commission, Notice to importers: Imports from Israel into the EU (3 August 2012) Official Journal of the European Union (2012/C 232/03).
[286] European Commission, Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967 (11 November 2015) C(2015) 7834 final.

notices advising private businesses on the legal and economic risks implied in investing in or trading with the settlements.[287] Such domestic developments had likely been determined by the ruling of the European Court of Justice in the case *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen* of 25 February 2010.[288] The Court decided *inter alia* that in the context of

> the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, the customs authorities of the importing State are not bound by the proof of origin submitted or by the reply given by the customs authorities of the exporting State where that reply *does not contain sufficient information,* for the purposes of Article 32(6) of that protocol, *to enable the real origin of the products to be determined*.[289]

However, it is to be noted that Paragraph 99 of the Settlements Inquiry, published in January 2013, had also brought the issue of labelling to the attention of the international community in the following terms:

> The mission also noted that Israel labels all its export products as originating from Israel, including those wholly or partially produced in settlements. Some companies operating in settlements have been accused of hiding the original place of production of their products. This situation poses an issue of traceability of products for other States wishing to align themselves with their international and regional obligations. It also poses an issue with regard to consumers' right to information. The mission notes that these issues are increasingly being addressed by States, regional organizations and some private businesses.

It would be a step too far to claim that the Mission's observation had any *independent* effect on the choices of European governments to issue notices for importers, especially in light of the

[287] For example, see Ministero degli Affari Esteri e della Cooperazione Internazionale, Common messages aimed at raising awareness among EU citizens and businesses regarding involvement in financial and economic activities in the settlements (27 June 2014) <https://www.esteri.it/mae/en/sala_stampa/archivionotizie/approfondimenti/2014/06/20140627_insediamenticittadiniimpreseue.html?LANG=EN> accessed 30 October 2018; Croatia Ministry of Foreign and European Affairs, Nacrt zajedničkih poruka s ciljem podizanja svijesti građana i poduzetnika iz EU-a u vezi sa sudjelovanjem u financijskim i gospodarskim aktivnostima u naseljima na OPT (3 June 2013) (in Croatian) <http://gd.mvep.hr/files/file/gd/2014/140704-Messages_hrv.pdf> accessed 30 October 2018; Latvia Ministry of Foreign Affairs, Par iesaistīšanos izraēliešu apmetņu finanšu un saimnieciskajās darbībās (4 July 2014) (in Latvian) <https://www.mfa.gov.lv/aktualitates/zinas/36413-par-iesaistisanos-izraeliesu-apmetnu-finansu-un-saimnieciskajas-dar bibas> accessed 30 October 2018; for a more comprehensive list of European countries that published such notices, see European Council on Foreign Relations, EU member state business advisories on Israeli settlements (2 November 2016) <https://www.ecfr.eu/article/eu_member_state_business_advisories_on_israel_settlements> accessed 30 October 2018.

[288] Case C-386/08 *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] European Court Reports 2010 I-01289.

[289] Ibid (emphasis added).

authoritative and binding judgment of the European Court of Justice. However, it is worth noting the argumentative similarities between the Mission's statement and the notices published by some EU Member States. For example, after reaffirming the illegality of the Israeli settlements under international law, the notice issued by the Italian Ministry of Foreign Affairs states that

> Financial transactions, investments, purchases, procurements as well as other economic activities (including in services like tourism) in Israeli settlements or benefiting Israeli settlements, entail legal and economic risks stemming from the fact that the Israeli settlements, according to international law, are built on occupied land and are not recognised as a legitimate part of Israel's territory. This may result in disputed titles to the land, water, mineral or other natural resources which might be the subject of purchase or investment.
>
> Possible violations of international humanitarian law and human rights law should also be borne in mind.[290]

Both the Mission's Report and the notice of the Italian Government refer to the obligation not to recognise an unlawful situation under general international law. The reference to international human rights and humanitarian law in the text of the notice is a clear reference to the obligations stemming from these bodies of law and their implications for third-party states and actors. In contrast, the *Brita* judgment relied on the terms of the Euro-Mediterranean Association Agreement of the EU with Israel and the Vienna Convention on the Law of the Treaties, and it reached its conclusions by arguing *inter alia* that affording Israel the competence to issue declarations of origins with respect to products originating in the West Bank would be tantamount to subtracting that competence to the PLO, who under the EU-PLO Association Agreement enjoys exclusively this prerogative.[291]

[290] Ministero degli Affari Esteri e della Cooperazione Internazionale, Common messages aimed at raising awareness among EU citizens and businesses regarding involvement in financial and economic activities in the settlements (27 June 2014) <https://www.esteri.it/mae/en/sala_stampa/archivionotizie/approfondimenti/2014/06/20140627_insediamenticitta diniimpreseue.html?LANG=EN> accessed 30 October 2018

[291] It is to be noted, though, that the European Court of Justice decides based on the law of the European Union and strictly in relations to the specific questions posed to it by the domestic courts.

By no means, this constitutes evidence for a claim that the Mission succeeded in prompting European states to issue notices of the kind analysed above. Indeed, one cannot underestimate the impact of civil society-led campaigns on the policies of European states, such as those initiated by the BDS movement.[292] However, two inferences can be made from the above in terms of causality. First, the most obvious one, the Mission has likely contributed, along with many other factors, to shaping the policy of the EU and its Members States with regards to goods produced in the Israeli settlements. While there is no proof of the fact that states based their decision to issue such notices also on the pronouncement of the Settlements Inquiry,[293] the frames employed are similar and may indicate that the Mission's Report was at least factored in. Second, the Mission itself may have been influenced by the increasing efforts to economically isolate Israel as a way to put pressure on its leadership to abandon further plans to entrench the settlements enterprise.

3.3 The UN Follow-up Process to the Settlements Inquiry

That the main contribution of the Settlements Inquiry consisted in spotlighting the impact of business-related activities on Palestinian rights is confirmed by the extensive follow-up action adopted by the Human Rights Council. In the Resolution of the Council that endorsed the Report, the bulk of the operative part was concerned with ensuring that specific action would be taken with regards to the findings of the Mission in relation to the impact of business activities.[294] With Operative Paragraphs 2 and 3, the Council

[292] For information regarding the BDS economic boycott, see BDS, 'Economic Boycott' <https://bdsmovement.net/economic-boycott> accessed 2 November 2018.

[293] The influential think-tank European Council on Foreign Relations (ECFR) cited the Mission's Report as evidence that European States and the European Union are increasingly aligning with international pronouncements on the settlements (see Hugh Lovatt, 'EU differentiation and the push for peace in Israel-Palestine' (31 October 2016) *ECFR* <https://www.ecfr.eu/publications/summary/eu_differentiation_and_the_push_for_peace_in_israel_palestine7163#_ftnref21> accessed 2 November 2018.

[294] UNHRC, Follow-up to the report of the independent international fact-finding mission to investigate the implications of Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem (19 March 2013) UN Doc A/HRC/22/L.45.

> 2. *Calls upon* the relevant United Nations bodies to take all necessary measures and actions within their mandates to ensure the full respect for and compliance with Human Rights Council resolution 17/4 on the Guiding Principles on Business and Human Rights, the Global Compact and other relevant international laws and standards, and to ensure the implementation of the United Nations "Protect, Respect and Remedy" Framework, which provides a global standard for upholding human rights in relation to business activities that are connected with Israel, the occupying Power, its illegal settlements and its illegal wall of separation in the Occupied Palestinian Territory, including East Jerusalem;
>
> 3. *Requests* the Working Group on the issue of human rights and transnational corporations and other business enterprises, including in consultation with relevant special procedures mandate holders, to fulfil its mandate and, accordingly, to take the necessary measures and actions relating to business activities connected to the illegal Israeli settlements and the illegal wall of separation in the Occupied Palestinian Territory, including East Jerusalem, and, to that end, include a relevant item in its programme of work and to report to the Human Rights Council at its twenty-sixth session.

At its 31st session, the Human Rights Council returned on the issue of the impact of business-related activities on Palestinian human rights and called upon international organizations, states and private actors to ensure that their actions do not violate international law.[295] In particular, the recommendations of the Council were three-fold. First, it recommended all states to take all necessary measures to ensure that their action do not recognise or assist the expansion of settlements, with specific reference to trade, ensure that businesses domiciled on their territories or anyway under their jurisdiction be not be involved in human rights violations in the Palestinian territories, and provide guidance to individuals and corporate entities as to the liability-related risks involved in trading with or providing services to settlements.[296] Second, it recommended businesses to abide by the Guiding Principles on Business and Human Rights.[297] Third, it recommended that all relevant international bodies, including all UN agencies, take proactive measures to ensure the implementation of the recommendation of the Settlements Inquiry.[298] With regard to the last point, the Council requested the UN High Commissioner for

[295] UNHRC, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan, Resolution No 31/36 (20 April 2016) UN Doc A/HRC/RES/31/36.
[296] Ibid, para 12.
[297] Ibid, para 13.
[298] Ibid, para 14.

Human Rights, in consultation with the Working Group on the issue of human rights and transnational corporations and other business enterprises, to follow up on the recommendation contained in paragraph 117 of the Report of the Settlements Inquiry, by producing 'a database of all business enterprises involved in the activities detailed in paragraph 96 of the afore-mentioned report, to be updated annually'.[299]

The Council's decision to request the creation of a database listing the companies involved in the settlements enterprise represents a meaningful step towards prompting the implementation of the recommendations of the Settlements Inquiry. In the absence of international norms binding on corporations, the strategy of the Council is to 'name and shame' those businesses that, by trading with or providing services to the settlements, contribute to their maintenance and expansion. The effectiveness of this strategy is proved by the decisions of European companies such as Veolia[300] or Orange[301] to divest from the settlements following intense advocacy campaigns led by, for example, the Boycott, Divestment, Sanction (BDS) movement.[302] Because, as noted by Valentina Azarova, the only way for businesses investing in the settlements to comply with the Guiding Principles on Business and Human Rights is to pull out entirely from their investments, due to the virtual impossibility to mitigate their adverse human rights impact,[303] it is possible that the compilation and publication of the database would

[299] Ibid, para 17.
[300] BDS, 'BDS Marks Another Victory As Veolia Sells Off All Israeli Operations' (1 September 2015) <https://bdsmovem ent.net/news/bds-marks-another-victory-veolia-sells-all-israeli-operations> accessed 30 October 2018.
[301] Ali Abunimah, 'Campaigners hail "inspiring" BDS victory as Orange quits Israel' (11 January 2016) *electronic intifada* <https://electronicintifada.net/blogs/ali-abunimah/campaigners-hail-inspiring-bds-victory-orange-quits-israel> accessed 30 October 2018.
[302] A report by the UN Conference on Trade and Development estimated a decrease in foreign direct investments in Israel of over $5 billion (equivalent to 46%) between 2013 and 2014 (UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (2015) Annex table 1). In an interview with Ynet, Roni Manos, one of the authors of the report's summary, claimed that the drop in investments was due to both Operation Protective Edge and the boycott campaigns against Israel (Moshe Glantz, 'Foreign investment in Israel cut by half in 2014' (24 June 2015) *Ynet* <https://www.ynetnews.com/articles/0,7340,L-4672509,00.html> accessed 30 October 2018).
[303] Valentina Azarova, 'Business and Human Rights in Occupied Territory: The UN Database of Business Active in Israel's Settlements' (2018) 3(2) *BHRJ* 187, 193-198. According to the Guiding Principles on Business and Human Rights, businesses should take due diligence measures to mitigate any potential adverse human rights impact. However, the violations to which companies investing in the settlements are integral to the business

cause them a significant reputational damage that could only be mitigated by terminating all relations with the settlements.[304] In turn, this may lead to a collapse of the settlements' economy, which may force Israel to halt its policy vis-à-vis the West Bank.

However, so far, the High Commissioner for Human Rights has failed to disclose the list of companies allegedly involved in the settlements enterprise. In January 2018, the Commissioner published its first report, claiming that it was in the process of screening 206 companies.[305] The Commissioner emphasised the importance of procedural fairness to ensure that the decision to include companies in the final database is reached legitimately, while underscoring the fact that the mapping exercise does not amount to a judicial process.[306] It did not provide details on the companies under screening. It appears that the Commissioner's failure to publish the names of the companies involved in the settlements' enterprise was the result of intense diplomatic pressure exercised by both Israel and the US. In a candid statement, Israeli Ambassador Manor declared that Israeli diplomats were prepared to do whatever it took to prevent the publication of the database. Moreover, the Israeli Government instructed Israeli companies who had been contacted by the Commissioner to refrain from discussing publicly the issue, after the chief executive of Bezeq, Israel's national telephone company, had published the letter she had received from the Commissioner.[307] Following the publication of the Commissioner's Report, Barak Ravid, a diplomatic correspondent for one of Israel's channels, tweeted that the

environment, because of the unlawful situation engendered *ab initio* by Israel's settlements enterprise. Hence, it is unlikely that a company involved would be able to take meaningful measures to influence the entire legal and political system that underpin the maintenance of the settlements enterprise.

[304] The risk to the reputation of private actors trading with the settlements is also confirmed in many of the notices issued by European governments to private actors operating under their jurisdiction.

[305] UNHRC, Database of all business enterprises involved in the activities detailed in paragraph 96 of the report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem: Report of the United Nations High Commissioner for Human Rights (26 January 2018) UN Doc A/HRC/37/39.

[306] Ibid, paras 7-11.

[307] The Associated Press, 'Israel races to head off UN settlement "blacklist"' (26 November 2017) *Ynet* <https://www.ynet news.com/articles/0,7340,L-5047947,00.html> accessed 30 October 2018.

publication of the list of companies had been postponed indefinitely due to strong pressure from the US and Israel.[308]

Be that as it may, the delay in the publication of the list of companies has so far stalled the – already slow – coercive process triggered by the Settlements Inquiry and, as I show below, has bought Israel time to take further steps to normalise the occupation.

3.4 Preliminary Examination at the International Criminal Court

On 1 January 2015, the State of Palestine, for the second time, lodged with the Registrar of the International Criminal Court a declaration in conformity with Article 12(3) of the Rome Statute accepting the Court's jurisdiction since 13 June 2014.[309] Only one day later, the State of Palestine deposited an instrument of accession to the Rome Statute.[310] On 16 January 2015, the Prosecutor of the International Criminal Court opened a preliminary investigation into the situation in Palestine.[311] While there is no indication of a possible causal link between the Settlements Inquiry's Report and the decision of the State of Palestine to accede to the Rome Statute[312] or the scope of the preliminary examination initiated by the Prosecutor of the International Criminal Court, it is to be noted that the Prosecutor's examination has so far focused *inter alia* on settlement activities carried out by Israel in the West Bank and East

[308] Barak Ravid's tweet of 31 January 2018 <https://twitter.com/BarakRavid/status/958682696548466688?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E958682696548466688&ref_url=https%3A%2F%2Felectronicintifada.net%2Fblogs%2Fali-abunimah%2Fun-holds-back-names-israel-settlement-profiteers> accessed 30 October 2018.

[309] State of Palestine, 'Declaration Accepting the Jurisdiction of the International Criminal Court' (31 December 2014) <https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf> accessed 2 November 2018.

[310] International Criminal Court, 'The State of Palestine accedes to the Rome Statute' (7 January 2015) <https://www.icc-cpi.int//Pages/item.aspx?name=pr1082_2> accessed 2 November 2018; note that, according to Article 11(2) of the Statute, accession to the Rome Statute by the State of Palestine provides the Court with jurisdiction over the territory of Palestine only from the date of entry into force of the Statute for the acceding State (in the case of the State of Palestine, 1 April 2015), whereas the declaration lodged under Article 12(3) of the Statute allows the Court to exercise its jurisdiction since the moment indicated by the declaring State.

[311] International Criminal Court, 'The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine' (16 January 2015) <https://www.icc-cpi.int//Pages/item.aspx?name =pr1083> accessed 2 November 2018.

[312] And, most likely, the State of Palestine would have acceded the Rome Statute even in the absence of the Settlements Inquiry, as the 2009 attempt demonstrates.

Jerusalem.[313] Most likely, the Prosecutor's focus is being determined by the content of the information received by the Court. However, regardless of whether the Settlements Inquiry had an influence in defining the scope of the Prosecutor's examination, the latter has the effect of reinforcing the conclusions of the Mission by realising the very condition indicated by its Report for triggering an accountability process.

Over the past few years, the Prosecutor of the International Criminal Court has been monitoring Israel's settlement activities in an attempt to notify Israel that such activities would not be tolerated. For example, in its *Policy Paper of Case Selection and Prioritisation*, the Prosecutor stated that the gravity of the crimes under her Office's scrutiny would be assessed *inter alia* in light of 'the social, economic and environmental damage inflicted on the affected communities' and that specific consideration would be afforded to crimes committed by means of 'the illegal exploitation of natural resources or the illegal dispossession of land'.[314] More recently, in response to a decision of the Israeli Supreme Court that authorised the demolition of the Bedouin village of Khan Al-Ahmar in the West Bank,[315] the Prosecutor reiterated her concern in a public statement recalling that 'extensive destruction of property without military necessity and population transfers in an occupied territory constitute war crimes under the Rome Statute'.[316]

[313] International Criminal Court, Office of the Prosecutor, *Report on Preliminary Examination Activities 2017* (4 December 2017) 13-14 <https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf> accessed 2 November 2018.
[314] International Criminal Court, Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation* (15 September 2016) para 41 <https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 2 November 2018.
[315] See, in particular, Israel's Supreme Court of Justice sitting as High Court of Justice, Joint cases HCJ 3287/16, HCJ 2242/17 and HCJ 9249/17 (24 May 2018) (translated by B'Tselem) <https://www.btselem.org/sites/default/files/2018-06/20180524_hcj_ruling_3287_16_khan_al_ahmar_eng.pdf> accessed 2 November 2018; and Israel's Supreme Court of Justice sitting as High Court of Justice, Joint cases HCJ 5193/18, HCJ 5257/18 and HCJ 5410/18 (5 September 2018) (in Hebrew) <https://www.btselem.org/sites/default/files/2018-09/20180905_hcj_5193_18_ruling.pdf> accessed 2 November 2018.
[316] International Criminal Court, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the Situation in Palestine' (17 October 2018) <https://www.icc-cpi.int//Pages/item.aspx?name=181017-otp-stat-palestine> accessed 2 November 2018.

3.5 An Overview of Some Recent Developments in Israel

So far neither the Prosecutor's preliminary examination nor the Settlements Inquiry appear to have been effective in deterring further settlements activities. For example, on 22 August 2018, the Higher Planning Committee of the Civil Administration approved plans for 1,004 housing units in the settlements;[317] on 28 August 2018, the Jerusalem District Court ruled that settlers of the Mitzpe Karmim outpost, situated east of Ramallah, have rights to the private land of the Palestinians on which the outpost was built, while the latter can only claim compensation;[318] on 16 October 2018, the Israel Antiquities Authority, the Israel Nature and Parks Authority and the Civil Administration inaugurated a new touristic settlement at Tel Rumeida located in the heart of the Palestinian city of Hebron;[319] on 14 October 2018, the Israeli Government approved the allocation of over NIS 21 million for the construction of 31 housing units in Hebron.[320]

These are only some examples of Israel's ongoing expansive policy vis-à-vis the settlements. A landmark in point was the enactment of the so-called Regularisation Law 2017, a piece of domestic Israeli legislation that declaredly aimed to 'regularize settlement in Judea and Samaria, and to enable it to continue to strengthen and develop'.[321] The bulk of the Regularisation Law consists of provisions that allow the relevant Israeli authorities to legalise, under Israeli law, situations of unlawful constructions carried out, purportedly in good faith,[322] on land for which the rights to use and hold it were not assigned to the relevant authorities

[317] Peace Now, 'Plans approved for 1004 settlement housing units' (22 August 2018) <http://peacenow.org.il/en/plans-approved-for-1004-units-in-settlements> accessed 2 November 2018.
[318] Peace Now, 'The District Court ruled that settlers in an outpost established on private Palestinian land have rights to the land' (29 August 2018) <http://peacenow.org.il/en/district-court-ruled-settlers-outpost-established-private-palestinian -land-rights-land> accessed 2 November 2018.
[319] Peace Now, 'A New Touristic Settlement Opens in Tel Rumeida in Hebron' (16 October 2018) <http://peacenow.org.il /en/new-touristic-settlement-opens-tel-rumeida-hebron> accessed 2 November 2018.
[320] Peace Now, 'The Government Allocates NIS 21.6 million for a New Settlement in Hebron' (17 October 2018) <http://peacenow.org.il/en/government-allocates-nis-21-6-million-new-settlement-hebron> accessed 2 November 2018.
[321] Law for the Regularization of Settlement in Judea and Samaria, 5777-2017 (6 February 2017) Book of Laws 2604 (13 February 2017), in particular at Article 1.
[322] The law would benefit, in particular, the so-called 'outposts'.

before the construction took place, by *ex post* transferring such rights to the authorities who, upon registration of the land, would then allocate them to the settlement institution.[323] According to Article 8 of the Law, the original owner of the land would only retain a right to compensation. It is easy to conclude that the law facilitates the consolidation of *de facto* situations that would further expand the territorial extension of the settlements. In February 2017, the law was challenged before the Israeli Supreme Court by a group of Palestinian and Israeli civil society organisations.[324] The international community, including the UN and the EU strongly criticised the law.[325] Prior to the enactment of the Law, Israel's Attorney General, Avichai Mandelblit, announced that he would not defend it because he believed it to be unconstitutional and potentially leading to a prosecution before the International Criminal Court.[326] However, in a legal brief submitted to the Israeli Supreme Court,[327] while opposing the Law and advising the Court to strike it down *inter alia* because it was enacted *ultra vires*, that is exceeding the jurisdiction of the Israeli Knesset that does not extend to the West Bank, the Attorney General suggested that there might be other legal avenues to 'legalise' the outposts. Commentators observed that the Attorney General's opinion has marked a shift in the Israeli overall policy vis-à-vis the settlements, which might indicate an intention to annex the West Bank.[328] Indeed, the Israeli Government has provided further indications to this effect: in

[323] Ibid Articles 3-5.
[324] HCJ 1308/17, *Silwad Municipality v Knesset* (case pending); see the petition translated in English by Adalah at <https://www.adalah.org/uploads/uploads/PDF_Final_English_translation_Settlements_Regularization_Petition_May_2017.pdf> accessed 2 November 2018.
[325] See, UN Secretary-General, 'Statement attributable to the Spokesman for the Secretary-General on the passing of the so-called settlements "Regularisation bill"' (7 February 2017) <https://www.un.org/sg/en/content/sg/statement/2017-02-07/statement-attributable-spokesman-secretary-general-passing-so-called> accessed 2 November 2018; European Union External Action, 'Statement by High Representative/Vice-President Federica Mogherini on the "Regularisation Law" adopted by the Israeli Knesset' (7 February 2017) <https://eeas.europa.eu/headquarters/headquarters-Homepage/20104/statement-high-representativevice-president-federica-mogherini-regularisation-law-adopted_en> accessed 2 November 2018.
[326] Tova Zimuki, Elisha Ben Cimon and Moran Azula, 'Attorney General to Netanyahu: I will not defend the Regularization Law before the High Court of Justice' (30 January 2017) *ynetnews* (in Hebrew) <https://www.ynet.co.il/articles/0,7340,L-4914676,00.html> accessed 2 November 2018.
[327](in Hebrew) <https://www.adalah.org/uploads/uploads/AG_response_Settlement_Law_22112017.pdf> accessed 2 November 2018.
[328] See, for example, Adalah, 'Even Israeli AG says Settlement Regularization Law should be repealed' (23 November 2017) <https://www.adalah.org/en/content/view/9300> accessed 2 November 2018; Adalah, 'Adalah: AG must retract legal opinion giving green light to appropriation of private Palestinian land' (20 February 2018)

August 2017, in a statement made before the Israeli Supreme Court in the same case, the Government argued that the Knesset is authorised to legislate everywhere in the world even if this implies violating a foreign country's sovereignty by enacting laws that would apply in their territory. In particular, it argued that '[the authority] of the Government of Israel to annex any territory or to enter into international conventions derives from its authority as determined by the Knesset' and that '[the Knesset] is allowed to ignore the directives of international law in any field it desires'.[329] Adalah, a legal centre representing the rights of Arab minorities in Israel, responded to the Government's statement and brief by stating that

> The state's position amounts to a *de facto* annexation of the West Bank. It ignores the fact that the area is occupied territory under Israeli military control. In its response, in fact, the state suspends the applicability of international law to the Occupied Palestinian Territory, and instead applies Israeli law in an explicit and unequivocal manner. With this law, Israel grossly violates international law, preferring both its own illegitimate interests as the occupying power and those of Israeli Jewish settlers over the rights of Palestinian residents. We believe that the Supreme Court must make a swift decision to invalidate all of the clauses of the law.[330]

Other initiatives that appear to confirm the Israeli Government's intention to annex the occupied territories include the proposed, and then indefinitely retired, Greater Jerusalem Bill and legislation passed in February 2018 to place settlement-based Israeli universities – specifically, Ariel University – under the control of Israel's Council for Higher Education. The former bill, which was due to be enacted in late 2017, was withdrawn indefinitely because of alleged US pressures. In its original form, it purported to annex to the Council of Greater

<https://www.adalah.org/en/content/view/9431> accessed 2 November 2018; Elena Chachko, 'Israel's Settlement Regularization Law: The Attorney General's Extraordinary Brief and What it Means for Israel's Legal Stance on Illegal Settlements' (8 December 2017) *Lawfare* <https://www.lawfareblog.com/israels-settlement-regularization-law-attorney-generals-extraordinary-brief-and-what-it-means> accessed 2 November 2018; Yonah Jeremy Bob, 'Attorney General's Move On Settlements: Shifting But No Game-Changer' (16 November 2017) *Jerusalem Post* <https://www.jpost.com/Israel-News/Attorney-Generals-move-on-settlements-shifting-but-no-game-changer-514460> accessed 2 November 2018.

[329] See, Adalah, 'Israeli gov't: Knesset can make laws everywhere in the world, and can violate sovereignty of foreign states' (19 August 2017) <https://www.adalah.org/en/content/view/9585> accessed 2 November 2018, reporting the content of the Government's statement available in Hebrew at <https://www.adalah.org/uploads/uploads/Settlement_Law_govt_additional_response_07082018.pdf> accessed 2 November 2018.

[330] Adalah, 'Israel confirms de facto annexation of West Bank lands' (24 August 2017) <https://www.adalah.org/en/conte nt/view/9209> accessed 2 November 2018.

Jerusalem some Israeli settlements located in Area C of the West Bank, including for example Ma'ale Adumim and Kfar Adumim.[331] Some MKs behind the proposed Bill publicly stated that this was aimed at ensuring a Jewish majority in the municipality of Jerusalem.[332] However, it was reported that US pressures put an end to the legislative process for enacting the proposed Law because it would have amounted to annexation, which in turn would have been harmful for future peace negotiations.[333] The second initiative consisted of legislation, passed in February 2018, placing Israeli universities in the settlements, formerly under the authority of the Council for Higher Education in Judea and Samaria, under the control of Israel's Council for Higher Education.[334] The MK who sponsored this piece of legislation was reported to have publicly acknowledged that one of the aims of the Law was to impose sovereignty on the Israeli settlements in the West Bank.[335]

The developments described above show that the recommendations of the Settlements Inquiry to Israel have not only been neglected by domestic policy- and law-makers, but they have also been actively countered in domestic politics. The wave of legislation that has characterised in particular the last Israeli legislature demonstrates that settlements represent a legally intractable issue: ideology and politics dominate this domain and have prevented not only the Settlements Inquiry but also every single other international mechanism that has voiced its criticism against the Government's settlements policy from engendering any meaningful

[331] See, Knesset, Proposed Greater Jerusalem Law, 2017-5777, initiated by MK Yehuda Glick (Internal Number: 2014607) (unofficial translation by al-Haq) <http://www.alhaq.org/en/wp-content/uploads/2018/02/P-20-4158.pdf> accessed 2 November 2018.
[332] Ramzy Baroud, '"Creeping Annexation": Why Israel Shelved the "Greater Jerusalem Law"' (9 November 2017) *Foreign Policy Journal* <https://www.foreignpolicyjournal.com/2017/11/09/creeping-annexation-why-israel-shelved-the-greater-jerusalem-law/> accessed 2 November 2018.
[333] Jeffrey Heller, 'U.S. pressure delays Israel's 'Greater Jerusalem' bill: legislator' (29 October 2017) *Reuters* <https://www.reuters.com/article/us-israel-palestinians-settlement/u-s-pressure-delays-israels-greater-jerusalem-bill-legi slator-idUSKBN1CY0CB> accessed 2 November 2018.
[334] Tovah Lazaroff, 'Knesset Applies Israeli Law to Ariel University in West Bank' (12 February 2018) *Jerusalem Post* <https://www.jpost.com/Israel-News/Israel-applies-sovereignty-over-Ariel-University-in-the-West-Bank-542446> accessed 2 November 2018.
[335] Middle East Monitor, 'Israel's Education Council backs 'annexation' of West Bank universities' (25 January 2018) <https://www.middleeastmonitor.com/20180125-israels-education-council-backs-annexation-of-west-bank-universities/> accessed 2 November 2018.

impact on the situation on the ground. The one instrument that could potentially put a spin on the accountability ball, the International Criminal Court, has so far refrained from taking meaningful action vis-à-vis the settlements. While the Court's preliminary examination may have succeeded in cautioning some lawyers from openly supporting the settlements enterprise,[336] protracting the preliminary examination of the situation in Palestine has bought Israeli policy- and law-makers time to seemingly expedite the annexation of the occupied territories. This has happened in open disregard for international law.

3.6 Analysis

So far, the Settlements Inquiry does not appear to have produced any meaningful or visible effect in Israel. On the contrary, recent legislative and jurisprudential developments signal the intention of the Israeli legislator to collide with international law in point of settlements. Such recent steps cannot be ascribed to one factor only but have likely been compounded by the overall increased international criticism of Israel's settlements policy, which included *inter alia* the Settlements Inquiry Report, the opening of a preliminary examination at the International Criminal Court, the diplomatic pressure of foreign states and the advocacy campaigns led by civil society groups such as BDS. The overarching reason underlying Israel's entrenchment behind its established policies vis-à-vis the settlements is apparent: settlements should be a political issue and, as such, all attempts to "juridify" the debate over them should be dismissed. Hence, the most urgent question is not why the Mission failed to trigger some sort of domestic change, but rather how it purported to produce such change and why the specific strategy pursued failed exert its pull.

[336] See the Attorney General's position on the Regularization Law before its enactment by the Knesset (supra) and, for example, Yonah Jeremy Bob, 'High Court President: Judges Can't Attend Settlement Ceremony Because It Is Political' (27 September 2017) *Jerusalem Post* <https://www.jpost.com/Israel-News/High-Court-president-Judges-cant-attend-settlement-ceremo ny-because-it-is-political-506091> accessed 2 November 2018.

The merit of the Settlements Inquiry lies precisely in its attempt to renew the debate about settlements under a different light by emphasising the obligation of third-party states not to recognise an unlawful situation and by highlighting the proximity between certain businesses and the impact of settlements on Palestinians' basic rights so as to engender an adverse economic impact. By partially shifting the attention to third actors, the Mission sought to start a process that eventually could result in some form of economic cost for Israel: a tactic typical of coercive strategies. In light of Israel's intractable position, coercion was arguably the only available strategy. From this viewpoint, the Mission has been able to elicit the action of the UN and to reinforce initiatives undertaken by the EU and some states, and it has thus successfully set in motion the wheel of coercion. However, potentially the most powerful tool of indirect pressure on Israel to terminate all settlements activity, the creation of a database of companies involved in the settlements' economy has been unduly delayed, purportedly as a result of Israeli and US diplomatic pressures. While withholding the names of the companies to be included in the database may also have been determined by reasons of procedural fairness, the loss of momentum, coupled with the protracted inaction of the Prosecutor of the International Criminal Court, has represented an occasion for the Israeli Government to intensify its annexation policies. Quite obviously, a prospective annexation of the settlements, or even of the entire West Bank, would not mend the unlawfulness of the situation, since, in international relations, international law takes precedence over national law, but it may alter pragmatic considerations of third actors, who may be more easily persuaded to recognise a *de facto* situation than to continue regarding the situation as unlawful under international law.[337]

In this sense, the Settlements Inquiry's potential for change has been so far curtailed by crippling its coercive arm. Consequently, while an assessment of its domestic effectiveness

[337] Although this would imply a progressive erosion of the customary prohibition to annex territory with the use of force.

must necessarily be postponed, the prospects are not too rosy. Under the enduring influence of the US, the database on companies involved in the settlements' economy may never see the light unless the UN machinery manages to free itself from the yoke of US diplomacy.[338] On the bright side, though, one cannot underplay the importance of the Mission in raising the level of discussion with regards to the issue of corporate proximity to unlawful activities. While it had been at the centre of debates for the most part confined to civil society and academic circles, the Settlements inquiry succeeded in conferring salience to this issue and to providing an international official platform for debating it.

An alternative explanation for the apparent ineffectiveness of the Mission's strategy may also be found in the thematic focus selected by the Mission. While the potential economic impact of the strategy deployed is evidenced by that produced by similar thematic campaigns led by civil society organisations, the prospect of economic losses caused by a possible divestment of certain companies may not imply sufficient material costs to outweigh the benefits – possibly, political and economic – accrued to the State of Israel from the maintenance of the settlements. Should this be the case, the publication of the UN database may be unlikely to succeed in causing a significant shift in policy.

4. Intra-Palestinian Violence: The Pitfalls of Unmonitored Internalisation

Despite attempts to delegitimise it by arguing that it only, or predominantly, addressed Israeli violations, the Goldstone Mission did not refrain from scrutinising the human rights situation in the Palestinian territories, not only in the Gaza Strip but also in the West Bank. A substantial part of the Goldstone Report criticises patterns of human rights violations perpetrated by both the PA and Hamas predominantly against their political opponents. The Mission stressed the

[338] On the enduring need to promote accurate information of the nature and purpose of the database as a way to counter misrepresentations by the US and Israel, see Valentina Azarova, 'The UN Database on Business in Israeli Settlements: Pitfalls and Opportunities' (29 May 2018) *Al-Shabaka* <https://al-shabaka.org/commentaries/the-un-database-on-business-in-israeli-settlements-pitfalls-and-opportunities/> accessed 2 November 2018.

need to tackle these patterns as a prerequisite for advancing a national process of reconciliation between the two main Palestinian factions.

This part of the Goldstone Report offers an insight into how persuasion and acculturation strategies are synergistically deployed, but the subsequent developments occurred in Palestine show that processes that leverage the cognitive perceptions of state actors are unlikely to succeed unless they are associated with some form of threat of sanction or with a steady follow-up process. Indeed, after the Goldstone Report and its initial resonance with the PA establishment in particular, substantive improvements have ceased to be implemented.

4.1 The Main Findings of the Goldstone Mission

The Goldstone Mission devoted two entire Chapters of its Report to analysing allegations of human rights violations perpetrated by Hamas and PA officials against political opponents relevant to their mandate.[339] The allegations brought to the attention of the Mission are the following:

- unlawful or irregular arrest and detention primarily for reasons of political affiliation;[340]
- death, torture and other forms of ill-treatment especially against detained individuals and often because of their political affiliation;[341]
- interferences by Hamas operatives with the freedom of movement, in particular, of Fatah members in the Gaza Strip;[342]
- attacks by Hamas or Al-Qassam operatives against individuals affiliated with Fatah in the Gaza Strip;[343]

[339] Goldstone Report, Chapters XIX and XXIII.
[340] Ibid, paras 1349 and 1555-1558.
[341] Ibid, paras 1348, 1351, 1354 and 1559-1560.
[342] Ibid, para 1364.
[343] Ibid, para 1367.

- interferences of the PA authorities with the freedom of association, in particular with respect to groups appointing individuals suspected of sympathising for Hamas as board directors and human rights groups;[344]
- interferences by PA officials with the appointment of civil servants, targeting especially Hamas affiliates;[345]
- interferences by PA officials with the freedom of the press, and freedom of expression and opinion, consisting, for example, of attacks against journalists and photographers.[346]

The Mission analysed these allegations in light of the Universal Declaration of Human Rights, the Palestinian Basic Law and some soft law instruments, including the United Nations Code of Conduct for Law Enforcement Officials and the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement.[347] It concluded that 'there [were] features of the repressive measures against actual or perceived Hamas affiliates and supporters in the West Bank that would constitute violations of international law' and that 'by failing to take action to put an end to the practices described above, the Palestinian executive and judicial authorities are contributing to the further deterioration of the fundamental rights and freedoms of Palestinians, the rule of law and the independence of the judiciary'.[348]

In its conclusive paragraphs, the Mission hinted at the need for reconciliation between Fatah and Hamas as a precondition for the protection of the basic rights of Palestinians. The Mission emphasised the need to tackle allegations of human rights violations perpetrated by the two parties against their political opponents and to restore the independence of the judiciary.[349] Thus, it recommended that the relevant Palestinian authorities took the following steps:

[344] Ibid, para 1561.
[345] Ibid, paras 1562-1563.
[346] Ibid, paras 1564-1570.
[347] Ibid, paras 1369-1372 and 1576-1583.
[348] Ibid, paras 1584-1585.
[349] Ibid, para 1911.

> (a) …. the Palestinian Authority should issue clear instructions to security forces under its command to abide by human rights norms as enshrined in the Palestinian Basic Law and international instruments, ensure prompt and independent investigation of all allegations of serious human rights violations by security forces under its control, and end resort to military justice to deal with cases involving civilians;
>
> (b) …. the Palestinian Authority and the Gaza authorities should release without delay all political detainees currently in their power and refrain from further arrests on political grounds and in violation of international human rights law;
>
> (c) …. the Palestinian Authority and the Gaza authorities should continue to enable the free and independent operation of Palestinian non-governmental organizations, including human rights organizations, and of the Independent Commission for Human Rights.[350]

Strategies Deployed

The findings and recommendations of the Goldstone Mission with regard to human rights violations in the West Bank and Gaza must be read in the overall context of the Goldstone Report in order to fully understand their strategic potential. As can be seen from the above overview of the main arguments put forward in its Report, the Mission deployed both acculturation and persuasive strategies to induce change at the domestic level. In particular, it exploited the domestic commitment to international human rights, which finds expression in Article 10(2) of the Palestinian Basic Law,[351] and data sets provided by not only prominent NGOs in the West Bank and Gaza, but also by the Palestinian Independent Commission for Human Rights, a national human rights institution established in 1993 by presidential decree of Yasser Arafat. By arguing that respect for the rule of law is a precondition for the effective discharge of the state's responsibilities vis-à-vis its citizens, the Mission clearly hoped to impulse some form of reconciliation between the two main Palestinian political factions, Hamas and Fatah.

[350] Ibid, para 1974.
[351] Which states that 'The Palestinian National Authority shall work without delay to join regional and international declarations and covenants which protect human rights'.

Persuasion was sought by cuing the Palestinian authorities to reconsider their human rights practices in light of, on the one hand, the international human rights standards and, on the other hand, the national reconciliation process between Hamas and the PA. That the Mission had in mind the reconciliation process, in particular, is confirmed by one specific recommendation that it addressed to the Israeli authorities, that is the recommendation that the Israeli authorities refrained from interfering with national political processes in the Occupied Palestinian territories.[352] While the information provided by the Mission were likely already known to the relevant Palestinian authorities thanks to the work undertaken by civil society organisations and the Independent Palestinian Commission of Human Rights, the Mission emphasised the patterns of violations, linked them to the general political reconciliation process and raised the level of scrutiny.

In addition, the Mission deployed acculturation strategies in two different ways. First, it leveraged the Palestinian domestic self-perception as a human rights-abiding state by evoking not only the international standards on human rights but also their domestic transposition and by showing how domestic practices fell short primarily of such domestic standards, above all the Palestinian Basic Law. Secondly, and most importantly, it did so while also levelling serious allegations against the other investigated party, Israel. Since the standards employed to scrutinise both Israeli and Palestinian practices were similar, contesting part of the Report – namely, that part that was adverse to the Palestinian authorities – while accepting the other would have meant engendering a state of what social psychologists have called cognitive dissonance, that is the unease deriving from holding contrasting cognitions. In other words, the Palestinian authorities would have lost credibility, had they decided to use the Report to chastise Israel while at the same time rejecting the allegations formulated against them. Thus, the Report offered a powerful weapon for Palestinians to wield against Israel but only at a cost, namely the

[352] Goldstone Report, para 1972(f).

acceptance of the criticisms levelled against them – and, thus, the initiation of domestic processes of accountability or changes in practices.

4.2 Precedents

The Goldstone Mission was not the first investigation to address allegations of human rights violations perpetrated by Palestinian state agents. Most notably, monitoring and reporting activities with respect to human rights violations perpetrated by Palestinian state agents have been carried out by the Palestinian Independent Commission on Human Rights and international and national NGOs, including Human Rights Watch, Amnesty International, Al-Haq and the Palestinian Center for Human Rights. The work undertaken by all these actors should be considered as a potentially alternative or, at least, concurrent cause for the developments described below. However, while it is not my purpose to analyse the work of these actors, below I briefly assess how it relates to the main findings of the Goldstone Mission in order to show how the latter contributed to amplifying the pleas of human rights governmental and non-governmental organisations.

In particular, the Independent Commission of Human Rights is the national human rights institution for Palestine and was established in 1993 with the mandate to 'follow up and ensure that all requirements to safeguard human rights are provided for in the various Palestinian laws, by-laws and regulations, and in the work of the various departments, agencies and institutions of the State of Palestine and the PLO'.[353] The Commission *inter alia* receives individual complaints and analyses patterns of violations. Since its establishment, the Commission has been monitoring cases of violations later registered by the Goldstone Inquiry. For example, the Commission has unsuccessfully requested that the practice of prosecuting civilians before military courts be terminated by the relevant agencies, thus complying with the judgments of

[353] Presidential Decree No 59 (1993).

the Supreme Court of Justice and the Directives of the President of the PA.[354] The Commission also reviewed cases of deaths in custody, unlawful detention of Fatah affiliates in the Gaza Strip for political reasons, death sentences inflicted by the Palestinian judiciary, violations of due process rights, torture and ill-treatment and termination of public contracts based on unlawful clearance procedures carried out by Palestinian security agencies.[355]

Similar work was undertaken by Human Rights Watch, in particular, in a report of July 2008, which highlighted how the political rift between Hamas and the PA was at the roots of several human rights violations, including torture and other forms of ill-treatment, violations of due process rights, and arbitrary arrests and detention.[356] Human Rights Watch draws a strong connection between the deterioration of the internal human rights situation in the Occupied territories and the political struggle between Hamas and the PA: it reported that, in 2007, more Palestinians had died as a result of internal Palestinian fighting than from Israeli attacks.[357] Similarly, prior to the establishment of the Palestinian Independent Investigation Commission, the Palestinian NGO Al-Haq had been monitoring violations in the West Bank and Gaza. For example, in a report of June 2009, it listed a number of human rights violations detected since the beginning of the year, which included extra-judicial killings, torture, arbitrary detention, violations of the freedoms of association and movement, disregard for judicial decisions and violations of fair trial.[358]

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[354] Independent Commission on Human Rights, 'ICHR Demands that Civilians not be Brought before the Military Judiciary and Immediately Implement Decisions of the Supreme Court of Justice' (27 November 2008) <http://ichr.ps/en/1/26/500/ICHR-Demands-that-Civilians-not-be-Brought-before-the-Military-Judiciary-and-Immediately-Implement-Decisions-of-the-Supreme-Court-of-Justice.htm> accessed 3 November 2018.

[355] For a list of all cases followed by the Commission, see Independent Commission for Human Rights since 2018 'Statements and Positions' <http://ichr.ps/en/1/26> accessed 3 November 2018. While the list of statements and positions only goes back to 2008, similar cases were reported to the Commission since its establishment (Skype interview with Ammar Dweik, Director General of the Independent Commission for Human Rights, 16 May 2018).

[356] Human Rights Watch, *Internal Fight Palestinian Abuses in Gaza and the West Bank* (July 2008).

[357] Ibid 18.

[358] Al-Haq, 'Overview of the Internal Human Rights Situation in the Occupied Palestinian Territory - June 2009' (18 June 2009) <http://www.alhaq.org/advocacy/topics/palestinian-violations/240-overview-of-the-internal-human-rights-situation-in-the-occupied-palestinian-territory-june-2009> accessed 3 November 2018.

Despite the intense reporting on human rights violations in the West Bank and the Gaza Strip, it was not until the publication of the Goldstone Report and the subsequent establishment of a Palestinian Independent Investigation Commission that the Palestinian authorities started to consider reviewing their practices vis-à-vis human rights. In this sense, the Goldstone Report functioned as an amplifier of civil society organisations' pleas, bringing them to the attention of the international community with a dual objective: on the one hand, enhancing its impartiality and independent by showing that it would not only investigate one party, namely Israel, and, on the other hand, advocating for effective reforms in the Palestinian territories.

4.3 The Palestinian Independent Investigation Commission: Towards Internalisation

Not long after the publication of the Goldstone Report, and in compliance with General Assembly Resolutions 64/10 and 64/2054, the PA established by Presidential Decree a Palestinian Independent Investigation Commission 'to follow up implementation of the recommendations made in the Goldstone report with respect to the Palestinian National Authority'.[359] In particular, the Commission was mandated to 'investigate the Palestinian contraventions and violations referred to in the report of the Fact-Finding Mission that was established by the Human Rights Council and headed by Justice Richard Goldstone'.[360] The Report produced by the Commission was submitted to the Secretary General and published as an annex to General Assembly Resolution 64/890.

The Report of the Commission addresses, on the one hand, the context in which the alleged violations perpetrated by both PA and Hamas officials have taken place and, on the other hand, the specific allegations included in the Goldstone Report. It is not within the purview of this study to analyse the factual and legal findings of the Commission. AS regards the allegations

[359] Annex 2 to UNGA, Second follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict, Res No 64/890 (11 August 2010) UN Doc A/64/890, Decree No () 2010 Concerning the formation of an independent commission to follow up the Goldstone report (25 January 2010) Art 1.
[360] Annex 3 to UNGA Res 64/890 (ibid) Statute of the Palestinian Independent Investigation Commission established pursuant to the Goldstone report, Art 3.

put forward by the Goldstone Mission with respect to episodes of internal violence, in all cases, the Palestinian Commission agreed with the observations of the Goldstone Report in that it found that the relevant international and domestic law provisions had been violated. In particular, the Commission concluded that:

- most arrests executed in the West Bank and the Gaza Strip were related to the Palestinian political split between the two territories and were thus politically motivated;[361]
- law enforcement agents in both the West Bank and the Gaza Strip carried out most arrests unlawfully or irregularly and subjected the arrested individuals to ill-treatment and cruelty;[362]
- arrested individuals would not be transferred before a Public Prosecutor within the statutory time limit;[363]
- civilians in both the West Bank and the Gaza Strip were tried by military courts;[364]
- often, security services in the West Bank failed to enforce civil court orders for the release of detainees;[365]
- torture for the purpose of extracting confessions was widespread both in West Bank and Gaza Strip prisons;[366]
- Gaza authorities carried out extrajudicial executions;[367]
- impunity for cases of extrajudicial killings in the Gaza Strip was endemic;[368]
- West Bank authorities, including the PA Ministry of Interior, interfered repeatedly with the freedom of association by *inter alia* refusing to register new-born associations;[369]

[361] Report of the Palestinian Independent Investigation Commission established pursuant to the Goldstone report: violations allegedly committed by Palestinians, Attachment II to UNGA Res 64/890, para 444.
[362] Ibid, para 445.
[363] Ibid, para 446.
[364] Ibid, para 447.
[365] Ibid, para 448.
[366] Ibid, para 449.
[367] Ibid, para 450.
[368] Ibid, para 451.
[369] Ibid, para 452.

- several ministerial structures in both the West Bank and Gaza interfered with the appointment of civil servants because of the political affiliation or sympathies of the appointees thus violating the right to hold a public office;[370]
- both West Bank and Gaza Strip authorities interfered with press freedoms by, for example, unlawfully incarcerating journalists or seizing their equipment.[371]

Finally, the Commission formulated a number of recommendations addressing domestic praxis, legislation and institutional arrangements. For example, the Commission recommended that the security services respect the legal requirements provided for by the law with respect to arrest and detention; that the military prosecutors and judges refrain from interfering with the ordinary justice system by trying civilians; that the protocol of cooperation and understanding between the Office of the Public Prosecutor and the Office of the Military Prosecutor, which entrusts the latter Office to exercise some powers normally held by the former Office with respect to criminal offences provided for by the Penal Codes of the West Bank and Gaza, be rescinded; that allegations of extrajudicial killings or torture be promptly and effectively investigated.[372] For the purposes of this Section, I highlight the following recommendations:

> The condition imposed by Government agencies in the West Bank and the Gaza Strip that an employee must obtain the approval of the security services as one of the requirements for appointment to an official post must be abolished, inasmuch as such approval is unlawful and constitutes a clear violation by Government agencies of the Palestinian Basic Law and the Civil Service Law.[373]
>
> ….
>
> With respect to torture and other forms of degrading treatment, the competent Palestinian authorities must remedy the shortcomings and deficiencies of penal legislation in the Palestinian territory by adopting clear legislative texts that criminalize and punish such practices in a manner that is in keeping with their gravity. The Commission deems it necessary for such laws to be consistent with the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which entered into force in 1987, because that

[370] Ibid, para 453.
[371] Ibid, para 454.
[372] For a full list of recommendations, see ibid paras 455-482.
[373] Ibid, para 473.

> Convention is a peremptory legal reference that must be respected and applied by all who are subject to international law.[374]

The establishment of the Palestinian Independent Investigation Commission and the publication of its report represent the first step towards the internalisation of human rights practices compatible with the relevant international standards. The genuineness of this process is evidenced by the Commission's harsh criticism of Palestinian practices both in the West Bank and in the Gaza Strip. Despite its deployment by the President of the PA, the Commission was fully independent in its review of Palestinian practices.[375] From the viewpoint of state socialisation, this signals a domestic acceptance of the relevant international human rights standards. While most of such standards had already been accepted and recognised in domestic legislation, their sub-optimal application rendered their domestic enactment flawed. Thus, the Commission's review of Palestinian practices constituted an essential step towards recognising the existing gaps in the application of the relevant domestic and international standards. Moreover, its transmission to the Human Rights Council by the PA President evidences acceptance, at least by the PA, of the criticism levelled by the Commission against PA official practices in the West Bank, that is of the protection gaps in the application of the existing law. In other words, by endorsing the Report of the Commission, the PA signalled its acceptance not only of the relevant normative standards, but also of their concrete applicability to real-life situations, that is of the scope of protection afforded to all individuals, which the PA's practices in the West Bank had seriously compromised.

4.4 Further Domestic Developments: Incomplete Internalisation

The conclusions and recommendations of the Palestinian Independent Investigation Commission demonstrate that the PA Government's choice to deploy the Commission constituted a sincere endeavour to scrutinise PA and Hamas officials' actions. As shown above,

[374] Ibid, para 479.
[375] The highly critical stance of the Commission towards Palestinian practices is a testament to the independence of the Commission.

the Commission went to great lengths to criticise both political factions and did not attempt to whitewash serious accusations levelled against PA officials, including torture and violations of the freedoms of association, expression and opinion for political reasons.

The Palestinian Independent Commission for Human Rights has been active in monitoring the human rights situation in the West Bank and the Gaza Strip and has repeatedly called on both Hamas and the PA to respect human rights as a pre-requisite for an effective process of national reconciliation.[376] Despite the renewed reconciliation efforts between the PA and Hamas after Operation Cast Lead[377] and the publication of the Palestinian Independent Investigation Commission's Report, violations of in particular due process rights, press freedoms and freedom of association persisted both in the West Bank and in the Gaza Strip. For example, throughout 2011 and 2012, the Independent Commission of Human Rights called repeatedly the military courts in the Gaza Strip to refrain from imposing the death sentence and the police in the West Bank to avoid interfering with peaceful protests. Similar patterns have been registered until the time of writing.[378]

[376] See, for example, Independent Commission for Human Rights, 'During a Meeting with Representatives of Civil Society and Media Organizations in Gaza, Dr. Harb Confirms that Respect for Human Rights is t' (28 November 2012) <http://ichr.ps/en/1/26/436/During-a-Meeting-with-Representatives-of-Civil-Society-and-Media-Organizations-in-Gaza-Dr-Harb-Confirms-that-Respect-for-Human-Rights-is-t.htm> accessed 3 November 2018. In particular, in a meeting with civil society organisations, intellectuals and journalists in the Gaza Strip, Commissioner-General Ahmad Harb stated that 'respect for human rights is our way to reconciliation and ending the internal political division among Palestinians'.

[377] Broadly speaking, relations between Hamas and the PA had been strained since the first appearance of the Islamist movement in the aftermath of the First Intifada, but they dramatically deteriorated in 2006 when Hamas took over control of the Gaza Strip after the controversial elections held in 2006. Since then, the two parties have tried to reconcile and form a unity government and put an end to the violence. For example, with the Mecca Agreement of 2007, which however failed and resulted in further military clashes in the Gaza Strip (see Hamas and Fatah, 'The Mecca agreement' (2007) *Al-Zaytouna Centre* <http://www.alzaytouna.net/en/resources/documents/palestinian-documents/109086-mecca-agreement-amp-program-of-the-palestinian-unity-government-2007.html> accessed 3 November 2018); on the relationship between Hamas and Fatah, see Jonathan Schanzer, *Hamas vs. Fatah: The Struggle for Palestine* (Palgrave Macmillan 2008); Khalil Shikaki, 'The Peace Process, National Reconstruction, and the Transition to Democracy in Palestine' (1996) 25(2) *Journal of Palestine Studies* 5.

[378] For a complete list of statements by the Palestinian Independent Commission on Human Rights, see Independent Commission on Human Rights, 'Statements and Positions' <http://ichr.ps/en/1/26> accessed 3 November 2018.

However, the Independent Commission for Human Rights also reported some cases that seem to demonstrate a positive shift in domestic legislation and practices in the direction indicated by the Independent Investigation Commission. For example, in September 2012, the plenary of the Palestinian High Court of Justice[379] decided a case concerning some school teachers who, despite having successfully passed their probationary period, had been dismissed from their public office because they had failed their security clearance process conducted by the security services. While the judgment could not be retrieved and the Independent Commission for Human Rights' report does not specify the reasons that led to the decision of the security services, in particular whether the teachers were affiliated with or sympathisers of Hamas, it is reported that the judgment brought to an end the 'unlawful practice resulting from the state of internal political divide between the West Bank and Gaza Strip'.[380] In particular, the Court ordered

> 1. The cancellation of all administrative decisions taken by the Minister of Education related to the placement, appointment and dismissal of teachers from public office are void and illegal procedures.
>
> 2. To bring justice to all teachers who were dismissed unlawfully from public office for security considerations, and compile files of all cases related to dismissal, cutting of salaries and non-appointment in public office upon the recommendation of the Security Services, and work quickly towards correcting the situation and bringing redress to all victims of this unlawful practice.[381]

While there is no conclusive proof that the Palestinian High Court of Justice handed down its judgment to implement the recommendations of the Investigation Commission, it is clear that the thematic analysis of the case, the relevant legal issues and the *ratio decidendi* correspond with the argument put forward by the latter.

[379] A composition of the Palestinian Supreme Court.
[380] Independent Commission for Human Rights, 'ICHR Welcomes the Palestinian High Court's Decision Regarding the Issue of the Dismissed Teachers and their Return to Their Former Jobs' (4 September 2012) <http://ichr.ps/en/1/26/428/ICHR-Welcomes-the-Palestinian-High-Court%E2%80%99s-Decision-Regarding-the-Issue-of-the-Dismissed-Teachers-an d-their-Return-to-Their-Former-Jobs.htm> accessed 3 November 2018.
[381] Ibid.

Similarly, in January 2011, only a few months after the publication of the Independent Investigation Commission's Report, the General Intelligence Agency in the West Bank issued a decision to terminate the practice of bringing civilians before military courts and to refrain from detaining individuals without an indictment[382] from the public prosecutor in compliance with the Palestinian Basic Law and the Code of Criminal Procedure.[383] While it was not possible to confirm the reasons for this decision and whether it was taken specifically in response to the recommendation of the Independent Investigation Commission, its timing and content are reflective of the recommendations formulated by the Commission in its Report submitted to the Secretary General. Furthermore, in July 2012, the General Intelligence Agency announced its decision to enforce civil courts' rulings and to release all detainees whom ordinary courts ordered to release.[384] As for the previous cases, it was not possible to retrieve the authentic text of the decision and its rationale, but it seems important to note that the merit of the decision mirrored the recommendations of the Independent Investigation Commission.

Quite obviously, there are several concurring factors that may explain these judicial and policy shifts, including the work of the Independent Commission on Human Rights itself through both its legal accompaniment of individual petitioners, as in the case of the dismissed

[382] While the communiqué of the Independent Commission on Human Rights reports the word 'indictment', in the summary of the relevant provisions of the Palestinian Code of Criminal Procedure (Law No 3 of 2001) provided by the Independent Investigation Commission, it is not clear whether the decision to detain individuals consist of an indictment or of an arrest warrant. The summary simply states that 'Article 29, affirming that individuals may be arrested or imprisoned only pursuant to an *order* issued by the competent authority. It stipulates that no person may be arrested or imprisoned except by *order* of the competent authority as set forth in law' (Palestinian Independent Investigation Commission's Report, para 131, emphasis added). The authentic version of Article 29 of the Code, in Arabic, employs the word 'أمر', which may be translated into English with the word 'order' or 'command', therefore leaving the nature of the decision unclear (See Palestinian Bar Association ' قانون الإجراءات الجزائية رقم 3 لسنة 2001 م' (2001) <https://www.bal.ps/p df/3.pdf> accessed 3 November 2018).

[383] Independent Commission on Human Rights, 'The General Intelligence Agency issues a Decision to Refrain from Bringing Civilians Before Military Courts' (17 January 2011) <http://ichr.ps/en/1/26/442/he-General-Intelligence-Agency-issues-a-Decision-to-Refrain-from-Bringing-Civilians-Before-Military-Courts.htm> accessed 3 November 2018.

[384] Independent Commission on Human Rights, 'Statement on General Intelligence Agency's Execution of Courts' Rulings' (25 July 2012) <http://ichr.ps/en/1/26/426/Statement-on-General-Intelligence-Agency%E2%80%99s-Executio n-of-Courts%E2%80%99-Rulings.htm> accessed 3 November 2018.

teachers,[385] and its advocacy,[386] as well as the pressures exerted by civil society organisations[387] and other international agencies.[388] However, it is significant that the shifts considered occurred in the two years following the publication of the Independent Investigation Commission's Report and concerned specific issues that had been highlighted in it. The Independent Commission on Human Rights itself, in its Sixteenth Annual Report, highlighted the importance of the Goldstone Report and the ensuing domestic investigation in the context of the ongoing efforts to strengthen the rule of law in the Palestinian territories with a view to creating the conditions for the advancement of the national reconciliation process between the PA and Hamas.[389]

4.5 Analysis

Catherine Harwood has posited that 'commissions [of inquiry] certainly *promote* transitional justice goals. But the power to *produce* transitional justice is out of their hands'.[390] The Goldstone Commission constitutes an example of such contribution with regards to the

[385] In the statement concerning the case of the dismissed teachers, the Palestinian Independent Commission on Human Rights claimed that it had followed the case since 2008 ('ICHR Welcomes the Palestinian High Court's Decision…' (supra)).
[386] Which included, for example, repeated calls on the relevant authorities to conform to the legal procedures regulated by the Code of Criminal Procedure, even before the Goldstone Inquiry and the Palestinian Independent Investigation Commission's investigation.
[387] Notably, Human Rights Watch and Al-Haq.
[388] For example, the UN Special Coordinator for the Middle East Peace Process (UNSCO), who regularly releases reports to support the UN Secretary General's peace-making efforts. In April 2011, for example, the Special Coordinator published UNSCO, *Palestinian State-Building: A Decisive Period* (13 April 2011), which at page 18 reports the improvements registered in the Palestinian territories with regards to human rights and the rule of law. For example, it states: 'In a positive step the government decided that all civilians detained will have their case submitted to civilian courts – rather than the military courts. The implementation of this decision by the General Intelligence Service will be closely monitored, and other relevant agencies are encouraged to adopt a similar approach. The PA is encouraged to respect nonviolent demonstrations, and ensure due process be afforded to all those facing arrest or detention. The PA should also continue to uphold and invest in the rule of law and basic rights for all, including criminal justice; the monitoring and reporting of arbitrary arrest and detention will continue'. Another example may be the Office of the High Commissioner for Human Rights through its Special Procedures, which periodically visited the Palestinian territories to highlight some of the shortcomings noted also by the Goldstone Inquiry (on the limitations of the press freedoms, see UNHRC, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, Addendum (11 June 2012) UN Doc A/HRC/20/17/Add.2).
[389] Independent Commission on Human Rights, *The Status of Human Rights in Palestine. Sixteenth Annual Report* (1 January – 31 December 2010) 23-24.
[390] Catherine Harwood, 'Contributions of International Commissions of Inquiry to Transitional Justice' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar, 2017) 401-423, 423.

reconciliation process between Hamas and the PA. In this respect, the main contribution of the Goldstone Report lies its ability to underline the close link between reconciliation and respect for the rule of law, thus advocating for the termination of human rights abuses both in the West Bank and in the Gaza Strip and the initiation of a process of accountability and reform. The Mission was able to raise concerns that had already been pinpointed by domestic actors, including the Palestinian Independent Commission of Human Rights and several NGOs, from an advantageous position. Indeed, the PA in particular, and to some extent Hamas, were faced with a Report that, on the one hand, strongly censored Israeli actions during Operation Cast Lead and more generally throughout the occupied territories, which they could effectively use to further their claims in international fora, and, on the other hand, criticised their own human rights practices in light of the political rift that divided them. They could not accept enthusiastically part of the Report and dismiss the other. While they may have not been sincere in their commitment to tackling the systemic problems identified by the Goldstone Mission, they had to convey the impression that they were and so they appointed a domestic inquiry that would investigate them from a domestic perspective. This was the beginning of a process of progressive internalisation. Indeed, the Independent Investigation Commission analysed genuinely the allegations contained in the Goldstone Report, as the Committee of Experts established by the Human Rights Council to oversee the implementation of the Goldstone Report's recommendations by the Israeli and Palestinian authorities noted in its reports. The Palestinian Commission agreed with all the conclusions reached by the Goldstone Commission and recommended a series of follow-up measures to the Palestinian authorities both in the West Bank and in the Gaza Strip. These measures fit in the broader reconciliation process between the PA and Hamas, which resumed immediately after Operation Cast Lead. In the following couple of years, some improvements in the direction pointed by, first, the Goldstone Mission and, second, the Palestinian Independent Investigation Commission were registered, including changes in the practices of the General Intelligence Service in the West Bank. Nonetheless, the

overall human rights situation in the Palestinian territories remains strained, as the latest report of Human Rights Watch demonstrates.[391]

Hence, was the Goldstone Mission effective with regards to the issue of Palestinian human rights violations? According to a severe standard that equates effectiveness with compliance, recent information gathered by human rights organisations suggest that the answer must be negative. However, according to a more flexible standard that considers the ultimate purpose of commissions of inquiry to engender a process of socialisation and that, thus, takes into account not only a strict adherence of Palestinian practices with human rights standards but also the triggering of such process, the answer must necessarily be mixed. As I have shown, in the time period that followed the publication of the Goldstone Report, a number of improvements was registered. These suggest that a process of internalisation was beginning to take place, the Independent Investigation Commission being the most visible sign of it. However, in the long run, violations have continued, and the core of the problem, the issue of political prisoners, has not ceased. Was the Goldstone Mission responsible for such improvements? Or, in other words, would some of these improvements have taken place even in the absence of the Goldstone Inquiry? As I have shown, several domestic and international actors participated in monitoring the human rights situation in the West Bank and the Gaza Strip, some of them including by accompanying individual cases, namely the Independent Commission of Human Rights. Moreover, the renewed reconciliation efforts that ensued to Operation Cast Lead required that the parties demonstrated to be committed to the process. All of these factors may and probably have contributed to determining some policy and jurisprudential shifts in Palestine, however, these shifts, besides having occurred immediately after the publication of the Goldstone Report, concerned issues that had been raised specifically by the Goldstone Mission, above all the

[391] Human Rights Watch, *Two Authorities, One Way, Zero Dissent: Arbitrary Arrest and Torture Under the Palestinian Authority and Hamas* (October 2018).

intelligence's interferences with the appointment of civil servants. The PA, in particular, had an incentive to accelerate any process of norm internalisation, be it sincere or not, to showcase its commitment to human rights norms and, thus, legitimise its use of the Goldstone Report. The PA needed to show that they were progressing on human rights-related issues, especially while the process of follow-up to the Goldstone Report was ongoing. The temporal indicator must be read in light of these considerations. In addition, as the periodic reports of domestic NGOs and the Independent Palestinian Commission of Human Rights show, once the oversight of the international community loosened, with investigations increasingly focused on issues related to the Gaza Strip or anyway adverse to Israel only, changes in policy and practices ceased.

Why was the process of internalisation incomplete? While UN agencies, in particular the UNDP, and domestic and international NGOs continue to monitor the human rights situation in Palestine, the most high-profile – or, to be more precise, visible – international institutions have lost sight of the internal human rights situation, focusing instead on the politics of the reconciliation process. Subsequent investigations of the UN Human Rights Council, in particular the McGowan Davis Fact-Finding Mission established to investigate the Gaza War of 2014, overlooked the issue of human rights in the Palestinian territories, especially within the West Bank. The Council itself has been much more concerned with Israel-related issues than with the internal practices in Palestine. Moreover, since 2012, the reconciliation process between Hamas and the PA, while marked by important steps, has also periodically deteriorated. Thus, it is reasonable to infer that, once human rights domestic practices in Palestine fell off the radar of the most high-profile UN agencies, the internalisation process stalled. Marginal improvements, for example in the form of paper commitments, to appease international observers with a lower profile, such as the UNDP, may still be of importance but are insufficient to address the systemic issues raised by the Goldstone Mission.

Moreover, despite the arguments of some critics that sought to delegitimise the Goldstone Mission as exclusively focused on Israel and as neglecting most of the Palestinian violations, its effects on Palestinian human rights practices, especially in the short term and especially in the West Bank, reveal that the scrutiny exercised by the Mission on Palestine-related human rights issues was extensive and that the domestic authorities, for either opportunistic or sincere reasons, took such criticism seriously.

5. Backlash Against Human Rights Organisations in Israel: An Example of Adverse Impact

In addition to the effects described above in this Chapter, international commissions of inquiry in Israel and Palestine have, or may have, contributed to producing what we could define as collateral effects. As explained in Chapter II, these effects fall outside the spectrum of expected outcomes and do not contribute to the effectiveness calculation. They should rather be classified as manifestations of the impact of commissions of inquiry because they were not envisioned by the mandate-givers or mandate-holders and, in some cases, even contradicted their goals. Such impact may take multiple forms, from spill-over effects on the peace process between Israel and Palestine to re-conceptualisations of the mainstream narrative of certain events, the systematic analysis of which would require a study in itself. In this Section, I will only address one direct collateral effect of the Goldstone process, in particular, but generalisable to all international inquiries on domestic human rights practices in Israel.

This may be identified with the backlash against human rights organisations that some commissions of inquiry, in particular the Goldstone Mission, engendered in Israel. As I have shown elsewhere, the Goldstone Mission gathered information in a variety of ways, including by relying on submissions, reports and information provided by domestic and international human rights organisations such as Human Rights Watch, Amnesty International, Al-Haq, B'Tselem and many others. Civil society organisations have acknowledged the role of the 'Goldstone process' in amplifying their advocacy efforts. Most notably, Jessica Montell,

current executive director of HaMoked and previously with B'Tselem, acknowledged that 'the engagement of the diplomatic community, international policymakers and international bodies has been crucial in virtually every achievement' of human rights organisations in Israel.[392] However, she also argued that the Goldstone Mission was at the origin of much backlash against human rights organisations. These were portrayed as 'aiding' terrorist groups by providing information detrimental to the IDF to international human rights bodies.[393] Then-Foreign Minister Avigdor Lieberman railed against Israeli and international human rights organisations by accusing them of intentionally concealing their funders, providing false information to in particular the Goldstone Mission and adopting a double standard when scrutinising the actions of other states or non-state groups, including Hamas and Saudi Arabia.[394] Right-wing MKs further proposed to establish a parliamentary commission of inquiry to probe the sources of funding of leftist NGOs in Israel.[395] This initiative was probably linked with a bill presented in 2010 before the Knesset to improve transparency of funding for non-profit organisations and a subsequent study on the duty of disclosure of foreign sources of funding presented to the Knesset in January 2011.[396] Similarly, in April 2010, a bill had been introduced into the Knesset to amend the Non-Governmental Organizations Law 1980, by, in particular, introducing a prohibition to register organisations 'for which there is a reasonable suspicion that the organization passes information to foreign authorities or is involved in legal prosecution abroad

[392] Jessica Montell, *Learning From What Works: Strategic Analysis of the Achievements of the Israel-Palestine Human Rights Community*, Final Report (Sida Decentralised Evaluation; September 2015) 4.
[393] Ibid 40.
[394] Rebecca Anna Stoil, 'Lieberman: Leftist NGOs Are Aiding Terror Groups' (11 January 2011) *The Jerusalem Post* <https://www.jpost.com/Diplomacy-and-Politics/Lieberman-Leftist-NGOs-are-aiding-terror-groups> accessed 4 November 2018.
[395] Rebecca Anna Stoil, 'Left-Wing NGOs Mad Knesset to Probe Foreign Funding' (5 January 2011) *The Jerusalem Post* <https://www.jpost.com/Diplomacy-and-Politics/Left-wing-NGOs-mad-Knesset-to-probe-foreign-funding> accessed 4 November 2018.
[396] Private Bill: Duty of Disclosure of Support by a Foreign Political Entity, 5751-2010, proposed by MK Zeev Elkin, MK Avraham Michaeli, MK David Rotem, MK Otniel Schneller, MK Yariv Levine, MK Michael Ben-Ari, MK Tzipi Hotovely (P/2018); Gilad Naveh, 'Foreign Legislative Arrangements Related to the Duty of Disclosure of Foreign Funding and the Prevention of Calls for Boycotts' Presented to the Constitution, Law and Justice Committee (30 January 2011) *The Knesset Research and Information Center* <https://knesset.gov.il/mmm/data/pdf/me02764.pdf> accessed 4 November 2018.

against senior Israeli politicians and/or IDF officers suspected of war crimes'.[397] In the explanatory note to the bill, the sponsor MKs explicitly clarified the link between the reputational damage produced by the Goldstone Mission and the information provided to the Mission by domestic NGOs in the following terms:

> when we must be united against these baseless accusations, we find that Israeli NGOs and associations, through passing of information (mostly incorrect and even fraudulent) to foreign authorities who are our enemies, and through public agreement or approval that Israel is guilty of war crimes. Sometimes they even provide significant legal assistance in phrasing the legal claims.
>
> The underlying assumption behind this bill is that this type of activity must be made illegal, (specifically regarding NGOs that receive a lot of money and some of which are supported by the state), because they effectively undermine the state and damage it, as if they were denying its existence.[398]

As a result, as Jessica Montell argues, several human rights advocates in Israel have started to perceive the engagement of international inquiries, and more generally international agencies, with human rights and humanitarian law violations in Israel and Palestine as detrimental to their work.[399] The long-term implications of such policies continue, to these days, to affect the domestic debate in Israel and recent international investigations such as the McGowan Davis Commission of Inquiry on the 2014 Gaza War, coupled with Palestine's accession to the Rome Statute of the International Criminal Court, have caused a new wave of attacks against human rights organisations in Israel. For example, in 2015, a Hague-based researcher for Al-Haq has received death threats through several means of communication in

[397] Private Bill: Associations Law (Correction-Restrictions for Registration and Activity of Organizations), proposed by MK Ronit Tirosh, MK Arieh Eldad, MK Yulia Shamalov-Berkovich, MK Uri Yehuda Ariel, MK Marina Solodkin, MK Otniel Schneller, MK Zevulun Orlev, MK Abraham Dicter, MK Yoel Hasson, MK Yitzhak Vaknin, MK Michael Ben Ari, MK Moshe Gafni, MK Chaim Amsellem, MK Jacob Edery, MK Uri Maklev, MK Avraham Michaeli, MK Alex Miller, MK Orly Levi-Abekasis, MK Gideon Ezra (unofficial translation by HaMoked) <http://hamokeden.red-id.com/files/2010/112430_eng.pdf> accessed 4 November 2018.

[398] Ibid.

[399] Montell (n 392) 40 who argued that 'Some human rights activists I interviewed argued that "the Goldstone effect" constituted a net loss for human rights, that any gains in promoting accountability are outweighed by the harm done to our effectiveness as a result of the backlash. The Israeli public climate certainly became more hostile as a result of the ultra-nationalist response to the Goldstone process. Human rights groups have been discredited in the eyes of larger sectors of the Israeli public, making education, dialogue and outreach activities with the Israeli public more difficult'; interview with Yael Stein, Research Director with B'Tselem, 14 February 2018; interview with Lior Yavne, Executive Director of Akevot, 21 February 2018.

connection to submissions that she had transmitted to the International Criminal Court. It has been suggested that the threats were made by agents acting on behalf of the Israeli Government, although the allegations have not been confirmed.[400] In May 2018, the State of Israel ordered the deportation of Human Rights Watch Israel and Palestine Director, Omar Shakir, from its territory alleging that he had advocated in favour of the boycott of Israel.[401] While the most recent developments cannot be causally linked with a commission of inquiry specifically or exclusively, several respondents in this study agree that the turning point in domestic policies vis-à-vis human rights organisations has been the Goldstone Inquiry and that all subsequent developments should be intended as long-term consequences of that particular inquiry.[402]

Conclusion

Through some paradigmatic examples, this chapter has sought to explain how international commissions of inquiry seek to engender domestic change. As Goodman and Jinks posit, embedded in the international human rights law regime, commissions of inquiry both share with other actors the demanding task of influencing states' behaviour and cooperate with such actors to that end.[403] The way commissions of inquiry have leveraged domestic audiences, commitments to norms, threats of material sanctions, prospective reputational damage and self-perceptions to induce compliance with international standards in the examples discussed in this chapter demonstrates how the three main strategies for influencing states, coercion, persuasion

[400] Thomas Escritt, 'Dutch investigate death threats against Palestinian ICC activist' (11 August 2016) *Reuters* <https://uk.reuters.com/article/uk-warcrimes-icc-death-threats/dutch-investigate-death-threats-against-palestinian-icc-ac tivist-idUKKCN10M1GF> accessed 4 November 2018; Jillian Kestler-D'Amours, 'Rights groups say Israel behind death threats campaign' (21 August 2016) *Al Jazeera* <https://www.aljazeera.com/news/2016/08/rights-groups-israel-death-threats-campaign-160818095638509.html> accessed 4 November 2018; interview with unnamed Palestine-based Human Rights Watch researcher, 12 February 2018.

[401] Human Rights Watch, 'Israel Orders Human Rights Watch Official Deported' (8 May 2012) <https://www.hrw.org/news/2018/05/08/israel-orders-human-rights-watch-official-deported> accessed 4 November 2018; for the decision of the competent Israeli authority see Letter of the Administration Service for Employers and Foreign Workers Permit Division – Expert Branch to Adv Michael Sfard with regard to reconsideration of Mr Omar Shakir's status in Israel (7 May 2018) <https://www.hrw.org/sites/default/files/supporting_resources/moi_revocation_de cision_english_redacted.pdf> accessed 4 November 2018.

[402] Interview with Yael Stein, Research Director with B'Tselem, 14 February 2018; interview with Michael Sfard, attorney at law, 9 April 2018; interview with Omar Shakir, Israel and Palestine Director with Human Rights Watch, 12 February 2018; interview with unnamed Palestine-based Human Rights Watch Researcher, 12 February 2018.

[403] Goodman and Jinks (n 50) 687-698.

and acculturation, are routinely employed, in turn emphasising synergies or discrepancies between different strategic approaches. For example, the Goldstone process demonstrates that mobilising human rights domestic networks may certainly be useful to acquire reliable information on the human rights situation on the ground and possibly to prompt a process of progressive internalisation that begins precisely with the amplification of the civil society's demands, but it can also lead to further human rights violations, specifically targeted at the domestic human rights community. At the same time, technical advice – typical of persuasion techniques – coupled with the threat of material sanction – typical of coercion techniques –, specifically in the form of international prosecutions, has triggered, for example, a process of domestic review of the military investigation system in Israel.

Moreover, this chapter has shown that certain topics may be less tractable than others as domestic authorities consider them a priority. The payoff that such issues may offer in terms of, for example, economic and political benefits may be difficult to displace. The Settlements Inquiry, for example, seemed to have found a weak spot in the long-term settlements policy perpetuated by the State of Israel. However, a lack of sustained follow-up measures at the international level has so far halted the domestic effectiveness cascade. In contrast, the IDF appears to have implemented a permanent moratorium on the use of white phosphorous weapons during military operations in densely populated areas, in compliance with the recommendation to that effect of the Goldstone Mission. This outcome is likely the result of a combination of effective mobilisation of shame – acculturation – and the relative transactionability of the issue – the IDF can easily do without white phosphorous. In other words, such weapons offer comparatively lower advantages than the reputational damage that their extensive use can cause if adequately publicised.

Language is another key ingredient of effective fact-finding processes. This stems both from Chapter IV, where I have outlined the harsh criticism levelled at the Goldstone Report for

claiming that the IDF had perpetrated international crimes, and from the analysis of the strategies deployed by the same Mission with regards to white phosphorous. As the Human Rights Watch Report on the use of white phosphorous during Operation Cast Lead shows, its misuse in violation of the principles of distinction and precaution may have been qualified as constituting evidence of war crimes. Yet, the Goldstone Mission refrained from making such claims and instead focused on technical issues of international humanitarian law and well-documented factual findings to both engage domestic actors in a constructive discussion about the use of such weapons and, at the same time, shame their conducts with the incontrovertible force of the established facts. A step further into the realm of international criminal law may have meant weakening the argument by exposing the findings to criticism relating, for example, to the complex issue of *mens rea*.

Finally, this chapter shows that rarely can commissions of inquiry rely only on their own strengths. The lack of coercive powers represents both the main weakness and the main strength of such mechanisms. It is a weakness in that commissions of inquiry have no other way to make their pronouncements heard than their argumentative and procedural authority; it is a strength in that they represent a lesser threat to state sovereignty than more intrusive mechanisms, such as international courts. The only way to remedy the weakness is to sustain the recommendations of commissions of inquiry with a consistent follow-up. The Goldstone Mission, for example, appears to have prompted some domestic change in the policies and case law of the PA in the West Bank. However, such change seems to have been discontinued as a result of a lack of further follow-up action at the international level, as all subsequent inquiries – and other international monitoring mechanisms – were not entrusted with investigating intra-Palestinian violence. In contrast, the Flotilla Inquiry and the McGowan Davis Commission on the 2014 Gaza War appear to have applied further pression on Israeli authorities to reform their domestic investigation system by monitoring the domestic follow-up to the Goldstone Inquiry and the

subsequent Turkel Commission. Indeed, that is how commissions of inquiry appear to work in general. All the thematic issues analysed in this chapter demonstrate that commissions of inquiry routinely interact with other international and domestic actors and it is through the willingness of those actors to act on the recommendations of commissions of inquiry that influence is transmitted to domestic systems.

Methodologically, the interaction between causes – or factors – makes it difficult to isolate the discrete causal contribution of commissions of inquiry. None of the thematic issues surveyed were groundbreakingly raised for the first time by the commissions of inquiry considered. Rather, commissions of inquiry were able to amplify already existing pleas of civil society organisations or to build on the work of other actors by adding further leverages. Both dynamics can be found, for example, in the way the Settlements Inquiry operated. On the one hand, it exploited the momentum generated by civil society's campaigns and, on the other, it raised the level of scrutiny and critique of Israeli settlements policies. But, should Israel loosen its policies in the West Bank, how much could be effectively credited to the Commission? Moreover, as I have already shown in Chapter II, causality poses the additional problem of determining how remote can the effects be from the cause. In other words, when should one stop claiming that certain changes have been determined by a given cause? This is best exemplified by the review and reform process of the Israeli military investigation system. The most recent changes may be said to have been determined by the Ciechanover Implementation Team, which in turn was established to oversee the implementation of the Turkel Commission. However, would such extensive review process have been triggered without the Goldstone Report, which placed much emphasis on the shortcomings of the Israeli investigation system? This chapter concludes that the Goldstone Inquiry was an essential catalyser of this institutional process, but one may speculatively – and yet legitimately – argue that, at some point in time, domestic demands for accountability would have led to a similar outcome anyway. Narrative

may mitigate this methodological problem but it is not a panacea for all causality-related problems.

An additional methodological problem, which I have already discussed in the methodological chapter, is the co-existence of several causes for the same outcome. In this chapter, I have limited my analysis to the most apparent ones, but political calculations, specific economic junctures and the human factor may have played equally important roles in causing the outcomes considered. Textual, documentary and oral evidence may mitigate this problem. Claims of causality should thus carefully be modulated according to the level of confidence attained by triangulating the evidence available. This is what I have sought to do throughout the chapter. In a way, none of the commissions of inquiry considered can be said to have caused the specific outcomes found *without doubt*. However, multiple textual traces, coupled with evidence generated by other sources, have assisted me in reaching with a reasonable degree of confidence the conclusions I have just presented.

If socialisation is the ultimate goal of international inquiries, these have to act strategically to maximise the chances of achieving such goal. This chapter has shown that contextual and thematic elements should be taken into account when devising the strategies to be employed, and language should be attuned to the strategy employed. However, one cannot overlook the fact that fact-finding missions are primarily designed to establish facts. Hence, not unlike the task of the researcher who engages in such type of inquiry, the language fact-finders employ should further be attuned to the level of confidence achievable in the inquiry, that is to the evidence available. Legalisation may support certain strategic approaches, but eventually the most persuasive instruments are facts, whether factual or legal, and shortage of facts cannot be mitigated by over-legalisation. Socialisation by inquiry is then about presenting facts in a compelling and convincing way so as to elicit institutional support and domestic change.

CONCLUSION

RE-APPRAISING INTERNATIONAL COMMISSIONS OF INQUIRY

The primary purpose of this study is to shed some light on the way international commissions of inquiry seek to make an impact on domestic systems. Through the analysis of a case study, I show how contextual factors, procedural indicators and argumentative strategies influence the activation of mechanistic processes that lead to domestic institutional, normative, jurisprudential and policy change and why, in some instances, the expected change does not occur or simply amounts to cosmetic reforms. While the analysis conducted is context-specific and thus warrants caution in generalising conclusions about the effectiveness and impact of international commissions of inquiry, some observations may be indicative of a more general need to rethink how such inquiries should work.

The boundaries of this study are rather narrow. They encompass a geographically limited space, a specific set of actors, with own characteristics and approaches to international law and institutions. Moreover, the wider framework of the Israeli occupation of Palestine,[1] which is more than fifty-year-old, constitutes a unique situation in the world. To add a further layer of complication, I focus on mechanism – international inquiries – that by nature are ad hoc, that is, deployed to investigate specific incidents or situations, with specific operational goals and mandates, and for a very limited period of time. All these elements detract from the possibility to replicate this study simply because the conditions that characterise it are so specific and, to a large extent, unique. At the same time, though, I have sought to dissect the analysis into discrete parts. On the one hand, this facilitates a more insightful analysis because it focuses on the microprocesses of socialisation, which would be difficult to capture if the study were to

[1] The overwhelming praxis considers the West Bank occupied, and there are solid arguments to consider that the Gaza Strip too is still occupied, despite Israel's disengagement plan in 2005.

consider the effectiveness and impact of inquiry commissions as a whole without breaking it down into different thematic issues. On the other hand, it maximises the possibility for replication.[2] Indeed, specific rejection patterns are likely to be encountered also in other cases, where states may be equally opposed to the interference of international bodies. Similarly, commissions of inquiry with similar mandates to those analysed in this study may be deployed to investigate other situations with similar patterns of inter-group violence. In addition, intractable issues are certainly not specific to the Israeli-Palestinian context but may characterise other domestic settings. Finally, state socialisation and the associated theories of coercion, persuasion and acculturation provide a framework applicable to virtually all international inquiries, regardless of their mandates and geographical boundaries.

Hence, while the primary objective of this study is and remains to determine the domestic impact and effectiveness of Human Rights Council-mandated commissions of inquiry in Israel and Palestine and to explain how domestic change is engendered, I conclude this work by seeking to distil some observations that may apply to other contexts with a view to suggesting some modest proposals for review of international inquiry mechanisms. These by no means have to be construed as providing one-size-fit-all proposals, but rather as points that may inform a future discussion on the reform of inquiry procedures.

This chapter is organised into two parts. I first summarise and chart the empirical data presented in Chapters IV and V in light of the theoretical insights introduced in Chapter III. In other words, I provide an answer to the *how* and *why* questions that drive this study. In the second section of the chapter, I explore cursorily the broader implications of the study and provide some modest policy recommendations for reform of human rights international inquiry mechanisms.

[2] On replicability as an indicator of the generalisability of a qualitative study, see Jane Lewis and Jane Ritchie, 'Generalising from Qualitative Research' in Jane Ritchie and Jane Lewis (eds), *Qualitative Research Practice. A Guide for Social Science Students and Researchers* (SAGE Publications 2003) 264-279.

1. Reading through the Empirical Record: Agency, Structure, Mechanisms and Performance

Agency and structure are sociological concepts that respectively indicate the ability of individuals to act independently[3] and the exogenous factors that constrain the individual's ability to act independently.[4] With the required adaptations, the inquiry process can be represented in these terms by, on the one hand, emphasising the independent role of commissions of inquiry (agency) and, on the other hand, highlighting constraining factors extraneous to the commission of inquiry as an agent (structure). Understanding the domestic effectiveness of international commissions of inquiry without accounting for such constraining factors is almost meaningless. Indicators that point towards the attributability of certain domestic effects to Human Rights Council-mandated commissions of inquiry, embedded as they are in an articulated network of human rights mechanisms, are insufficient to establish a causal relationship between these and relevant domestic changes. Hence, it is no less important to understand the processes – intended in their mechanistic dimension – that commissions of inquiry seek to set in motion to engender domestic impact. This is further compounded by the intrinsic limitations of inquiry mechanisms, that is the non-binding force of their pronouncements and their lack of enforcement powers.

Thus, performance cannot be understood simply as measuring results, but, as I have argued in Chapter II, it needs to account for the processes of change that commissions of inquiry are capable of eliciting in order to trigger a variation in the dependent variable.

1.1 Structural and Contextual Factors

This study has focused on the domestic impact and effectiveness of international commissions of inquiry in Israel and Palestine. As explained in Chapter II, the geographical

[3] John Scott (ed), *A Dictionary of Sociology* (4rd edn; OUP 2014) 11.
[4] Ibid 737-738; this is one of the acceptation of the term structure in its social dimension, which emphasises the deterministic character of structures. The general definition of social structure is 'any recurring pattern of social behaviour; or, more specifically, […] the ordered relationship between the different elements of a social system or society'.

boundaries of this case and the historical and political context that characterise it make it a unique case study.[5] In contrast to the past, when commissions of inquiry were mainly used as dispute settlement mechanisms between states,[6] modern human rights fact-finding missions are deployed in large part to investigate episodes or situations of state or quasi-state internal violence.[7] In this respect, the commissions of inquiry analysed in this research sit somewhere in between these two models. On the one hand, they have investigated large scale military operations that resulted in the death of large numbers of civilians, surgical but deadly operations such as the boarding of the *Mavi Marmara* or state policies affecting human rights. On the other hand, they have done so in a context where two parties are opposed in what would very much resemble an inter-state conflict, despite the fact that so far only one party is recognised – at least at the UN level – as a fully-fledged state. This means that commissions of inquiry have had to take into account different and, at the same time, partially overlapping legal and political systems, a complex diplomatic setting characterised by an intricate network of international alliances, different predispositions towards the intervention of international agencies in what are regarded as domestic matters and an interlocked network of civil society organisations.

Against this backdrop, commissions of inquiry have to tread carefully. As shown throughout this entire study, non-cooperation by a party to an international inquiry is likely to severely hinder the ability of that commission to fulfil its mandate comprehensively. However, what should a commission do if a party refused to cooperate? Mandate-givers should think about who should bear the burden of non-cooperation. In other words, should we expect a commission of inquiry to refrain from formulating certain conclusions, findings or recommendations in the absence of information provided by one party or despite its inability to visit the sites where the

[5] See Chapter II, pp 74-78.
[6] JG Merrills, *International Dispute Settlement* (5th edn; CUP 2011) 41-57; Larissa J van den Herik, 'An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of
International Law' (2014) 13 *Chinese JIL* 507, 510-518.
[7] For example, the Independent international fact-finding mission on Myanmar (2017), the Commission of Inquiry on Burundi (2016) or the Commission of inquiry on human rights in Eritrea (2014).

abuses were perpetrated?[8] Sensitivity to legally intractable issues may require mandate-givers to draft mandates that do not directly tackle those specific issues, although it may be argued that, precisely because commissions of inquiry do not constitute legally binding or enforceable procedures, politically sensitive issues should be approached head-on. Strategic thinking suggests that there may be indirect ways to pressure governments to comply with international standards. For example, the Settlements Inquiry was able to partially shift the burden on third state and non-state actors in an indirect attempt to pressure Israeli authorities to change their settlement policies in the West Bank.

Are the currently applied criteria for the selection of fact-finders sufficient to dispel any doubt of partiality or bias? For example, should expertise in international humanitarian and human rights law be an absolute requirement for the appointment of a member of a commission of inquiry?[9] Most importantly, how does expertise relate to professionalism? As Chapter IV demonstrates, Israeli army officials attribute a very specific meaning to the word 'professionalism', which does not necessarily correspond with the content that inform the notion of professionalism as applied within the UN context.[10] Indeed, in Chapter V, I have shown that Israeli domestic investigations have been criticised by some international commissions of inquiry as unprofessional.[11] Hence, how much deference to domestic inputs should UN bodies observe in appointing commissioners? Or, even more to the point, would it not be better for UN bodies to let the parties of an inquiry – provided that there is more than one as in the case study analysed in this research – appoint some the commissioners, as it was

[8] As noted above, Yuval Shany, for example, posits that a state policy of non-cooperation does not authorise a fact-finding mission to make adverse findings against that state in the absence of compelling evidence to that effect, when, with reference to the Goldstone Mission, he states that 'the members of the commission did not always maintain the restraint necessitated by the fact that Israel had no legal obligation to cooperate with the fact-finding mission and that ulterior motives had been attributed to the commission by Israel' (Yuval Shany, 'Opinion: Goldstone Notwithstanding, IDF Obligated to Investigate Conduct' (2 November 2009) *The Israel Democracy Institute* <https://en.idi.org.il/articles/9537> accessed 5 November 2018).
[9] See Chapter III, pp 129-130.
[10] See Chapter IV, pp 243-246.
[11] See Chapter V, p 294.

common under the Hague Conventions 1899 and 1907?[12] The empirical analysis in Chapter IV seems to suggest that expertise in humanitarian law and human rights is not necessarily the kind of expertise that the parties would like fact-finders to have. Israeli officials have repeatedly criticised UN inquiries for their lack of military expertise. For example, despite the harsh criticism it was subjected to for other reasons, the Goldstone Mission was not criticised on this account.

Several Israeli officials expressed the view that better cooperation with such missions may be fostered by providing for confidential procedures. Indeed, in contrast to all the Human Rights Council-mandated inquiries analysed in this study, the inquiries established by the Secretary General were able to elicit the cooperation of the Israeli authorities. While this may be explained in light of the prestige of the mandate-giver and the thematic issues investigated by the Boards of Inquiry, the insights provided by some of the respondents indicate that a decisive factor was the confidentiality of the proceedings and results. This should lead us to re-consider the functions of international commissions of inquiry. A confidential procedure may be more attuned to an advisory function, while public proceedings may best be able to elicit the condemnation of the international community of states. Interestingly, in no way do socialisation theories suggest that confidentiality is incompatible with coercion. On the contrary, it may be argued that, because for coercion to be credible the commitment to sanctioning the target state has to be graduated, a confidential procedure, which shields the state from public condemnation, may better signal a sincere cooperative approach to accountability that may be complemented by the threat that certain confidential information be shared with bodies with the power to inflict sanctions. At the same time, these considerations must be weighed against the power of 'name and shame' strategies, which necessarily require publicity to discredit the human rights practices of the target state.

[12] See Chapter I, pp 21-25 and infra.

Furthermore, mandate-givers and commissions of inquiry should take into account also external contextual factors, in particular the pre-disposition of domestic actors towards the interference by international agencies with domestic matters. As explained in Chapter IV, the State of Israel tend to regard the Human Rights Council as an irremediably biased forum, which is exploited by supposedly anti-Israel actors to advance arguments constraining in particular the operational capabilities of the IDF by means of the laws of armed conflict and human rights (lawfare). While Israel's allegations of so-called lawfare may be opportunistic, the Council is undeniably stained by a record of activities that systematically single out Israel. This emerges from both quantitative and qualitative analyses of the actions and agendas of the Council. Thus, it is no surprise that the Israeli Government systematically refuses to cooperate with inquiries mandated by this body. Whether this does any good to Israel or not, such considerations should lead us to consider whether the Human Rights Council is in the best position to be the main promoter of such forms of inquiries, despite its institutional mandate to promote human rights. More generally, this poses the problem of what institution is better placed to establish these forms of inquiry. Not unsurprisingly, the UN Declaration on Fact-Finding privileges the Secretariat of the UN, an essentially administrative body, as the most appropriate forum for deploying fact-finding missions, even if delegated by other UN bodies such as the General Assembly or the Security Council.

1.2 Synergies: Intervening or Pre-Existing Factors Enabling Effectiveness

The case study analysed shows that the effectiveness of the international commissions of inquiry considered was partly dependant on the ability of such commissions to elicit or exploit the action of other domestic and international actors. Because international commissions of inquiry lack enforcement powers and their determinations are not binding on the parties involved in the investigation, their coercive potential rests largely on their ability to mobilise other actors that retain such direct coercive capacity. When we think about accountability for

systematic human rights violations or grave breaches of international humanitarian law, we typically refer to international agencies such as the UN Security Council or the International Criminal Court, but it is not excluded that coercion may be exerted by domestic institutional actors. A functioning and independent judiciary, for example, may be able to induce compliance with international norms by investigating and prosecuting decision- and policy-makers who have violated those standards.[13]

As explained in Chapter II, coercion strategies hinge on the ability of a regime, norm or institution to impose a material cost on the target state so as to alter the latter's cost-benefit calculation. Commissions of inquiry are generally unable to impose such material cost as they are not entrusted with the authority and power to do so. They can, however, impose reputational sanctions on deviant actors. After all, while they may not be entrusted with formal authority to issue binding pronouncements, commissions of inquiry do enjoy some authoritativeness.[14] It is by means of such authoritativeness in the eyes of the international community of states that commissions of inquiry may be able to directly coerce state and non-state actors into complying with international standards. As explained in Chapter II and confirmed by the study of the Settlements Inquiry in Chapter V, reputational costs may translate into material costs, typically through their spill-over effect onto the economic and diplomatic relations between countries.

Domestic actors and non-governmental organisations have also proved crucial for the effective deployment of socialisation strategies by international commissions of inquiry. The

[13] See, for example, Emilia Justyna Powell and Jeffrey K Staton, 'Domestic Judicial Institutions and Human Rights Treaty Violation' (2009) 53 *Int Stud Q* 149, who, through an empirical analysis of the relation between the states' choice to ratify the Convention Against Torture, their domestic practices relevant under the Convention and some indexes of domestic judicial effectiveness, show that states' compliance with international standards to which they have committed is more likely in states that have a strong domestic legal enforcement system. However, they also show that the same domestic judicial system, when effective or strong, is likely to determine the states' choice to ratify international human rights treaties.

[14] Authority, here, is intended in its subjective or sociological acceptation of prestige, which leads the subjects of the institution bearing that authority to obey it (for a discussion of the different meanings of authority, see Gerald Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement' (1956) 19(1) *MLR* 1; Alfred P Rubin, *Ethics and authority in international law* (CUP 1997); Samantha Besson, 'The Authority of International Law – Lifting the State Veil' (2009) 31 *Syd LR* 343).

two levels mutually cooperate towards promoting socialisation with human rights and humanitarian law standards. While NGOs and other domestic actors provide a regular oversight over state and non-state practices, commissions of inquiry step in only in exceptional circumstances, but their resonance with the international community of states is arguably greater than that of domestic or even international NGOs and probably more long-lasting. Hence, the relation between international inquiries and such actors must be assessed with reference to both the short time span of the inquiry itself and the long-term, which may see domestic actors reaping the benefits of particularly successful inquiries or suffering from some drawbacks engendered by the same mechanisms.

1.3 International Actors: The Coercive Prosthesis of International Inquiries

International commissions of inquiry may be represented as human bodies with no limbs. Their voice sounds loud and clear, but their ability to physically affect the surrounding environment depends on the functionality of the prosthetic limbs they wear. Sometimes, these limbs will be fully functional, while in other circumstances they may prove dysfunctional or even unmovable. We should think about commissions of inquiry as parts of a wider institutional setting – in this study, the UN. Their effectiveness depends in large part on the follow-up action that the international actors – including, for example, the UN Security Council, international courts and tribunals, international NGOs – interacting with such inquiries are willing and able to take.[15]

The analysis conducted in Chapter V has shown that in particular coercive strategies deployed by international inquiries tend to yield better results or to remain viable as long as they are sustained by the action of actors that can in fact impose material costs on the state targeted. The threat of international prosecution by the International Criminal Court represents

[15] Zeray Yihdego, 'The Gaza Mission: Implications for International Humanitarian Law and UN Fact-Finding' (2012) 13 *Melb J Int'l L* 158, 162.

such a material cost. However, a preliminary examination of the Office of the Prosecutor that does not engender the expectation that an actual investigation might in fact follow, because of factors both internal and external to the Court, is unlikely to be taken seriously by the targeted state. The PA's political machinations after the publication of the Goldstone Report and the International Criminal Court's delay in deciding whether to open an investigation appear to have signalled a lack of commitment by both the Palestinian establishment and the Court to follow up on the recommendations of the Goldstone Mission. Moreover, as the example of the Settlements Inquiry shows, coercion strategies may be deployed also by means other than international courts. The creation of a database of companies involved in the settlements' economy may impose significant financial costs on the companies involved, possibly lead them to disinvest from the settlements and, thus, indirectly negatively affect the sustainability of the settlements enterprise. However, delays in the publication of the list of companies, which seem to have occurred as a result of political pressures by the US and Israel, have bought Israel time to further entrench and normalise the settlement regulatory framework, to the point that it may be argued that such moves foreshadow a progressive territorial annexation of the West Bank by Israel.

Moreover, this study shows that the factors capable of directly coercing the targeted state into complying with the recommendations of the international commissions of inquiry may act as both independent variable themselves or intervening variables (***Table 1*** below). For example, the first attempt to trigger the jurisdiction of the International Criminal Court by the PA was not the result of a decision taken in light of the recommendations of the Goldstone Report. Indeed, the Palestinian referral predated the publication of the Report. Rather, as shown in Chapter V, it is plausible that the Goldstone Mission based its recommendation to the Prosecutor of the Court on the referral made by the PA, which it regarded as an opportunity to exact direct coercion from the Court. In other words, it is the referral itself that exerted an

independent causal force in determining the subsequent developments at the domestic level. On the contrary, the Human Rights Council's decision to establish a database of companies involved in the settlements' economy was taken in response to the Settlements Inquiry alone.

Table 1 Two examples of mechanisms from the empirical analysis conducted: the causal force is transmitted from left to right

<table>
<tr><td colspan="2">PA's referral of the situation in the Occupied Palestinian Territories to the Prosecutor of the International Criminal Court</td><td colspan="3" rowspan="2">Israel expected to investigate and prosecute allegations of international crimes committed during Operation Cast Lead and to ensure that domestic justice system provides forum for accountability in order to avoid international criminal proceedings</td></tr>
<tr><td colspan="2">Goldstone Mission's recommendation that the Prosecutor conduct an investigation into Operation Cast Lead</td></tr>
<tr><td>Settlements Inquiry's recommendation that states and appropriate international institutions ensure that businesses consider the human rights impact of their activities</td><td>Human Rights Council's decision to establish a database of companies involved in the settlements' economy</td><td>Expected reputational and financial damage to companies involved in settlements' economy as a result of listing in the UN database</td><td>Expected economic impact on settlements as a result of divestment of companies listed in the database to minimise financial losses</td><td>Expected change in settlements policy as a result of unsustainability of settlements' economy due to the loss of revenues from divested companies</td></tr>
</table>

On the one hand, these observations substantiate the rather obvious claim that commissions of inquiry need some form of institutional support for their coercion-oriented recommendations to elicit some form of domestic change. In an edited volume, Chantal Meloni and Gianni Tognoni asked the following crucial question, which was also the title of the book: 'is there a court for Gaza?'.[16] The book broadly explores the available options to implement the recommendations of the Goldstone Report. The editors' main concern is accountability for the allegations of international humanitarian law and human rights violations perpetrated in the course of Operation Cast Lead, which they seek through means other than the inquiry itself. Reasonably, the authors regard inquiry commissions as tools that precede the activation of different accountability mechanisms, which should act on the findings and recommendations

[16] Chantal Meloni and Gianni Tognoni (eds), *Is There a Court for Gaza? A Test Bench for International Justice* (TMC Asser Press 2012).

of the former. However, the politicisation of the UN human rights machinery[17] and the inter-institutional independence that characterises the relationship between different structures of the international architecture beg for a cautious approach to regulating how international agencies, including the International Criminal Court, should make use of the reports of international commissions of inquiry. On the other hand, this should lead us to question the accountability orientation that is often imprinted on commissions of inquiry. Coercion, as shown in Chapter III, functions if the actor wielding it is able to evoke a credible threat of material sanction. If the accountability process is off the hands of commissions of inquiry and there is no regulatory framework that allows for an almost automatic activation of accountability mechanisms in light of the findings and recommendations of an inquiry, is it wise for such commissions to abuse the language of accountability, perhaps by evoking the intervention of the International Criminal Court or other similar law enforcement mechanisms?

To be sure, I do not argue that coercion is unhelpful *tout court*. However, it should be wielded by actors that are institutionally empowered to escalate the threat into some more concrete and tangible action. If we assume that coercion was to be the main pull of the commissions of inquiry studied in this research, the ineffectiveness, or partial effectiveness, of some of their recommendations considered in Chapter V can be explained precisely in light of the incomplete escalation of the threat of sanction by the actors that had the power to do so.

[17] Which Cherif Bassiouni compellingly described with the following words: 'The human rights component of the UN system reflects the values of justice, while systemically it functions as a political process, thus conditioning the upholding of these values to political oversight. In past decades, what Secretary-General Kofi Annan frequently refers to as the "international civil society" compelled realpolitik to take into account the values of justice. It is not for the sake of these values but rather to offer persons pursuing political ends utility in the form of conflict management and conflict settlement. Seen from this perspective, justice becomes another card for the realpolitician to play and eventually barter away, in a mostly hidden manner, when in pursuit of achieving a political goal. This reality, more than anything else, impacts upon the effectiveness and impartiality of fact-finding missions' (M Cherif Bassiouni, 'Appraising UN Justice-Related Fact-Finding Missions' (2001) 5 *J L & Pol'y* 35, 38).

1.4 Domestic and Transnational Advocacy Networks: Interdependency, Amplification and Internalisation

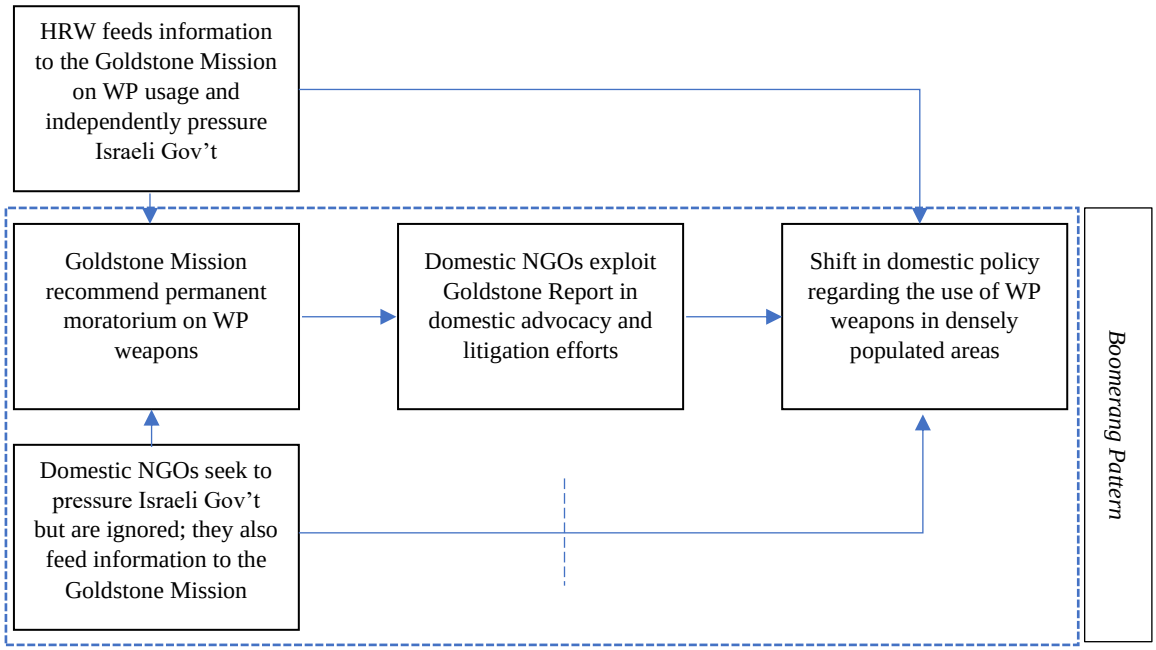
Domestic actors such as civil society organisations represent an additional essential building block for the effective deployment of, in particular, persuasion strategies by international commissions of inquiry. The empirical analysis conducted in Chapter V demonstrates that the relation that ties international inquiries to domestic NGOs is both circular and, in certain cases, one of causation. In a movement similar to the 'boomerang pattern' described by Margaret E Keck and Kathryn Sikkink, domestic NGOs, such as B'Tselem, Al-Haq or the Palestinian Center for Human Rights provided the fact-finding missions with information bypassing the domestic authorities so that such information could be used by the commissions to pressure the state into complying with international standards.[18] At the same time, international NGOs, through their in-country branches, have also mobilised information regarding human rights and humanitarian law violations. However, and quite obviously, while domestic civil society organisations have proven to resonate mainly with domestic constituencies, international NGOs have been able to mobilise other sections of the international public opinion such as the press. This has been observed, for example, with reference to Human Rights Watch's international advocacy with regard to the use of white phosphorous in the context of Operation Cast Lead (***Figure 1*** below). While this may indicate that international NGOs, such as Human Rights Watch, may be able to exert a stronger independent causal influence on state policies, the case of white phosphorous demonstrates that the Goldstone Missions in particular was crucial in raising the profile of the thematic issue considered, and in piercing the blockage separating the state and its domestic actors, as the ensuing litigation before the Israeli High Court of Justice demonstrates.[19] In this sense, commissions of inquiry amplify the pleas of domestic civil society

[18] Margaret E Keck and Kathryn Sikkink, *Activists Beyond Borders. Advocacy Networks in International Politics* (Cornell University Press 1998) 12-14.
[19] Keck and Sikkink argue that the 'boomerang pattern' is activated when the channels between the state and its domestic actors are blocked (ibid).

organisations and provide a cloak of authoritativeness to the factual and legal position of international non-governmental actors.

This relationship is further reinforced by the opportunities that, from a strategic viewpoint, domestic civil society organisations offer to international commissions of inquiry seeking to persuade and, to some extent, coerce the state into complying with international standards. As explained in Chapter III, domestic processes of internalisation – which persuasion strategies seek to engender – are often channelled through domestic actors who exploit the authoritativeness of international pronouncements in domestic advocacy and litigation. This, in turn, may lead to domestic actors increasingly accepting the legal and factual frames employed by commissions of inquiry. Once again, this appears to have occurred with reference to the regulation of the use of white phosphorous weapons on densely populated areas (***Figure 1*** below). Clearly, processes of internalisation occur through different channels and their detection may only be possible over long periods of time. However, particularly high-profile, or even controversial, international mechanisms, such as commissions of inquiry may be able to abruptly raise the level of saliency of a specific issue.

Figure 1 Example of mechanism involving domestic and international NGOs



While reliance on NGO-produced material may compensate for the non-cooperation of a party to an inquiry or simply for the material inability to gather a considerable amount of information typically in a short time frame, from a strictly legal viewpoint, reliance on non-governmental sources may pose some dangers to the credibility of international commissions of inquiry. These have been noted not only by critics of international commissions of inquiry, such as Gerald M Steinberg,[20] but also, and in a more generalised way, by Cherif Bassiouni, who claimed that 'more frequently than not, the reports produced are designed to please the influential Geneva-based nongovernmental organization (NGO) community'.[21] Whether deference to data provided by such organisations does indeed signal a preference for certain political interests or not, the problems posed by such mode of operation are eminently technical in that they relate to the applicable standard of proof.

As shown in Chapter I,[22] there exists no uniform evidentiary standard applicable to the fact-finding undertaken by international commissions of inquiry, however, most publications and guidelines on effective fact-finding recommend the adoption of the *balance of probabilities* standard. In Common Law systems, such standard has been defined as follows: 'if the evidence is such that the tribunal may say "we think it is more probable than not" the burden is discharged, but if the probabilities are equal it is not'.[23] In his study on the fact-finding missions' practice with regard to standards of proof, Stephen Wilkinson suggested that the *balance of*

[20] Gerald M Steinberg, 'NGOs, the UN, and the Politics of Human Rights in the Arab—Israeli Conflict' (2011) 5(1) *Isr J Foreign Aff* 73; Gerald M Steinberg, 'From Durban to the Goldstone Report: the centrality of human rights NGOs in the political dimension of the Arab–Israeli conflict' (2012) 18(3) *Israel Affairs* 372.
[21] Bassiouni (n 17) 40.
[22] See Chapter I, pp 51-53.
[23] *Miller v Minister of Pensions* [1947] 2 All ER 372. In the UK, the Judicial Studies Board suggested that 'if the prosecution has not made you sure that the defendant has (set out what the prosecution must prove), that is an end of the matter and you must find the defendant "Not Guilty". However, if and only if, you are sure of those matters, you must consider whether the defendant [e.g. had a reasonable excuse etc. for doing what he did]. The law is that that is a matter for him to prove on all the evidence; but whenever the law requires a defendant to prove something, he does not have to make you sure of it. He has to show that it is probable, which means it is more likely than not, that [e.g. he had reasonable excuse etc. for doing it]. If you decide that probably he did [e.g. have a reasonable excuse etc. for doing it], you must find him "Not Guilty". If you decide that he did not, then providing that the prosecution has made you sure of what it has to prove, you must find him "Guilty"' (Judicial Studies Board, *Criminal Law: Specimen Direction*); see also Jonathan Doak and Claire McGourlay, *Evidence in Context* (3rd edn; Routledge 2012) 63-64.

probabilities standard should be understood as requiring the fact-finder to ask 'is there more evidence to support a finding than not?'.[24] In principle, nothing prevents fact-finders to reach this standard of proof by also relying on information collected through NGOs. However, at least two problems emerge from this practice. First, it is impracticable for commissions of inquiry to verify whether the information provided by NGOs have themselves been proved to at least the *balance of probabilities* standard. Second, and related to the previous point, commissions of inquiry should always seek to corroborate information provided by NGOs with other independent sources and take into account evidence to the contrary. The existing practice, including of some of the commissions considered in this study, shows that this is not always the case and that commissions of inquiry, especially when they cannot collect first-hand evidence for example because they have been denied cooperation by one party to the inquiry, simply defer to the information gathered through non-governmental intermediaries.[25]

This raises the question whether commissions of inquiry should reach a factual determination if they are not able to verify the information received or the epistemological process employed by the provider of the information to determine that a particular piece of information was to be believed,[26] assumed that the provider is itself a receiver of information and thus relies on other sources. The credibility of a commission of inquiry, as shown in Chapter III, is determined by the legitimacy afforded to it by the end-users of the inquiry report, which in turn is normally based on a number of procedural factors (procedural fairness).[27] Among

[24] Stephen Wilkinson, 'Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry
Missions', *Geneva academy of international humanitarian law and human rights* 49.
[25] The generalisability of this practice has been noted, albeit as an advantage of international inquiries, by Liesbeth Zegveld, 'The Importance of Fact-Finding Missions Under International Humanitarian Law' in Meloni and Tognoni (n 16) 161, 167.
[26] In this sense, there exist several proposals to harmonise NGO fact-finding standards such as the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, *Guidelines on International Human Rights Fact-Finding Visits and Reports by Non-Governmental Organisations (Lund-London Guidelines)*; M Cherif Bassiouni and Christina Abraham (eds), *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies* (Intersentia 2013); Gerald M Steinberg and Anne Herzberg, 'NGO Fact-Finding for IHL Enforcement: In Search of a New Model' (2018) 51(2) *Israel L Rev* 261.
[27] See Chapter III, pp 125-127.

these factors, rules of evidence are particularly important because, on the one hand, they guarantee the consistency and quality of the inquiry process and, on the other hand, they protect the individual or entity against which a finding is made from unsubstantiated allegations that might harm their reputation.[28] Hence, exclusive deference to information provided by non-governmental actors should be avoided as much as possible, despite the opportunity that these offer to overcome a situation of non-cooperation by the parties of an inquiry and to raise the profile of domestic issues raised by civil society organisations and neglected by the state authorities.

1.5 Discrete Causal Contribution of Commissions of Inquiry

To a limited extent, Human Rights Council-mandated commissions of inquiry in Israel and Palestine have been able to independently and directly elicit some form of domestic state action. The most visible of such effects has been the wave of domestic investigations into reported incidents of human rights and humanitarian law violations by the Israeli authorities following the publication of both the Goldstone Report and the McGowan Davis Report. However, as the empirical analysis conducted has shown, the ability of commissions of inquiry to generate domestic change is largely dependent on the intermediation of or synergy with other actors who, either for the powers they are entrusted with or because of their special relation with domestic authorities and constituencies, are in a better position to prompt such change. Hence, how can we describe the discrete causal contribution of commissions of inquiry?

As stated multiple times, international commissions of inquiry are not entrusted with enforcement powers nor are their reports binding in any way. Therefore, their discrete causal force can only be attributed to their ability to pull together effective legal or policy arguments

[28] Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Torkel Opsahl Academic EPublisher 2013).

or to substantiate their findings and recommendations with enough evidence to convince their interlocutors that their claims are verifiable.

Theories on state socialisation have offered a useful angle from where to assess the effectiveness of international commissions of inquiry because they can explain how the use of certain legal arguments may better resonate with domestic constituencies. This is not to say that fact-finders necessarily think strategically. On the contrary, it is more plausible that the mandate only guides the commissioners' work. Still, strategic thinking may sharpen the ability of commissions of inquiry to maximise their potential to elicit domestic change by producing compelling arguments. This requires sensitivity to and knowledge of domestic contexts and political and legal traditions[29] in order to devise strategies capable of bypassing the domestic intractability of certain thematic issues. This means that international inquiries should ideally privilege strategies that may offer better prospects of success based on their understanding of the domestic positions, priorities and interests, although by no means does this approach guarantee the achievement of the goals of international inquiries. By emphasising the role of private actors and third states in supporting the occupation, the Settlements Inquiry appears to have sought to precisely bypass Israeli authorities with regards to the issue of the illegality of settlements. Indeed, the illegality of the settlements had already been established in a multitude of international documents and pronouncements, and the Mission would have added little to the

[29] For example, Israel's response to allegations of indiscriminate attacks against the civilian population and the radical divergence in reports regarding the ratio combatants/civilians killed during military operations in the Gaza Strip produced by Israel in relation to those published by Palestinian and Israeli NGOs may be explained in light of a different understanding – specific to Israel – of the category of combatants, which in turn determines the way the principles of distinction and proportionality are applied, as explained by Jean-Philippe Kot, 'Israeli Civilians versus Palestinian Combatants? Reading the Goldstone Report in Light of the Israeli Conception of the Principle of Distinction' (2011) 24 *LJIL* 961. Specifically, Kot explains that the Israeli military code of ethics, which reflects the so called Kasher and Yadlin doctrine, and the case law of the Israeli Supreme Court have significantly widened the scope of notions such as combatants, direct participation in the hostilities and the temporal scope of such participation, by prioritising the state's human rights obligations vis-à-vis its citizens, to which category soldiers belong, over the humanitarian law obligation to protect foreign nationals who are not participating in the hostilities in a territory that is – in the Kot's opinion – not under the state's effective control. Based on the prioritisation of the protection of the soldiers' lives over the lives of foreign nationals in the above-mentioned situation, the state apparatus has endorsed a system of presumptions that significantly loosen the protections afforded by international humanitarian law to the Palestinian population especially in the Gaza Strip.

established consensus. It thus opted to shift the responsibility to enforce the international normative principle against the transfer of an occupant's population into the occupied territory onto private actors by emphasising their own legal obligations and by exploiting their breach of such obligations to threaten actions that would harm their reputation.

Factual accuracy has also been able to elicit meaningful state response. Substantiating factual findings with incontrovertible evidence, at the very least, compels states to admit to the facts and shift the debate on the legal consequences attached to such facts. Given the common trend that sees states denying the facts of a dispute in the first place, it is of the essence that commissions of inquiry devote much of their work to establishing such facts in a manner that minimises the possibility of contestation. After all, this is the primary (operational) goal of such mechanisms – also from a historical view point, as explained in Chapter I.[30] By gathering enough evidence to demonstrate beyond reasonable doubt that white phosphorous weapons had been used in a manner that caused injury to civilians that was not commensurate to the anticipated military advantage and, most importantly, as a result of inefficient or insufficient warnings, the Goldstone Mission appears to have been able to prompt the implementation of a permanent moratorium on the use of such weapons during combat operations in densely populated areas.

As explained in Chapter III, the above points are closely connected to the way commissions of inquiry employ language. Language is the means through which commissions of inquiry deploy strategies and its gradation should be consequential to the evidentiary threshold attained during the investigation. At times, these two characterisations of language may clash. Indeed, as shown in Chapter III, acculturation approaches, which seek to shame governments into complying with international norms, deliberately inflate claims of non-compliance, perhaps by framing them in a particularly strong or evocative language, to induce in the targeted actor that

[30] See Chapter I, pp 21-40.

state of dissonance that is at the roots of domestic processes of re-alignment with the self-perceived identity or role of a state. However, such use of language may not be supported by the evidence gathered, which may point to a violation of the norm but be, at the same time, insufficient to allow for a re-qualification of the violation under the more evocative legal framework. Once again, the case of white phosphorous is in point. The facts gathered by the Mission strongly supported allegations of violations of the principles of distinction, proportionality and precaution. However, while there was evidence that seemed to indicate that the IDF had been made aware of the damages that the white phosphorous shelling was causing to civilian infrastructures, the Mission refrained from drawing conclusions under the more evocative international criminal law framework, contrary to what, for example, Human Rights Watch did.

1.6 Thematic Constraints

The empirical analysis in Chapter V has shown that the effectiveness of international commissions of inquiry is also dependent on the specific thematic focus of the investigation. Put it simply, certain issues carry such political or legal gains that governments can hardly be socialised into complying with the relevant international norms or, if they can, the process usually takes a long time. Ambiguous legal frames offer the possibility for states to escape the application of a norm to a situation that they may be able to exploit politically or economically. Such is the case of the unlawful transfer of an occupant's civilian population into an occupied territory, whose applicability to the Israeli settlements is contested not only by Israel itself but also by prominent international lawyers.[31] This issue is so politically crucial for the Israeli Government that decades of adverse pronouncements of the most authoritative international agencies have been unable to reverse the de facto situation on the ground. It is certainly unrealistic to think that a commission of inquiry would be able to fare differently. Indeed, as I

[31] See supra, Chapter V, pp 334-336.

have shown, the Settlements Inquiry's main contribution does not lie so much in re-stating the illegality of the settlements enterprise but rather in shifting the responsibility for the maintenance of the settlements economy on private actors and their states of registration.

In such cases, persuasion and acculturation strategies, which seek to exploit the domestic potential for the internalisation of the relevant international norms and the state's self-perceived identity or role in the international community, are unlikely to yield significant results, at least in the short terms. It is only logical that international commissions of inquiry should rather endeavour to activate coercive actions by involving third actors who are empowered or able to impose sanctions on the targeted state so as to shift its cost-benefit calculation.

1.7 Positive and Negative Externalities

Some of the effects observed in Chapter V were not (explicitly) foreseen by the commissioners or the UN Human Rights Council, and they certainly cannot be considered goals of the inquiries deployed. One of the most easily identifiable such effect is the domestic backlash against Israeli human rights organisations, which, as the parliamentary debates show, begun as an explicit response to the participation of civil society organisations to the Goldstone process. A less traceable spill-over effect of the Goldstone Mission was its contribution to the yet-to-be-achieved reconciliation between the two major Palestinian political parties, Hamas and Fatah, in particular in the aftermath of Operation Cast Lead.

These heterogenous phenomena suggest, on the one hand, that the deployment of strategies that leverage civil society organisations should be accompanied by some procedural safeguards. Quite obviously, civil society organisations cannot be treated like individual witnesses or victims, for whom confidentiality may be enough to shield them from retaliation. Most of the information gathered by domestic and international NGOs is made public through their websites and periodic reports and, even if a commission of inquiry were to keep the names of the organisations that participated in the inquiry process secret, it would be relatively easy for state

authorities to match the publicly available information with the content of the inquiry report. Moreover, an inquiry that relies almost exclusively on information gathered through the inputs of civil society organisations not only is likely to add little to what is already known and publicly available but also is likely to compromise its impartiality and independence. In order to minimise such risks, commissions of inquiry should always strive to gather or at least verify the information received independently. However, such an approach leaves an open question: what are commissions of inquiry expected to do when the only way to fulfil a mandate is by replying on information gathered by other organisations, possibly NGOs? This is not just a moot point because states can, and in fact do, refuse to cooperate with international inquiries, as the stance of the Israeli Government with regard to the Beit Hanoun Inquiry and the Settlements Inquiry demonstrates.

On the other hand, despite some scepticism,[32] commissions of inquiry appear to be able to contribute, albeit to a limited extent, to local transitional justice efforts. Truth is considered one of the pillars of transitional justice processes[33] and fact-finding constitutes one of the articulations of the right to truth.[34] Despite the commonly held position that it predominantly focused on Israeli conducts, the Goldstone Mission extensively scrutinised Palestinian conducts and, in particular, it tackled head-on allegations of inter-factional violence both in the West Bank and the Gaza Strip. Allegations of the sort were not unknown especially at the domestic level thanks to the work of civil society organisations, including Al-Haq or Human Rights Watch, but the Goldstone Mission officially sanctioned the truth of such allegations. The identification of specific patterns of violations and the recommendation that these be set right

[32] Catherine Harwood, 'Contributions of International Commissions of Inquiry to Transitional Justice' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar, 2017) 401-423.
[33] See, for example, Priscilla B Hayner, *Unspeakable Truths. Transitional Justice and the Challenge of Truth Commissions* (2nd edn; Routledge 2011) in particular at 19-26; Ruti Teitel, *Globalizing Transitional Justice* (OUP 2014) 1-8.
[34] Priscilla B Hayner (ibid) 20 argues that 'The first and most straightforward objective of a truth commission is sanctioned fact-finding: to establish an accurate record of a country's past, clarify uncertain events, and lift the lid of silence and denial from a contentious and painful period of history'.

by taking specific actions seem to have, at least in part, determined the decision of domestic authorities to amend their policies. In turn, these apparent successes fell within a general framework of renewed reconciliation efforts, likely triggered by the need of both the PA and Hamas to identify a common strategy to respond to the Israeli military escalation in the Gaza Strip.[35] Against this backdrop, it certainly cannot be claimed that the Goldstone Mission caused such renewed efforts to be initiated, but it clearly fostered a climate of acknowledgement of the wrongdoings, especially in the West Bank, where the PA appears to have taken seriously its obligation to at least investigate allegations of human rights violations driven by political motives. In addition, while it cannot be claimed that the Mission *produced* transitional justice or truth, it certainly managed to vest the facts reported with officiality and authoritativeness. Inserting such considerations in a report that the Palestinians could have exploited to their benefit in their efforts to garner the support of the international community against the actions of the State of Israel further enhanced such officiality and authoritativeness, because Palestinians needed to acknowledge the legitimacy of the entire Goldstone process to reap its benefits. In a way, this does not simply amount to *promoting* transitional justice but to something more: it seems to indicate that the Mission actively contributed to fostering a climate of mutual acknowledgement of politically motivated human rights violations. Ironically, the follow-up to the Goldstone Mission failed precisely at supporting or promoting domestic reconciliation efforts by failing to provide a sustained oversight over such processes. But one could rightly argue that such an endeavour was not within the remit of the Goldstone Mission and its follow-up mechanisms.

2. Some Proposals for Reform

While this research was designed to primarily investigate the domestic effectiveness and impact of international commissions of inquiry, the processes through which domestic

[35] And, possibly, by the PA's need to re-affirm its leadership that had been corroded by its inertia during Operation Cast Lead.

institutional, legislative, jurisprudential and policy change is elicited and the influence of endogenous and exogenous factors on such processes, the analysis conducted has also shed some light on the function, performance and position within the international human rights machinery of Human Rights Council-mandated commissions of inquiry. However, the bearing of such insights must not be overplayed. This study focuses on only one situation, one which is riddled with seemingly insurmountable political obstacles and with distinctive features, starting from the fact that the inquiry processes analysed involve two state (or quasi-state) sides. But the Human Rights Council has dispatched fact-finding missions to investigate widely differing situations and contexts. It seems appropriate that commissions of inquiry maintain a certain degree of *ad-hoc*-ery and flexibility to be able to carry out their investigatory function efficiently. Indeed, commissions of inquiry constitute one of the first responses that the UN is able to deploy to tackle human rights or humanitarian law violations and their chief potential, as I argue below, lies precisely in their ability to obtain early access to the evidence. Stiffening their structure and mode of operation would likely hamper their ability to fulfil this task, even though this might enhance their legitimacy. However, this does not mean that the UN should abandon any attempt to better regulate this tool.

Amidst burgeoning attempts at formulating guidelines and best practices to regulate the functioning of international commissions of inquiry, this section seeks to provide some starting points for data-driven regulatory reforms of the system. In this author's opinion, some of the ensuing considerations should not simply be translated into non-binding guidelines but should be operationalised in a rigid rulebook that all commissions of inquiry should abide by. Differently, other more context-specific inputs should be translated into flexible guidelines so as to allow for that responsiveness that underpins the effective deployment of such commissions of inquiry in different contexts.

2.1 Nomenclature

A first formal observation concerns the nomenclature of the inquiry mechanisms. Throughout this study, I have deliberately used interchangeably the terms 'international commissions of inquiry' and 'fact-finding missions' to reflect the practice of the UN Human Rights Council, which does not seem to clearly distinguish between the two. However, from a purely semantic viewpoint, these different nomenclatures evoke different instruments. The term 'fact-finding' refers to the most immediate operational goal of fact-finding mission, that is finding the facts or, better said, establishing the facts of a given event or situation. On the contrary, the term 'commission of inquiry' evokes instruments commonly employed by governments to investigate matters of public or political concern such as industrialisation, surveillance or urbanisation.[36] In addition, national commissions of inquiry are usually entrusted with advisory functions vis-à-vis policy-makers. Perhaps because the boundaries of the institutional functions that international commissions of inquiry and fact-finding missions are called upon to discharge is still unclear, an agreement upon the most appropriate nomenclature has yet to be achieved. Be that as it may, the practice of such bodies seldomly is limited to a mere recognition of the facts of a given situation or event. It would thus be more appropriate to harmonise the formal nomenclature aspect by reserving the label of 'fact-finding mission' to those mechanisms established for the exclusive purpose of establishing the facts, while all other tools should be referred to as 'commissions of inquiry'. Albeit to a marginal extent, this might assist in dispelling misplaced expectations about the work that such mechanisms are empowered to carry out.

[36] Mike Rowe and Laura McAllister, 'The Roles of Commissions of Inquiry in the Policy Process' (2006) 21(4) *Public Policy Adm* 99; Stuart Farson and Mark Phythian (eds), *Commissions of Inquiry and National Security. Comparative Approaches* (Praeger 2011).

2.2 Re-Configuring Goals

In Chapter III, I have argued that international commissions of inquiry are mechanisms of state socialisation.[37] As agents of the international human rights law regime, Human Rights Council-mandated commissions of inquiry share the institutional responsibility to ensure that states comply with and implement international law obligations. They do so by monitoring the domestic human rights situation, determining state, and sometimes individual, responsibilities and recommending specific actions in an attempt to provide avenues for accountability, defuse tensions or prevent further violations. Moreover, commissioners set their own goals, explicitly or implicitly, for example by privileging witness and victims testimony in the evidence-gathering process as a way to ensure that victims and witnesses can recount their stories and, thus, facilitate some sort of cathartic process.[38] Finally, there is a range of additional unforeseen effects that commissions of inquiry engender, as Chapter V has also shown, such as supporting national reconciliation (or, more generally, domestic transitional justice efforts) or causing governments to crack down on domestic civil society actors.[39] These additional unforeseen effects contribute to defining the impact (as opposed to the effectiveness) of international commissions of inquiry and may or may not contribute towards the broader regime goal of state socialisation.

The traditional goals attributed to commissions of inquiry, that is prevention, de-escalation of violent situations and accountability, are insufficient, and possibly inadequate, to describe the full range of effects that commissions of inquiry may be able to trigger at the domestic level. Indeed, this research shows that, for example, in the Israeli-Palestinian conflict, accountability

[37] See Chapter III, pp 104-106.
[38] This has been done, in particular, in the context of the Goldstone Fact-Finding Mission. It is worth reproducing the words of the commissioners: 'The purpose of the public hearings, which were broadcast live, 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. The Mission is of the view that no written word can replace the voice of victims' (UNHRC, Human Right in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact-Finding Mission on the Gaza Conflict (25 September 2009) UN Doc A/HRC/12/48, para 166)
[39] See, for example, the role of the Goldstone Mission in the national reconciliation between Fatah and Hamas (Chapter V, pp 356-373).

has hardly been advanced. Nor Human Rights Council-mandated inquiries have been able to prevent periodical escalations of violence in the Gaza Strip. And yet, the deployment of such inquiries has made a difference. The IDF has apparently halted all use of white phosphorous weapons during combat operations in densely populated areas; the Israeli Government has thoroughly reviewed its domestic investigation system into allegations of human rights and humanitarian law violations during combat operations and introduced some significant changes, for example, as regards the mode of appointment of key actors in the investigation system; the discourse over the legality of the settlements has shifted on the international law obligation of third party states and private actors; Palestinian courts and administrative authorities have issued decisions that seek to remedy politically-motivated human rights violations.

State socialisation provides for a more accurate description of the overall goal of international commissions of inquiry, because it is a broad enough category to include also the above-mentioned changes. Moreover, appraising the performance of international commissions of inquiry in light of the overall objective of state socialisation allows for a more realistic management of the expectations attached to these mechanisms. From an operational viewpoint, commissioners appear to be aware of the limitations intrinsic to inquiry mechanisms and, as a result, they already aim at engendering incremental change by recommending specific and targeted action, as shown in Chapter V. Their recommendations do not simply seek to elicit the action of the international community, as an alternative or supplement to domestic follow-up, but also, and especially, endeavour to pressure the domestic authorities to abide by the rules of international law. If state socialisation is to be taken seriously, mandate-givers should forge mandates with more realistic and focused goals that may span beyond the boundaries set by prevention, mitigation and accountability.

This may result in a re-orientation of international inquiries. No longer should these be regarded as remedial tools with an exclusively *ex post facto* function. Rather, I argue that

commissions of inquiry carry a potential as constructive tools, which may be well placed to provide domestic authorities with cues and advice as to how to implement international obligations with a view to minimising human rights and humanitarian law violations. Obviously, this requires, on the one hand, a sincere political will by the targeted actors to avoid such violations and, on the other hand, an adequate thematic focus. This does not mean that commissions of inquiry should abandon their traditional functions vis-à-vis the international community. As Chapter V demonstrates, coercive strategies, which normally underline the role of externally-imposed accountability or sanctions, may strengthen the argument for domestic change by providing negative incentives.

2.3 Re-Orienting International Commissions of Inquiry

An additional advantage of re-purposing international commissions of inquiry in light of state socialisation lies with the opportunities that this offers to conceive the inquiry process not simply as a procedure for the establishment of the facts of a given situation or event, but also in strategic terms.

While most of the literature on commissions of inquiry has focused on researching how to perfect quality control for international inquiries, in particular by emphasising the importance of rules of procedure and evidence, this research seeks to shed some light on the mechanisms set in motion by such commissions for socialising states. This approach aims to verify how, on the one hand, procedural and structural factors and, on the other hand, legal and factual arguments impact on the reality on the ground through a series of interlocked mechanisms, which may involve actors other than the commissions themselves. In other words, cognisant of the importance of the notions of legitimacy and procedural fairness, this study combines a procedural and a mechanistic understanding of commissions of inquiry. The latter understanding is filtered through the frames borrowed from international relations theories on state socialisation. These constitute useful lenses to understand how follow-up processes to

international inquiries lead to domestic change. At the same time, though, they may be understood as operational strategies that commissioners should consider deploying in order to maximise the effectiveness and positive impact of the inquiry process.

In this sense, coercion, persuasion and acculturation do not simply function as interpretative or conceptual categories to assess the effectiveness and impact of international commissions of inquiry but they also represent blueprints for the effective conduct of the inquiry process. While, as I have shown, it belongs to the mandate-givers to establish the scope of the investigation, whether this should be confined to factual aspects or should also include a legal analysis of the facts, what type of recommendations the commission is expected to formulate and the addressees of such recommendations, it behoves the commissioners to operationalise the goals formulated in the mandate by devising strategies to achieve such goals.

Because socialisation is dependent on several factors, including for example the receptiveness of international pronouncements (that is, the influence that is generally accorded to pronouncements of international agencies), the existence of an active domestic civil society, the political, economic or symbolic significance of the thematic issue for domestic constituencies and several other factors, a one-size-fit-all approach is unlikely to be identifiable. In contrast, the strategic approaches offered by coercion, persuasion and acculturation, which reflect different understandings of international relations, are better positioned to allow commissioners to take into account such factors. Generally speaking, coercion, for example in the form of a threat of international prosecutions or economic sanctions, may prove a valuable pull factor especially when coupled with other more constructive approaches, but it need not be the only way. The example of white phosphorous weapons shows that a persuasion-acculturation approach, which leverages the self-perceived standing of the state or sub-state actor among its peers, may be in itself sufficient to trigger a significant policy change.

In less abstract terms, this requires commissioners to reasonably anticipate the prospective impact[40] of the inquiry by taking into account contextual and structural factors, including, for example, the domestic sensitivity of the thematic issues to be investigated, the predisposition of the domestic authorities towards the commission, its mandate and the establishing body, the existence of a pro-active domestic civil society, the state's claim to a specific international standing and the likelihood that a sustained follow-up process will ensue to the publication of the report. At an operative stage, the commissioners will have to decide whom to engage with, whether to do so in an open or confidential manner, what type of information they will need, and the standard of proof needed to best use those information, whether to seek further international action and by which actors. Finally, commissions will need to draft a report, the language of which must reflect the socialisation strategy privileged and the level of certainty attained in determining the facts. Hence, for example, shaming a state into complying with given international standards by leveraging its self-perceived role within its international community of peers (acculturation) requires the use of morally and politically charged language, which may emphasise, for example, the alleged criminality of certain violations. A less confrontational approach, which for example leverages the prospect of international prosecutions, should rather linger on the more technical aspects of the allegations of criminality: this may require, for example, prioritising an accurate assessment of the available evidence of the relevant *mens rea*, while it may rely less on an explicit qualification of the allegations in criminal law language.

2.4 Re-Operationalising Procedural Fairness

As noted in the preceding sub-section, understanding commissions of inquiry as agents of state socialisation does not necessarily imply overlooking their procedural dimension. Indeed,

[40] In a fashion similar to what is demanded by Article I(5) of the UN Declaration on Fact-Finding, which states: 'In deciding if and when to undertake such a mission, the competent United Nations organs should bear in mind that the sending of a fact-finding mission can signal the concern of the Organization and should contribute to building confidence and defusing the dispute or situation while avoiding any aggravation of it'.

as I have shown throughout Chapters IV and V, one of the factors that certainly conditions the ability of such mechanisms to engender some form of tangible domestic change (effectiveness) or, in some cases, appear to have prompted a negative impact on sections of the domestic society that decided to cooperate with the inquiries is their ability to be perceived as legitimate. But, as argued by Thomas Frank, legitimacy may be understood as procedural fairness. This is certainly true for commissions of inquiry, whose legitimacy can only be anchored to meagre textual sources, the repeated practice of the UN organs and the implicit power to launch inquiries held by some UN bodies. In other words, as explained in Chapter I, international commissions of inquiry have to garner their legitimacy by operating according to sound rules of procedure and evidence.

Most of the rules and guidelines elaborated in the academic and professional literature are valuable and may be able to shield, at least to a certain extent, the commissions from procedural criticism. However, the case study analysed in this research, albeit admittedly unique in this regard, has shown that there may be some room for improvement.

As Chapter IV shows, Israeli and Palestinian policy-makers have responded to the establishment of international inquiries by the Human Rights Council in radically different ways. Palestine has largely welcomed the establishment of such commissions by the Council, while Israel has systematically criticised such decisions because they allegedly concealed a political agenda pushed forward by countries hostile to Israel. This is not surprising. The long-standing Israeli perception of the Human Rights Council as an agency fundamentally biased against it is no mystery. It is not the purpose of this study to show whether the Council is actually biased, but in order to understand this criticism, suffice it to note that the Council has indeed issued more resolutions condemning Israel than any other country, that the only country-specific item in the agenda of the Council concerns the situation in the Occupied Palestinian territories and that the situation in Israel and Palestine has been the target of more commissions

of inquiry than any other country. The UN Declaration on Fact-Finding privileges the UN Secretary-General as the authority in the best position to establish fact-finding missions, even when the decision to do so is taken by the Security Council or the General Assembly.[41] The rationale behind this position probably lies with the administrative – and less political – character of the Secretariat in comparison with the other two political organs of the UN. While the Human Rights Council is the natural repository of human rights expertise within the UN architecture, it remains a political agency highly vulnerable to states' manipulations, thanks to the country blocs that have consolidated within its folds. Moreover, the specific expertise and competence retained by the Council are jeopardised by still questionable membership criteria, which admit countries with deplorable human rights records. Transferring entirely the competence to decide whether to dispatch inquiry procedures and to make all the logistical arrangements for their functioning on to the Secretary General would be unrealistic and would potentially greatly diminish the relevance of the Human Rights Council. However, a praxis may be put in place whereby the decision to dispatch commissions of inquiry would be retained by the Human Rights Council, whereas the formation of such commissions could be entrusted to the Secretary General along with the provision of logistical support. Such an arrangement is unlikely to remedy the politicisation of the decision-making procedure for dispatching commissions of inquiry, but it may shield the strictly formation stage from undue political influence.

Another consideration that emerges from the empirical record, in particular from Chapter IV, is concerned with the composition of commissions of inquiry. As explained in both Chapter I and III,[42] the academic and professional literature on the subject has elaborated several criteria for the choice of the commissioners. Emphasis has been put on guaranteeing the independence, impartiality and human rights expertise of the commissioners, but such efforts have not always

[41] UN Declaration on Fact-Finding, Article II(15).
[42] In particular, see Chapter III, pp 129-130.

been acknowledged by domestic authorities. In particular, Chapter IV has shown that Israel has consistently sought to discredit the work of international commissions of inquiry by attacking the independence and impartiality of the commissioners. It is clear that, in large part, smear campaigns against fact-finders were motivated by the need to deflect substantive criticism against Israeli state policies. However, as I have shown, regardless of the purposes of such attacks, domestic criticism is not entirely misplaced.

Broadly speaking, this stems from, on the one hand, the choice to appoint individuals who, in some capacity, had previously pronounced themselves on issues related to the Israeli-Palestinian conflict, even if these were not directly connected to the events being investigated, and, on the other hand, a different understanding of the requirement of professionalism. All judicial enterprises are regulated so as to ensure that their members not only are independent, impartial and unbiased, but also appear to be so. Indeed, an appearance of bias is likely to seriously damage the legitimacy of international courts and tribunals. The same holds true for non-judicial ad hoc mechanisms such as international inquiries. One could even argue that, because the legitimacy of such tools rarely finds comfort in a written statute to which states agree, the application of these requirements should be even stricter. While familiarity with a situation under investigation is often regarded as a criterion for the choice of a fact-finder, practice seems to suggest that perhaps the contrary holds true. That is, a lack of prior intellectual engagement with a given geographical situation may be advantageous for a commissioner as it would signify an impossibility for that individual to hold a preconceived view about that situation. However, as noted by others, such a strict interpretation might result in an unreasonable limitation of the pool of potential candidates to the post of fact-finder. An alternative may be for the authority entrusted to dispatch a commission of inquiry to establish, in consultation with the states, a permanent roster of experts among which to choose the commissioners. While such a solution might reduce the space left for *argumenti ad hominem*,

because the states would have consented to the composition of the roster in advance, it does not entirely eliminate the possibility for a single state to attack individuals appointed to a commission of inquiry concerning it. Setting up such a roster would also imply elaborating procedures that allow for a wide consensus among states on the names to be included therein and, unless a general agreement can be found, a state that was overruled by the majority as regards a given name might still voice its criticism against that individual.

Probably a more realistic alternative would be to resort to a system of appointment akin to that employed to form commissions of inquiry under the Hague Conventions 1899 and 1907. As explained in Chapter I, these inquiries had a more arbitral nature than modern human rights inquiries, and they sometimes resembled more courts of law in their mode of operation, whereby state parties advanced opposing claims as to the facts of a given dispute. In contrast, modern international commissions of inquiry on human rights only rarely feature inter-state factual disputes. More accurately, one should say that the events under investigation are underpinned by a public (international) interest to peace and security, and to respect for human rights as a pillar of the international legal system. In other words, modern inquiries resemble more prosecutorial mechanisms, whereby the inquirer of facts acts on behalf of the public interest of the international community of states. Nonetheless, it may be possible to apply the party-based paradigm of early international inquiries to modern human rights inquiries by appointing as fact-finder at least one individual chosen by the state(s) whose actions are being investigated. While, on the one hand, such system would compromise on the independence and impartiality requirements by acknowledging, and even embracing, the partisanship of at least a part of the commission of inquiry, on the other hand, it would also guarantee a greater representativeness of the domestic views and positions, in pursuance of the spirit of the UN Declaration on Fact-Finding, which requires 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'.[43]

Finally, while prominent scholars have described human rights international commissions of inquiry as tools for pressuring domestic authorities to account for their violations,[44] I have argued that such commissions may also embrace a more technical or advisory function with respect to compliance with international norms. However, such advisory function is partially incompatible with the public character of modern Human Rights Council-mandated commissions of inquiry. Some of the respondents in this study stated that confidentiality may provide a partial solution to this issue. Indeed, Israeli authorities have been prepared to cooperate with boards of inquiry dispatched by the UN Secretary General. In light of these observations, it may be argued that the functioning of international commissions of inquiry should be restructured in two phases. The first phase, from the beginning of the inquiry process to the submission of the report to the mandate-giver(s), should be characterised by strict confidentiality and, for reasons of public accountability, may be concluded with the publication of a summary of the final report. The second phase, characterised by the publication of the detailed findings of the inquiry, would only be contingent on a decision of the mandate-giver(s) based on a determination that the target state or actor has proved unwilling or unable to act upon the recommendations of the commission. Such state failure to act would demonstrate that persuasion and, to a certain extent, acculturation strategies are not enough in the specific case and, hence, a coercion, or more markedly acculturation, approach is warranted. Moreover, postponing the publication of the detailed findings of an inquiry would be consistent with the requirement that the commitment to imposing a cost or sanction on non-compliance policies – under coercion strategies – is graduated to signal its sincerity. The resulting system would be

[43] UN Declaration on Fact-Finding, Article III(26).
[44] It may be worth remembering Antonio Cassese, 'Fostering Increased Conformity with International Standards: Monitoring and institutional Fact-Finding' in Antonio Cassese (ed), *Realizing Utopia. The Future of International Law* (OUP 2012) 303.

akin to the interlocked procedure established under ECOSOC Resolutions 1235 (XLII) and 1503 (XLVIII) in place with the former UN Commission on Human Rights, whereby allegations of human rights violations would be first investigated in a strictly confidential manner by a working group appointed by the Sub-Commission under Resolution 1503 and, subsequently, made public by the Commission had it decided to take action under Resolution 1235.[45]

Conclusion

International fact-finding has become a distinct field of study in the international legal scholarship and likely a specific method of 'soft' enforcement of international human rights and humanitarian law, with an own epistemic community of professionals.[46] However, while the academic scholarship in point has largely focused on issues related to the procedural legitimacy of and law-application by international inquiries, comparatively few studies have sought to appraise these mechanisms in light of their impact. On the contrary, several commentators, while praising the work carried out by such commissions, have concluded that these are of limited usefulness for domestic constituencies and that the ambitions of advancing accountability, preventing further escalations of violence and mitigating ongoing violence have largely remained paper commitments. Indeed, periodic cycles of violence in Israel and Palestine, structural gaps in the protection of fundamental human rights and the steady – if not increasing – number of victims, despite the deployment of five Human Rights Council-mandated inquiries – and many other mechanisms for the enforcement of human rights and humanitarian law – over less that fifteen years, seems to point towards an inevitable finding of

[45] Ron Wheeler, 'The United Nations Commission on Human Rights, 1982-1997: A Study of "Targeted" Resolutions' (1999) 32 *Can J Political Sci* 75, 76; Philip Alston, 'The Commission on Human Rights' in Philip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press 1992) ; Maja Bova, *Il Consiglio Diritti Umani nel Sistema onusiano di promozione e protezione dei diritti umani: profili giuridici ed istituzionali* (Giappichelli Editore 2011) 48-50.

[46] Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 *EJIL* 265; Cecilia M Bailliet, 'Introduction' in Cecilia M Bailliet (ed), *Non-State Actors, Soft Law and Protective Regimes: From the Margins* (CUP 2012) 1-2; see also Bassiouni (n 17).

ineffectiveness of such mechanisms. However, by focusing on their causal contribution to domestic institutional, legislative, jurisprudential and policy change, this research demonstrates that commissions of inquiry have been able to generate processes of micro-socialisation.

Antonio Cassese has described international fact-finding as 'the best way of bringing the weight of the community to bear on each member state'.[47] The emphasis on the word 'weight' is underpinned by an understanding of inquiry mechanisms as tools of coercion or for 'naming and shaming' (a distinct form of acculturation). But, as this study has shown, commissions of inquiry may be able to engender a wider variety of processes, including of progressive internalisation of international norms. More generally, the case of Human Rights Council-mandated commissions of inquiry in Israel and Palestine demonstrates that, on punctual issues, commissions of inquiry may be able to generate all sorts of processes of socialisation. The capacity to elicit such processes is contingent upon a number of factors of both endogenous and exogenous nature. Commissioners must be aware of these contextual factors. In turn, such considerations will point fact-finders towards the best strategy to maximise their chances to achieve the desired impact.

The largely empirical, yet theoretically-informed, argument developed throughout this study seeks to provide an innovative understanding of Human Rights Council commissions of inquiry, which emphasises their active role as catalysts for domestic change. This requires more than simply analytical tools to appraise the impact of commissions of inquiry *ex post*. It necessitates a proactive awareness by fact-finders or the potential role of the inquiry process and their ability to put the inquiry process to its best use by simultaneously pursuing the tasks entrusted to them by the mandate-givers.

[47] Cassese (n 43).

ANNEX A

LIST OF RESPONDENTS*

Respondent	Role	Date Interviewed
Omar Shakir	Israel and Palestine Director at Human Rights Watch	12 February 2018
Yael Stein	Research Director with B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories	14 February 2018
Lior Yavne	Executive Director with Akevot, formerly with B'Tselem	21 February 2018
Ata Hindi	Legal Advisor with Diakonia	26 February 2018
Nimrod Karin	Former legal adviser with the IDF, at the International Law Department of the MAG Corps	27 February 2018
David Benjamin	Lt Col (Res) with the IDF and former Chief Legal Advisor for the Gaza Strip and as Director of the Strategic and International Branch in the International Law Department	4 March 2018
Pnina Sharvit Baruch	Col (Ret) Adv with the IDF, former Director of the International Law Department	5 March 2018
Tal Mimran	Adv and Former Legal Advisor with the Israeli Ministry of Justice, Department for International Litigation and Agreements	11 March 2018
Danny Efroni	(has not agreed to disclosure)	7 and 18 March 2018
Michael Sfard	Attorney at law	9 April 2018
Ammar Dwaik	Director General of the Palestinian Independent Commission for Human Rights	16 May 2018
Shahrazad Odeh	Attorney at law, formerly with the Public Committee against Torture	5 June 2018
Rina Rosenberg Jabareen	Co-founder and International Advocacy Director of Adalah – The Legal Center for Arab Minority Rights in Israel	18 June 2018
Shireen Qaru	Attorney at law and former UNRWA legal officer	19 June 2018

* The list of respondents below does not include details about interviews held with individuals who did not agree to their identities or positions being disclosed, nor does it include details about individuals who were contacted but refused to be interviewed. In addition to the respondents listed below, I also benefited from the insights provided by professionals and academics whom I met in an informal setting. Finally, the list does not include the participants to a roundtable discussion that took place at the Hebrew University of Jerusalem on 20 March 2018.

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