Review Essay

Fact-Finding in Situations of Atrocities: In Search of Legitimacy

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Abstract

While international inquiries have long been used by states and international organisations to address situations of human rights violations, it is only since the turn of the millennium that they have increasingly become the focus of academic reflection. Harwood's book is unique in that it represents the first effort at systematically surveying and systematising the practice of atrocity-related UN inquiries. In this essay, building on both the arguments set out in the book and other relevant scholarship, I propose three lenses to read through Harwood's meticulous review of the practice of UN inquiries: legitimacy, juridification, and roles and functions. While Harwood makes a largely critical-descriptive argument that positions atrocity-related UN inquiries in the liminal space between principle and pragmatism, I contend that any discussion about the roles and functions of international inquiries should be informed by a reflection on their legitimacy.

Keywords

international commissions of inquiry – UN inquiries – human rights fact-finding – legitimacy of human rights fact-finding – functions of UN inquiries

1 Introduction¹

Inquiry is as old as modern international law. Part III of the 1907 Hague Convention for the Pacific Settlement of International Disputes includes a detailed set of regulations for the establishment and functioning of commissions of inquiry.² Nonetheless, apart from a few academic commentaries and a book,³ it was not until the new millennium, and especially throughout the past decade that academic scholarship on the topic started to burgeon.⁴ Catherine EM Harwood's book⁵ fits within this strand of scholarship.

Probably this renewed focus on commissions of inquiry, in particular in the field of human rights, is a consequence of the UN Human Rights Council's prolific recourse to inquiries in the discharge of its functions, as Harwood notes in

- 1 I wish to thank the anonymous reviewers for their useful comments, which have been essential to improving the first draft of this essay.
- 2 Convention for the Pacific Settlement of International Disputes (Hague I) (adopted 29 July 1899, entered into force 4 September 1900) Artt 9–30.
- 3 For example: Thomas M Frank and H Scott Fairley, 'Procedural Due Process in Human Rights Fact-Finding by International Agencies' (1980) 74(2) *AJIL* 308; Bertrand G Ramcharan (ed), *International Law and Fact-Finding in the Field of Human Rights* (Martinus Nijhoff Publishers, 1982).
- 4 Some of the most important recent contributions on the topic are: Sylvain Vit, *Les procdures internationales dtablissement des faits dans la mise en uvre du droit international humanitaire* (ditions Bruylant 1999); M Cherif Bassiouni, 'Appraising UN Justice-Related Fact-Finding Missions' (2001) 5 *JL&Pol'y* 35; Tho 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 2021).
- 5 Catherine EM Harwood, *The Roles and Functions of Atrocity-Related United Nations Commissions of Inquiry in the International Legal Order: Navigating between Principle and Pragmatism* (Brill | Nijhoff 2020).

her book.⁶ Harwood focuses, in particular, on what she defines ‘atrocities-related United Nations commissions of inquiry’ and she counts sixteen such bodies set up by the UN since 1945, while a UN Research Guide lists seventy-six international commissions of inquiry or fact-finding missions established by the UN since 1963.⁷ This discrepancy is justified by Harwood’s delimitation of the scope of the book, which defines UN-mandated inquiries into situations of atrocities as impartial and independent *ad hoc* fact-finding mechanisms established by the UN to investigate situations which are governed by international human rights law, international humanitarian law or international criminal law, and whose final report is not binding.⁸ By contrast, the long list of investigative mechanisms included in the UN Research Guide, which for example includes mechanisms that are tasked to investigate individual incidents or are deployed and staffed by the UN Secretariat and therefore lack independence as conceptualised by the author, demonstrates that there is little uniformity both in the common substantive and procedural features that characterise these mechanisms and in their nomenclature.

While existing scholarly works have focused on discrete aspects of international inquiries,⁹ Harwood’s book comprehensively and systematically X-rays the life of UN inquiries from their establishment to the formulation of their conclusions and recommendations through their interpretation and application of international human rights, humanitarian and criminal law. The practice of atrocity-related UN inquiries is so wide-ranging that it makes this exercise almost a feat and it reveals one of the main characteristics of UN inquiries: their flexibility.

After a historical overview of the practice of establishing atrocity-related inquiries that makes reference to even two almost forgotten – at least in anglophone academic legal scholarship – Inter-Allied Commissions of Inquiry on Occupied Serbia and into the Greek Occupation of Smyrna and adjoining Territories following WWI,¹⁰ Harwood takes us through the different stages that

6 Ibid 52.

7 UN Library Research Guide, International Commissions of Inquiry, Fact-finding Missions: Chronological List <<https://libraryresources.unog.ch/factfinding/chronolist>> accessed 1 December 2020.

8 Harwood (n 5) 7–17.

9 For example, in Alston and Knuckey (eds), the reader can find contributions such as Frédéric Mégret, ‘Do Facts Exist, Can They Be “Found”, and Does It Matter?’ or Larissa van den Herik and Catherine Harwood, ‘Commissions of Inquiry and the Charm of International Criminal Law: Between Transactional and Authoritative Approaches’ or Théo Boutruche, ‘The Relationship between Fact-Finders and Witnesses in Human Rights Fact-Finding: What Place for the Victims?’.

10 Harwood (n 5) 27–29.

characterise the life of atrocity-related UN inquiries. The book demonstrates the intrinsic ambiguity of inquiry exercises by the UN, which is signalled by the author herself by reference to binomials such as principle and pragmatism, advocacy and adjudication, and law and politics.

In this essay, I seek to critically read some of what I consider to be the key points of Harwood's review and analysis of the practice of atrocity-related UN inquiries. I organise my reflections in three broad themes, which recurs throughout the Harwood's book: legitimacy, juridification and roles and functions.

2 Legitimacy

The tension between principle and pragmatism, advocacy and adjudication, and international law and politics emerges early on in the life of UN inquiries, when they are established by their mandating body. Because UN inquiries are *ad hoc* mechanisms – notes Harwood – their establishment inevitably implies a certain degree of selectivity.¹¹ Hence, the relevant question is to what degree the selection of situations to be investigated is guided by technical rather than political criteria. Harwood argues that a degree of politicisation cannot be completely expunged from the decision to establish UN inquiries¹² – after all, mandating authorities *are* political organs themselves! Moreover, there may be wider institutional dynamics at play, whereby Geneva-based UN human rights bodies may be acting as 'correction mechanism[s]' to New York-based UN dynamics and, in particular, the power-plays within the UN Security Council.¹³ This tension at the formative stage of UN inquiries certainly deserves a deep exploration, if anything, in light of, on the one hand, the continuous search for legitimacy by international inquiries¹⁴ and, on the other, the allegations of politicisation directed specifically at the UN Human Rights Council.¹⁵

Legitimacy, which from this viewpoint can be broadly described as the acceptability of a given (legal) tool by a community, has been construed by Thomas M Franck as procedural fairness and 'it accommodates a deeply felt popular belief that for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how rules are made, interpreted, and applied'.¹⁶ While they may facilitate adaptability to different contexts and

¹¹ Ibid 64.

¹² Ibid 68–69.

¹³ Ibid 69–71; similarly, van den Herik, (n 4) 528.

¹⁴ See Franck and Fairley (n 3).

¹⁵ For example, Rosa Freedman and Ruth Houghton, 'Two Steps Forward, One Step Back: Politicisation of the Human Rights Council' (2017) 17(4) *HRL Rev* 753.

¹⁶ Thomas M Franck, *Fairness in International Law and Institutions* (OUP 1995) 7–8.

tasks, flexibility and *ad hoc*-kery inevitably clash with the stability that procedural fairness seems to imply. This tension is compounded by the contextual need for international law to elicit voluntary compliance in the absence of strong enforcement mechanisms, which is all the more relevant in the context of UN inquiries because the full deployment of their investigative power depends on the cooperation of the states on whose territory have the events under investigation occurred. Allegations of bias against and non-cooperation with Human Rights Council inquiry mandates by dint of the supposed politicisation of the Council's selectivity¹⁷ exemplify the impact of a lack of clear and transparent selection criteria on the legitimacy of the inquiries – although there is no doubt that some allegations of bias, partiality and pre-judgment are motivated by opportunistic reasons.

Harwood highlights how a consensual approach in the establishment of UN inquiries, especially by the UN Secretary General and Security Council, has generally prevented accusations of politicisation, but she also notes that this has not always guaranteed cooperation.¹⁸

Legitimacy concerns are not limited to the selection of situations to be investigated but extend to the formulation of inquiry mandates. In particular, Harwood lingers on the possible justifications for the Human Rights Council's competence to confer mandates that trespass on fields of international law that are not strictly speaking within the remit of the Council itself, including for example international humanitarian law and international criminal law.¹⁹ Whether such broad competence may be more easily justified in light of the combination of the principles of implied powers and of conferral, a broad interpretation of the rights to the truth and to a remedy or the practice of the Human Rights Council and the General Assembly in light of states' acquiescence or objection, Harwood's empirical observation is that very few states have in fact objected to the inclusion of international humanitarian law or international criminal law in the mandates of Human Rights Council-mandated inquiries.

Conversely, what has attracted allegations of partiality are the wording of the inquiry mandates and the profile of the commissioners. As for the wording

17 For example, 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 1 December 2020, which reads as follows: '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'.

18 Harwood (n 5) 62–63.

19 Ibid 78–88.

of the mandates, Harwood notes that inquiries dispatched to investigate situations of armed conflicts in particular warrant a certain degree of political awareness, which Human Rights Council mandates often lack.²⁰ One of the most cited examples of a politically insensitive mandate is that of the infamous Goldstone Commission, which originally provided for the investigation of violations 'by the occupying Power, Israel, against the Palestinian people' and that was unsurprisingly rejected as biased and partial.²¹ While the mandate was subsequently *de facto* amended so as to include also violations perpetrated by Palestinians upon commissioner Richard Goldstone's acceptance of his appointment on condition that the mandate of the commission would be amended,²² the question is whether such political blindness could ever be repaired in the eyes of the Israeli government. Or, to put it more bluntly, whether such amendment of the mandate could ever avoid any opportunistic criticism or obstruction of the inquiry by Israel. While commissioners are meant to act impartially and independently²³ and, hence, identification of the commissioners with the mandating body should be avoided, it would be naïve to believe that a state with such a troubled relation with the Council²⁴ would give up on the opportunity to delegitimise an inquiry likely to at the very least question the legality of the state's conduct on the battlefield.

Harwood further lingers on the interesting issue of the commissioners' prior statements. How should prior statements that reveal a potential bias of the

²⁰ Ibid 93.

²¹ 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 1 December 2020.

²² Haviv Rettig Gur, 'Goldstone: Israel Should Cooperate' (16 July 2009) *The Jerusalem Post* <<https://www.jpost.com/Israel/Goldstone-Israel-should-cooperate>> accessed 1 December 2020. 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'; see also Harwood (n 5) 130–131.

²³ Harwood (ibid) 98–105.

²⁴ Israeli 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 1 December 2020.

commissioners in relation to a given set of events be treated? Would these be a reason for the disqualification of commissioners from the inquiry? While acknowledging that professional expertise may not necessarily be sufficient to identify the best candidates for the position of commissioners, Harwood also posits that there may be need for greater tolerance with respect to the commissioners' prior statements in light of both the fact that it is difficult to anticipate when a commission of inquiry may be established and for what purposes, and that the required expertise may be of greater importance than certain prior statements.²⁵ She notes, though, that recent Human Rights Council practice suggests an increasing responsiveness of the Council 'to apprehensions of bias from commissioners' prior statements'.²⁶

The issue of prior statements must be contextualised within the specific microcosm of UN inquiries. It may be argued that members of temporary investigative bodies that need to permanently reassess and reassert their legitimacy should, precisely for this reason, be held to similar or even higher standards than, say, judges that serve on judicial bodies whose legitimacy rests on more solid and discernible foundations, be it a Security Council resolution or an international treaty.²⁷ If legitimacy is to be understood as the acceptance of the authority of a given institution or mechanism by the relevant constituencies,²⁸ then all good-faith efforts should be made to secure the acceptance of the authority and legitimacy of commissions of inquiry by the party whose conduct is to be investigated. Similarly to the negotiations that lead to the adoption of a new international legal instrument such as a treaty, this would likely ensure a more solid foundation for commissions of inquiry and maximise the opportunities for cooperation between the commission itself and the domestic authorities of the country where the inquiry is to take place. Moreover, part of the problem could probably be addressed by instituting a roster of experts eligible for appointment to UN inquiries, which would render the appointment process more transparent, as Harwood argues.²⁹ Individuals included in a roster of experts may be required to abide by specific codes of conduct and to disclose any past activity that may raise doubts about their impartiality in advance to any appointment, thus making the vetting process carried out by the Council more transparent.³⁰

25 Harwood (n 5) 101–103.

26 Ibid 104.

27 For a different view, see Marco Longobardo, 'Sull'imparzialità dei membri delle Commissioni d'inchiesta istituite dal Consiglio dei diritti umani' (2015) 9(2) *Diritti Umani e Diritto Internazionale* 463.

28 Franck (n 16) 138.

29 Harwood (n 5) 97–98.

30 Arguments in favour of establishing a roster of independent experts to facilitate the deployment of fact-finding missions have been put forward by Micaela Frulli, 'Fact-Finding

3 Juridification

Throughout her book, Harwood notes that modern inquiries into situations of atrocities are characterised by the ‘juridification’ of their mandates. She rightly posits that ‘a juridified investigative focus hones in on facts capable of being characterised as legal violations’.³¹ While this turn to international law can be empirically observed in the increasingly legal mandates that parent bodies confer on commissions of inquiry³² and is compounded by the ever-more sophisticated and technical interpretation and application of the law by mandate-holders,³³ it also begs the question as to whether the emphasis on law interpretation and application by commissions of inquiry is warranted.

In turn, this bears on the expertise of the individuals that are appointed as commissioners and on the role and functions of atrocity-related inquiries. These observations are underpinned by the tension between law and politics identified at the beginning of this essay. Are atrocity-related inquiries to be understood as legal, quasi-judicial mechanisms? Or should they be more concerned with elucidating the facts and circumstances of a given set of events? Or are they diplomatic tools that should assist in defusing situations of conflict or systematic human rights violations?

While empirical evidence suggests that atrocity-related inquiries are used as part of the UN legal accountability toolkit at least when the inquiry is established by human rights-mandated institutions, a difference in practice seems to persist if we consider separately the UN Human Rights Council and other organs of the UN. While the former invariably establishes inquiries with a clear legal mandate, the UN Secretary-General, for example, has dispatched inquiries with a less ‘juridified’ mandate. Probably one of the most salient examples – which Harwood too discusses³⁴ – is the Palmer Commission dispatched by the UN Secretary-General to investigate the ‘facts, circumstances and context’ of

or Paving the Road to Criminal Justice? Some Reflections on United Nations Commissions of Inquiry’ (2012) 10 *JICJ* 1323, 1338. It is also worth remembering the UN General Assembly’s recommendation to the Secretary-General that ‘a register of experts in legal and other fields, whose services the States parties to a dispute may use by agreement for fact-finding’ be established in UNGA Res 2329 (XXII) (18 December 1967) UN Doc A/RES/2329(XXII).

³¹ Harwood (n 5) 72.

³² Ibid 72–78.

³³ Ibid 158–257.

³⁴ Ibid 160–161.

the Gaza flotilla incident. The Commission's interpretation of its mandate is particularly revealing of their approach to the 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.³⁵

Legal framing in international inquiry processes can indeed generate cognitive and emotional bias and, therefore, polarisation, at least according to Shiri Krebs.³⁶ She argues that the emphasis on 'legal truth' may trump efforts to clarify what happened.

If factual accuracy should be prioritised over legal truth, then one may also question the assumption – noted by Harwood³⁷ – that atrocity-related inquiries should be staffed by legal experts. Harwood herself notes, for example, that naval officers have served on inquiries into maritime incidents before. The Goldstone Commission included among its members former Irish Army Colonel Desmond Travers. Profiles of the sort may be better suited to provide inquiry panels with more practical expertise and experience, and they may also better elicit trust by state authorities. Following the military escalation in Gaza Strip in the summer of 2014, 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 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 field

35 *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident* (September 2011) para 7.

36 Shiri Krebs, 'The Legalization of Truth in International Fact-Finding' (2017) 18(1) *CJ Int'l L* 83.

37 Harwood (n 5) 105–109.

presences. The different professional backgrounds of the members of the Board were praised by the then-head of the International Law Department of the Israeli Defence Forces, who argued 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’.³⁸ While this assessment should not be taken at face value, given that Israel was one of the investigated parties and arguably had an interest in an outcome that favoured its military, neither it should be deemed completely devoid of logic. Commissioners who are familiar with the reality of the battlefield, the conduct of law enforcement operations or who have technical experience in relation to specific aspects of the use of force – for example, weapons or medical expertise – may be better suited to assess the available evidence to establish the facts and circumstances of a given event, which in turn may elicit the trust of domestic authorities.

An additional area that would deserve some exploration, and that is not discussed in the book, is to what extent criteria of professionalism, impartiality, independence and thematic expertise are applied in the recruitment of support staff to inquiry commissions, and how their work informs the final output of the inquiry process.

The ‘juridification’ of atrocity-related inquiries, especially in the context of investigations into situations of armed conflict, may contribute to eroding their legitimacy. Harwood demonstrates how, both in the interpretation of their mandates and in the application of the law, UN inquiries have tended to adopt an expansive understanding of the reach of international human rights law. For example, Harwood shows that commissions have tended to deem non-state armed groups bound by certain customary human rights obligations under specific sets of circumstances, namely the exercise of government-like functions by the armed group under scrutiny.³⁹ In a similar spirit, she notes that while, generally speaking, UN inquiries have interpreted the relationship between international humanitarian law and international human rights law consistently with the position of human rights bodies and the International Committee of the Red Cross (ICRC) by deeming the two bodies of law complementary and mutually applicable, some commissions have gone a step further

38 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-protective-edge-balanced-and-unbiased/>> accessed 1 December 2020.

39 Harwood (n 5) 183–187.

by, for example, affirming that international human rights law may limit the use of lethal force in situations of armed conflict.⁴⁰ This 'humanisation' of international humanitarian law – notes Harwood – is contested by some scholars who are concerned that the detachment between law and conditions of warfare may decrease trust in the law by belligerent parties and even be conducive to decreased compliance.⁴¹ Moreover, it may harm the legitimacy of international inquiries, which may be seen as trespassing norm entrepreneurship in defiance of their mandates.⁴² For those commissions that are established by the UN Human Rights Council, this risk may be further compounded by the fact that, by setting up inquiries tasked with investigating alleged violations of international humanitarian law or even international criminal law, the parent body would arguably be overstepping the boundaries of its mandate. It may thus be questioned whether the Council is the most suitable UN body for the establishment of inquiries with such broad mandates. Be as it may, most atrocity-related UN inquiries have in fact been established by the Council. Harwood argues that this may be justified in light of the political dynamics between New York-based UN institutions and Geneva-based UN institutions. In particular, she argues that the division of labour between the two sets of institutions may not necessarily need to be comprehensively defined, because some flexibility may allow institutions to respond strategically to the different situations.⁴³ Whether this is an accurate and comprehensive explanation of the role of the Human Rights Council in the deployment of international commissions of inquiry may need further research.

4 Roles and Functions

As foreshadowed in the title, Harwood's review of the practice of atrocity-related UN inquiries informs a broader discussion about their roles and functions within the international legal order. The progressive human rights-based approach that Harwood identifies in the interpretation and application of international legal standards by several commissions of inquiry, coupled with their lack of coercive powers to enforce their conclusions and recommendations, would suggest that

⁴⁰ Ibid 210–212.

⁴¹ Ibid 212–213.

⁴² Thilo Marauhn, 'Sailing Close to the Wind: Human Rights Council Fact-Finding in Situations of Armed Conflict – the Case of Syria' (213) 43 *Cal W Int'l LJ* 401, 455.

⁴³ Harwood (n 5) 68–72.

they lean more towards an advocacy role.⁴⁴ At the same time, though, a more rigorous, conservative, or even legalistic, approach to the interpretation of international legal norms ‘may render a report less vulnerable to political challenge.’⁴⁵ This cautious approach – notes Harwood – was adopted by most inquiries when interpreting the elements of international crimes.⁴⁶ The former, more progressive approach to norm interpretation positions inquiries among norm entrepreneurs and, if we understand inquiry reports as sources of international law within the meaning of Article 38(1) of the Statute of the International Court of Justice, it would not be so far-fetched to understand them as exerting a normative authority in moving forward the frontiers of international law.⁴⁷ If, however, we understand international inquiries as participating in the international law epistemic community, then their role seems to be more closely resembling that of an adjudicator, whose legitimacy rests on its ability to ‘adhere to the disciplining rules of the interpretive community, including principles of legal interpretation.’⁴⁸

However, both of these approaches – the advocative one more so than the adjudicatory one – seem to overlook the factual dimension of inquiry mandates. ‘What happened?’ seems to be the central question to most inquiry mandates, whether they explicitly mention the relevant legal lenses or not. Harwood hints at the problem of truth-finding.⁴⁹ What is interesting – and perhaps not so surprising – in particular about the literature she references is that many of the authors – including Laurie Blank, Liesbeth Zegveld and Shiri Krebs – have discussed, in either the specific publications referenced in the book or elsewhere, the application of legal standards by international commissions of inquiry in the very specific Israeli-Palestinian context.⁵⁰ In this specific contextual background, arguments about the legal qualifications of the facts are the object of sustained contestation by the parties involved. This legal sparring arguably obscures the importance of what happens on the ground, especially during the periodic military escalations that have characterised the last twenty years. While we see haunting pictures of what is left standing in the

44 Ibid 250.

45 Ibid 249.

46 Ibid 234–245 and 249.

47 Ibid 252 and 255.

48 Ibid 253.

49 Ibid 307–312.

50 See, in particular, Laurie R Blank, ‘The Application of IHL in the Goldstone Report: A Critical Commentary’ (2009) 12 *YIHL* 347; Liesbeth Zegveld, ‘The Importance of Fact-Finding Missions Under International Humanitarian Law’ in Chantal Meloni and Gianni Tognoni (eds), *Is There a Court for Gaza?* (TMC Asser Press 2012); Shiri Krebs, ‘Designing International Fact-Finding: Facts, Alternative Facts, and National Identities’ (2018) 41(2) *Fordham Int’l LJ* 337.

aftermath of military escalations, questions such as ‘how many Palestinians were killed?’ or ‘how many of these were taking part in the hostilities?’ remain largely unanswered.⁵¹

Harwood argues that ‘commissions cannot comprehensively uncover the truth of violations’ and that ‘[t]heir truth-seeking role is more modest than that of truth commissions.’⁵² But while their ad hoc and temporary nature, coupled with the resource constraints imposed on them by mandating authorities, is indeed an obstacle to uncovering the truth of patterns of violations, they may still be able to engage in an in-depth investigation of the *factual* – rather than legal – circumstances of *specific* incidents.⁵³ Similarly, while for the same reasons outlined above they may not be well-equipped to analyse the multidimensionality of systemic violations, inquiries may nonetheless be able to engage with relatively straightforward *factual* questions about these patterns of violations. From this viewpoint, the ‘rhetorical entrapment’ Harwood refers to when she discusses the potential role of commissions of inquiry in counteracting denials by concerned states⁵⁴ should perhaps be supplanted by a ‘factual entrapment’.

If nothing else, facts trigger the need for accountability – be it legal, moral or political.⁵⁵ In this sense, if atrocity-related inquiries were to focus more on the factual dimension of the events they are mandated to investigate, they would become more of an alerting mechanism than a gear in the accountability cascade. In other words, their messaging would shift to one of “x has happened, and someone needs to account for that”. This seems to be supported by Geoffrey Palmer’s argument that the domestic rationales identified by the British House of Commons Public Administration Select Committee for the establishment of domestic inquiries may be similarly applied to international inquiries.⁵⁶ Among these are included: establishing the facts, especially when facts are contested or causation of events is unclear; reassurance when public trust has been damaged by the course of events; showing that something is being done about the events.

51 Krebs (ibid) 341–342.

52 Harwood (n 5) 307.

53 Ibid 245–246.

54 Ibid 310–311.

55 Ibid 300–315.

56 Geoffrey Palmer, ‘Reform of UN Inquiries’ in Suzannah Linton, Gerry Simpson and William Schabas (eds), *For the Sake of Present and Future Generations: Essays on International Law, Crime and Justice in Honour of Roger S. Clark* (Brill, 2015) 597, 605–606.

5 Conclusion

Harwood concludes her book with a look to the future and the potential that commissions of inquiry carry in relation to 'information concerning situations of atrocities ... increasingly acquired and shared through informal networks and communities'.⁵⁷ She acknowledges further that commissions of inquiry may revert to focusing on 'the essential task of finding facts',⁵⁸ which may prove particularly important to counter the rise of 'fake news' and 'post-truth' politics.⁵⁹ Indeed, the publicity of inquiry findings and recommendations points in the direction of a vaguer notion of accountability than the typology identified by Ted Piccone and relied upon for classification purposes by Harwood,⁶⁰ which could perhaps be described with the term 'public accountability' borrowed from management studies.

Drawing on Harwood's book and detailed review of the practices of atrocity-related UN inquiries, I have made two main arguments in this essay. First, I have argued that the roles and functions, and the legitimacy of international commissions of inquiry are two faces of the same coin. The flexibility of inquiry commissions – to which Harwood refers to as a factor that will determine their survival in the face of the rising of new international investigation mechanisms⁶¹ – implies that their roles and functions may be shaped by the mandating authority depending on the context in which they are dispatched. But this also means that determining what the roles and functions of atrocity-related inquiries should be in a given context should be informed by a strategy to enhance their legitimacy, so that they may discharge these roles and functions in optimal conditions. Second, I have argued that the 'juridification' of mandates and recourse to legal analysis by commissions of inquiry may hinder this quest for legitimacy by polarising the investigated parties, and, at the same time, leave fundamental factual questions unanswered or answered ambiguously, thus providing detractors of international inquiries with arguments to rebut the inquiry findings and recommendations.

⁵⁷ Harwood (n 5) 321.

⁵⁸ Ibid.

⁵⁹ Ibid 322.

⁶⁰ Ted Piccone, 'U.N. Human Rights Commissions of Inquiry: The Quest for Accountability' (2017) *The Brookings Institutions* <https://www.brookings.edu/wp-content/uploads/2017/12/fp_20171208_un_human_rights_commissions_inquiry.pdf> accessed 1 December 2020; ibid 260.

⁶¹ Harwood (ibid) 323.