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**Killing Two Birds with One Stone: Can Increased use of Article  
34(2) of the ICJ Statute Improve the Legitimacy of UN  
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# **Killing Two Birds with One Stone: Can Increased use of Article 34(2) of the ICJ Statute Improve the Legitimacy of UN Commissions of Inquiry & the Court's Fact-finding Procedure?**

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## **Abstract**

In light of the significant number of high profile UN Commissions of Inquiry established in recent times, this paper attempts to map out the areas in which such inquiries operate and evaluate their contribution to international law to date. Next, the paper seeks to take the next step and ask what can be done to remedy some of the weaknesses that are apparent in the operation of such commissions in order to ensure more effective functioning of such inquiries.

To this end the paper ponders whether increased use of Article 34(2) of the ICJ Statute (more specifically, the Court requesting the Human Rights Council or the Secretary-General of the UN to establish a commission of inquiry to provide it with information in relation to a case before it) could both benefit the Court itself and improve the operation of UN Commissions of inquiry. After exploring this possibility in light of the jurisdictional constraints under which the Court operates, the paper in its final section briefly considers some other structural and procedural reforms that could be introduced in order to remedy some of the current weaknesses of UN Commissions of Inquiry.

## **Key-words**

UN Commissions of Inquiry, International Court of Justice, Judicial Fact-Finding, Human Rights Fact-Finding, ICJ Statute

# **Killing Two Birds with One Stone: Can Increased use of Article 34(2) of the ICJ Statute Improve the Legitimacy of UN Commissions of Inquiry & the Court's Fact-finding Procedure?**

James G. Devaney<sup>1</sup>

SUMMARY: Introduction. – 1. Fact-Finding Inquiries under the Auspices of the United Nations: Definitions. – 2. Advantages. (i) Impartial Establishment (ii) The Ability to ‘Legalise’ Complicated Situations (iii) UN Commissions of Inquiry & their use by the International Court of Justice. – 3. Disadvantages. (i) Lack of Coordinated Procedure Including Mandate and Appointments (ii) Issues Related to the Consent of States (iii) Problematic Engagement with International Law. – 4. Assessment: Costs, Benefits and Legitimacy. – 5. Article 34- The Power to Request Information from Public International Organizations. - 6 Jurisdictional Constraints. (i) Advisory Jurisdiction (ii) Contentious Jurisdiction. - 7. Conclusion.

## **Introduction**

This paper takes as its starting point the noteworthy rise in the number of UN Commissions of Inquiry in recent years more often than not established to investigate alleged breaches of international humanitarian law and international human rights law (IHL and IHRL respectively). After briefly mapping out the areas in which UN Commissions of Inquiry operate and evaluating their contribution to international law to date, this paper seeks to take the next step and ask what can be done to remedy some of the weaknesses that are apparent in the operation of such commissions in order to ensure more effective functioning of such inquiries and ultimately greater accountability for breaches of human rights.

To this end the paper ponders whether increased use of Article 34(2) of the ICJ Statute (more specifically, the Court requesting the Human Rights Council or the Secretary-General of the UN to establish a commission of inquiry to provide it with information in relation to a case before the Court) could both benefit the Court itself and improve the operation of UN Commissions of inquiry. To elaborate, it is suggested that not only would the information that could be brought before the Court prove useful on account of the Court's problematic reactive approach to judicial fact-finding, such a request from the Court could be equally beneficial for Commissions of Inquiry. This is so since the Court's request could provide Commissions of Inquiry with a clear mandate – potentially remedying the main criticism of UN Commissions of Inquiry to date: that in lacking a clear mandate such inquiries are neither useful as traditional fact-finding tools nor as judicial fact-finding inquiries that could be utilised by international courts. In this regard the current legitimacy

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of UN Commissions of Inquiry is assessed and possibility of improving the legitimacy of such reports through this mechanism is considered.

Ultimately, it is concluded that increased use of Article 34(2) of the Court's Statute, whilst potentially useful in theory, is not likely to be a viable way to improve the operation of UN Commissions of Inquiry or to provide the Court with additional evidence. This is due to the fact the Court handles a relatively small number of cases and the fact its jurisdiction is based on cases being brought before it by parties or questions asked of it by competent organs. As such, the Court can only employ Article 34(2) of the Court's Statute incidentally in cases brought before it or advisory opinions sought from it. As such, the paper in its final section briefly considers some other structural and procedural reforms that could be introduced in order to remedy some of the current weaknesses of UN Commissions of Inquiry.

## **1. Fact-Finding Inquiries under the Auspices of the United Nations: Definitions**

First of all, it is necessary to clarify what exactly is meant by UN Commissions of Inquiry. It is important to note that here we are not talking about the type of inquiry referred to in Article 33 of the UN Charter, namely, a means for settling disputes exclusively between states through clarification of the facts surrounding the dispute.<sup>2</sup> This form of inquiry has fallen into desuetude for a number of reasons including its exclusively state-centric nature. Instead, any reference to inquiry is to the process by which an international organisation, such as the UN, sets out to objectively resolve a disputed issue of fact not necessarily related to any dispute or state as such.<sup>3</sup>

The establishment of international inquiries by the UN has become increasingly commonplace in recent times – most notably in investigating alleged breaches of international

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<sup>2</sup> 1899 Hague Convention, Title 3, Articles 9 to 14. See for example: Finding of the International Commission of Inquiry Organized Under Article 9 of the Convention for the Pacific Settlement of International Disputes, of July 29, 1899, *The International Commission of Inquiry between Great Britain and Russia arising out of the North Sea Incident*, (1908) 2 AJIL, 929; Report of the commission of inquiry established by the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Kingdom of Denmark on November 15, 1961; investigation of certain incidents affecting the British trawler 'Red Crusader' 35 International law reports (1967) 485-501; and Chile-United States Commission Convened under the 1914 Treaty for the Settlement of Disputes: Decision with Regard to the Dispute Concerning Responsibility for the Deaths of Letelier and Moffitt (1992) 31 ILM 1. See also the resolution of the General Assembly encouraging greater use of this procedure: (General Assembly Resolution 2329 (XXII) 18 December 1967 and Manila Declaration on the Peaceful Settlement of International Disputes, General Assembly Resolution 37/10 of 15 November 1982).

<sup>3</sup> The *Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security*, General Assembly Resolution A/RES/46/59 (1991) defines such inquiries as 'any activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent United Nations organs need in order to exercise effectively their functions in relation to the maintenance of international peace and security' – however this definition is too narrow for our purposes, since not all modern commissions of inquiry will involve the maintenance of international peace and security. This type of inquiry could be characterized as 'more modern', being 'trimmed of [some of] the old clauses hinging on outright prostration before sovereign prerogatives of states'. A. Cassese, 'Fostering Increased Conformity with International Standards: Monitoring and Institutional Fact-Finding' in A. Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 296.

humanitarian law and international human rights.<sup>4</sup> In fact, in light of a significant number of high profile inquiries the Secretary-General recently described UN commissions of inquiry as important contributors to the enhancement of human rights protection.<sup>5</sup> Furthermore, it would appear that such commissions of inquiry will continue to play an important role in investigating and documenting human rights violations in the foreseeable future with a number of commissions due to report their findings in 2013.<sup>6</sup>

It should be emphasised that such inquiries are not the property of one UN organ alone. To elaborate, despite not possessing any formal fact-finding powers, the UN Secretary-General plays a pivotal role in UN fact-finding, being regularly mandated to investigate particular situations by the Security Council (or, less frequently, by the General Assembly.)<sup>7</sup> The crucial role of the Secretary-General is a result of the Security Council's reluctance to set up its own commissions of inquiry under Article 34 of the UN Charter<sup>8</sup> and a preference to rely on its implied powers of investigation.<sup>9</sup> Most recently in March 2013, after negotiations with the World Health Organization and the Organization for the Prohibition of Chemical Weapons, the Secretary-General established a Fact-Finding Mission to investigate the alleged use of chemical weapons in Syria.<sup>10</sup>

In addition the Security Council, through these implied powers, has carried out fact-finding missions into the situations in the former Yugoslavia,<sup>11</sup> Rwanda,<sup>12</sup> Burundi<sup>13</sup> and perhaps most famously to investigate breaches of IHL and IHRL in Darfur in 2004.<sup>14</sup> Whilst Security Council

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<sup>4</sup> Indeed, it is hard to ignore the significant number of high profile fact-finding inquiries in recent times including the controversial Goldstone Report (HRC Resolution A/HRC/12/48, 25/9/2009), and the inquiries into situations such as the Gaza Flotilla incident (HRC Resolution A/HRC/14/L.1; HRC Resolution 15/1, 29 September 2010; HRC Resolution 16/20, 25 March 2011; HRC Resolution 16/32, 25 March 2011; HRC Resolution 17/10, 17 June 2011) and the conflict in Syria (HRC Resolution S-17/1, 23 August 2011; see First Report A/HRC/S-17/1/2/Add.1 and Second Report A/HRC/19/69, 22/2/12).

<sup>5</sup> Report of the Secretary General, 'Strengthening and coordinating United Nations rule of law activities', A/67/290, 10 August 2012, §19.

<sup>6</sup> See, for example, the much-anticipated report on the implications of Israeli Settlements in the Occupied territories, pursuant to HRC Resolution 19/17. In addition, according to Human Rights Watch, there is the possibility of the establishment of a long-awaited inquiry into human rights abuses in North Korea by the Human Rights Committee at the next session; see <http://www.hrw.org/news/2013/01/25/north-korea-japan-s-backing-un-inquiry-gives-hope>.

<sup>7</sup> Katherine Del Mar, 'Weight of Evidence Generated through Intra-Institutional Fact-finding before the International Court of Justice' 2 *Journal of International Dispute Settlement* 393, 401.

<sup>8</sup> Due to the need for unanimity in the Council (an ever-illusive concept) and the requirement of a link to a threat to international peace and security under article 39 UN Charter.

<sup>9</sup> See E. Jiménez de Aréchaga, 'Le traitement des différends internationaux par le Conseil de Sécurité' *Recueil des cours*, 85 (1954-I), 1-105, 41 Solene Bouiffon, 'Article 34' in Jean Pierre Cot and Alain Pellet (eds), *La Charte des Nations Unies, commentaire article par article* (3rd edn, Economics 2005) 1062, Theodor Schwisfurth, 'Article 34' in B. [et al] Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, Oxford University Press 2002) 516.

<sup>10</sup> See Letter of the Secretary-General to the Security Council, 25 March 2013, S/2013/184; for a broad overview of the situation before the establishment of the Human Rights Council see BG Ramcharan, *International law and fact-finding in the field of human rights* (Martinus Nijhoff Publishers 1982).

<sup>11</sup> Security Council Resolution 780 [1992] 6 October 1992.

<sup>12</sup> Security Council Resolution 935 [1994] 1 July 1994.

<sup>13</sup> Security Council Resolution 1012 [1995] 28 August 1995.

<sup>14</sup> UNSC Resolution 1564 (2004), 18 September 2004.

fact-finding is undoubtedly important, the fact-finding reports of the United Nations Human Rights Bodies are also key actors in this area. For example, since its establishment,<sup>15</sup> the Human Rights Council has adopted resolutions which have established fact-finding inquiries into situations including the Middle East Conflict,<sup>16</sup> the Gaza Flotilla incident<sup>17</sup> and the situation in Syria recently.<sup>18</sup>

Now that a broad-brush picture of fact-finding under the auspices of the United Nations has been painted, we can consider the question originally posed; namely, what are the main positive and negative aspects of UN fact-finding that have emerged from recent practice? In turning to advantages, there are three in particular that deserve to be highlighted.

## **2. Advantages**

### **(i) Impartial Establishment**

The first relates to the establishment of UN inquiries which is not dependent solely on the individual states involved in the matter but comes about as a result of a majority decision of a UN body. As such, one significant drawback of the historical form of international inquiry (mentioned above) is avoided, namely that an impartial inquiry into the facts of a dispute can be established without being thwarted by the will of one of the disputing parties. Instead, UN commissions of inquiry are established by notionally disinterested states bearing in mind their goal of maintaining international peace and security and protecting the human rights of the citizens of the disputing states. In addition, these inquiries are (in theory) composed of impartial experts with no interest in the outcome of the inquiry.<sup>19</sup> Furthermore, the commissions report back to their 'parent' UN organs that can potentially take follow-up action – opening up the possibility of real practical significance, despite the non-binding nature of the fact-finding reports.

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<sup>15</sup> By the General Assembly in Resolution A/Res/60/250, 3 April 2006.

<sup>16</sup> HRC Resolution S-1/1, 6 July 2006; HRC Resolution 3/1, 8 December 2006; HRC Resolution 4/2, 27 March 2007; HRC Resolution S-3/1, 15 November 2006, HRC Resolution 6/18, 28 September 2007, HRC Resolution 9/18, 24 September 2008; HRC Resolution 9/1, 12 January 2009; HRC Resolution 10/21, 26 March 2009; HRC Resolution S-12/1, 16 October 2009; HRC Resolution A/HRC/16/L.31, 25 March 2011; HRC Resolution 15/6, 29 September 2010.

<sup>17</sup> HRC Resolution A/HRC/14/L.1; HRC Resolution 15/1, 29 September 2010; HRC Resolution 16/20, 25 March 2011; HRC Resolution 16/32, 25 March 2011; HRC Resolution 17/10, 17 June 2011.

<sup>18</sup> HRC Resolution S-17/1, 23 August 2011; see First Report A/HRC/S-17/1/2/Add.1 and Second Report A/HRC/19/69, 22/2/12.

<sup>19</sup> Cassese 302.

## **(ii) The Ability to ‘Legalise’ Complicated Situations**

Secondly, whilst ostensibly entitled ‘fact-finding’ missions, in reality these inquiries often make determinations on points of international law,<sup>20</sup> such as determining that a certain factual situation amounts to a violation of IHL or human rights.<sup>21</sup> For example, the Goldstone Report established by the Human Rights Council in April 2009 to ‘investigate all violations of international human rights law and international humanitarian law’ committed in Gaza between 2008 and 2009 has been praised for providing an incisive analysis of the role that IHL and IHRL play in the conflict.<sup>22</sup> Similarly, the Legal Annex of the Palmer Report established by the Secretary-General on 2 August 2010 following the Gaza Flotilla Incident carefully manages the difficult distinction between IHL and IHRL in relation to whether Israeli soldiers had used ‘excessive force’.<sup>23</sup> There are of course obvious drawbacks to this practice, which will be examined momentarily, but for the moment it suffices to note that in merely stating that international humanitarian law is applicable in a particular situation, for example, the reports ‘legalise’ a dispute. This can be seen as advantageous for two reasons. Firstly, applying legal characterisations to events has the potential to move the discourse beyond the tit-for-tat accusations of wrongdoing that usually permeate disputes between states. It can be hoped that once breaches of international law perpetrated by each side are quantified, states could perhaps more readily agree to resolve the dispute (although in practice this has not always been the case<sup>24</sup>). Secondly, in situations that do not necessarily involve states alone, such as in situations where a government is perpetrating breaches of human rights against its own citizens, legal characterisation of events can help to raise awareness of breaches carried out by a particular regime and may provide the international community with some leverage with which to increase pressure on the regime to reverse current policies or relinquish power altogether.

## **(iii) UN Commissions of Inquiry & their use by the International Court of Justice**

The third advantageous aspect that falls to be emphasised is the reliance on such inquiries by international courts and tribunals. The practice of the International Court of Justice provides a good example - showing that it tends to attribute ‘significant weight’ to factual determinations made by the UN fact-finding reports.<sup>25</sup> For example, in the *Bosnian Genocide* case, the Court's factual

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<sup>20</sup> Dapo Akande and Hannah Tonkin, ‘International Commissions of Inquiry: A New Form of Adjudication?’ <EJIL: Talk!> accessed 16 April 2012.

<sup>21</sup> Ibid; B.G. Ramcharan, *Introduction to International Law and Fact-Finding*, at 1, 6.

<sup>22</sup> See Goldstone Report, *supra* note 19 at paras 379-436.

<sup>23</sup> See Palmer Report, *supra* note 51 at paras 117, 134.

<sup>24</sup> The Middle East Conflict for example is an example of a conflict in which the legalisation of the dispute does not appear to have contributed significantly towards the resolution of the conflict – each side have its own apparently valid legal arguments.

<sup>25</sup> Del Mar.

determinations relied significantly on the Secretary-General's *Fall of Srebrenica* Report.<sup>26</sup> In particular the Court highlighted:

‘...the care taken in preparing the report, its comprehensive sources and the independence of those responsible for its preparation all lend considerable authority to it. As will appear later in this Judgment, the Court has gained *substantial assistance from this report*.’<sup>27</sup>

Similarly, in the course of proceedings of the *Armed Activities* case, there is evidence that the Court attributed greater weight to several UN fact-finding reports – particularly the April 2001 ‘First UN Panel Report’<sup>28</sup> - than to other secondary evidence.<sup>29</sup> For example, in relation to the issue of whether Uganda had breached human rights law and IHL, the Court based its conclusions entirely on the facts as they were set out in reports by the Secretary-General, the Special Rapporteur and the United Nations Mission in the Democratic Republic of the Congo (MONUC).<sup>30</sup> Whereas the Court was dismissive of much of the secondary evidence presented by the parties<sup>31</sup> it found evidence contained within UN reports, in the words of one commentator, ‘virtually conclusive’<sup>32</sup> ostensibly

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<sup>26</sup> Report of the Secretary-General pursuant to General Assembly Resolution 53/35, 'The Fall of Srebrenica', 15 November 1999, UN Doc A/54/549; see Anna Riddell and Brendan Plant, *Evidence before the International Court of Justice* (British Institute of International and Comparative Law 2009) 240.

<sup>27</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgement, ICJ Reports 2007, p 43 at para 230 (emphasis added).

<sup>28</sup> Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo – Reply of Congo, Annex 69; The Security Council then created a second UN Panel to address some errors in the first UN Panel but it was unable to do so. A Third Panel then had to be set up. Uganda refuted these Panels as inadequate. Uganda's Rejoinder, p 137, para 324, *supra* note 5. Uganda also criticised the Report of the Special Rapporteur (17 September 1999) saying that it made no 'appropriate legal assessment of responsibility and, when individual States are implicated, no evidence is presented'. Uganda Counter Memorial, p 80, para 111.

<sup>29</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, ICJ Reports 2005, p 168 at para 176.

<sup>30</sup> S. Halink, 'All Things Considered: How the International Court of Justice Delegated its Fact-Assessment to the United Nations in the Armed Activities Case' 40 NYUJ Int'l L & Pol 13, 27; Report of the Special rapporteur of the Commission on Human Rights, January 18, 2000, the Third Report on the United Nations Mission in the Democratic Republic of Congo (MONUC), Security Council Resolution 1304 (2000) and the Report of the Special Rapporteur of the Commission on Human Rights February 1, 2001 and January 2000-December 2000 Special Report by MONUC, *Armed Activities Case at paras 34-5, 60, 182*; Riddell and Plant 237' Similarly, the Court held that there had been massive human rights violations and grave breaches of IHL the Court relying on 'credible sources', UN Doc S/2001/128, 12 February 2001, para 207, including the Third Report of the Secretary-General on MONUC, Third Report of the Secretary-General on the United Nations Organisation Mission in the Democratic Republic of the Congo, 12 June 2000, UN Doc S/2000/566, para 79, para 206; See 'Convincing Evidence' consisting of two reports of the SG and a special report by MONUC – Sixth Report of the Secretary-General on the United Nations Organisation Mission in the Democratic Republic of the Congo, 12 February, 2001, UN Doc S/2001/128, para 56, 239, para 209.

<sup>31</sup> *Armed Activities Case at paras 64-5, 72-91 and 106-147*; stating that it did not rely on numerous items of evidence proffered by the DRC finding them 'uncorroborated, based on second-hand reports, or not in fact saying what they are alleged to say by the DRC, or even partisan', *ibid* at para 159.

<sup>32</sup> Halink 27.

due to the presumption that such UN reports are based on solid, objective and impartial fact-finding.<sup>33</sup>

Taking these advantageous aspects of UN Commissions of Inquiry together it is clear that they have something to offer contemporary international law. However, in recent times doubt has been cast upon the reliability of such reports – which leads us to the more troublesome legal implications of their operation.<sup>34</sup> Generally speaking there are again three main deficiencies ought to be highlighted.

### 3. Disadvantages

#### (i) Lack of Coordinated Procedure Including Mandate and Appointments

Firstly, on a purely procedural level, a number of operational difficulties have become apparent. For instance, after fifty years of UN fact-finding there is no standard operating procedure regarding organisation and planning of fact-finding missions.<sup>35</sup> As a result, every time an inquiry is established, it has to ‘reinvent the wheel’, as it were.<sup>36</sup> Whilst the very nature of these inquiries means that their operation will be very much context-specific, a lack of coordination at the procedural level prevents the development of a consistent standard of practice.<sup>37</sup> In actual fact the methodology unit established under the Office of the High Commissioner for Human Rights (OHCHR) which reviews the practice of past commissions of inquiry has a set of internal guidelines relating to operational issues.<sup>38</sup> The publication of these guidelines could promote continuity across the board and would be a welcome development in ensuring the more effective operation of UN Commissions of Inquiry.

Similarly, certain factors can potentially affect the procedural legitimacy of fact-finding inquiries. These factors include cases where the wording of the mandate suggests a prejudging of the situation,<sup>39</sup> supposedly disproportionate focus on some situations (such as the Middle East

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<sup>33</sup> R. Teitelbaum, ‘Recent Fact-Finding Developments at the International Court of Justice’(2007)’ 6 *The Law and Practice of International Courts and Tribunals* 184, 145 Riddell and Plant 237.

<sup>34</sup> Teitelbaum 146; reference to C. Van den Wyngaert, *International Criminal Courts as Fact (and Truth) Finders in Post-Conflict Societies: Can Disparities with Ordinary International Courts be Avoided?* (JSTOR 2006).

<sup>35</sup> M.C. Bassiouni, ‘Appraising UN Justice-Related Fact-Finding Missions’ 5 *Wash UJL & Pol’y* 35, 40; stating ‘there is nothing to guide, instruct, or assist the heads and appointees to these missions of how to better carry out their mandates.’

<sup>36</sup> *ibid*

<sup>37</sup> *ibid*

<sup>38</sup> Rob Grace and Claude Bruderlein, ‘On Monitoring, Reporting, and Fact-finding Mechanisms’ (2012) 1 *ESIL Reflections* 1, 4.

<sup>39</sup> For example, see the Commission established following the 2006 Lebanon war which had the mandate of investigating alleged breaches of IHL and IHRL by Israel but not Hezbollah, A/HRC/3/2, at 3, the Commissioners stating ‘any independent, impartial and objective investigation into a particular conduct during the course of hostilities must of necessity be with reference to all the belligerents involved’; see also Christine Chinkin, ‘U.N. Human Rights Council Fact-Finding Missions: Lessons from Gaza’ in Arsanjani et al (ed), *Looking to the Future: Essays on International Law in Honour of W Michael Reisman* (Martinus Nijhoff 2011) 494.

Conflict),<sup>40</sup> and criticism of the composition of the panel of inquiry.<sup>41</sup> To highlight one recent example, controversy surrounding the appointment of certain members to the Goldstone Panel forced its authors to publicly defend their personal impartiality and the impartiality of the report itself.<sup>42</sup> Furthermore, the reliance on such inquiries by international courts as an evidence-gathering tool, mentioned above, is undermined by issues of procedural rigor and the fact that commissions of inquiry are rarely established with future judicial proceedings in mind.<sup>43</sup> In making findings on legal issues the question arises as to what standard of proof the commissions of inquiry, being at most quasi-judicial, ought to apply when making legal determinations.<sup>44</sup> In reality the standard of proof applied is often ambiguous and the judicial skills and experience demonstrated by some commissions dubious.<sup>45</sup> Research shows that in the practice the standard of proof applied has varied widely between different commissions of inquiry.<sup>46</sup> To be clear, it is not argued that UN Commissions of Inquiry should apply the same rigorous standard of proof as would be expected of a judicial body. Rather it is argued that the considerable variation in standards of proof between inquiries threatens the development of a consistent standard of practice. Concerted focus on this important issue from the outset and throughout is essential for the future operation of such commissions of inquiry. Such issues will be considered in greater detail below.

## **(ii) Issues Related to the Consent of States**

Secondly, issues of consent have arisen in practice. Whilst the consent of states is not required for the initial establishment of a fact-finding inquiry, consent is normally required for entry

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<sup>40</sup> T.M. Franck and H.S. Farley, 'Procedural Due Process in Human Rights Fact-Finding by International Agencies' 74 *Am J Int'l L* 308, 312; Chinkin notes that by early 2009, five out of ten special sessions had been directed towards criticising Israel (a trend that has continued)—echoing the shortcomings of the Commission on Human Rights, Chinkin 494.

<sup>41</sup> For example see the Commission set up after the Six-Day War in 1968, GA Res 2443 (XXIII) (December 19, 1968) in which, due to the allegedly partisan makeup of the commission, Israel refused to cooperate. Similar objectives to personnel led to a proposed inquiry into the Jenin refugee camp in the West Bank resulted in it being called off in 2002, See SC Res 1405 (Article 19, 2002) then UN Doc S/PV 4525 (May 3, 2005). See; Chinkin 498; There exists no ad hoc representative element to fact-finding missions. Instead, in the case of the Human Rights Council, members are appointed by the President of the Council (unless otherwise specified in the mandate – usually in this case special rapporteurs). In the case of fact-finding missions undertaken by the Security Council or the General Assembly, they usually invite the Secretary-General to form the commission; see Declaration on Fact-Finding states that SC and GA should give preference to the SG 'in deciding to whom to entrust the conduct of a fact-finding mission', see para 15.

<sup>42</sup> See <http://www.guardian.co.uk/commentisfree/2011/apr/14/goldstone-report-statement-un-gaza>.

<sup>43</sup> Halink 32; Bassiouni 45 describing such fact-finding bodies efforts as most often 'not oriented to a statement of what the law is' – instead they are used for more political goals.<sup>43</sup>

<sup>44</sup> T. Boutruche, 'Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice' *Journal of Conflict and Security Law*.

<sup>45</sup> Halink 32.

<sup>46</sup> 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, 2012) 25.

into that state's territory.<sup>47</sup> The dispatch of a fact-finding inquiry could after all be seen as an 'intrusive act' which 'may be resented as unwarranted interference into events deemed to be within a state's own domestic jurisdiction.'<sup>48</sup> And it should be noted it is not uncommon that such consent be denied, leading to reports being compiled based on interviews with victims and information from NGOs without any members of the panel ever having travelled to the state in question, as was the case in relation to the Human Rights Council's recent report on Syria.<sup>49</sup>

### **(iii) Problematic Engagement with International Law**

Thirdly, and relatedly, an additional problematic legal aspect is the manner in which these inquiries engage with legal issues. This issue is the other side of the coin of the effect that inquiries can have in 'legalising' a dispute, put forward as a positive aspect of their operation in the previous section. It is suggested that there exists a tendency to provide cursory consideration of the relevant legal issues and legal arguments of dubious soundness. A few examples illustrate this potentially problematic practice.

For instance, the Goldstone report asserted that despite Israel ostensibly disengaging in 2005, it retained effective control over the Gaza strip. As such, the report stated that 'the international community continues to regard [Israel] as the occupying Power', citing a Security Council Resolution<sup>50</sup> and a Human Rights Council Resolution in support of this position.<sup>51</sup> In doing so, the Goldstone Report presented the legal issues as straightforward and generally accepted whilst failing to note a significant number of competing legal positions, or considering the precise legal effect of the resolutions relied upon by the Report.<sup>52</sup> The report also stated that 'non-State actors that exercise government-like functions over a territory have a duty to respect human rights' without providing any state practice or *opinio juris* in support of this position.<sup>53</sup>

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<sup>47</sup> Despite the Declaration on Fact-Finding urging states to adopt a policy of allowing such fact-finding missions into their territory. GA Res 46/59, (Declaration on Fact-Finding), paras 6, 21.

<sup>48</sup> Chinkin 488. Such refusal of admittance is in fact commonplace in practice; See; D. Weissbrodt and J. McCarthy, 'Fact-Finding by International Nongovernmental Human Rights Organizations' 22 Va J Int'l L 1, 59; 'the great bulk of human rights fact-finding by both IGOs and NGOs is accomplished without on-site visits'; see also; for example, Israel refused to allow the Human Rights Council's fact-finding mission to visit the Occupied Palestinian Territory under HRC Resolution S-1/1. Similarly, the high-level fact-finding mission to Darfur was unable to obtain visas from the government of Sudan. HRC Res 4/8 (March 30, 2007).

<sup>49</sup> See First Report A/HRC/S-17/1/2/Add.1

<sup>50</sup> Security Council Resolution 1860 [2009] 8 January 2009.

<sup>51</sup> Human Rights Council Resolution S-9/1, [2009] 12 January 2009.

<sup>52</sup> Including a strict reading of Article 42 of the Hague Regulations<sup>52</sup> - the traditional standard for establishing occupation and triggering IHL obligations<sup>52</sup> or strict application of the generally accepted 'effective control' test<sup>52</sup> would still appear to require the physical presence of troops on the ground in the territory of the state allegedly under occupation.<sup>52</sup>

<sup>53</sup> *Report of the United Nations Fact-Finding Mission on the Gaza Conflict, Human Rights in Palestine and Other Occupied Arab Territories, Human Rights Council, 12th Session, 25 September 2009, A/HRC/12/48* (2009) at para 305 "In actual fact, it is far from clear that non-state actors who exercise government-like functions over a territory have a

Similarly, the Philips Report established by the Human Rights Council following the Gaza Flotilla Incident<sup>54</sup> made the legal determination that Gaza was occupied by Israel relying solely on the findings of the Goldstone Report<sup>55</sup> and stated that it was under an illegal blockade<sup>56</sup> without considering the relationship between Israel's status as an Occupying Power and the legality of the blockade. This is significant since it could be plausibly argued that an Occupying Power need not invoke the concept of a naval blockade in international law to justify its barring access to a territory it effectively controls.<sup>57</sup>

Another example is the Palmer Report mentioned earlier,<sup>58</sup> which straightforwardly characterised the Middle East Conflict as an International Armed Conflict.<sup>59</sup> The Report did not provide any justification for this determination, simply stating that the opinion of the Panel was 'based on facts as they exist on the ground'<sup>60</sup> and that the conflict had 'all the trappings of an international armed conflict'.<sup>61</sup>

This is not to mention the contentious issue of self-defence raised by both the Palmer and Philips reports<sup>62</sup> which both suggested that Israel had a right to self-defence under the UN Charter in these circumstances despite the fact the doctrine of self-defence has not been traditionally considered applicable to the Middle-East Conflict owing to it being a concept of the *jus ad bellum* applicable in principle only in inter-state conflicts.<sup>63</sup>

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duty to respect human rights"; Marko Milanovic, 'Goldstone Report on Gaza: A Question of Trust' EJIL: Talk! <<http://www.ejiltalk.org>> Whilst reference to a former Special Rapporteur and one commentator are made earlier in the report – these do not provide adequate support for such a broad assertion is open to criticism. Disagreement is also evident in international legal scholarship on this issue, compare: E. Samson, 'Is Gaza Occupied? Redefining the Status of Gaza under International Law' *American University Law Review* 915, 923; Y. Shani, 'Faraway, so close: the legal status of Gaza after Israel's disengagement' 8 *YIHL* 369, 11.

<sup>54</sup> *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 Ships Carrying Humanitarian Assistance, Human Rights Council, 15th Session, 27 September 2010, A/HRC/15/21* (2010) - Human Rights Council Resolution 14/1 of 2 June 2010.

<sup>55</sup> *Ibid* at para 64.

<sup>56</sup> *Ibid* at paras 59-61

<sup>57</sup> Yuval Shany, 'Know Your Rights! The Flotilla Report and International Law Governing Naval Blockades' EJIL: Talk! <<http://www.ejiltalk.org>>

<sup>58</sup> Tamar Feldman, 'A Tale of Two Closures: Comments on the Palmer Report Concerning the May 2010 Flotilla Incident' EJIL: Talk! <<http://www.ejiltalk.org>>

<sup>59</sup> *Report of the Secretary-General's Panel of Inquiry on 31 May 2010 Flotilla Incident, July 2011* (2010) at para 73

<sup>60</sup> *Ibid* at para 73

<sup>61</sup> *Ibid* at para 73 The Panel justifies this position by highlighting the thousands of rockets fired into Israel from Gaza.<sup>61</sup> Whether or not the Middle-East Conflict can be characterised as international in nature or not, it is clear that simply classifying rocket fire as 'all the trappings of an international armed conflict' is problematic legal reasoning.<sup>61</sup> The Report's Legal Annex uses different reasoning in reaching the same conclusion. The Annex relies on the US Civil War *Prize Cases* as the sole basis for its assertion that a blockade can be invoked against a non-State actor. However, a major weakness of the legal reasoning displayed in the Annex is its sole reliance on this authority – as it has been noted, 'the idea that the modern law can be completely exposed by reference to a single set of national proceedings 150 years old is dubious at best'.<sup>61</sup>

<sup>62</sup> *Ibid* at para 73.

<sup>63</sup> C. J. Tams and J. G. Devaney, 'Applying Necessity and Proportionality to Anti-Terrorist Self-Defence' 45 *Israel Law Review* 91.

The most recent example of the problematic engagement of UN Commissions of Inquiry with international law are the Human Rights Council reports established to investigate alleged breaches of international human rights law and to identify those responsible for such violations in relation to the (at this moment) still on-going situation in Syria.<sup>64</sup> In its Report of February 2012, the Commission went even further than the Goldstone Report had in finding that the armed anti-government group (the Free Syrian Army) was bound by human rights obligations.<sup>65</sup> The Commission stated that ‘at a minimum, human rights obligations constituting peremptory international law (*ius cogens*) bind states, individuals and non-State collective entities, including armed groups.’<sup>66</sup> This is a somewhat contentious legal finding since human rights obligations are traditionally only thought to apply to States or non-State entities that carry out the functions of states or have effective control over some territory.<sup>67</sup> Whilst the argument could be made that armed groups are under an obligation not to commit breaches of norms constituting *ius cogens*, the point remains that it is doubtful whether the Commission of Inquiry is the best placed body to legally determine whether any breaches of *ius cogens* had occurred, whether such action was attributable to the group and what consequences would result in terms of responsibility.

Whether or not such armed groups have human rights obligations is an unsettled legal issue, and in taking this position the Commission could be seen to be ‘progressively developing’ the law.<sup>68</sup> However, the Commission could also be seen as attempting to extend the law to apply it to entities it was not intended to, and most crucially, to be doing so in a way that lacks rigor and legal justification. For instance, the Commission did not assess the organisation of the Free Syrian army, the extent to which it controlled territory or the non-military functions it operates. This lack of examination can perhaps be attributed to the fact that the Commission was not permitted access to the territory but rather had to rely on accounts of other individuals and bodies coming from within

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<sup>64</sup> See First Report A/HRC/S-17/1/2/Add.1 and Second Report A/HRC/19/69, 22/2/12.

<sup>65</sup> Which described its mandate as being ‘to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view of ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.’ See A/HRC/19/69, at p. 20.

<sup>66</sup> A/HRC/19/69, at p. 20

<sup>67</sup> See the position taken in the Report of the International Commission of Inquiry to Investigate all the alleged violations of international human rights law in the Libyan Arab Jamahiriya, A/HRC/17/44 1 June 2011, para 72; and UN Secretary General, *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, para. 188. For a detailed discussion of this issue see Henckaerts, Jean-Marie & Wiesener, Cornelius ‘Human rights obligations of non-state armed groups: a possible contribution from customary international law?’ in Robert Kolb and Gloria Gaggioli, *Research Handbook on Human Rights and Humanitarian Law* (Robert Kolb and Gloria Gaggioli eds, Edward Elgar Publishing Ltd 2013) 148

<sup>68</sup> Tilman Rodenhäuser, ‘Progressive Development of International Human Rights Law: The Reports of the Independent International Commission of Inquiry on the Syrian Arab Republic’ EJIL: Talk! <<<http://www.ejiltalk.org>>>

Syria. It can be seen as somewhat worrying that in extending this obligation for the first time so little consideration was given to the law or legal argumentation.

Whilst this paper does not take a position on these issues at this stage, it ought to be emphasised that issues such as the occupation of Gaza and the human rights obligations of non-state actors are extremely complex legal and political issues. In making such bold legal determinations without proper legal substantiation, acknowledging different legal positions or authority or articulating a coherent standard of proof, the reports potentially undermine their legitimacy.

#### **4. Assessment: Costs, Benefits and Legitimacy**

In assessing the advantages and disadvantages of UN Commissions of Inquiry in the round, it is clear that they have something to offer to contemporary international law. In being able to investigate situations not related to any dispute between states as such, inquiries can bring turn a spotlight on to breaches of IHL and IHRL committed by non-state actors in a way that international courts and tribunals struggle to. It is perhaps for this reason that it has been suggested that inquiries potentially offer a real alternative to international adjudication.<sup>69</sup> The shortcomings of adjudication are well known and do not need rehearsing here, but it seems clear that in light of contemporary international law in which states are no longer the exclusive, or even the main, player, alternative avenues of investigating and securing compliance with IHL and IHRL deserve exploring.

In addition, it could be presumed that any increase in objective fact-finding investigation into international disputes would be a welcome development due to the reluctance (or inability) of many international tribunals and organisations to investigate facts themselves. The willingness of international tribunals to accept facts as presented to them has led to criticism of the international legal order being too willing to accept ‘pre-packaged’ facts.<sup>70</sup> The International Court of Justice is particularly guilty of doing so, adopting a reactive approach to fact-finding that generally relies on the information put before it by the parties themselves and rarely utilises its extensive statutory fact-finding powers.<sup>71</sup>

And indeed, there are some things that these fact-finding missions do very well, particularly in relation to establishing whether or not there have been breaches of International Humanitarian

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<sup>69</sup> Akande and Tonkin

<sup>70</sup> See the Court’s use of evidence in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14; Riddell, A and Plant, B. *Evidence Before the International Court of Justice* (2009, British Institute of International and Comparative Law); Charlesworth, H. ‘International Law: A Discipline of Crisis’, (2002) 65(3) *Modern Law Review* 377.

<sup>71</sup> See the Dissenting Opinion of Judges Simma and Al-Khasawneh in *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, ICJ Judgment (20 April 2010) <<http://www.icj-cij.org/docket/files/135/15877pdf>> accessed 13 April 2012

Law. This has been the traditional role for human rights fact-finding missions<sup>72</sup> and perhaps through longer practice in this area, the reports generally are more adept at making these kinds of legal judgements. A few brief illustrations of this proficiency can be highlighted. The Goldstone Report has been praised for providing an incisive analysis of the role that IHL and IHRL play in the conflict and its documenting of the abuses committed is both helpful and provides solid evidence for the legal position taken in relation to breaches of this area of law.<sup>73</sup> Similarly, the Legal Annex of the Palmer Report successfully manages the difficult distinction between IHL and IHRL in relation to what could be considered 'excessive legal force'.<sup>74</sup>

Nevertheless, the examples of problematic engagement with international law as discussed above are significant and cannot be ignored. Despite the fact these fact-finding inquiries are becoming increasingly important in international community, they remain non-binding instruments in an international legal order which States are rarely compelled to comply with their legal obligations. Neither the Secretary-General nor the Human Rights Council possess formal enforcement mechanisms that can compel States to implement or take into account the recommendations of such inquiries and as such any impact they hope to make will depend heavily on their legitimacy. This issue deserves closer attention.

The traditional conception of international law as only amenable to enforcement bilaterally between two states through self-help no longer (if it ever did) accurately reflects reality.

International law has, to a large extent, moved past the *couple diabolique obligation-sanction*,<sup>75</sup> it cannot any longer be said that there exists a necessary connection between the enforcement of law and its binding effect or its effectiveness.<sup>76</sup> But if not the threat of countermeasures or sanctions, why should states comply with legal norms? De Visscher has highlighted the significance of *techniques spontanées*, or voluntary compliance with international norms and has advocated the position that states comply with international legal norms as a result of a 'social conscience'.<sup>77</sup> Henkin, on the other hand, suggested states interest in orderly relations was the key.<sup>78</sup>

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<sup>72</sup> B.G. Ramcharan, *Introduction to International Law and Fact-Finding*, at 1, 6.

<sup>73</sup> See Goldstone Report, *supra* note 19 at paras 379-436.

<sup>74</sup> See Palmer Report, *supra* note 51 at paras 117, 134.

<sup>75</sup> P. Weil, Académie de droit international de La Haye and Académie de droit international, *Le Droit international en quête de son identité: cours général de droit international public* (Martinus Nijhoff publishers 1992) 53 (doublecheck)

<sup>76</sup> J. Brunnée, 'Enforcement Mechanisms in International Law and International Environmental Law' in U. Stoll Beyerlin and Rüdger Wolfrum (eds), *Ensuring Compliance with Multilateral Environmental Agreements, A Dialogue between Practitioners and Academia*, vol 2 (BRILL 2006)

<sup>77</sup> P. de Visscher and others, *Cours général de droit international public*, vol 136 (AW Sijhoff 1973) 138, 'dans la tres large mesure ou le droit international refletere fidelement un etat de conscience sociale'

<sup>78</sup> L. Henkin, *How nations behave: law and foreign policy* (Columbia University Press 1979) 47

International legal scholarship in particular has placed much emphasis on the legal legitimacy of rules and this issue is key in assessing the legitimacy of fact-finding inquiries.<sup>79</sup> Brunée explains that the dominant framework for exploring how international law generates voluntary compliance is that of constructivism.<sup>80</sup> This framework supports the position that international law can exert independent ‘compliance-pull’ when it meets particular legitimacy requirements.<sup>81</sup> These legitimacy requirements, famously set out by Franck, include determinacy,<sup>82</sup> symbolic validation,<sup>83</sup> coherence<sup>84</sup> and adherence.<sup>85</sup> Applying such a framework to the situation at hand can shed light on the implications of the reports’ problematic engagement with international law.

There are a number of legitimacy requirements that UN Commissions of inquiry possess. For instance, as a result of being part of the apparatus of the United Nations, the symbolic validation of commissions of inquiry is high. However the legitimacy of the commissions is threatened by the fact that their statements on the law are often given without proper justification and in broad terms (and as such lack the determinacy requirement) and often go beyond the settled law towards ‘progressive development’ (and in doing so, violate the coherence requirement). As such, the ‘compliance pull’ that such reports exert is materially affected.<sup>86</sup>

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<sup>79</sup> J. Brunnée and S.J. Toope, ‘Persuasion and Enforcement: Explaining Compliance with International Law’ 13 *Finnish Yearbook of International Law*, 273

<sup>80</sup> Brunnée, ‘Enforcement Mechanisms in International Law and International Environmental Law’ cf. A. Chayes and A.H. Chayes, *The new sovereignty: compliance with international regulatory agreements* (Harvard Univ Pr 1998)

<sup>81</sup> Brunnée, ‘Enforcement Mechanisms in International Law and International Environmental Law’

<sup>82</sup> Determinacy is defined as ‘the ability of a text to convey a clear message...Rules which have a readily accessible meaning and say what they expect of those who are addressed are more likely to have a real impact on conduct’; T.M. Franck, *Fairness in international law and institutions* (Clarendon Press 2002) 30; To this end Treves states that decisions of international courts (including commissions of inquiry?) could fail this test if they avoid answering the question asked of it or if the reasons given are difficult to understand or open to too many interpretations’; Tullio Treves, ‘Aspects of Legitimacy of Decisions of International Courts and Tribunals (and discussion)’ in Rüdger Wolfrum and Röben Volker (eds), *Legitimacy in International Law* (Springer 2008) 174; For example see *Nuclear Weapons Advisory Opinion* and in particular the dissenting opinion of Rosalyn Higgins; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, ICJ Reports 1996, p 66

<sup>83</sup> Symbolic validation has the component elements including the formality of the proceedings, the detailed character of the reasoning and judgment and even the connection with the United Nations that the court enjoys which taken altogether signify that the judgment is “is a significant part of the overall system of social order”; Franck, *Fairness in international law and institutions* 34; Treves 175

<sup>84</sup> Franck, *Fairness in international law and institutions* 38 Although it should be noted that Franck defined legitimacy as “a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively” and as such it ought to be noted that Franck’s indicators of legitimacy apply in principle only to ‘primary rules, the ordinary rules, whether made by legislatures, bureaucrats, judges or plebiscites.’; *ibid*; see also Rein Müllerson, ‘Aspects of Legitimacy of Decisions of International Courts and Tribunals: Comments’ in Rüdger Wolfrum and Röben Volker (eds), *Legitimacy in International Law* (Springer 2008)

<sup>85</sup> The final indicator is adherence this indicator is related to rules that “are demonstrably supported by the procedural and institutional framework within which the community organizes itself”; Franck, *Fairness in international law and institutions* 41

<sup>86</sup> Shany

Legitimacy is not something that can be granted, but something that has to be earned and demonstrated.<sup>87</sup> Quite simply, it is imperative that bodies such as these inquiries be convincing in their legal reasoning and at all times bear in mind that compliance is often ‘connected to the quality and persuasiveness of... judgements or other findings...’<sup>88</sup> The result of failing to achieve this legitimacy for fact-finding reports will most likely be non-cooperation from the state being investigated, the failure to protect human rights and the confinement of the report to obscurity.<sup>89</sup> The Ixion’s Wheel of non-cooperation and resulting loss of legitimacy of fact-finding bodies is one which can be avoided, however, through providing better legal reasoning and ensuring that related institutional and procedural issues that impact on legitimacy are also addressed.

To this end, the next section will attempt to explore whether the mechanism by which the Court can request information from International Organizations, article 34(2) of the Court’s Statute, could provide UN Commissions of Inquiry with a clearer mandate and *modus operandi* and as such increase the legitimacy and compliance pull of such investigations, as well as the fact-finding approach of the Court itself.

## **5. Article 34 – The Power to Request Information from Public International Organizations**

Article 34 represents a weapon in the armoury of the ICJ’s fact-finding powers. Article 34(2) provides that the Court may request of public international organizations information relevant to cases before it and represents another fact-finding tool for the Court.<sup>90</sup> The relevant Rules of the Court, Article 69 (1) to (3) further provide that the Court can ‘at any time prior to the closure of the oral proceedings, either *proprio motu* or at the request of one of the parties...request a public international organization...to furnish information relevant to a case before it’.

Article 34(2) and (3) was not applied in the early years of the Court.<sup>91</sup> The first use of the provision was in the *Aerial Incident of 27 July 1955* case in which the Secretary-General made the Council of the ICAO aware of the pending case before the Court.<sup>92</sup> The ICAO Council subsequently

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<sup>87</sup> See example of European Court of Human Rights in P & Scheinin Slotte, M, ‘Captain, Fire Brigade or Icebreaker? Political Legitimacy as Rationale in Human Rights Adjudication’ in T & Hertzberg Kurtén (ed), *Legitimacy: the Treasure of Politics* (Peter Lang 2011) 95

<sup>88</sup> *ibid*

<sup>89</sup> Chinkin 487

<sup>90</sup> C.M. Chinkin and R. Mackenzie, ‘Intergovernmental Organizations as "Friends of the Court"’ in L. R. [et al] Chazournes (ed), *International Organizations and International Disputes Settlement - Trends and Prospects* (Transnational 2002) 140

<sup>91</sup> Although it has been suggested that it could have been utilized in cases such as the *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, see Pierre-Marie Dupuy, ‘Article 34’ in A. Zimmermann (ed), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2006) 551

<sup>92</sup> *Case concerning the Aerial Incident of July 27th, 1955 (Israel v Bulgaria)*, *Preliminary Objections, Judgment of May 26th, 1959: ICJ Reports 1959*, p 127

agreed that information could be supplied to the Court on request.<sup>93</sup> Subsequently, in the *ICAO Council* case<sup>94</sup> the President of the Court made the ICAO aware of proceedings before the Court under Article 34(3) but the ICAO did not ultimately wish to file observations on the case.<sup>95</sup> The Court similarly informed the OAS in the *Border and Transborder Armed Actions* case<sup>96</sup> but again no action was taken by the international organization.

In the *Bosnian Genocide* case<sup>97</sup> the Registrar of the Court informed the UN Secretary-General under Article 34(3) that the Genocide Convention would form the subject matter of the case – the first time that the Court had applied Article 34(3) to the United Nations itself.<sup>98</sup> Dupuy has made reference to ‘the striking fact that on the whole, inter-governmental organizations do not seem to be particularly interested in taking the initiative, on the basis of Art. 34, para. 2, of requesting the Court to receive information which they would consider as relevant to a case pending before it’.<sup>99</sup>

However, despite the fact this is not a provision that has been extensively used by international organizations nor widely cited as means by which the Court could seek to improve its fact-finding procedure, it is suggested that it is a potentially useful provision for our purposes. Although the Court to date has only in a handful of cases simply informed affected international organizations that their interests will form part of a case before the Court, it is argued that the wording of the provision means that it has the potential to play a more influential role.

In fact, it is suggested that greater use of this provision could both (a) provide commissions of inquiry with a clearer mandate and (b) provide the Court with additional information that would not have been put before the Court by the parties and as such help the Court to move away from its problematic reactive approach to judicial fact-finding.

To elaborate, one of the main weaknesses of the operation of UN commissions of inquiry to date has been the unclear mandate that they are usually given – characterising such inquiries as neither classic purely fact-finding commissions nor judicial fact-finding bodies competent to make legal determinations. In attempting to remedy this weakness in the operation of inquiries it is suggested

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<sup>93</sup> ICAO Doc. C-WP/2609, 21 February 1958, para.5

<sup>94</sup> *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment*, ICJ Reports 1972, p 46

<sup>95</sup> *ibid* p. 48 (para. 5)

<sup>96</sup> *Border and Transborder Armed Actions (Nicaragua v Honduras), Jurisdiction and Admissibility, Judgment*, ICJ Reports 1988, p 69

<sup>97</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina/Yugoslavia [Serbia and Montenegro], Provisional Measures*, ICJ Reports (1993) pp 3

<sup>98</sup> Dupuy 553, although technically there was no need for this since Articles 40 and 42 of the Court’s Statute provide the Secretary-General notification of all cases before the Court, and that Article 69(2) of the Rules of the Court permit the Secretary-General to submit information to the Court.

<sup>99</sup> *Ibid*

that under Article 34(2) the Court could request the Human Rights Council or the UN Secretary-General to establish a commission of inquiry to investigate and provide it with more in cases that come before the Court. In doing so the Court could be prescriptive in providing a detailed request for exactly what information it sought and the manner in which it wished the commission to go about gathering this information, what standard of proof it was to apply and even the nature of the members of the commission.

In addition, use of this provision could provide the Court with a contribution to its factual record other than that put forward by the parties themselves. This could be of potential use to the Court since its current reactive approach to fact-finding (through which the Court does not conduct its own fact-finding nor direct the fact-finding process in proceedings before it) has been criticised in recent times.<sup>100</sup> Through almost complete reliance on the facts submitted by the parties, and corresponding neglect of the Court's not inconsiderable statutory fact-finding powers, the Court has been accused in recent times of not doing enough to arrive at a clear and factual basis upon which to make legal determinations or for not fully appreciating the intricacies of particularly complex scientific or technical information. Requesting the Human Rights Council or the Secretary-General to provide it with information relating, for instance, to the aftermath of a conflict in which violations of IHL and IHRL have been alleged would allow the Court to more proactively make use of its statutory fact-finding powers and get closer to the facts that form the basis of the case before it. Doing so would have the additional benefit to the Court of being an inexpensive means of conducting fact-finding since the costs would be borne by the Human Rights Council or Secretary-General. This would circumvent one of the main reasons given as to why the Court does not conduct more of its own fact-finding, namely that it does not possess the resources to do so. In addition, the generally lengthy nature of cases that come before the Court and the relatively swift reporting by commissions of inquiry in practice would not necessarily delay the proceedings. Indeed, if the Court were concerned about such a delay they would be competent to stipulate the time limits within which the inquiry was to operate in the same way it is able to clearly lay out its mandate.

However, whilst it is suggested that in theory Article 34(2) of the Court's Statute could be potentially useful both for the Court and for UN Commissions of Inquiry, it is necessary to note that there is a potentially insurmountable obstacle that will prevent this provision from being mutually beneficial to the Court and UN Commissions of Inquiry in any material way. It is to this issue to which we now turn.

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<sup>100</sup> For instance see the Joint Dissenting Opinion of Judges Simma and Al-Khasawneh in *Pulp Mills Case*; see also C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (Cambridge University Press 2011); Halink; Del Mar

## 6. Jurisdictional Constraints

Whilst Article 34(2) is undoubtedly a potentially useful provision that could aid the Court in its judicial fact-finding and the operation of UN commissions of inquiry by giving them clear mandates to follow in theory, it must be noted that due to a number of facts this is unlikely to be case in practice. To elaborate, it is shown that crippling strict jurisdictional constraints represent a barrier to the Court being an effective means of providing UN commissions of inquiry with a clear mandate for operation. In simple terms, whilst use of Article 34(2) could certainly be useful in bringing new information before the Court in relation to any particular case that comes before it, the Court's jurisdictional bases both advisory and contentious are limited to such an extent that the Court gets too few cases to in any meaningful way improve the systematic operation of UN commissions of inquiry.

### (i) Advisory Jurisdiction

In turning to the Court's advisory jurisdiction first of all, under Article 96(1) of the UN Charter the General Assembly and the Council can request an advisory opinion on 'any legal question' and under Article 96(2) any other organ or specialised agency, if so authorised by the Assembly, can request an opinion on any question 'arising within the scope of their activities'.<sup>101</sup> In the course of a request for an advisory opinion, a factual question may arise in relation to which a request to establish a commission of inquiry could be useful. One recent example where this was the case comes immediately to mind; that of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion in which the Court's relied heavily on UN Documentation in the absence of the non-appearing Israel.<sup>102</sup> In particular the report of the Secretary-General referred to in the request for the advisory opinion itself was seen as particularly authoritative.<sup>103</sup>

However, there exist several important factors that in theory could feasibly prevent the Court from requesting that such a commission be established to provide it with information in its advisory capacity. The Court's main debilitation results almost entirely from the problem of

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<sup>101</sup> B. Simma, 'Article 92' in B. Simma (ed), *The Charter of the United Nations: A Commentary* (2 edn, OUP 2002) *ibid*

<sup>102</sup> Although see the objections in the Declaration of Judge Burgenthal in *Legal Consequences of the Construction of a Wall (Advisory Opinion)* 2004 <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframehtm>> accessed 13 April 2012 240 at para 1; Judge Burgenthal argued that since this was an advisory opinion, Israel was under no obligation to present facts to the Court, '[t]he Court may therefore not draw adverse evidentiary conclusions from Israel's failure to supply it or assume, without fully enquiring into the matter, that the information and evidence before it is sufficient to support each and every one of its sweeping conclusions'.

<sup>103</sup> See Separate Opinion of Judge Higgins in *ibid* at para 57; for further reliance on the Secretary-General's Report and Written Statement by the United Nations see 168-171, paras 80-85, and 184, para 122

initiative that severely limits the number of advisory opinions the Court is asked to give.<sup>104</sup> As Bowett points out ‘the difficulties are well known’.<sup>105</sup> Since individual states are not permitted to request an advisory opinion under Article 96 of the Charter, any state seeking guidance from the Court in its advisory capacity must first obtain the support of a majority of the Council (including permanent members) or a two-thirds majority of the Assembly. This is no small task and is near impossible for unpopular or isolated states.<sup>106</sup> This problem is further compounded by both the Council and the Assembly's under-use of the Court's advisory procedure (the Council has only ever requested one advisory opinion, in the *Namibia* case<sup>107</sup>).<sup>108</sup> Whilst this may suggest that requesting an opinion through the Assembly would be the best course of action, the chances of gaining a majority in the General Assembly will usually be slim.<sup>109</sup>

## (ii) Contentious Jurisdiction

The situation with regards to contentious proceedings is similar. The Court's ability to provide a clear mandate for UN Commissions of Inquiry under its contentious jurisdiction is likewise limited due to the requirement of jurisdiction in accordance with the Court's Statute (and the related issue of the limited number and restrictive nature of Optional Clause Declarations under Article 36(2)).

The Court's contentious jurisdiction is limited by Article 34(1) of its Statute which excludes non-state actors from having standing before the Court; meaning that the issues of alleged breaches of international humanitarian law for which additional evidence is required will have to arise incidentally in proceedings between states. In other words, for the possibility of the Court to utilise Article 34(2) to arise, an evidentiary gap that could be remedied through resort to this provision must necessarily form part of the dispute to be adjudicated between the parties.<sup>110</sup>

Ultimately, the Court can only contribute to the development of UN fact-finding if it is

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<sup>104</sup> V. Arangio-Ruiz, ‘The ICJ Statute, the Charter and Forms of Legality Review of Security Council Decisions’ in L.C. Vorah (ed), *Man's Inhumanity to Man, Essays in Honour of Antonio Cassese* (Kluwer Law International, the Hague 2003) 60

<sup>105</sup> Derek Bowett, ‘Impact of Security Council Decisions on Dispute Settlement Procedures, The’ 5 *Eur J Int'l L* 89, 99; V. Gowlland-Debbas, ‘The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case’ 88 *The American Journal of International Law* 643, 670

<sup>106</sup> Bowett 99; Gowlland-Debbas 670

<sup>107</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p 16

<sup>108</sup> Philippe Weckel, ‘Le Chapitre VII de la Charte et son application par le Conseil de Sécurité’ 37 *Annuaire français de droit international* 165; Rosalyn Higgins, ‘The Place of International Law in the Settlement of Disputes by the Security Council’ 64 *The American Journal of International Law* 1, 64

<sup>109</sup> Bardo Fassbender, ‘Review essay: Quis judicabit? The Security Council, its powers and its legal control’ 11 *European Journal of International Law* 219, 223; T.D. Gill, ‘Legal and some political limitations on the power of the UN Security Council to exercise its enforcement powers under chapter VII of the Charter’ 26 *Netherlands Yearbook of International Law* 33, 122

<sup>110</sup> E. De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004) 70

given the opportunity to do so, and as we have seen there is little possibility of the Court exercising any significant amount of control over Council discretion through the existing jurisdictional set-up.

## 7. Conclusion

All this having been said, what can be said about the current state of UN fact-finding inquiries? This paper has attempted to map out in general terms the areas in which these UN Commissions of Inquiry operate today and to show that there are both advantageous and disadvantageous aspects of their practice to date. The paper next attempted to take the next step and ask what can be done to remedy some of the weaknesses that are apparent in the operation of such commissions in order to ensure more effective functioning of such inquiries.

To this end the paper pondered whether increased use of Article 34(2) of the ICJ Statute (more specifically, the Court requesting the Human Rights Council or the Secretary-General of the UN to establish a commission of inquiry to provide it with information relating to alleged breaches of human rights which may have arisen in relation to a case before the Court) could both benefit the Court itself and improve the operation of UN Commissions of inquiry. It was suggested that not only could the information that could be brought before the Court potentially prove useful on account of the Court's problematic reactive approach to judicial fact-finding, such a request from the Court could be equally beneficial for Commissions of inquiry.

Ultimately, however, it was concluded that increased use of Article 34(2) of the Court's Statute, whilst potentially useful in theory, would do little to improve the operation of UN Commissions of Inquiry or to provide the Court with information other than that provided by the parties in practice. This is due to the fact the Court handles a relatively small number of cases and the fact its jurisdiction is based on cases being brought before it by parties or questions asked of it by competent organs. As such, the Court can only incidentally utilise Article 34(2) of its Statute in cases brought before it or advisory opinions sought from it. Consequently, the Court cannot be an effective means of directly improving the operation of UN Commissions of Inquiry.

So if Article 34(2) of the Statute is not the answer to the problem what can be done to improve the efficacy of these commissions of inquiry? In the short term, there are some steps that can be taken such as those suggested by Cassese to establish a roster of experts prepared to take part in fact-finding and a fund to finance fact-finding free from political influence, and work towards harmonizing the procedural operation of fact-finding between UN bodies.<sup>111</sup>

However, in the long term these inquiries will need to answer the question regarding what they are hoping to achieve. We can see that fact-finding inquiries established by the UN are no

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<sup>111</sup> So that, once the need arises to investigate a situation, all the relevant rules are already in place; Cassese

longer solely a mechanism for investigating the veracity of allegations of violations of human rights. However, in lacking the required procedural rigor, they cannot easily be conceptualised as a form of ‘pre-judicial body...capable of clearing the ground for a court of law’ either.<sup>112</sup> As such, it is hard to answer the question of whether these reports are fit for purpose, as their purpose is itself rather ambiguous. This question begs answering since, in their current state, in trying to be all things to all men, inquiries risk the possibility of being little use to anyone.

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<sup>112</sup> Ibid