

U.N. HUMAN RIGHTS COMMISSIONS OF INQUIRY: THE QUEST FOR ACCOUNTABILITY

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EXECUTIVE SUMMARY

The U.N. Human Rights Council has established a growing number of commissions of inquiry with mandates not only to investigate facts regarding major human rights crises but also to identify perpetrators for the purpose of holding them accountable under international law. What does this demand for accountability mean specifically? This paper proposes a typology of accountability—moral, political, and legal—to help distinguish among the various objectives of these mandates and examines specific outcomes of 17 different commissions of inquiry established by the Human Rights Council between 2006 and 2016 against these criteria. It concludes that the high expectations associated with legal accountability, particularly under international criminal law, should be reduced in favor of greater attention to the truth-telling and political accountability aspects of their mandates. These elements, if strengthened, will, in turn, increase the odds that legal accountability will be achieved.

INTRODUCTION

Since it was established in 2006, the U.N. Human Rights Council (UNHRC) has authorized a growing number of independent commissions of inquiry (COI) to investigate facts and circumstances of urgent human rights situations.¹ Increasingly, these international commissions of inquiry receive explicit mandates to pursue “accountability” in addition to their central fact-finding role.² Since the creation of the Commission of Inquiry on

1 This fact-finding function is grounded in well-established international human rights norms regarding the right to truth, found, *inter alia*, in Additional Protocol I to the Geneva Conventions of 1949, which recognizes the right of families to know the fate of their relatives; the International Convention for the Protection of All Persons from Enforced Disappearance, which sets out the right of victims to know the truth regarding the circumstances of the disappearance; and decisions of the U.N. Human Rights Committee and the Working Group on Enforced or Involuntary Disappearances that recognize the right of victims of gross violations of human rights to the truth about events, including identification of perpetrators. See United Nations General Assembly, Resolution 68/165, “Right to the Truth,” A/RES/68/165, Preamble (January 21, 2014), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/165.

2 Michael Nesbitt, “Taking the (International) Rule of Law Seriously: Legality and legitimacy in United

Libya in 2011, through March 2016, 17 of the 22 commissions of inquiry mandated by the Council include some type of reference to ensuring accountability for human rights violations, including by identifying alleged perpetrators.³ This development has occurred in parallel to the growth of international criminal law mechanisms such as the International Criminal Court (ICC) and ad hoc tribunals, raising questions about the distinct roles and relationships of these different bodies in the international human rights system. It is important to bear in mind, for example, some of the predecessor fact-finding and accountability mechanisms established by the U.N. Security Council (UNSC) to address serious violations of human rights, for example in the former Yugoslavia,⁴ Darfur,⁵ and the Central African Republic.⁶ It is worth considering also the pros and cons of UNSC versus UNHRC mandates, e.g., the UNSC's power to refer cases directly to the ICC (subject to a veto) versus the UNHRC's power to create COIs on a majority vote. This paper, which focuses exclusively on recent UNHRC mandates, seeks to discuss these issues by considering the different types of accountability that commissions of inquiry can realistically pursue given their temporary and resource-constrained characteristics.

The growing number of UNHRC commissions of inquiry with mandates to “ensure accountability” reflect at least three fundamental concerns of member states: (1) independent fact-finding, while important in and of itself, is insufficient to achieving justice for the victims of the violations;⁷ (2) some kind of punitive or corrective action is a necessary instrument both to remedy the violations and deter future abuses; and (3) identifying state and non-state perpetrators, including individuals, can empower other actors—national and international—to mobilize political pressure and resources for pursuing justice, institutional reform, and capacity-building, thereby preventing future violations.

Nations ad hoc commissions of inquiry” (PhD diss., University of Toronto, 2013), https://tspace.library.utoronto.ca/bitstream/1807/43680/3/Nesbitt_Michael_201311_SJD-thesis.pdf.

3 These 22 mandates include five consecutive mandates to investigate human rights violations in Syria. The five post-2011 mandates that do not specifically mention accountability concern the Occupied Palestinian Territories (2012), Mali (2013), Central African Republic (2013), Eritrea (2014), and South Sudan (2016). In at least one of these cases—Eritrea—the commissioners interpreted their mandate to include ensuring full accountability, including when violations may amount to crimes against humanity. See “International Commissions of Inquiry, Fact-Finding Missions: Mandating authority,” United Nations Library and Archives at Geneva, <http://libraryresources.unog.ch/c.php?g=462695&p=3162812>.

4 The UNSC established the mandate of a commission of experts to investigate the situation in Bosnia and the former Yugoslavia in October 1992 (UNSC Resolution 780), which was headed by Cherif Bassiouni, followed shortly by the UNSC's creation in May 1993 of the International Criminal Tribunal on the Former Yugoslavia (UNSC Resolution 827).

5 The UNSC established the commission of inquiry on the Darfur situation in Sudan in September 2004 (UNSC Resolution 1564) led by Antonio Cassese, which led to the Security Council's unprecedented referral of the situation to the prosecutor of the International Criminal Court in March 2005 (UNSC Resolution 1593).

6 The UNSC unanimously created a commission of inquiry to investigate the human rights situation in the Central African Republic (CAR) in December 2013 as part of a broader strategy to address the conflict there (UNSC Resolution 2127). This was followed by the CAR transitional government's second referral of allegations connected to renewed violence to the ICC in May 2014, while the COI team was still in the field.

7 As Pablo de Grieff, U.N. special rapporteur for promotion of truth, justice, reparation, and guarantees of non-recurrence pointed out in his first annual report to the Council, “truth-seeking exercises, even thorough ones, when implemented on their own, are not taken to be coterminous with justice, for adequate redress is not exhausted by disclosure. Justice is not merely a call for insight but also requires action on the truths disclosed.” See United Nations General Assembly, “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence Pablo de Grieff,” A/HRC/21/46, 8 (August 2012), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-46_en.pdf.

This last point reflects the reality that these mechanisms, while charged with applying facts to relevant international law within a larger justice and accountability ecosystem, are not endowed with any judicial authority to prosecute and enforce the law; they are therefore more, though not exclusively, political in nature. They are much closer in practice to mechanisms of transitional justice as represented by a number of truth and reconciliation commissions first established in Latin America in the 1990s. Nonetheless, as commissions of inquiry usually operate in dire situations in which serious and large-scale violations are being committed by multiple actors or recently have occurred, with little recourse to domestic sources of accountability, they are often the first, and sometimes the only, official act of accountability.

These three aims are both legitimate and ambitious. But are they achievable? What does the recent experience of the Council's commissions of inquiry tell us about how these purposes are pursued in practice? Is it realistic to think that such ad hoc mechanisms can achieve these goals in the short to medium term, particularly those relating to individual criminal responsibility?



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To answer these questions, I suggest a typology of accountability that helps to distinguish among the various accountability-related aims of the COI mechanism. I then analyze the experiences of several COIs established by the Human Rights Council since 2006 with regard to these types of accountability. Finally, I consider what best practices are most likely to lead toward higher degrees of moral, political, and legal accountability.

TYPOLGY OF ACCOUNTABILITY

In the following section, I outline three types of accountability—moral, political, and legal—and their relationships to each other.

a. Moral accountability and the right to truth

International commissions of inquiry share the fundamental purpose of impartially establishing facts sufficient to reach conclusions about what happened to whom and by whom in a given situation. They are mandated, in other words, to discharge a duty to establish and document the truth, especially for the victims. They are, unlike other Human Rights Council mechanisms, more investigatory in nature, which implies a certain rigor and seriousness closer to a judicial proceeding, even though they do not have the authority to issue subpoenas or the capabilities to conduct full-blown criminal law enforcement investigations. The quality of their fact-finding work, therefore, is critical to the authority they have, on behalf of the United Nations, to issue findings and conclusions that give voice to victims and hold states and individuals at least morally accountable to the most fundamental norms of the international community.

By recognizing and validating the suffering of victims, their families, and communities, a commission of inquiry can help heal wounds by establishing a relatively accurate and unbiased historical record of violations and violators, thereby facilitating at least some closure and pointing the way toward a measure of reconciliation, if not forgiveness. In this sense, the public disclosure of a well-documented and credible account of specific

human rights abuses by the United Nations is a form of accountability in its own right—it is the international community’s contribution to fulfilling the right to truth as set forth by various U.N. instruments.⁸ Other criteria for evaluating the degree of moral accountability that fact-finding missions can generate are the level of transparency of the COI’s methodology, protection and proper treatment of witnesses, and wide and accessible dissemination of the final report’s findings and conclusions, including in the languages of the country concerned. It is also the basic building block of any additional steps toward political and legal accountability.

b. Political accountability

The political accountability that follows from the public disclosure of authoritative conclusions regarding responsibility for serious human rights abuses can take many forms. These include imposing reputational harm on the actors (state and non-state) identified as perpetrators by the commission and any follow-up efforts to name and shame those responsible; taking actions to hold individuals responsible by denying them certain political rights; removing them from public office or security services; or vetting new personnel to ensure they are not tied to the commission of serious violations discussed in the commission’s report. The international community also could impose targeted sanctions against those named by a commission, including visa bans, asset freezes, or other restrictions on financial and business transactions.

Other political accountability measures are remedial in nature, for example, memorializing the events through public displays of atonement and respect to the victims, or payment of reparations or other forms of compensation to victims and their families. Another form of political accountability are policy measures intended to prevent the re-occurrence of such violations, for example institutional reform of security services, and capacity-building of judicial bodies, national human rights institutions, and other mechanisms of accountability at the national and local levels. In situations where violence is ongoing and prospects for accountability are low, the international community can continue to monitor and investigate the situation both for truth-telling purposes and to put the relevant actors on notice that their violations will be subject to ongoing scrutiny and eventual prosecution, as in the case of Syria.

c. Legal accountability

The Human Rights Council’s growing invocation of language like “holding perpetrators of abuses accountable, including for crimes against humanity” in commission mandates is self-evidently a call for legal accountability, preferably criminal. The primary focus of such demands is and should be on national authorities with jurisdiction to judge individuals in accordance with domestic and international law. A well-documented COI report should give such authorities a running start on their own investigations and prosecutions, and empower victims and their representatives to demand justice. The institutional capacity and/or political will to prosecute such crimes, however, is usually absent at the national level, particularly in the grave situations typically examined by commissions of inquiry. As a result, many commissions call on the international community to refer the matter to the International Criminal Court or some other ad hoc tribunal as a means of achieving some measure of justice and combating impunity.⁹ Civil or administrative measures to

⁸ See the preamble of United Nations General Assembly, “Right to the Truth.”

⁹ At least three COIs recommended that the situation be referred to the prosecutor of the ICC (Palestine/Israel 2009, DPRK 2014, Eritrea 2016); two COIs recommended a referral to the ICC or the establishment

punish violators, e.g., denial of political rights to run for office, house detention, or other temporary constraints on normal civilian life, also carry legal effects and have a punitive and deterrent value.

While such legal measures appear on the surface to be the ultimate aim of the latest COI mandates from the UNHRC, in practice they have been largely non-existent. To date, no COI report has directly resulted in a trial by an international or domestic tribunal (the ICC proceedings against former President Laurent Gbagbo of Côte d'Ivoire were initiated at the request of the government of Côte d'Ivoire). In any event, international prosecutors are quick to point out that the information gathered by COIs have limited direct impact on their own efforts to build a case against alleged perpetrators. While both COIs and international tribunals share the same goal of seeking the truth, their methodologies differ in important ways, particularly regarding the burden of proof and due process protections for defendants.¹⁰

Nonetheless, COIs can play a critical role in paving the way for subsequent international or national criminal investigations. For example, they usually collect information before prosecutors, interview witnesses before memories fade, and protect evidence before documents and other primary materials are destroyed or witnesses displaced.¹¹ In cases where they gain access to national territory, COI investigators can

even preserve physical evidence of violations. If COI investigations are carried out at high legal standards with professionally trained staff and proper methodologies, they can be a repository of precious material for criminal prosecutors who usually arrive later. Systematic and well-organized data archives of witness testimonies and other material and carefully documented chains of custody of evidence, for example, would increase the value of COI investigations to prosecutors, at least at the preliminary investigative phase of their work, when prosecutors are looking for criminal patterns, context, attributes of combatants, and methods.¹² The international community has begun recognizing that COIs need to do a better job in substantiating the context and patterns associated with crimes against humanity. For example, the U.N. General Assembly, in response to growing concern that the UNHRC's COI on Syria has fallen short in producing adequate criminal evidence to share with prosecutors, took the unprecedented step in 2016 to establish a separate but complementary independent body of experts to collect, consolidate, preserve, and analyze evidence pertaining to violations and abuses of human rights and humanitarian law.¹³ Similarly, independent experts have recommended that the



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of an ad hoc international tribunal (both Syria).

10 For a careful analysis of the differences between Geneva and ICC processes for fact-finding and accountability by Stephen J. Rapp, former U.S. ambassador at large for war crimes, see Stephen J. Rapp, "Bridging The Hague-Geneva Divide," *Intersections Magazine (The Hague Institute for Global Justice)*, January 13, 2017, <http://www.thehagueinstituteforglobaljustice.org/latest-insights/latest-insights/news-brief/bridging-the-hague-geneva-divide-recommendations-concluded-by-the-group-of-practitioners-in-fact-finding-accountability/>.

11 Fabricio Guariglia, "Remarks of Fabricio Guariglia, Director of Prosecutions Division, International Criminal Court, at the International Conference on the United Nations Human Rights System: Present and Future," (speech, University Pantheon-Assas, Paris, November 8, 2016).

12 Ibid.

13 It will also prepare files in order to facilitate and expedite fair and independent criminal proceedings,

Office of the High Commissioner for Human Rights (OHCHR) in Seoul strengthen its documentation efforts and appoint legal advisers to assess evidence for possible use in any future accountability process in North Korea.¹⁴

There is less consensus on how far COIs should go in making legal conclusions based on the information they collect and analyze.¹⁵ While in most cases their mandates explicitly or implicitly authorize them to make such judgments, some argue that this should remain within the purview of traditional judicial processes. When COIs decide to name names of individual perpetrators, the consequences can be decidedly mixed. On the positive side, identifying specific individuals can help prosecutors hit the ground running and are often the only opportunity to carry out any form of accountability. On the other hand, doing so can raise claims of bias and lack of due process and can harm the integrity of the judicial process. COIs mandated by the UNHRC have avoided naming names publicly, though at least five of them (Libya, Côte d'Ivoire, Syria, North Korea, and Burundi) have compiled confidential lists of alleged perpetrators for safekeeping by the OHCHR.



Closing the gap between high expectations of legal accountability and the often disappointing outcomes, then, is vital to the future legitimacy of the COI mechanism.

Unfortunately, the capacities and methodologies of the COIs are not properly designed for collecting the kind of evidence that can be used in a court of law, further reducing the likelihood that their work can actually lead to legal accountability of the kind envisioned by the drafters of their mandates. Lack of proper education and training on the requisite elements of international criminal law and weak practices of collection and preservation of evidence are just some of the recent problems associated with COIs. Not surprisingly, judges have taken a conservative approach so far to relying on indirect evidence of criminal activity, whether as set forth in reports by nongovernmental organizations or U.N. bodies, citing hearsay concerns.¹⁶ Closing the gap between high

in accordance with international legal standards, in national, regional, or international courts or tribunals that have or may in the future have jurisdiction over these crimes. See United Nations General Assembly, Resolution 71/248, “International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in [Syria] since March 2011,” A/RES/71/248 (December 21, 2016), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/248.

14 United Nations General Assembly, “Report of the group of independent experts on accountability”, A/HRC/34/66/Add.1 (February 24, 2017), <http://undocs.org/A/HRC/34/66/Add.1>.

15 See, e.g., Carsten Stahn and Dov Jacobs, “The Interaction between Human Rights Fact-Finding and International Criminal Proceedings: Toward a (new) Typology,” and related chapters in *The Transformation of Human Rights Fact-Finding*, eds. Philip Alston and Sarah Knuckey (Oxford: Oxford University Press, 2015).

16 In paragraphs 49 and 120 of the case over abuses in the Democratic Republic of the Congo, the pre-trial chamber of the ICC complained about the overreliance on hearsay evidence and other assertions made in U.N. and NGO reports. See International Criminal Court, “In the Case of Prosecutor v. Callixte Mbarushimana,” ICC-01/04-01/10, (December 16, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_22538.PDF. On a similar note, the ICC judgment in Prosecutor v. Thomas Lubanga Dyilo raised concerns about fact-finding carried out by “human rights and humanitarian organizations.” See International Criminal Court, “Transcript of Deposition on Deposition of Witness DRC- OTP- WWWW- 0582,” ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 46, lines 14-20 (November 17, 2010), https://www.icc-cpi.int/Transcripts/CR2012_00067.PDF. For an analysis of the relationship between COIs and ICC actions, see Triestino Mariniello, “The Impact of International Commissions of Inquiry on the Proceedings before the International Criminal Court,” in *Commissions of Inquiry: Problems and Prospects*, ed., Christian Henderson (Oxford: Hart Publishing, 2017), 171-198.

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SPECIFIC OUTCOMES ON ACCOUNTABILITY

While accountability can take years to materialize, the experiences to date of COIs mandated since the creation of the HRC in 2006 reveal different degrees and timelines of accountability across the three categories set forth above. The degree of moral accountability resulting from the publication of the COI report itself is higher and more immediate. There are some modest examples of political accountability resulting from COIs in the medium term, while forms of legal accountability have proven to be unrealized to date.

In terms of **moral accountability**, the practices of COIs are generally becoming more victim-oriented as methodologies and resources have improved over the years. COIs are still constrained, however, by the predominant lack of state cooperation, especially the refusal to allow access to the territory of the state concerned.

An early example is the COI on Lebanon, established in 2006 to investigate the killings of civilians by Israel in Lebanon and the effects of the conflict on the general population. The COI's mandate only referred to violations committed by the state of Israel and therefore was seen as overly politicized and imbalanced. To correct this bias, the commissioners decided to consider the conduct not only of the Israeli military but also that of its opponent, Hezbollah (although it interpreted its mandate to exclude Hezbollah actions in Israel). Its final report, however, provided little information on the methodology used to evaluate the written and oral testimonies it received, or its efforts to protect witnesses. It also was hampered by the lack of cooperation from Israel, where its final report was criticized for being one-sided and politicized. For example, Israel or the Israel Defense Force was cited in 13 conclusions regarding breaches of international law, whereas Hezbollah was mentioned only once. On the other hand, it concentrated its recommendations on the social and humanitarian effects of the conflict on the Lebanese people, as called for in the mandate.

In the case of the COI on Libya (2011-12), the commissioners followed a transparent methodology and their reports included details on the types of witnesses interviewed, but withheld names in the interest of protecting witnesses. It chose to keep testimonies confidential and had only limited contact with the media during its term, in consideration of the privacy of witnesses. The reports did, however, garner international attention at the time and likely increased political pressure on the national authorities for follow-up steps toward political and legal accountability.

The COI on Eritrea (2014-16) faced a number of challenges in its attempt to fulfill the core function of truth-telling for victims of the regime. The government refused access to the country by the commissioners and their staff, while allowing other U.N. field officers selective access to a limited number of controlled sites.¹⁷ The government also refused to respond to requests for information and allegedly recruited its supporters to flood the commission with positive stories of the human rights situation on the ground, both in writing and in public appearances before the commission.¹⁸ The short version of the

17 Confidential interview with former member of COI Eritrea staff.

18 Commissioners reported hearing stories of witness intimidation and other efforts to discredit the final report.

final report was translated into the country's national language, but the longer, more detailed version was not, and there were discrepancies between the two.¹⁹ Nonetheless, the reports generated significant support from the Eritrean diaspora. "The COI is the only initiative that gives a voice to the victims, even if the country... has refuted the report. By increasing accountability, the COI has the possibility to act as a deterrence."²⁰

A more robust example of truth-telling can be found in the COI on the Democratic People's Republic of Korea (DPRK, commonly referred to as North Korea). It decided, for instance, to allow victims, witnesses, and experts to testify in public hearings open to the media and the general public, thereby advancing the goal of transparency of a dire situation that was traditionally cut off from U.N. or public scrutiny. When requested, private rather than public interviews were conducted with identifying details of witnesses withheld to protect them. In principle, only witnesses with no family inside the DPRK were allowed to testify publicly, in respect of the "do no harm" principle. The final report was written in a consciously straightforward language with reference to lots of first-hand testimonies and garnered widespread international publicity (dissemination of the report in the DPRK was highly restricted). It has become the authoritative international reference point for understanding the uniquely woeful state of human rights in the country and has given those refugees who have escaped the system a credible platform for telling their stories to the world. This truth-telling work continues in various forms. For example, a coalition of NGOs convened by the International Bar Association's War Crimes Committee held a full-day "Inquiry on Crimes against Humanity in North Korean Political Prisons," featuring testimony by key defector witnesses and presided over by three eminent international jurists.²¹



[The COI on North Korea] has become the authoritative international reference point for understanding the uniquely woeful state of human rights in the country...

The criteria for evaluating outcomes relating to political accountability are more diverse and range from follow-up monitoring of violations to sanctions imposed on state and non-state actors. Over time, the results have become more robust in step with commissions receiving more resources and public attention, but are still highly dependent on the specific country situation and on how different actors use the report to exert pressure on national and international authorities.

One of the most direct forms of political accountability available to COIs is the naming of individual perpetrators responsible for human rights violations. A number of COI mandates specifically authorize these kinds of factual findings and legal conclusions.²² In practice, however, most COIs have shied away either from making such designations or disclosing them publicly for at least three reasons: (1) evidence may be inadequate

19 Confidential interview with former member of COI Eritrea staff.

20 Intervention by Eritrean human rights defender at the URG-Brookings Workshop on Commissions of Inquiry, February 23-24, 2016.

21 An event on the "Inquiry on Crimes Against Humanity in North Korean Political Prisons," was held at the Johns Hopkins University School of Advanced International Studies in Washington, DC on December 8, 2016.

22 The COIs on Libya, Côte d'Ivoire, Syria, Gaza, and Burundi were all mandated to identify specific perpetrators.

to reach the “reasonable grounds to believe” standard typically applied by the COIs; (2) COI proceedings usually receive little to no cooperation from alleged perpetrators, raising questions of due process; and (3) even if the first two concerns are addressed, commissioners are reluctant to prejudice subsequent judicial proceedings or negotiations to resolve conflict. An important exception to this pattern is the COI on the DPRK, which took the unprecedented step of sending a letter to Kim Jong Un, appended to the COI report, reminding him that he could be held responsible for crimes against humanity.

In light of these inhibiting factors to name names publicly, a number of COIs have decided to identify alleged perpetrators only in private, with access to such lists protected by OHCHR. OHCHR, in turn, is authorized, for example in the case of the COI on the DPRK, to grant access to the list to “competent authorities that carry out credible investigations for the purposes of ensuring accountability for crimes and other violations committed, establishing the truth about violations committed or implementing United Nations-mandated targeted sanctions against particular individuals or institutions.”²³ This explicit pre-authorization for confidential access to specific identities is an innovative way to increase the likelihood that the COI’s investigation can be used for truth, political, and legal accountability purposes in the future.

An argument could be made, however, that withholding the names of alleged perpetrators from the public greatly diminishes the power of COIs to pursue political accountability. As noted earlier, the dire state of justice in conflict-affected states strongly weighs against any chance of achieving legal accountability in the short and medium term; withholding names in such contexts denies victims who seek their day in the court of public opinion and prevents the possible deterrent role of such disclosure.

An analogous case in point is the experience of the U.N. Truth Commission for El Salvador, the first internationally-authorized truth and reconciliation body created by the parties to a conflict as part of a comprehensive peace accord.²⁴ After much debate, the commissioners decided to publicly name names of those responsible for committing or authorizing serious human rights abuses. They did so in part on grounds that the odds of pursuing justice on the national or international levels were unacceptably low. They reached conclusions about specific individuals only after carefully assembling evidence sufficient to meet a “reasonable grounds to believe” burden of proof (e.g., all material facts required corroboration by at least two independent sources), and giving named individuals an opportunity to defend themselves before the commission.²⁵ Their judgment regarding the minimal chances of legal accountability were immediately confirmed when El Salvador’s president and the national assembly adopted a comprehensive amnesty law within days of the release of the report’s findings.²⁶ Only after many years of dogged

23 United Nations Human Rights Council, “Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea,” A/HRC/25/CRP.1, p. 18 (February 7, 2014), <http://www.securitycouncilreport.org/un-documents/document/ahrc25crp1.php>.

24 Belisario Betancur, Reinaldo F. Planchart, and Thomas Buergenthal, “From Madness to Hope: The 12-year War in El Salvador: Report of the Commission on the Truth for El Salvador,” (Washington, DC: United States Institute of Peace, March 1993), <http://www.usip.org/sites/default/files/file/ElSalvador-Report.pdf>. The report was mandated by the U.N.-brokered peace accords between the government of El Salvador and the Farabundo Marti National Liberation Front (FMLN). The author served as counsel to the Commission.

25 Thomas Buergenthal, “The United Nations Truth Commission for El Salvador,” *Vanderbilt Journal of Transnational Law* 27, no. 3 (October 1994): 497-544, http://heinonline.org/HOL/Page?handle=hein.journals/vantl27&div=21&g_sent=1&collection=journals.

26 A parallel ad hoc commission composed of eminent Salvadorans appointed by the U.N. secretary-general was tasked with reviewing the records of armed forces personnel for compliance with human

efforts by victims and their attorneys are most of those named in the report now facing some type of justice in the form of deportations and possible criminal proceedings in El Salvador. In this case, justice delayed may not be justice denied, as recently evidenced by the ICC's conviction of Ratko Mladic 22 years after the commission of crimes in the former Yugoslavia.

It is important to distinguish, however, between a post-conflict transitional justice body established by the parties to the conflict and a commission of inquiry imposed on a state by the U.N. Human Rights Council while a conflict is still raging. The relevant parties in the former situation usually have already resolved the key questions of legal accountability.²⁷ The latter situation, on the other hand, demands a careful calculation of whether identifying perpetrators publicly would help or harm a resolution of the conflict and the termination of severe human rights abuses.

A number of COIs have made recommendations to national authorities to remove alleged perpetrators from military, security, prison, and judicial institutions as an administrative measure to reduce human rights violations and punish units identified as responsible for past abuses (Syria 2011, Libya 2012), or to disarm persons not belonging to the national army (Côte d'Ivoire 2011). The COI on Eritrea took a comprehensive approach to addressing the root causes of the civil conflict, recommending political reforms to ensure separation of powers, free elections, checks and balances, and the creation of an independent human rights institution; it also called for the suspension of indefinite national service and forced labor. The government, however, has made little observable progress on these recommendations. Similarly, despite a long list of recommendations directed to Israeli national authorities by the COI on the Gaza conflict in 2009, the highly polarized nature of the conflict and of the investigation itself have led to only modest results. According to Justice Richard Goldstone, the COI chair, the Israel Defense Forces have adopted new procedures for protecting civilians in case of urban warfare and limited the use of white phosphorous in civilian areas.²⁸

A mildly more positive picture is apparent in Libya. After the release of the COI reports on Libya calling for impartial and transparent investigations at the national level, a national council for civil liberties and human rights was established with the power to receive complaints and file cases in court. The National Transitional Council also adopted a Transitional Justice Law creating, *inter alia*, a victims' compensation fund.

In the vexing case of the DPRK, the COI conclusion that the regime was responsible for crimes against humanity prodded the government to engage seriously with U.N. human rights mechanisms, including for the first time with the UNHRC's Universal Periodic

rights standards and making binding recommendations for their dismissal. Although they were not publicly named, over 100 senior officers were transferred or forced into retirement. As one expert observed, "While prosecutions would have been preferable, this was not possible given the weak and corrupt judicial system and the dominance of the military, which would have refused to accept a peace agreement that included provisions punishing its members. In this context, the Ad Hoc Commission "represented a creative answer to the need for a cleansing of the military." Martha Doggett and Ingrid Kircher, "Human Rights in Negotiating Peace Agreements: El Salvador," (Geneva: The International Council on Human Rights Policy, 2005), 11-12, http://www.ichrp.org/files/papers/55/128_-_El_Salvador_-_Human_Rights_in_Negotiating_Peace_Agreements_Dogget_Martha_Kircher_Ingrid_2005.pdf.

27 See, e.g., the truth commission in South Africa and the peace accords recently negotiated in Colombia.

28 Richard Goldstone, "Reconsidering the Goldstone Report on Israel and war crimes," *The Washington Post*, April 1, 2011, https://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html?utm_term=.39eca5af98c2.

Review. But when the U.N. General Assembly referred the report's findings to the U.N. Security Council in December 2014, the DPRK renounced any further cooperation with U.N. human rights mechanisms and little national political action has been observed since. Continued pressure on the regime, however, may have led it to approve the visit of the U.N. special rapporteur on rights of persons with disabilities in May 2017, just five months after it ratified the U.N. Convention on Rights of Persons with Disabilities.²⁹ According to Tomas Ojea Quintana, the U.N. special rapporteur on human rights in the DPRK, "the more the international community has insisted on the necessity to seek justice and uphold universal human rights principles, the more the authorities have seemingly opened up a conversation with human rights mechanisms, at least in some areas."³⁰

Given the usually hostile reaction of subject states to COI reports, many of the COIs' recommendations regarding political accountability are directed at the international community. The most common outcome is a decision to continue international scrutiny of the situation of concern by various actors—the Human Rights Council, special rapporteurs and independent experts (e.g., Côte d'Ivoire, Mali), a renewal of the COI mandate (Libya, Syria, Eritrea), the General Assembly (DPRK) or the Security Council (Libya, DPRK, Israel). In the case of the DPRK, OHCHR established a field office in Seoul to continue the work of documentation and fact-finding. In addition, following an Arria briefing organized by France on the findings of the COI's report, a U.N. Security Council procedural motion led eventually to an unprecedented agreement initiated by the United States to put the DPRK's human rights situation on the UNSC's permanent agenda.³¹

On the matter of sanctions, COI recommendations have been careful to distinguish between targeted sanctions against specific individuals or institutional actors and more blanket economic sanctions against a country's population as a whole. The COIs on the DPRK and Eritrea, for example, called for targeted sanctions, such as asset freezes and travel bans, on persons "where there are reasonable grounds to believe that the said persons are responsible for crimes against humanity or other gross violations of human rights."³² The COI's first report on Syria similarly did not support "the imposition of economic sanctions that would have negative impact on the human rights of the population, in particular of vulnerable groups";³³ the COI reiterated this position in its

29 "End of Mission Statement by the United Nations Special Rapporteur on the Rights of Persons with Disabilities, Ms. Catalina Devandas-Aguilar, on her visit to the DPRK," *Office of the United Nations High Commissioner on Human Rights*, May 8, 2017, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21610&LangID=E>.

30 United Nations General Assembly, Resolution 72/394, "Report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea," A/72/394 (September 18, 2017), <http://undocs.org/A/72/394>.

31 Security Council Report, "Arria-Formula Meeting with the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (DPRK)," *What's in Blue*, April 16, 2014, <http://www.whatsinblue.org/2014/04/arria-formula-meeting-with-the-commission-of-inquiry-on-human-rights-in-the-democratic-peoples-repub.php>; Security Council Report, "Meeting on the Human Rights Situation in the Democratic People's Republic of Korea (DPRK)," *What's in Blue*, December 9, 2015, <http://www.whatsinblue.org/2015/12/meeting-on-the-human-rights-situation-in-the-democratic-peoples-republic-of-korea-dprk.php>.

32 United Nations Human Rights Council, "Report of the detailed findings of the Commission of Inquiry on Human Rights in Eritrea," A/HRC/29/CRP.1, 14 (June 5, 2015), http://www.ohchr.org/Documents/HRBodies/HRCouncil/ColEritrea/A_HRC_29_CRP-1.pdf.

33 United Nations Human Rights Council, "Report of the Working Group on the Universal Periodic Review Uganda," A/HRC/19/16, (December 22, 2011), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/19/16.

report of August 2012.³⁴ The COI on the DPRK reached a comparable conclusion in its final report.³⁵ The OHCHR Assessment Mission on human rights in South Sudan in 2015 went further in recommending “expanding the current sanctions regime by imposing a comprehensive arms embargo on South Sudan.”³⁶ Eighteen months later, the United States and Secretary-General Ban Ki-moon in November 2016 called for a U.N. arms embargo and other sanctions against South Sudan as a measure to prevent further ethnic violence bordering on genocide, but failed to garner the requisite votes in the Security Council as of September 2017.³⁷

In response to the report of the COI on the DPRK, the U.N. General Assembly passed a resolution urging the Security Council to refer the DPRK to the ICC for further investigation for crimes against humanity.³⁸ While subsequent UNSC decisions to expand sanctions against Pyongyang were ostensibly taken as punishment for its fourth nuclear test and not on human rights grounds, they occurred in the context of heightened attention to North Korea’s alarming human rights situation and a specific call on the Security Council by the COI to “adopt targeted sanctions against those who appear to be most responsible for crimes against humanity.”³⁹ It is also worth recalling that the COI has shared the names of possible perpetrators on a confidential basis with U.N. authorities.



To paraphrase an old adage, if a U.N. report lands on a desk and no one reads it, what is the point?

To improve the odds of achieving some kind of political accountability of the types described above, commissions of inquiry must follow certain good practices. First and foremost, the political impact of a commission’s findings and conclusions must be amplified wherever possible through high-level platforms of public dissemination and communication among all relevant national and international political authorities and actors, particularly the media and civil society. Reports must be translated into local languages and special steps taken to recognize and protect victims and their representatives. To paraphrase an old adage, if a U.N. report lands on a desk and no one reads it, what is the point?

34 United Nations Human Rights Council, “Report of the independent international commission of inquiry on the Syrian Arab Republic,” A/HRC/21/50, (August 16, 2012), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-50_en.pdf.

35 United Nations Human Rights Council, “Report of the detailed findings of the commission of inquiry on human rights in the Democratic People’s Republic of Korea,” A/HRC/25/CRP.1, (February 7, 2014), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/108/71/PDF/G1410871.pdf?OpenElement>.

36 United Nations Human Rights Council, “Report on the human rights situation in South Sudan,” A/HRC/28/49, (March 27, 2015), <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Pages/ListReports.aspx>.

37 Colum Lynch, “U.S. Push to Halt Genocide in South Sudan Unravels at United Nations,” *Foreign Policy*, November 30, 2016, <http://foreignpolicy.com/2016/11/30/u-s-push-to-halt-genocide-in-south-sudan-unravels-at-united-nations/>.

38 “General Assembly decides to refer U.N. report on human rights in DPR Korea to Security Council,” *U.N. News Centre*, December 18, 2014, <http://www.un.org/apps/news/story.asp?NewsID=49648#WE3XsPMo5Fo>.

39 United Nations Human Rights Council, “Report of the detailed findings of the commission of inquiry on human rights in the Democratic People’s Republic of Korea,” A/HRC/25/CRP.1, 370 (February 7, 2014), <https://daccess-ods.un.org/TMP/5021730.66139221.html>.

In order to take the more meaningful step of identifying perpetrators, commissions must follow transparent criteria for burden of proof, appoint properly trained staff capable of collecting and preserving evidence, offer alleged perpetrators an opportunity to defend themselves, and demonstrate impartiality.

In the category of **legal accountability**, the outcomes of the 17 COIs that were expressly tasked with making recommendations on accountability have been modest at best. A number of COIs recommended that the Security Council refer the situation to the prosecutor of the International Criminal Court (Palestine/Israel 2009, DPRK 2014, Eritrea 2016); two of the COI reports on Syria also recommended the establishment of an ad hoc international tribunal. In the case of Sri Lanka, the OHCHR-led inquiry recommended the establishment of a hybrid special court composed of national and international personnel. In three cases (Darfur-Sudan 2006, Libya 2011, Côte d'Ivoire 2011), the situation had already been referred to the prosecutor of the ICC. More recently, the ICC prosecutor initiated a preliminary examination of human rights crimes committed in Burundi in April 2016, but the decision came before the OHCHR fact-finding mission had completed its work.⁴⁰ Thus, we can say that none of the COI recommendations for international-level legal accountability have been implemented to date. Non-state parties to the Rome Statute of the ICC, such as the DPRK, can only be referred to the court by the Security Council, where countries such as Russia and China continue to block consensus for such referrals.

There are some examples, however, where the work of COIs helped support or strengthen legal accountability measures at the international level, including the expansion of sanctions or for ICC proceedings already underway. In the case of North Korea, the COI's findings and its identification of alleged perpetrators catalyzed action by the U.S. Congress, which, citing the COI report, adopted legislation calling for human rights-related sanctions on the regime.⁴¹ Subsequently, the Obama administration announced in March 2016 the unprecedented imposition of sanctions on specific individuals in North Korea due to their role in human rights violations;⁴² the United States later that year added Kim Jong Un to the list. In the case of Côte d'Ivoire, the ICC prosecutors' request for authorization of a criminal investigation mentions the COI's report several times,⁴³ and the government of President Alassane Ouattara invited the ICC to investigate the post-election crisis. As of September 2017, the case against former President Gbagbo and his alleged co-perpetrator Charles Blé Goudé is in the trial phase in The Hague, but the decision of the ICC Pre-Trial Chamber cited the COI's report several times to buttress its findings of fact. On Libya, however, the COI report was filed after the Security Council's referral of Libya to the ICC in February 2011⁴⁴ and subsequent ICC investigations and

40 Subsequently, in September 2016, the Human Rights Council decided to establish a COI on Burundi to investigate human rights violations since April 2015, including "whether they may constitute international crimes, with a view to contributing to the fight against impunity" and to identify alleged perpetrators with a view to "ensuring full accountability." See United Nations Human Rights Council, Resolution 33/24, "Resolution adopted by the Human Rights Council on 30 September 2016," A/HRC/RES/33/24, 4 (October 5, 2016), <http://www.refworld.org/pdfid/586f79014.pdf>.

41 "North Korea Sanctions and Policy Enhancement Act of 2016," 22 U.S.C. § 9201 et seq, <http://uscode.house.gov/view.xhtml?path=/prelim@title22/chapter99&edition=prelim>.

42 "Executive Order 13722 on Blocking Property of the Government of North Korea and the Workers' Party of Korea, and Prohibiting Certain Transactions with Respect to North Korea," March 18, 2016, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/nk_eo_20160316.pdf.

43 International Criminal Court, "Situation in the Republic of Côte d'Ivoire," ICC-02/11-3, (June 23, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_07959.PDF.

44 United Nations Security Council "Resolution 1970," S/RES/1970 (2011), (February 26, 2011), <https://>

pre-trial hearings on Libya do not refer to the COI's report.⁴⁵ As national courts exercise universal jurisdiction to try crimes against humanity occurring outside their borders, as in the case against Syrians in German courts, COI reports may have further impact.

At the national level, some actions were taken after COI reports were released to advance legal accountability. In Côte d'Ivoire, for example, President Ouattara established a special investigative unit to pursue economic and blood crimes as well as crimes against the state punishable under national law.⁴⁶ Under the National Transitional Council in Libya, 41 loyalists to ousted leader Moammar Gadhafi were put on military trial (later referred to a civil court).

As in the case of political accountability, the COI's methodologies for pursuing legal accountability depend largely on its ability to follow good practices regarding collection and preservation of evidence, transparency and clarity of burden of proof, opportunities for alleged perpetrators to defend themselves, clear exposition of the legal frameworks used to reach its conclusions regarding responsibility, and recruitment of well-qualified legal experts and staff free from outside influence.



COIs can and should upgrade their methodologies to ensure the strongest possible contribution to subsequent legal proceedings at the national and international levels...

CONCLUSION

As the above analysis suggests, the experiences to date of UNHRC-mandated commissions of inquiry regarding accountability demonstrate relatively strong outcomes on the moral accountability to the truth and moderate to weak outcomes on political and legal accountability measures. This is partly a function of time—justice takes many years to be achieved, particularly when abuses are committed in the context of intractable violent conflict. But it also reflects the inherently political nature of international fact-finding missions and the hurdles they face from targeted parties and their allies.

Given the track record to date, it might be more appropriate to think of these mechanisms as closer to transitional justice mechanisms than to traditional judicial processes. Fact-finders are first and foremost meant to be independent assemblers and interpreters of an authoritative historical record of human rights violations—this alone is a critical function both for the victims and for the pursuit of other types of accountability. To maximize the truth-telling impact of their mandates, they must have the proper resources, trained personnel, political support from member states and U.N. agencies, and high visibility in the media and civil society. These features will also strengthen their ability to hold states and other actors politically accountable in the eyes of the public.

They can also play a vital role in laying the groundwork for policy measures and institutional reforms to prevent future violations and combat impunity over the longer term. But COIs' contribution to legal accountability outcomes remains to be seen. Does the threat of criminal punishment, for example, spur some alleged perpetrators to yield at least some

www.icc-cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5D0B0F2F5EFA/0/1970Eng.pdf.

⁴⁵ As of September 2017, the case remains in the pre-trial stage pending transfer of Saif Al-Islam Gadhafi to the ICC in The Hague.

⁴⁶ "Côte d'Ivoire," International Center for Transitional Justice, <https://www.ictj.org/our-work/regions-and-countries/c%3%B4te-divoire>.

ground on the moral and political elements of accountability? Regardless, COIs can and should upgrade their methodologies to ensure the strongest possible contribution to subsequent legal proceedings at the national and international levels, while recognizing that they themselves are not judicial bodies. Aligning expectations and resources with best case but realistic outcomes for moral, political, and legal accountability will ensure that the COI mechanism improves its contribution to the international human rights system.

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