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Challenging Some Baseline Assumptions about the Evolution of International Commissions of Inquiry

Michael A. Becker
Trinity College Dublin

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ABSTRACT

Conventional accounts of the historical development of international commissions of inquiry reflect a progress narrative consisting of three propositions: (1) that recourse to inquiry bodies has increased dramatically in the post–Cold War era, (2) that inquiry bodies have evolved from mechanisms for "pure" fact-finding into quasi-judicial bodies that engage with international law, and (3) that the function of inquiry bodies has shifted from diplomatic dispute settlement to norm enforcement and accountability. Part I explains how this narrative simplifies and distorts the rich history of inquiry bodies in international affairs. Part II shows how the idea of a post–Cold War "turn to inquiry" downplays the extent and scope of earlier practice. Part III examines how inquiry bodies have long engaged with questions of international law, even if the form of that engagement has varied. Part IV then considers historical inquiry bodies that, like their modern-day counterparts, engaged in norm enforcement, pursued accountability, and addressed human rights violations and atrocity crimes. Ultimately, a more nuanced understanding of past practice has value for ongoing debates about the usefulness of inquiry bodies and the extent to which their contemporary role reflects a measure of progress.

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* Adjunct Assistant Professor of Law, Trinity College Dublin (beckerma@tcd.ie).
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TABLE OF CONTENTS

I. INTRODUCTION

International commissions of inquiry and fact-finding missions are a regular feature of contemporary international affairs. Familiar examples include inquiry bodies for the situations in Myanmar, North Korea, South Sudan, Syria, Venezuela, and Yemen, among many

others.[1] More recently, the World Health Organization (WHO) established inquiry bodies relating to the COVID-19 pandemic,[2] and events in Ethiopia, Gaza, and Ukraine have led to new inquiry bodies.[3] This body of practice has attracted considerable scholarly interest, which in turn has shaped a common narrative surrounding the historical development of inquiry. This Article challenges the key strands of that narrative by providing a new account of the past practice against which contemporary practice is routinely compared.

The standard account of international commissions of inquiry reflects a "progress narrative."[4] In this account, inquiry bodies have been transformed from limited fact-finding mechanisms on the periphery of diplomacy into powerful actors that apply international

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1. *See, e.g.*, Human Rights Council Res. 34/22, Situation of Human Rights in Myanmar, U.N. Doc. A/HRC//RES/34/22 (Apr. 3, 2017); Human Rights Council Res. 22/13, Situation of Human Rights in the Democratic People's Republic of Korea, U.N. Doc. A/HRC/RES/22/13 (Apr. 9, 2013); Human Rights Council Res. 31/20, Situation of Human Rights in South Sudan, U.N. Doc. A/HRC/RES/31/20 (Apr. 27, 2016); Human Rights Council Res. S-17/1, Situation of Human Rights in the Syrian Arab Republic, U.N. Doc. A/HRC/RES/S-17/1 (Aug. 22, 2011); Human Rights Council Res. 42/45, Situation of Human Rights in the Bolivarian Republic of Venezuela, U.N. Doc. A/HRC/RES/42/45 (Sept. 27, 2019); Human Rights Council Res. 36/31, Human Rights, Technical Assistance and Capacity-Building in Yemen, U.N. Doc. A/HRC/RES/36/31 (Sept. 29, 2017).

2. The World Health Assembly resolved to establish an impartial and independent evaluation into the WHO-coordinated response to COVID-19. World Health Assembly, Res. WHA73.1 (May 19, 2020), https://apps.who.int/gb/ebwha/pdf_files/WHA73/A73_R1-en.pdf [https://perma.cc/4ECJ-4NEN] (archived Feb. 12, 2022). The Independent Panel for Pandemic Preparedness & Response delivered its report in May 2021. *See Main Report & Accompanying Work*, INDEP. PANEL, https://theindependentpanel.org/mainreport/#download-main-report [https://perma.cc/JPU2-YMBS] (archived Feb. 12, 2022). The WHO also convened a team of Chinese and international experts to study the origins of the virus; that inquiry body spent four weeks in Wuhan in early 2021. World Health Organization, *WHO-convened Global Study of Origins of SARS-CoV-2: China Part Joint WHO-China Study: 14 January-10 February 2021* (Mar. 30, 2021), https://www.who.int/ publications/i/item/who-convened-global-study-of-origins-of-sars-cov-2-china-part [https://perma.cc/3RXZ-WM4L] (archived Feb. 12, 2022). In August 2021, the WHO established a new body, the Scientific Advisory Group for the Origins of Novel Pathogens, to continue the study of COVID-19's origins. *See* WHO, *Scientific Advisory Group for the Origins of Novel Pathogens*, https://www.who.int/ groups/scientific-advisory-group-on-the-origins-of-novel-pathogens-(sago) [https://perma.cc/E9WT-GJEZ] (archived Feb. 12, 2022).

3. *Probe Announced into Alleged Tigray Rights Violations: UN Rights Office*, UN NEWS (Mar. 25, 2021), https://news.un.org/en/story/2021/03/1088272 [https://perma.cc/5T58-YTEL] (archived Feb. 12, 2022); Human Rights Council Res. S-30/1, Ensuring Respect for International Human Rights Law and International Humanitarian Law in the Occupied Palestinian Territory, Including East Jerusalem, and in Israel, U.N. Doc. A/HRC/RES/S-30/1 (May 28, 2021); Human Rights Council Res. 49/1, Situation of Human Rights in Ukraine Stemming From the Russian Aggression, U.N. Doc. A/HRC/RES/49/1 (Mar. 4, 2022).

4. Adopting the language of "progress," the idea is that the practice of inquiry has continually become "better in its methods, efficiency, techniques, or in attaining its goals." THOMAS SKOUTERIS, THE NOTION OF PROGRESS IN INTERNATIONAL LAW DISCOURSE 6–7 (2009).

law to the world's worst crises and conflicts.[5] International lawyers, diplomats, UN officials, and human rights activists have reimagined the moribund concept of inquiry into an indispensable part of a post–Cold War liberal-internationalist project organized around accountability, anti-impunity, human rights, and international rule of law.[6] This reimagining includes a shift from "pure" fact-finding by inquiry bodies to their anointment as "norm entrepreneurs"[7] and quasi-judicial or quasi-prosecutorial bodies with an overt focus on the authoritative interpretation and application of international law.[8] The progress narrative positions these developments as normatively desirable and legitimizes the further use of inquiry—even if much commentary is dedicated to critiquing the performance of inquiry bodies in individual cases.[9]

The conventional narrative surrounding the contemporary role of inquiry bodies and their evolution can be distilled into three propositions: (1) that there has been a dramatic increase in the establishment of inquiry bodies in the post–Cold War period, (2) that inquiry bodies originated as "pure" fact-finding bodies and have

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5. *See* Dapo Akande & Hannah Tonkin, *International Commissions of Inquiry: A New Form of Adjudication?*, EJIL: TALK! (Apr. 6, 2012), https://www.ejiltalk.org/international-commissions-of-inquiry-a-new-form-of-adjudication/ [https://perma.cc/W75K-SLSG] (archived Feb. 12, 2022) (suggesting that inquiry bodies provide an alternative means to obtain authoritative pronouncements on questions of fact and law when no international court or tribunal has jurisdiction).

6. On the international rule-of-law movement and its ambiguities, see Axel Marschik, *Enhancing Rule of Law*, *in* THE UNITED NATIONS SECURITY COUNCIL IN THE AGE OF HUMAN RIGHTS 247 (Jared Genser & Bruno Stagno Ugarte eds., 2014); Bardo Fassbender, *What's in a Name? The International Rule of Law and the United Nations Charter*, 17 CHINESE J. INT'L L. 761 (2018); Kostiantyn Gorobets, *The International Rule of Law and the Idea of Normative Authority*, 12 HAGUE J. RULE L. 227 (2020); *see also* Martti Koskenniemi, *Law, Teleology, and International Relations: An Essay in Counterdisciplinarity*, 26 INT'L RELS. 3, 8 (2012) (describing a post–Cold War turn to "the teleologies of the interwar period" and "[n]ew normative and institutional approaches . . . expressed in the language of the 'rule of law'").

7. CATHERINE E.M. HARWOOD, THE ROLES AND FUNCTIONS OF ATROCITY-RELATED UNITED NATIONS COMMISSIONS OF INQUIRY IN THE INTERNATIONAL LEGAL ORDER: NAVIGATING BETWEEN PRINCIPLE AND PRAGMATISM 321 (2020). *See generally* G. Le Moli, *From "Is" to "Ought": The Development of Normative Powers of UN Investigative Mechanisms*, 19 CHINESE J. INT'L L. 625 (2021).

8. Academic studies of inquiry and its evolution reflect techniques associated with the construction of progress narratives, including "ascending periodization" and "increased value-orientation" in international law. *See* Tilmann Altwicker & Oliver Diggelmann, *How is Progress Constructed in International Legal Scholarship*, 25 EUR. J. INT'L L. 425, 432–34 (2014).

9. *See* SKOUTERIS, *supra* note 4, at 5–6 (on "talking progress" as a "strategy of legitimation and delegitimation"). Commentary tends towards "technical critique" that reinforces the assumed value of inquiry as a form of response. Christine Schwöbel-Patel, *Commissions of Inquiry: Courting International Criminal Courts and Tribunals*, *in* COMMISSIONS OF INQUIRY: PROBLEMS AND PROSPECTS 145, 151 (Christian Henderson ed., 2017); *see also* David Kennedy, *Challenging Expert Rule: The Politics of Global Governance*, 27 SYDNEY L. REV. 5, 25 (2005) (describing the risk that progress narratives "redirect policy makers from solving problems to completing the work of a mythological history").

evolved in the post–Cold War period into quasi-judicial bodies that reach authoritative conclusions on questions of international law, and (3) that inquiry has evolved from a means to pursue the diplomatic settlement of bilateral disputes into a normative tool focused on accountability for human rights violations and international crimes.

These propositions are not entirely wrong. In some respects, they are broadly correct. But these shorthand assessments offer a simplified conception of inquiry that distorts what is new (or not) about its contemporary practice. At one level, there is standalone value in seeking to provide a more nuanced and detailed description of past practice.[10] On another level, the standard narrative requires adjustment so that debates about the merits and demerits of inquiry practice—including whether that practice reflects some notion of progress—can proceed from a place of deeper understanding. The standard narrative risks sending the message that contemporary inquiry bodies are so removed from their predecessors—in terms of objectives, design, methodology, or engagement with law—that earlier practice is irrelevant or obsolete, a historical curiosity.[11] The revised account presented here pushes back against that notion, in part by revealing a greater degree of commonality between past and present practice than is typically assumed.

A word about terminology is also needed. This Article adopts the term "inquiry body" to encompass a variety of ad hoc fact-finding mechanisms that go by different names and designations: international commissions of inquiry, fact-finding missions, committees of investigation, inquiry panels, high-level missions, and so on.[12] Taken together, such entities reflect a diverse array of objectives, functions, and working methods; the labels themselves usually provide limited insights into those differences.[13] Some inquiry bodies are established in the midst of conflict; others are retrospective. Some are genuinely *sui generis*; others reflect a temporary delegation of fact-finding responsibilities by a standing body, sometimes to a sub-unit of its own members. For purposes of this study, an "inquiry body"

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10. *See* Anne Orford, *In Praise of Description*, 25 LEIDEN J. INT'L L. 609, 621–25 (2012).

11. Evaluating the ways in which these variables, as well as external or contextual factors, contributed to the relative success or failure of historical inquiry bodies—and how such lessons might be applied to contemporary practice—is an empirical and normative project beyond the scope of the present study. On the practical and methodological challenges of assessing impact and effectiveness in this context, see Michael A. Becker & Sarah M.H. Nouwen, *International Commissions of Inquiry: What Difference Do They Make? Taking an Empirical Approach*, 30 EUR. J. INT'L L. 819, 828–30 (2019).

12. *See* Piergiuseppe Parisi, *Fact-Finding in Situations of Atrocity: In Search of Legitimacy*, 12 J. INT'L. HUMANITARIAN LEGAL STUDS. 141, 143 (2021) (noting the lack of uniformity in the substantive and procedural features of inquiry bodies and their nomenclature).

13. *See* Becker & Nouwen, *supra* note 11, at 823

is an entity established by two or more states or by an international organization on an ad hoc and temporary basis to make non-binding findings of fact in response to a specific incident, dispute, or situation of international concern.[14] It may or may not reach legal conclusions or make recommendations. Inquiry bodies are also collegial in nature, made up of two or more people whether acting in a personal or representative capacity.[15]

This effort to delimit the scope of an "inquiry body" does not entirely resolve the definitional uncertainties that complicate this field of study (a problem with which the existing literature does not seriously engage). For example, some activities that ostensibly involve ad hoc fact-finding may in fact be exercises in high-level diplomacy, or long-term commitments to observation and monitoring.[16] These types of classification questions highlight the diversity of international fact-finding activity but complicate efforts to draw neat comparisons between past and present-day practice, as considered further in Part II.

The Article proceeds as follows. Part II examines the claim that there has been a dramatic increase in recourse to inquiry bodies in the post–Cold War period. Part III challenges the proposition that inquiry bodies have only recently began to engage with international law. Part IV then questions whether inquiry has been transformed from a method of diplomatic dispute settlement into an accountability mechanism focused on gross human rights violations and mass atrocities. Part V concludes with some thoughts on the relevance of this adjusted narrative for future practice.

II. PROPOSITION NO. 1: THE DRAMATIC INCREASE IN RECOURSE TO INQUIRY BODIES SINCE 1991

The academic literature is full of references to a "dramatic increase," "discernible rise," and "proliferation" of inquiry bodies in the post–Cold War period[17]—a veritable "revival of the inquiry

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14. This excludes "private" fact-finding undertaken by non-governmental organizations, as well as domestic inquiry bodies at the state level that may be considered "international" in various respects. On the latter, *see infra* note 120 and accompanying text.

15. This excludes a broad range of fact-finding activity by sole actors—for example, the work of special rapporteurs or special envoys—that may otherwise overlap substantially with the work of inquiry bodies.

16. *See infra* text accompanying notes 97–102.

17. *See* Philip Alston & Sarah Knuckey, *The Transformation of Human Rights Fact-Finding: Challenges and Opportunities*, *in* THE TRANSFORMATION OF HUMAN-RIGHTS FACT-FINDING 3, 6 (Philip Alston & Sarah Knuckey eds., 2016); CHRISTINE CHINKIN & MARY KALDOR, INTERNATIONAL LAW AND NEW WARS 122 (2017); Russell Buchan, *Quo Vadis? Commissions of Inquiry and their Implications for the Coherence of International Law*, *in* COMMISSIONS OF INQUIRY: PROBLEMS AND PROSPECTS, *supra* note 9, at 259; Christian Henderson, *Commissions of Inquiry: Flexible Temporariness or Permanent Predictability*, 45 NETH. Y.B. INT'L L. 287, 288 (2015); Zachary D. Kaufman,

function."[18] This creates the impression that inquiry bodies were previously uncommon or that inquiry was largely abandoned following an initial burst of early-twentieth century interest. By contrast, the story goes, inquiry bodies became far more prevalent from the early 1990s on. Leading international law textbooks and treatises reinforce this before-and-after binary by focusing on the relatively few inquiry bodies established under the 1899 and 1907 Hague Peace Conventions, noting only briefly, if at all, the use of inquiry bodies by the United Nations and other international organizations.[19] The specialized literature also tends to undercount the number of inquiry bodies that the League of Nations, the United Nations, and other international organizations established prior to 1992.[20] This Part provides a fuller account of the extent to which states and international organizations made use of inquiry bodies over the course of the twentieth century. Ultimately, the data supports the proposition that recourse to inquiry bodies in the post–Cold War period has increased, but this historical survey shows that the conventional narrative provides an incomplete picture of relevant practice and risks exaggerating the degree of the "turn to inquiry." The exercise also highlights definitional challenges. As noted in the Introduction, whether to classify something as an inquiry body is not always clear and these decisions affect any historical comparison.

A. *A Short History of Inquiry*

1. The 1899 and 1907 Hague Conventions

States formalized the concept of the international commission of inquiry in the 1899 Hague Convention for the Pacific Settlement of International Disputes.[21] The 1899 Hague Convention provided that

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The Prospects, Problems and Proliferation of Recent UN Investigations of International Law Violations, 16 J. INT'L CRIM. JUST. 93, 112 (2018).

18. Alexander Orakhelashvili, *Commissions of Inquiry and Traditional Mechanisms of Dispute Settlement*, *in* COMMISSIONS OF INQUIRY: PROBLEMS AND PROSPECTS, *supra* note 9, at 143.

19. *See, e.g.*, JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 707 (9th ed. 2019); J. G MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 41–57, 222, 225-26 (5th ed. 2011); MALCOLM SHAW, INTERNATIONAL LAW 771-73, 934-36 (8th ed. 2017).

20. *See, e.g.*, Federica D'Alessandra, *The Accountability Turn in Third Wave Human Rights Fact-Finding*, 33 UTRECHT J. INT'L L. & EUR. L. 59, 63 (2017); Shiri Krebs, *The Legalization of Truth in International Fact-Finding*, 18 CHI. J. INT'L L. 83, 146–47 (2017); Le Moli, *supra* note 7, at 663 (each identifying only five examples of UN fact-finding missions from 1963 to 1992).

21. Convention [No. I] Regarding the Pacific Settlement of International Disputes, arts. 9–14, July 29, 1899, 32 Stat. 1779, 1 Bevans 230 [hereinafter 1899 Hague Convention]. There were earlier examples of inquiry bodies in medieval and early modern Europe, and colonial commissions of inquiry played a prominent role in nineteenth-century empire building. *See* LAUREN BENTON & LISA FORD, RAGE FOR ORDER: THE BRITISH EMPIRE AND THE ORIGINS OF INTERNATIONAL LAW, 1800–1850 56–

states could voluntarily establish ad hoc commissions of inquiry to make non-binding findings of fact regarding "differences of an international nature involving neither honor nor vital interests."[22] With the 1898 *Maine* incident fresh in the minds of delegates to the 1899 Hague Peace Conference,[23] the proponents of inquiry (chief among them, the Russian diplomat and jurist Friedrich Martens) emphasized two points: (1) that an impartial investigation of the facts surrounding a low-level dispute could contribute to its peaceful settlement through negotiation or arbitration, and (2) that recourse to inquiry would provide a "cooling off" period to prevent a rush to war on the basis of misinformation or public hysteria.[24] The international commission of inquiry was a *fin de siècle* response to the problem of jingoist reporting and "fake news"[25] at a time when war remained a lawful response to nearly any perceived violation of the law of nations.[26] States supported the idea but rejected the proposal for compulsory, rather than consent-based, inquiry.[27]

Following the successful use of an international commission of inquiry in 1905 following the Dogger Bank incident,[28] delegates to the 1907 Hague Conference signalled further support for the use of inquiry

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84 (2016). In the British Empire, commissions of inquiry were "mostly law-trained men" with mandates to investigate localized legal disputes arising out of colonial administration: "[C]ommissions of inquiry served to legitimate imperial authority and intervention while quelling metropolitan and peripheral critiques of colonial despotism." *Id.* at 83–84.

22. 1899 Hague Convention, *supra* note 21, at art. 9. Delegates accepted this limitation to allay concerns that inquiry bodies might be used to embarrass or humiliate states. NISSIM BAR-YAACOV, THE HANDLING OF INTERNATIONAL DISPUTES BY MEANS OF INQUIRY 25–31 (1974).

23. In February 1898 an explosion destroyed the US battleship *Maine* while in port in Havana, killing 259 crew members. The United States rejected Spain's proposal for an international commission. Instead, each state established its own domestic commission. The US inquiry blamed Spain for the explosion; the Spanish inquiry pointed to an internal source on the ship. Meanwhile, American newspapers fueled a wave of ill-will towards Spain, and the United States declared war on April 25, 1898. The *Maine* incident highlighted the risk that states might use domestic inquiry bodies to pursue ulterior motives; it later emerged that some US officials had been determined to go to war with Spain even prior to the incident and opportunistically used the findings by the US inquiry to push for such action. BAR-YAACOV, *supra* note 22, at 33–35; Louis A Pérez, *The Meaning of the Maine: Causation and the Historiography of the Spanish-American War* 58 PACIFIC HIST. REV. 293, 311–13 (1989).

24. *Id.* at 23, 27; *see* JAMES BROWN SCOTT, THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1899 641 (1920).

25. Walter Lippman wrote of the early twentieth-century press in the United States that "since everything is on the plane of assertion and propaganda, [readers] believe whatever fits most comfortably with their prepossessions . . . . Under the influence of headlines and panicky print, the contagion of unreason can easily spread through a settled community." WALTER LIPPMAN, LIBERTY AND THE NEWS 55–56 (1920). The description is no less apt a century later.

26. *See* OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD 31–55 (2017).

27. BAR-YAACOV, *supra* note 22, at 21–24.

28. *See infra* text accompanying notes 141–49.

by agreeing to a more elaborate set of rules to govern the procedure.[29] However, states went on to establish relatively few commissions of inquiry under the Hague Conventions: the *Tavignano, Camouna and Galois* case (France/Italy) (1912);[30] the *Tiger* case (Germany/Spain) (1918);[31] the *Tubantia* case (Netherlands/Germany) (1922);[32] and, decades later, the *Red Crusader* case (Denmark/UK) (1962).[33] Two lesser-known wartime disputes also led to international commissions of inquiry: the *UB-6 and UB-3* case (Netherlands/Germany) (1917) and the *Igotz Mendi* case (Germany/Denmark) (1918).[34]

2. The "Bryan Treaties" and Similar Treaty-Based Initiatives

Meanwhile, states began to establish standing fact-finding commissions by treaty.[35] The United States entered into more than thirty such bilateral agreements with states in Europe and the Americas (the so-called Bryan Treaties).[36] These agreements typically created five-member commissions to which the parties agreed to refer future disputes; they incorporated the 1907 Hague Convention procedures but did not exclude disputes relating to "vital interests."[37] As Europe collapsed into war in October 1914,[38] President Woodrow Wilson—with either extraordinary optimism or profound naïveté—proclaimed that the Bryan Treaties would ensure that:

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29. Hague Convention for the Pacific Settlement of International Disputes, arts. 9–36, Oct. 18, 1907, 36 Stat. 2199, T.S. No. 536.

30. *See* THE HAGUE COURT REPORTS 413 (James Brown Scott ed., 1916).

31. *See infra* text accompanying notes 151–55.

32. *See Report Concerning the Loss of the Dutch Steamer "Tubantia" by the International Commission of Inquiry at the Hague*, 16 AM. J. INT'L L. 485 (1922).

33. *See* BAR-YAACOV, *supra* note 22, at 141–97; Henry G. Darwin, *Factfinding and Commissions of Inquiry*, *in* INTERNATIONAL DISPUTES: THE LEGAL ASPECTS 159, 163–71 (1972).

34. *See* GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW, VOL. VII 462, 581–82 (1943); WILLIAM I. SHORE, FACT-FINDING IN THE MAINTENANCE OF INTERNATIONAL PEACE 17 (1970); *see also infra* text accompanying notes 156–60.

35. *See* U.N. Secretary-General, *Report of the Secretary-General on Methods of Fact-Finding*, ¶¶ 68–80, U.N. Doc. A/5694 (May 1, 1964) [hereinafter 1964 Secretary-General Report].

36. *Id.* ¶ 62. On earlier efforts to incorporate inquiry into dispute settlement treaties, see John E. Noyes, *William Howard Taft and the Taft Arbitration Treaties*, 56 VILL. L. REV. 535, 556–57 (2011).

37. *See, e.g.*, Treaty for the Advancement of Peace, U.S.-Den., Apr. 17, 1914, 38 Stat. 1883. Several of these treaties were consolidated in the Convention for the Establishment of International Commissions of Inquiry, Feb. 7, 1923, *reprinted in* 17 AM. J. INT'L L. (Supp. 1923); *see also* Noyes, *supra* note 36, at 547–49.

38. After Serbia refused to allow Austro-Hungarian delegates to join its investigation into the assassination of Archduke Ferdinand during the "July crisis" of 1914, Austria-Hungary rejected Serbia's response to its "ten-point ultimatum" and headed for war. HATHAWAY & SHAPIRO, *supra* note 26, at 101. One can only speculate whether mandatory recourse to an international commission of inquiry might have led to a different outcome.

> [W]henever any trouble arises the light shall shine on it for a year before anything is done; and my prediction is that after the light has shone on it for a year, it will not be necessary to do anything; that after we know what happened, then we will know who was right and who was wrong.[39]

Similar treaty-based inquiry mechanisms included a 1915 pact among Argentina, Brazil, and Chile,[40] bilateral treaties between the United Kingdom and Chile and Brazil, respectively,[41] and the Gondra Treaty among the United States and other Western hemisphere countries.[42] Like the Hague Conventions, these agreements prohibited recourse to armed force until inquiry had been exhausted.[43]

Arrangements that combined inquiry with conciliation also emerged during the interwar period, including the 1925 Locarno Conventions,[44] the 1928 General Act for the Pacific Settlement of International Disputes,[45] the 1929 General Convention of Inter-American Conciliation,[46] and more than two hundred bilateral agreements.[47] These instruments collapsed the conceptual distinction

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39. E.H. CARR, THE TWENTY YEARS' CRISIS, 1919–1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS 32 (2d. ed. 1946). Wilson's faith in informal mechanisms and the voluntary observance of international legal norms was broadly consonant with "classical legal thought" in U.S. foreign-policy thinking at the time. *See* Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64, 65–66 (2006). His notion of inquiry also echoed a philosophical tradition according to which it was "unthinkable" that a problem concerned with facts, if properly considered, could lead to "more than one point of view [that] could honestly be defended." CHAÏM PERELMAN & LUCIE OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION 46 (John Wilkinson & Purcell Weaver trans.) (1969).

40. The agreement never entered into force. *See* MARTIN MULLINS, IN THE SHADOW OF THE GENERALS: FOREIGN POLICY MAKING IN ARGENTINA, BRAZIL AND CHILE 50 (2006).

41. *See* BAR-YAACOV, *supra* note 22, at 117.

42. Treaty to Avoid or Prevent Conflicts Between the American States, May 3, 1923, 33 L.N.T.S. 25.

43. Inquiry provisions did not appear only in dispute settlement treaties. For example, the Convention for the Amelioration of the Condition of the Wounded and the Sick in Armies in the Field, July 27, 1929, art. 30, 118 L.N.T.S. 303, included inquiry as a method to resolve disputes arising from the treaty. *See* HARWOOD, *supra* note 7, at 31–32 (discussing an abandoned effort to establish an inquiry body under that treaty in connection with Italy's invasion of Ethiopia).

44. The Locarno Conventions were a series of seven treaties regarding conciliation, arbitration, and compulsory adjudication. *See* Treaty of Mutual Guarantee, Done at Locarno, Oct. 16, 1925, 54 L.N.T.S. 289; Arbitration Convention, Done at Locarno, Ger.-Belg., Oct. 16, 1925, 54 L.N.T.S. 303; Arbitration Convention, Done at Locarno, Ger.-Fra., Oct. 16, 1925, 54 L.N.T.S. 315; Arbitration Treaty, Done at Locarno, Ger.-Pol., Oct. 16, 1925, 54 L.N.T.S. 327; Arbitration Treaty, Done at Locarno, Ger.-Czechoslovakia, Oct. 16, 1925, 54 L.N.T.S. 341; Treaty of Mutual Guarantee, Done at Locarno, Fra.-Pol., Oct. 16, 1925, 54 L.N.T.S. 353; Treaty of Mutual Guarantee, Done at Locarno, Fra.-Czechoslovakia., Oct. 16, 1925, 54 L.N.T.S. 359.

45. General Act for the Pacific Settlement of International Disputes, Sept. 26, 1928, 93 L.N.T.S 345.

46. General Convention of Inter-American Conciliation, Jan. 5, 1919, *reprinted in* 23 AM. J. INT'L L. 76 (1929).

47. SHORE, *supra* note 34, at 32–36. *See* SVEN M.G. KOOPMANS, DIPLOMATIC DISPUTE SETTLEMENT: THE USE OF INTER-STATE CONCILIATION 82–89 (2008); JEAN-

between inquiry and conciliation, which held that inquiry was focused exclusively on investigating facts and conciliation aimed at achieving settlement. As Charles Cheney Hyde observed at the time, the distinctive feature of a commission of inquiry was that it did "not embrace recommendations or give expression to an affirmative endeavour to effect accord between the states at variance."[48] But Hyde also noted that conciliation treaties routinely contemplated that efforts at settlement shall "be the consequence of investigation," thus differentiating conciliation from "the easy ways of mediators."[49] In practice, inquiry and conciliation were undertaken concurrently, or a commission might investigate the underlying facts if initial settlement talks failed.[50] In some cases, the inquiry might be curtailed if it threatened to frustrate settlement.[51] Between 1930 and 1960, states established at least twelve conciliation commissions.[52] Some dealt entirely with legal questions but many engaged in fact-finding and merit inclusion when comparing historical and modern-day inquiry practice. The porous relationship between inquiry and conciliation meant that conciliation commissions were functionally equivalent to commissions of inquiry in many cases.[53]

PIERRE COT, INTERNATIONAL CONCILIATION 76–88 (Rollo H. Myers trans., Europa Publ'ns. 1972) (1968).

48. Charles Cheney Hyde, *The Place of Commissions of Inquiry and Conciliation Treaties in the Peaceful Settlement of International Disputes*, 10 BRIT. Y.B. INT'L L. 96, 97 (1929).

49. *Id.* at 101. The Belgian jurist Henri Rolin described conciliation as the synthesis of mediation and inquiry. Henri Rolin, *L'heure de la conciliation comme mode de règlement pacifique des litiges*, EUR. Y.B. 3 (1957). A study by the *Institute de Droit International* in the 1950s revealed concerns that conciliation commissions engaged in inquiry might frustrate settlement prospects; similar arguments concerned whether conciliation commissions should even disclose their views on the parties' legal positions. *See* BAR-YAACOV, *supra* note 22, at 225–41; KOOPMANS, *supra* note 47, at 134–38.

50. On contrasting European and American views at the time, *see* Hyde, *supra* note 48, at 102–05, 108; *see also* BAR-YAACOV, *supra* note 22, at 323; Nguyen-Quoc-Dinh, *Les Commissions de Conciliation Sont-Elles Aussi Des Commissions d'Enquête?* 38 R.G.D.I.P. 565 (1967).

51. A 1958 Franco-Moroccan commission concerning France's diversion of an aircraft carrying Algerian rebels rejected Morocco's demand that it take testimony from all passengers on the plane because this was "likely to embitter Franco-Moroccan relations" and preclude settlement. COT, *supra* note 47, at 193–95. It was sometimes preferable "to allow the parties some flexibility in their view of the facts." Edward Plunkett Jr., *U.N. Fact-Finding as a Means of Settling Disputes*, 9 VA. J. INT'L L. 154, 167 (1969).

52. *See* BAR-YAACOV, *supra* note 22, at 211–25; COT, *supra* note 47, at 91–96; Hans Wehberg, *Die Vergleichskommissionen im modernen Völkerrecht*, 19 ZaöRV 551, 567–85 (1958).

53. For examples of conciliation commissions with a fact-finding function and accompanying discussion, see the 1934 Belgium-Luxembourg Conciliation Commission, Wehberg, *supra* note 52, at 568–70; the 1947 French-Siamese Conciliation Commission, 28 R.I.A.A. 433–50 (1947); the 1952 Belgium-Denmark Conciliation Commission, Henri Rolin, *Une Conciliation Belgo-Danoise*, 57 R.G.D.I.P. 353, 353–71 (1953); the 1955 Franco-Swiss Conciliation Commission, BAR-YAACOV, *supra* note 22, at 220–25, the 1956 Greco-Italian Conciliation Commission, THE PERMANENT COURT OF ARBITRATION:

The interwar effort to institutionalize inquiry and conciliation through a web of bilateral and multilateral agreements had its critics. Hersch Lauterpacht viewed inquiry and conciliation—non-compulsory procedures that did not directly generate legal binding outcomes—as obstacles to the broad acceptance of international adjudication:

> It is easy, by signing a multitude of conciliation obligations, to create the impression that an imposing edifice of pacific settlement has been erected. The complacency with which some international lawyers rejoice at the existence of the large number of conciliation treaties is disquieting. . . . There is no occasion for self-congratulation because States have agreed to meet before a body of conciliators authorized to propose recommendations which Governments are not bound to accept. The practical result of conciliation and of other 'alternative means' is not to substitute one mode of peaceful settlement for another of equal force and value. The effect is to substitute a series of *attempts at* settlement for settlement proper.[54]

Lauterpacht's critique reflected the preoccupations of the peace-through-law movement at that time. A renewed focus on international law and organization that could withstand or resist "unstable alliances or Great Power machinations" had supplanted the faith in traditional diplomacy shattered by the First World War.[55] However, the treaty-based commissions that drew Lauterpacht's ire were only one branch in the evolution of inquiry. At the League of Nations, several commissions of inquiry did lead to "settlement proper."

3. The League of Nations

The Covenant of the League of Nations placed inquiry at the core of the new organization and detached inquiry from the consent requirement of the Hague Convention model. Article 12 provided for the submission of disputes "either to arbitration or judicial settlement *or to inquiry* by the Council."[56] Article 15 authorized "full investigation" by the Council when disputants failed to agree to

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SUMMARIES OF AWARDS, SETTLEMENT AGREEMENTS AND REPORTS 291–93 (P. Hamilton, H.C. Requena, L. van Scheltinga, & B. Shifman eds., 1999); and the 1958 France-Moroccan Commission of Inquiry and Conciliation, COT, *supra* note 47, 193–95. These bodies were distinct from the "conciliation commissions" established with Italy after World War II, which made legally binding awards. *See* Ignaz Seidl-Hohenveldern, *General Principles of Law as Applied by the Conciliation Commissions Established under the Peace Treaty with Italy of 1947*, 53 AM. J. INT'L L. 853, 854 (1959).

54. HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 274–75 (Oxford Univ. Press 2011) (1933).

55. Cecelia Lynch, *Peace Movements, Civil Society, and the Development of International Law*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 198, 215–16 (Bardo Fassbender & Anne Peters eds., 2012); *see also* Steinberg & Zasloff, *supra* note 39, at 68–70.

56. League of Nations Covenant art. 12 (emphasis added); *The Covenant of the League of Nations*, LEAGUE NATIONS – OFFICIAL J., Feb. 1920, at 6.

adjudication.[57] The Council established commissions of inquiries for at least eight situations, and their findings and recommendations typically provided the basis for further action or terms of settlement.[58] Some inquiries involved territorial disputes, minority rights, and the nascent principle of self-determination; others concerned aggression and the use of force. League of Nations inquiry bodies also dealt with emerging questions of transnational law, including narcotics and human trafficking.[59] Individuals served on League of Nations inquiry bodies in a personal capacity, not as government representatives, and were often selected from states deemed not to have a direct interest in the matter.[60] This differed from the arbitral model of the Hague Convention under which party-appointed members sat alongside one or more neutrals. In practice, League of Nations commissions not only made findings of fact but also recommended measures to see the conflict resolved.[61] In most cases, parties accepted decisions of the Council taken on the basis of those reports.[62] However, the inquiries for the crises in Manchuria and the Grand Chaco in the early 1930s, which failed to help the Council to restore the peace, showcased inquiry's limitations, as well.[63]

4. Inquiry by International Organizations (1945–1991)

The advent of the United Nations marked the next chapter in the evolution of inquiry bodies. Article 33 of the UN Charter refers to "enquiry" among the means of peaceful dispute settlement that states shall pursue in cases that pose a risk to international peace and security.[64] Article 34 authorizes the Security Council to "investigate any dispute, or any situation which might lead to international friction or give rise to a dispute" to determine the existence of a danger to

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57. League of Nations Covenant art. 15; *The Covenant of the League of Nations*, LEAGUE NATIONS – OFFICIAL J., Feb. 1920, at 6.

58. *See infra* Part III.B.

59. *See infra* text accompanying notes 347–55. These projects embodied the aspiration to transform international politics through "expert knowledge" and "dispassionate decision-making." Quincy R. Cloet, Truth Seekers or Power Brokers? The League of Nations and its Commissions of Inquiry 2–3, 18, 51 (Feb. 2019) (Ph.D. dissertation, Aberystwyth University), https://pure.aber.ac.uk/portal/files/29823099/Cloet_Quincy.pdf [https://perma.cc/HYQ4-7FP9] (archived Feb. 14, 2022).

60. DAVID W. WAINHOUSE, PEACE OBSERVATION: A HISTORY AND FORECAST 10–11 (1966). Achieving impartiality could also mean balancing the perceived interests of commissioners based on nationality. Cloet, *supra* note 59, at 49.

61. WAINHOUSE, *supra* note 60, at 10.

62. Edwin B. Firmage, *Fact-Finding in the Resolution of International Disputes—From the Hague Peace Conference to the United Nations*, 1971 UTAH L. REV. 421, 427 (1971).

63. *See infra* text accompanying notes 208–24 and 230–41.

64. U.N. Charter art. 33. This contemplates the establishment of an inquiry body by the parties to a dispute, rather than by a UN organ. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, VOL. II, 871, 1077 (Bruno Simma, Hermann Mosler, Albrecht Randelzhofer, Christian Tomuschat, & Rüdiger Wolfrum eds., 2d ed. 2002).

international peace and security—a power that may be exercised by establishing an inquiry body.[65] Articles 22 and 29 provide that each of the General Assembly and the Security Council also "may establish such subsidiary organs as it deems necessary for the performance of its functions."[66] In practice, the Security Council has expressly invoked Article 34 to establish an inquiry body only twice—for the 1946 Greek Frontiers matter and the 1948 India-Pakistan dispute[67]—but a much broader range of Security Council practice can be characterized as "in the framework" of Article 34.[68] The Security Council has also delegated the establishment of inquiry bodies to the Secretary-General,[69] and the Secretary-General has relied on Article 99 to establish inquiry bodies on his own initiative.[70]

The UN created more than twenty inquiry bodies from 1946 to 1965. The Security Council, General Assembly, and Secretary-General each established inquiry bodies in those early years.[71] The Organization of American States (OAS) was also active in this early–Cold War period. Acting under Article 6 of the 1949 Inter-American Treaty of Reciprocal Assistance or Article 87 of the OAS Charter, the OAS established nine investigating committees in response to

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65. U.N. Charter art. 34. Article 39 requires the Security Council to make such a determination before acting under Articles 41 or 42.

66. *Id.* arts. 22, 29. Early Security Council practice featured debates about whether the appointment of a sub-committee pursuant to Article 29 to receive or hear evidence ("a decision about an investigation") was a procedural matter that could be authorized over a permanent member's negative vote. United Nations, Department of Political and Security Council Affairs, Repertoire of the Practice of the Security Council 1946–1951, U.N. Doc. ST/PSCA/1, 149–50, 169 (1954). States also debated whether a sub-committee established to collect and analyze evidence could also make recommendations. *Id.*

67. S.C. Res. 15 (May 2, 1947); S.C. Res. 39 (Jan. 20, 1948); *see infra* text accompanying notes 242–47 and 368–72.

68. The periodic supplements to the Repertoire of the Practice of the Security Council, *see, e.g.*, sources cited *supra* note 66, contain a record of investigations and fact-finding missions mandated by the Security Council "in the framework" of Article 34, whether or not it was formally invoked; *see Pacific Settlement of Disputes (Chapter VI of UN Charter)*, UNITED NATIONS SECURITY COUNCIL, https://www.un.org/securitycouncil/content/pacific-settlement-disputes-chapter-vi-un-charter (last visited Feb. 22, 2022) [https://perma.cc/AV9F-GPZT] (archived Feb. 14, 2022); *see also* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 64, at 1092–93, 1105–07.

69. Larisa J. van den Herik, *An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of International Law*, 13 CHINESE J. INT'L L. 507, 524 (2014).

70. The Secretary-General "may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security." U.N. Charter art. 99; *see* M. Christiane Bourloyannis, *Fact-Finding by the Secretary-General of the United Nations*, 22 N.Y.U. J. INT'L L. & POL. 641, 647 (1989–1990).

71. *See infra* Part III.

interstate disputes.[72] In addition, the International Labour Organization (ILO) established its first commission of inquiry in 1962.[73]

There was also sustained discussion within the United Nations during the 1960s about how to make better use of inquiry, including a Dutch proposal for a permanent UN fact-finding body.[74] That proposal was motivated in part by a concern that the conflation of inquiry and conciliation had undermined the utility of third-party fact-finding.[75] The UN Secretariat prepared two detailed studies, and the Sixth Committee considered the topic from 1962 to 1966.[76] Ultimately, the Dutch proposal failed. The General Assembly instead urged states to make "more effective use of the existing methods of fact-finding" and called upon the Secretary-General to prepare a register of experts that

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72. WAINHOUSE, *supra* note 60, at 89–91, 103–14, 135–55, 167–71, 175–79; CAROLYN M. SHAW, COOPERATION, CONFLICT, AND CONSENSUS IN THE ORGANIZATION OF AMERICAN STATES 71–85 (2004).

73. The ILO may establish a commission of inquiry when a member state formally alleges another member state's non-observance of any ILO convention accepted by the non-observing state. Constitution of the International Labour Organization, art. 25–26, June 28, 1919, 49 Stat. 2712. As of 2020, there had been fourteen such commissions. In 1950, the ILO established a Fact-Finding and Conciliation Commission on Freedom of Association (the "FAS Commission") to examine alleged infringements of trade union rights; there have been six FAS Commission inquiries. INTERNATIONAL LABOUR ORGANIZATION, REPORTS OF THE FACT-FINDING AND CONCILIATION COMMISSIONS ON FREEDOM OF ASSOCIATION, https://www.ilo.org/global/standards/information-resources-and-publications/WCMS_160778/lang--en/index.htm [https://perma.cc/73VG-4N4N] (archived Feb. 18, 2022). The FAS Commission is distinct from the Committee on Freedom of Association, another ILO fact-finding body, which has considered more than 3,200 cases since its establishment in 1951. *Compilation of Decisions of the Committee on Freedom of Association*, INT'L LAB. ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:70001:::NO::: (last visited Feb. 22, 2022) [https://perma.cc/6FXX-YMU8] (archived Feb. 18, 2022).

74. *See* BAR-YAACOV, *supra* note 22, at 299–312; J.H. Leurdijk, *Fact-Finding: Its Place in International Law and International Politics*, 14 NETH. INT'L L.R. 141, 158–61 (1967). The General Assembly established a Panel for Inquiry and Conciliation in 1949, a standing body of candidates to serve on ad hoc commissions; it was never used. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 64, at 1078. As the human rights covenants were negotiated during the 1950s, there were also proposals to provide for ad hoc fact-finding committees to settle disputes relating to alleged human rights violations; treaty monitoring bodies were created instead. BERTRAND G. RAMCHARAN, A HISTORY OF THE UN HUMAN RIGHTS PROGRAMME AND SECRETARIAT 29 (2020).

75. *See Report of the Sixth Committee on the Question of Methods of Fact-Finding*, U.N. Doc. A/6995, ¶ 8 (Dec. 15, 1967).

76. *See* 1964 Secretary-General Report, *supra* note 35; U.N. Secretary-General, *Methods of Fact-Finding with Respect to the Execution of International Agreements (Study Prepared in Pursuance of General Assembly Resolution 2104 (XX) (1966))*, UN Doc. A/6228 (Apr. 22, 1966); *see also* BAR-YAACOV, *supra* note 22, at 304–10.

states could draw upon; however, there is no evidence that states ever did so.[77]

From 1965 to 1991, the Security Council, General Assembly, and Secretary-General, joined by the UN Commission on Human Rights (CHR),[78] established as many as twenty-five inquiry bodies.[79] There were no Hague Convention–model inquiry bodies during this period. At a regional level, the locus of fact-finding activity in the Americas migrated from the OAS Council to the Inter-American Commission on Human Rights (IACHR), which made extensive use of country visits and on-the-spot inspections from the mid-1970s onward.[80] This coincided with the emergence of other fact-finding mechanisms within the UN system, including special procedure mandate holders in the human rights field (i.e., special rapporteurs holding country-specific or thematic mandates)[81] and the more frequent use of special representatives to conduct high-level diplomacy.[82] In 1977, the International Humanitarian Fact-Finding Commission (IHFCC) was established,[83] and the International Civil Aviation Organization

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77. G.A. Res. 2329 (XXII) (Dec. 18, 1967); *see* Dick A. Leurdijk, *Fact-Finding: The Revitalization of a Dutch Initiative in the UN*, 21 BULL. PEACE PROPOSALS 59, 60–62 (1990).

78. Established in 1946 as a subsidiary organ of the Economic and Social Council, the CHR declared in 1947 that it lacked competence to investigate or respond to complaints. RAMCHARAN, *supra* note 74, at 46. This changed in 1967 when pressure from newly-independent states led the CHR to investigate torture and prisoner abuse in South Africa. Comm'n on Hum. Rts. [C.H.R], Res. 2 (XXIII) (Mar. 6, 1967); *see* Elvira Dominguez-Redondo, *The History of the Special Procedures: A "Learning-by-Doing" Approach to Human Rights Implementation*, *in* THE UNITED NATIONS SPECIAL PROCEDURES SYSTEM 9, 18–24 (Aoife Nolan, et al., eds., 2017).

79. Consider the inquiry bodies established by the Security Council for the Seychelles (S.C. Res. 496 (Dec. 15, 1981)) and Angola (S.C. Res. 571 (Sept. 20, 1985)) and the inquiries created by the Secretary-General with respect to Iran in 1980 (as discussed in the *Tehran Hostages* case (Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, 1981 I.C.J. Rep. 3, 20–21 (May 24)) and chemical weapons use in the Iran-Iraq war (*see, e.g.*, Rep. of the Specialists Appointed by the Secretary-General To Investigate Allegations by the Islamic Republic of Iran Concerning the Use of Chemical Weapons, U.N. Doc. S/16433 (Mar. 26, 1984)).

80. *See* SHAW, *supra* note 72, at 85–89. The IACHR made forty-four site visits from 1961 to 1991. *IACHR On-Site Visits*, ORG. AM. STS, https://www.oas.org/en/iachr/activities/countries_all.asp (last visited Feb. 22, 2022) [https://perma.cc/M5JY-9LWZ] (archived Feb. 15, 2022).

81. *See* Dominguez-Redondo, *supra* note 78.

82. EVAN LUARD, A HISTORY OF THE UNITED NATIONS—VOLUME 2: THE AGE OF DECOLONIZATION, 1955–1965 526–27 (1989). For example, the UN Secretary-General dispatched a special representative to Equatorial Guinea in 1969 and to Bahrain in 1970 in situations that might previously have been addressed by inquiry bodies. *See* U.N. Secretary-General, *Report by the Secretary-General*, U.N. Doc. S/9053 (Mar. 7, 1969); U.N. Secretary-General, *Note by the Secretary-General*, U.N. Doc. S/9772 (Apr. 30, 1970).

83. The IHFCC is a standing body available to investigate serious IHL violations. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 90(5)(a), June 8, 1977, 1125 U.N.T.S. 3. The IHFFC did not receive its first mandate until 2017. *See Executive Summary of the Report of the Independent Forensic Investigation in relation to Incident Affecting an OSCE Special Monitoring Mission in Ukraine (SMM) Patrol on 23*

(ICAO) established three inquiry bodies in the 1970s and 1980s.[84] Figure 1[85] shows the number of inquiry bodies established from 1899 (following the 1899 Hague Peace Conference) through 1991 based on the source of their mandates.[86]

April 2017, ORG. FOR SEC. & CO-OPERATION IN EUR. (Sept. 7, 2017), https://www.osce.org/home/338361 [https://perma.cc/RRW4-6Y7R] (archived Feb. 14, 2022) [hereinafter *Executive Summary of the Report of the Independent Forensic Investigation*].

84. ICAO established inquiry bodies for three incidents in which state actors shot down civilian aircraft: Libyan Airlines Flight 114 (1973) (ICAO Working Paper C-WP/5764); Korean Air Lines Flight 007 (1983) (Attachment A to State Letter LE 4/19.4-93/68); and Iran Air Flight 655 (1988) (28 ILM 896 (1989)). In May 2021, ICAO announced a fact-finding mission into "the apparent forced diversion of Ryanair Flight FR4978" by Belarus to assess any potential breach of international aviation law. Press Release, ICAO, ICAO Council To Pursue Fact Finding Investigation into Ryanair FR4978 (May 27, 2021), https://www.icao.int/Newsroom /Pages/ICAO-Council-agrees-to-pursue-fact-finding-investigation-into-Belarus-incident.aspx [https://perma.cc/P7WY-5H58] (archived Feb. 14, 2022). These examples differ from transnational investigations in which law enforcement authorities from multiple countries work together, such as the Joint Investigation Team established in relation to the downing of Malaysian Airways Flight 17 over Ukraine in 2014. *See The Criminal Investigation by the Joint Investigation Team (JIT)*, NETH. PUB. PROSECUTION SERV., https://www.prosecutionservice.nl/topics/mh17-plane-crash/criminal-investigation-jit-mh17 (last visited Feb. 22, 2022) [https://perma.cc/L2R3-W5PW] (archived Feb. 14, 2022).

85. Figures 1-5 are based on a dataset of inquiry bodies (on file with author) that aspires to comprehensiveness; there are inevitably missed cases and the figures presented are best read as close approximations.

86. In Figure 1, treaty-based inquiry bodies include conciliation commissions that undertook fact-finding. Figure 1 does not include activity by the African Commission on Human and Peoples' Rights (ACHPR), the European Commission on Human Rights (ECHR), and IACHR, even though some of their fact-finding activity is not easily distinguished from the inquiry practice described in this study. For example, after Denmark, Norway, Sweden, and the Netherlands brought cases against Greece in 1969, an ECHR sub-commission carried out an inquiry in the country. *See* James Becket, *The Greek Case Before the European Human Rights Commission*, 1 HUM. RTS. 91, 102–04, 107–11 (1970). Also in 1969, the IACHR visited El Salvador and Honduras to assess claims by each state that its own nationals were suffering human rights violations in the other's territory. IACHR, *Report on the Situation of Human Rights in El Salvador and Honduras*, Doc No. OEA/Ser.L/V/II.23 (Apr. 29, 1970). This resembled earlier OAS committees of investigation (*see infra* Part III). A different IACHR mission to Chile in 1974 found serious human rights violations—an investigation that broadly resembled many contemporary examples of inquiry. IACHR, *Report on the Situation of Human Rights in Chile*, Doc No. OEA/Ser.L/V/II.34 (Oct. 25, 1974).

Figure 1: Inquiry Bodies Established between States or by International Organizations (1899–1991)

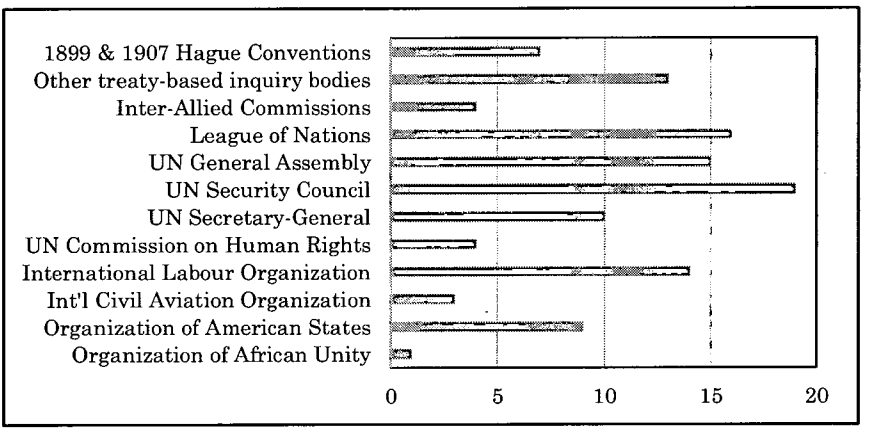
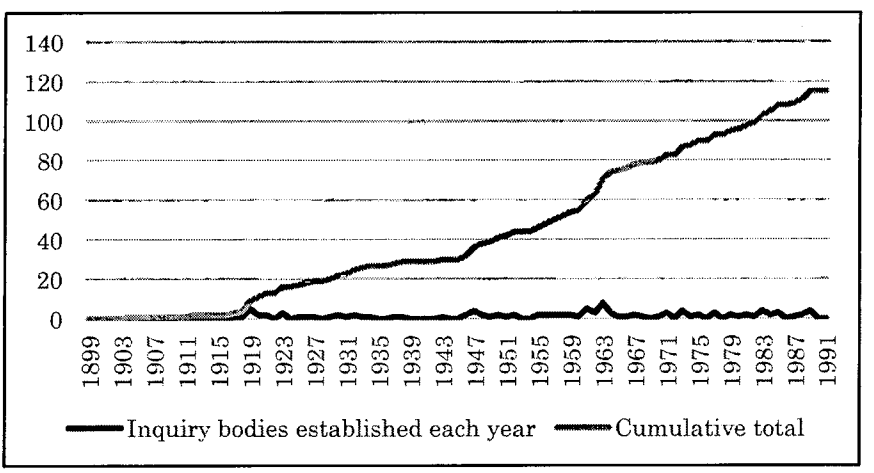


Figure 2 demonstrates the sharp increase in inquiry practice during the interwar period, followed by a steady recourse to inquiry bodies during the Cold War.[87]

Figure 2: Inquiry Bodies Established Each Year and Cumulatively (1899–1991)



87. The data in Figure 2 do not include activity by the regional human rights commissions (dataset on file with author).

5. Post–Cold War Practice (1992–Present)

The fall of the Berlin Wall, the collective action to repel Iraqi forces from Kuwait, and the collapse of the Soviet Union ushered in a period of renewed enthusiasm in the potential to forge a "new world order" in place of a "world divided."[88] This generated a wave of initiatives that coincided with a turn—or return—to inquiry. First, the UN General Assembly in 1991 adopted the Declaration on Fact-Finding by the United Nations.[89] Echoing its work on inquiry during the 1960s, the General Assembly reaffirmed the "particular usefulness of fact-finding missions" in the maintenance of peace and security, including as a tool of preventive diplomacy, and recommended that UN organs make greater use of fact-finding missions when "knowledge of all relevant facts" could not otherwise be obtained.[90] Within a year, the UN Security Council established the Commission of Experts to Investigate the Situation in the former Yugoslavia to examine alleged international humanitarian law (IHL) violations, even as the conflict in the Balkans continued.[91] For many commentators, the Yugoslavia commission marked a turning point in the role and function of inquiry bodies in international affairs, especially because of its role in the Security Council's establishment of the International Criminal Tribunal for the former Yugoslavia in 1993.[92]

There is no question that international organizations and states have established numerous inquiry bodies in the post–Cold War period. Some have been high-profile initiatives—for example, the commission of inquiry established by the Security Council in 2004 to examine the situation in Darfur[93] or the commission led by Richard Goldstone to investigate Israel's Operation Cast Lead under a mandate

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88. President George H.W. Bush, Address to Joint Session of Congress on the Cessation of the Persian Gulf Conflict (Mar. 6, 1991).

89. G.A. Res. 46/59 (Dec. 9, 1991) [hereinafter Fact-Finding Declaration]; *see* Axel Berg, *The 1991 Declaration on Fact-Finding by the United Nations*, 4 EUR. J. INT'L L. 107 (1993).

90. Fact-Finding Declaration, *supra* note 89, at Annex, ¶ 4. This reaffirmed the 1988 Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security (G.A. Res. 43/51 (Dec. 5, 1988)) and drew upon efforts in the 1980s to promote the greater use of fact-finding bodies. *See* Leurdijk, *supra* note 77, at 64–67. The Secretary-General's *Agenda for Peace* report in 1992 reiterated the link between fact-finding and preventive diplomacy. *See* BERTRAND G RAMCHARAN, PREVENTIVE DIPLOMACY AT THE UN 45–48, 72–74 (2008).

91. S.C. Res. 780 (Oct. 6, 1992).

92. *See, e.g.*, Marina Aksenova & Morten Bergsmo, *Non-Criminal Justice Fact-Work in the Age of Accountability*, *in* QUALITY CONTROL IN FACT-FINDING 1, 4 (Morten Bergsmo & Carsten Stahn eds., 2013); M. Cherif Bassiouni, *Appraising UN Justice-Related Fact-Finding Missions*, 5 WASH. U. J.L. & POL'Y 35, 46 (2001); D'Alessandra, *supra* note 20, at 63; Triestino Mariniello, *The Impact of International Commissions of Inquiry on the Proceedings before the International Criminal Court*, *in* COMMISSIONS OF INQUIRY: PROBLEMS AND PROSPECTS, *supra* note 9, at 173.

93. Rep. of the International Commission of Inquiry on Darfur to the Secretary-General, U.N. Doc. S/2005/60 (2005).

from the UN Human Rights Council (HRC) in 2009.[94] As discussed below, the mandates of many post–Cold War inquiry bodies foreground international law in a way that distinguishes them from the bulk of their predecessors.[95] It is also indisputable that many contemporary inquiry bodies concern allegations of gross and widespread human rights violations and mass atrocities.[96]

In the post–Cold War period, fact-finding by the UN Security Council has included commissions of inquiry made up of individuals who serve in an independent and personal capacity, as well as "missions" and "special missions" by representatives of Security Council member states. From 1991 to 2020, the Security Council established eleven bodies in the first category and undertook as many as sixty-seven missions in the second category.[97] Whether the latter should be classified as "inquiry bodies" raises interesting questions; the fact that states rather than independent experts conduct the missions—which, broadly speaking, engage in some type of fact-finding[98]—need not be disqualifying.[99] Even when Security Council missions are "not expressly charged with investigative tasks," they "allow the Council members to form an impression of the respective situations on the ground."[100] However, such missions might have other objectives: communicating concern, support, or disapproval; mediating a dispute; applying pressure to comply with Security Council resolutions; or taking stock of peace talks, ceasefire agreements, or peacekeeping operations. Security Council missions or subcommittees during the Cold War era were often established in reaction to specific incidents; more recent missions tend to reflect ongoing engagement

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94. Rep. of the UN Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48 (2009); *see also* sources cited *supra* note 3.

95. *See* Le Moli, *supra* note 7, at 642–44 (seeking to pinpoint the post–Cold War emergence of mandates that expressly direct inquiry bodies to assess conduct "in the light of a prescription/prohibition derived from international law").

96. *See* HARWOOD, *supra* note 7, at 41 (describing "atrocity-related inquiry practice" between 1945 and 1991 as "sparse" compared with post–Cold War practice).

97. All Security Council members or a subset may comprise a mission or special mission. Alexandra Novosseloff, *Les "Missions Spéciales" Du Conseil de Sécurité des Nations Unies*, 49 ANNUAIRE FRANÇAIS DE DROIT INT'L 165 (2003) (Fr.). Mission reports since 1992 are available at *Reports of the Security Council Missions*, UNITED NATIONS SEC. COUNCIL, https://www.un.org/securitycouncil/content/ reports-security-council-missions [https://perma.cc/NY4Z-DGSP] (archived May 11, 2022).

98. The 1991 Declaration defines fact-finding 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." Fact-Finding Declaration, *supra* note 89, at Annex ¶ 2.

99. Inquiry bodies established by the General Assembly and carried out by member state delegates (*e.g.*, the inquiries for South Vietnam in 1963 or Mozambique in 1973, *see* text accompanying notes 378–79 and 390–95, *infra*) are routinely included in historical studies of inquiry.

100. Repertoire of the Practice of the Security Council, Supplement, 2008-2009, U.N. Doc. ST/PSCA/1/Add.16, 406 (2014). The Secretariat places such missions within the framework of Article 34 of the Charter. *Id.*; *see also supra* note 68.

with a situation. Some recent missions—such as a visit to Bangladesh and Myanmar in 2018 amidst the Rohingya crisis—clearly served a fact-finding function that informed Security Council deliberations.[101] Another prominent feature of post–Cold War Security Council practice includes sanctions committee expert panels that carry out fact-finding to monitor compliance with sanctions regimes; the Security Council established seventeen expert panels during 1999–2020.[102]

The UN Secretary-General, acting either on his own initiative or upon a Security Council request, has established as many as eighteen inquiry bodies since 1992. Meanwhile, the UN Human Rights Council (HRC), which replaced the CHR in 2006, established more than twenty inquiry bodies during its first fifteen years of existence,[103] and the Office of the High Commissioner for Human Rights (OHCHR) has conducted up to twenty-four fact-finding investigations.[104] Furthermore, regional intergovernmental bodies—including the

101. Briefing by Security Council Mission to Bangladesh and Myanmar (28 April to 2 May 2018), U.N. Doc. S/PV.8255 (May 14, 2018). Yet such missions might also be viewed as part of the Council's regular function and therefore insufficiently "ad hoc" to qualify.

102. Security Council activity in this area is compiled at: *Sanctions and Other Committees*, UNITED NATIONS SEC. COUNCIL, https://www.un.org/securitycouncil/content/repertoire/sanctions-and-other-committees (last visited Feb. 22, 2022) [https://perma.cc/6PMF-XADC] (archived Mar. 16, 2022).

103. G.A. Res. 60/251 (Apr. 3, 2006). Prior to its dissolution, the CHR also established post–Cold War inquiry bodies for Guatemala, the DRC, East Timor, and Palestine.

104. OHCHR investigations are formally carried out by OHCHR personnel rather than independent external experts. However, the OHCHR may recruit external experts to advise specific investigations, which blurs the distinction between internal OHCHR fact-finding missions and formally-independent inquiry bodies. For example, in 2014 the HRC requested OHCHR to investigate alleged human rights abuses and related crimes during the Sri Lankan civil war. Human Rights Council Res. 25/1, U.N. Doc. A/HRC/RES/25/1 (Apr. 9, 2014). The OHCHR investigation retained three independent experts to play "a supportive and advisory role." Rep. of the OHCHR Investigation on Sri Lanka, ¶ 24 UN Doc. A/HRC/30/CRP.2 (Sept. 16, 2015). Likewise, OHCHR staff might be seconded to a formally-independent HRC inquiry body.

African Union (AU),[105] the European Union (EU),[106] the OAS,[107] and the Organization for Security and Cooperation in Europe (OSCE)[108]—have established more than twenty-five inquiry bodies in the post–Cold War era.

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105. For example, the AU has established inquiry bodies for Somaliland, Darfur, Côte d'Ivoire, and South Sudan. *See* African Union, *Resume, AU Fact-Finding Mission to Somaliland (30 April to 4 May 2005)*, https://saxafimedia.com/wp-content/uploads/2018/01/au-fact-finding-mission-to-somaliland-30-april-to-4-may-2005.pdf [https://perma.cc/2ZQH-XCB5] (archived May 11, 2022); Press Release, UNAMID, Sudan: DJSR Anyidoho Welcomes African Union Fact-Finding Team to Darfur (Nov. 6, 2008), https://reliefweb.int/report/chad/sudan-djsr-anyidoho-welcomes-african-union-fact-finding-team-darfur [https://perma.cc/8ULN-NSM4] (archived May 11, 2022); African Union, *Report of the African Union High-Level Panel on Darfur (AUPD)*, PSC/AHG/2 (CCVII) (2009), https://reliefweb.int/sites/reliefweb.int/files/resources/2A061A49A2933E73C1257663003ACC38-Full_Report.pdf [https://perma.cc/5ZHC-U32E] (archived May 11, 2022); Press Release, African Union, The High Level Panel for the Resolution of the Crisis in Côte d'Ivoire Concludes its First Visit to Abidjan (Feb. 22, 2011), https://au.int/es/ node/24187 [https://perma.cc/QQA6-5V4B] (archived May 11, 2022); African Union, Peace and Security Council, Communiqué, ¶8, PSC/AHG/Comm.1(CDXI)Rev.1 (Dec. 30, 2013).

106. In 2008, the EU established the Independent International Fact-Finding Mission on the Conflict in Georgia. Council Decision 2008/901/CFSP, 2008 O.J. (L 323/66); *see also* 1–3 INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA, REPORT (2009).

107. For example, the OAS has dispatched fact-finding missions to Guatemala (1993), Venezuela (2002), and Paraguay (2012) (see *OAS Political Missions Map*, OAS PEACE FUND, https://www.oas.org/sap/peacefund/peacemissions/politicalmissionsmap.html [https://perma.cc/8CBD-R2U] (archived May 11, 2022)), as well as to Haiti and the Dominican Republic (2015) (OAS, Press Release, Report of the Technical Fact-Finding Mission on the Situation in the Border Region Between the Dominican Republic and Haiti (July 29, 2015), https://www.oas.org/en/media_center/press_release.asp?sCodigo=S-030/15 [https://perma.cc/BS2M-YZ6N] (archived May 11, 2022)).

108. The OSCE has created inquiry bodies for situations in Bosnia, Croatia, Turkmenistan, Nagorno-Karabakh, Italy, and Ukraine. *See* Organization for Security and Cooperation in Europe [OSCE], *Decision No. 7* PC.DEC/7 (Jan. 12, 1995) (Bosnia); Organization for Security and Cooperation in Europe [OSCE], *Decision No. 74* PC.DEC/74 (Sept. 21, 1995) (Croatia); Organization for Security and Cooperation in Europe [OSCE], *OSCE Rapporteur's Report on Turkmenistan*, at Annex 2.1, ODIHR. GAL/15/03 (Mar. 12, 2003); Organization for Security and Cooperation in Europe [OSCE], *Report of the OSCE Fact-Finding Mission (FFM) to the Occupied Territories of Azerbaijan Surrounding Nagorno-Karabakh (NK)* (Feb. 28, 2005); Organization for Security and Cooperation in Europe [OSCE], *Assessment of the Human Rights Situation of Roma and Sinti in Italy: Report of a Fact-Finding Mission to Milan, Naples and Rome on 20-26 July 2008*); Organization for Security and Cooperation in Europe [OSCE], *Decision No. 1117 Deployment of an OSCE Special Monitoring Mission to Ukraine* PC.DEC/1117 (Mar. 21, 2014). An inquiry body for Kyrgyzstan was established in coordination among Kyrgyzstan, the OSCE, and other international bodies. *See* Kyrgyzstan Inquiry Commission [KIQ], *Report of the International Commission of Inquiry into the Events in Southern Kyrgyzstan in June 2010*, https://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_490.pdf [https://perma.cc/7AMY-3V3J] (archived May 11, 2022).

The ILO[109] other UN specialized agencies[110] have also established inquiry bodies, as have human rights treaty monitoring bodies[111] and regional human rights commissions.[112] Whether all of this activity

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109. Since 1992, the ILO has established commissions of inquiry for Myanmar (1996), Belarus (2003), Zimbabwe (2010), and Venezuela (2015). *See* ILO, *Complaints/Commissions of Inquiry (Art 26)*, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50011:0::NO::P50011_ARTICLE_NO:26 [https://perma.cc/X2MT-MYDH] (archived May 11, 2022). The FAS Commission carried out an inquiry in South Africa (1992). International Labour Office [ILO], Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South AfricaGB.253/15/7 (May–June 1992).

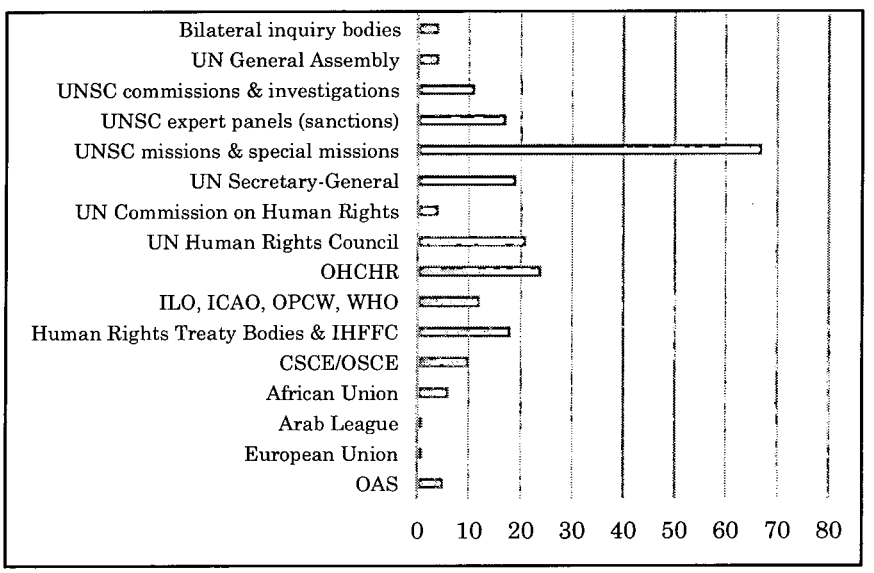
110. The Organization for the Prohibition of Chemical Weapons (OPCW) established a fact-finding mission for Syria in 2014 (*see* OPCW, *Fact-Finding Mission*, https://www.opcw.org/fact-finding-mission [https://perma.cc/4QRM-K6NX] (archived Feb. 16, 2022)) and the Investigation and Identification Team for Syria in 2018 (*see* ORG. FOR THE PROHIBITION CHEM. WEAPONS, DECISION ADDRESSING THE THREAT FROM CHEMICAL WEAPONS USE (2018), https://www.opcw.org/sites/default/files/documents/CSP/C-SS-4/en/css4dec3_e_.doc.pdf [https://perma.cc/6M74-5CQQ] (archived Mar. 22, 2022)). ICAO established an inquiry body in 1996 to investigate the downing of two U.S.-registered private aircraft by Cuba. *See* U.N. Secretary-General, *Note by the Secretary-General*, U.N. Doc. S/1996/509 (July 1, 1996) (Enclosure 2, Int'l Civ. Aviation Org. Doc. C-WP/10441). The WHO established two inquiry bodies in 2020 relating to COVID-19. *See* sources cited *supra* note 2. The WHO also created an independent investigation into alleged sexual abuse during the Ebola response. Press Release, World Health Org., WHO To Investigate Allegations of Sexual Exploitation and Abuse in Ebola Response in the Democratic Republic of the Congo (Sept. 29, 2020), https://www.who.int/news/item/29-09-2020-who-to-investigate-allegations-of-sexual-exploitation-and-abuse-in-ebola-response-in-the-democratic-republic-of-the-congo [https://perma.cc/ML8F-ZRBB] (archived Feb. 2022)). The WHO has also convened four International Health Regulation Review Committees under Article 50 of the WHO Constitution since 2010. *See IHR Review Committees*, WORLD HEALTH ORG., https://www.who.int/teams/ihr/ihr-review-committees (last visited Feb. 22, 2022) [https://perma.cc/3RQV-QQ84] (archived Feb. 16, 2022).

111. Some international human rights treaties empower their monitoring committees to undertake confidential inquiries into well-founded allegations of systematic violations. As of 2020, the Committee Against Torture had carried out ten inquiries, the Committee on the Elimination of Discrimination Against Women had done so five times, and the Committee on the Rights of the Child had done so once. *See Human Rights Treaty Bodies*, OFF. OF THE HIGH COMM'R FOR HUM. RTS., https://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx (last visited Feb. 22, 2022) [https://perma.cc/LQ96-WETX] (archived Feb. 15, 2022).

112. From 1992 to 2020, the IACHR made fifty-seven country visits, including to Chile and Venezuela in 2020. *See* sources cited *supra* note 80. The ACHPR has undertaken fact-finding missions to Zimbabwe, Sudan (Darfur), Mali, Mauritania, Botswana, Western Sahara, Mali, Central African Republic, and Burundi. *See* Afr. Comm'n on Human & Peoples' Rights, *Zimbabwe: Report of the Fact-Finding Mission (June 2002)*, DOC/OS(XXXIV)346a (Apr. 29, 2003); Afr. Comm'n on Human & Peoples' Rights, *Report of the African Commission on Human and Peoples' Rights' Fact-Finding Mission to the Republic of Sudan in the Darfur Region (8 to 18 July 2004)*, at Annex III EX.CL/364(XI) (Sept. 20, 2004); ACHPR, *Final Communiqué of the 42nd Ordinary Session* ¶ 28 (Nov. 2007) (adopting the report of the Fact-Finding Mission to Mali and Mauritania); Press Release, Secretariat Afr. Comm'n on Human & Peoples' Rights, Press Release on the Fact-Finding Mission to Botswana, https://www.achpr.org/pressrelease/detail?id=357 [https://perma.cc/KQ7S-36KL] (archived May 11, 2022); Press Release, Secretariat Afr. Comm'n on Human & Peoples' Rights, Press Release on the Fact Finding Mission to the Sahrawi Arab Democratic Republic (Sept. 17,

should be included in this study raises tricky questions of classification, particularly in the case of the regional human rights commissions for whom investigation might be seen as part of their routine operations or, in some cases, general oversight rather than a response to a specific situation. Figure 3 provides a breakdown of practice since 1992 based on source of mandate; UN Security Council practice is further broken out to distinguish among inquiry bodies composed of external experts, sanctions panels, and missions and special missions by member states.[113]

Figure 3: Inquiry Bodies Established between States or by International Organizations (1992–2020)

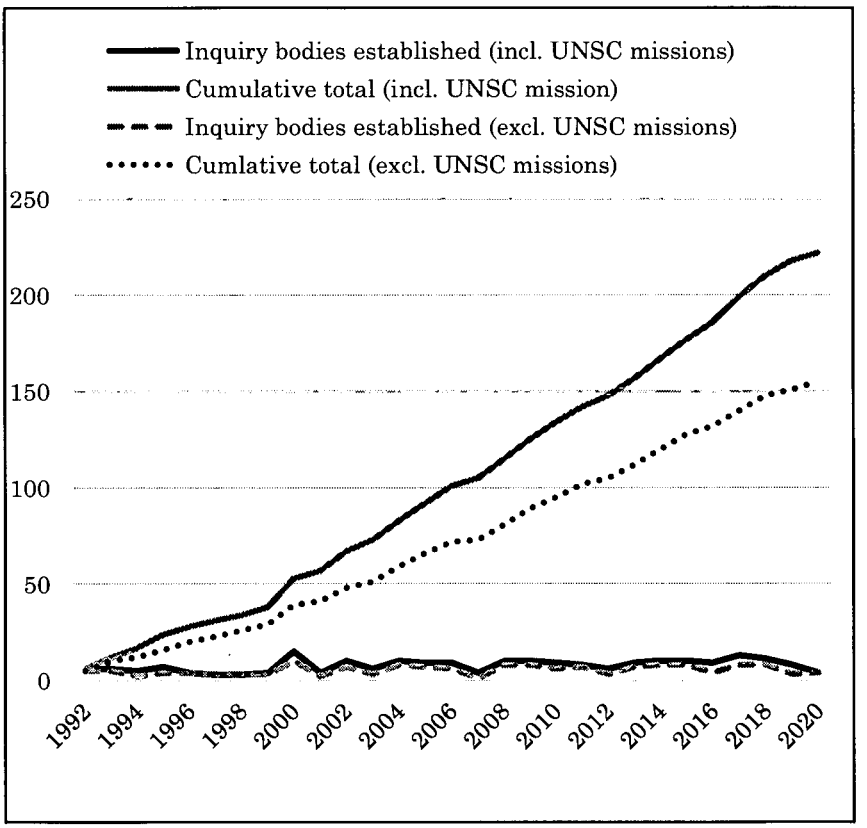


2012), https://www.achpr.org/pressrelease/detail?id=279 [https://perma.cc/HAU2-SJ6] (archived May 11, 2022); Afr. Comm'n on Human & Peoples' Rights, *Report of the Fact-Finding Mission to the Republic of Mali (3-7 June 2013)*; Press Release, Afr. Comm'n on Human & Peoples' Rights, Press Release on the Fact-Finding Mission of the African Commission on Human and Peoples' Rights to the Central African Republic (Sept. 15, 2014), https://www.achpr.org/pressrelease/detail?id=198 [https://perma.cc/Q5Y3-S3N7] (archived May 11, 2022); Afr. Comm'n on Human & Peoples' Rights, *Report of the Delegation of the African Commission on Human and Peoples' Rights on its Fact-Finding Mission to Burundi 7-13 December 2015*. The Independent Permanent Human Rights Commission (IPHRC) of the Organisation of Islamic Cooperation has also carried out a handful of fact-finding missions (CAR (2014), Palestine (2016), India/Pakistan (Kashmir) (2017) and Bangladesh/Myanmar (2018)). *See* INDEP. PERMANENT HUM. RTS. COMM'N, *Field Visits*, https://oic-iphrc.org/home/post/32 (last visited Feb. 22, 2022) [https://perma.cc/Q62M-SU2K] (archived Mar. 16, 2022).

113. The data in Figure 3 exclude ad hoc fact-finding missions by the regional human rights commissions and internal UN boards of inquiry (dataset on file with the author). Bilateral inquiry bodies include conciliation commissions that were functionally equivalent to inquiry bodies.

Figure 4 depicts inquiry practice since 1992 on an annual and cumulative basis.[114] The data are presented with and without Security Council missions and special missions.

Figure 4: Inquiry Bodies Established Each Year and Cumulatively (1992–2020) (With and Without UN Security Council Missions)



B. *Conclusion on the First Proposition*

This historical overview provides the basis to evaluate the proposition that recourse to inquiry bodies has increased dramatically in the post–Cold War period. Prior to 1992, states established as many as seven inquiry bodies under the 1899 and 1907 Hague Conventions. At least sixteen inquiry bodies can be associated with the League of Nations, and the Inter-Allied Peace Conference also used inquiry

114. The data in Figure 4 exclude the regional human rights commissions and internal UN boards of inquiry (dataset on file with the author).

bodies. From the 1930s through the 1960s, states established at least a dozen further inquiry bodies (including conciliation commissions that engaged in inquiry). During the Cold War era, the United Nations, UN specialized agencies, and regional intergovernmental bodies established around seventy-five additional inquiry bodies. In total, states and international organizations established approximately 115 inquiry bodies between the adoption of the 1899 Hague Convention and the end of the Cold War in 1991 (roughly, 1.25 inquiry bodies per year).[115] This figure stands at odds with the common perception that only a smattering of inquiry bodies existed prior to the 1990s. For one reason or another, the literature undercounts and downplays the extent of inquiry practice over most of the twentieth century. Definitional challenges and the absence of any comprehensive dataset of practice may explain this undercount, which reinforces the conventional narrative.

However, these findings do not disprove the proposition that recourse to inquiry bodies has increased substantially in the post–Cold War era. The Security Council, General Assembly, and Secretary-General established at least thirty-two inquiry bodies between 1992 and 2020, excluding Security Council missions and sanction committee expert panels. Setting aside that activity, the annual rate at which the principal UN organs have established inquiry bodies in the post–Cold War era (roughly, 1.15 per year) does not differ dramatically from the rate at which they established inquiry bodies from 1945 to 1991 (roughly, one per year). However, the annual rate at which the principal UN organs established inquiry bodies from 1992 to 2020 increases significantly (to 4.15 per year) if Security Council missions and sanctions committee expert panels are included. Moreover, the UN Human Rights Council (and its predecessor), as well as the OHCHR, established as many as forty-nine inquiry bodies from 1992 to 2020.[116] Including that activity means that UN bodies have established nearly three inquiry bodies per year since 1992, without even considering Security Council missions and expert panels (which boosts the rate to nearly six per year). In short, the data make apparent the significant increase in recourse to inquiry bodies in the post–Cold War era.

And this is not the end of the story. UN specialized agencies and regional intergovernmental organizations established as many as thirty-seven inquiry bodies from 1992 to 2020. The IHFFC acted in one

115. Notwithstanding the precise figures used in this study, the numbers are better read as close approximations given fuzzy definitional boundaries and a measure of subjectivity when it comes to classifying individual examples (or even categories of practice).

116. This is the locus of the perceived increase in use of inquiry bodies. *See* Catherine Harwood, *Human Rights in Fancy Dress? The Use of International Criminal Law by Human Rights Council Commissions of Inquiry in Pursuit of Accountability*, 58 JAPANESE Y.B. INT'L L. 71, 71 (2015); van den Herik, *supra* note 69, at 508.

case, and human rights treaty bodies undertook seventeen inquiries.[117] At the regional level, the ACHPR undertook at least eight fact-finding missions and the IACHR made as many as fifty-seven country visits between 1992 and 2020.[118] There have been a handful of bilateral or treaty-based inquiry and conciliation bodies as well.[119] Even setting aside the regional human rights commissions, these additional categories of practice boost the number of inquiry bodies established between 1992 and 2020 to around 220 (roughly, eight per year). If UN Security Council missions are excluded, there are still as many as 150 examples since 1992 (roughly, 5.5 per year). Finally, this does not include instances in which individual states have established inquiry bodies of an "international character" (e.g., based on subject matter or the inclusion of nonnationals on the panel).[120] Nor do these figures include internal UN boards of inquiry or UN peacekeeping operations that have a fact-finding component.

Figure 5 brings all of this data together to compare the number of inquiry bodies established across different historical periods: 1899–1945, 1946–1991, and 1992–2020.[121] The comparison makes clear that the post–Cold War era has seen more inquiry bodies established than were created during the preceding ninety years.

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117. *See Executive Summary of the Report of the Independent Forensic Investigation*, *supra* note 83; *see also Human Rights Treaty Bodies*, *supra* note 111.

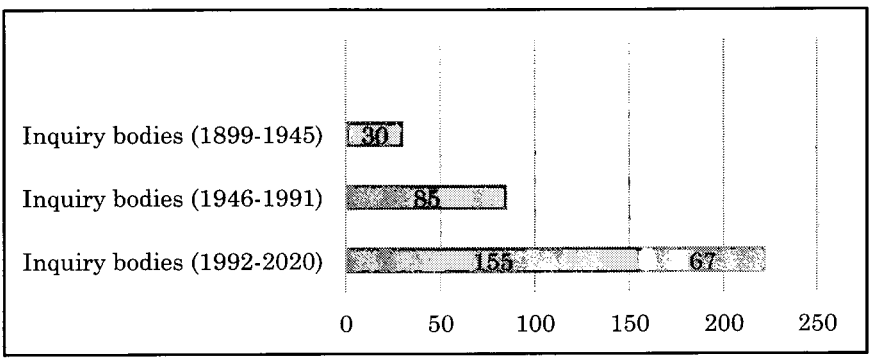
118. *See IACHR On-Site Visits*, *supra* note 80.

119. *See, e.g.*, Arthur Lenk, *Fact-Finding as a Peace Negotiation Tool—The Mitchell Report and the Israeli-Palestinian Peace Process*, 24 LOY. INT'L. & COMP. L. REV. 289, 290 (2002) (discussing the 2000 Sharm el-Sheikh Fact-Finding Committee during the Second Intifada).

120. Examples include the 2001 "Porter Commission" established by Uganda to examine the alleged unlawful exploitation of resources by its forces in the Democratic Republic of Congo (*see Judicial Commission of Inquiry into Allegations into Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo 2001, Final Report* (Nov. 2002)); the "Chilcot inquiry" established by the United Kingdom in 2009 to examine the 2003 invasion of Iraq (*see Report of the Iraq Inquiry* (July 2016), https://www.gov.uk/government/publications/the-report-of-the-iraq-inquiry [https://perma.cc/3774-KZQM] (archived May 23, 2022)); the "Turkel Commission" established by Israel to examine the 2010 Gaza flotilla incident (*see Public Commission to Examine the Maritime Incident of 31 May 2010, Report, Part One* (Jan. 2011), https://www.gov.il/BlobFolder/generalpage/downloads_eng1/en/ ENG_turkel_eng_a.pdf [https://perma.cc/4MJ5-AR28] (archived May 23, 2022)); and the Independent Commission of Enquiry (ICOE) set up by Myanmar in 2018 concerning alleged atrocities in Rakhine state (*see* Executive Summary, ICOE Final Report (Jan. 21, 2020), https://reliefweb.int/sites/reliefweb.int/files/resources/ BM.pdf [https://perma.cc/3SSN-VRB8] (archived Ma. 23, 2022)). Most "internationalized" domestic inquiry bodies examine the mandating state's own conduct; the Independent International Commission on Kosovo, established by Sweden to examine the 1999 NATO bombing campaign, provides a counter-example. *See* INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (2000).

121. UN Security Council missions and special missions are broken out separately for the post-1992 period. As above, the data do not include activity by the regional human rights commissions or UN boards of inquiry (dataset on file with author).

Figure 5: Inquiry Bodies Established across Historical Periods



In light of the data, the proposition in question—frequently invoked but rarely substantiated—is well founded. There has been a "discernible increase" in resort to inquiry bodies since the end of the Cold War. This conclusion may seem anti-climactic but establishing the proposition reveals other important insights. First, this exercise has shown that the conventional narrative exaggerates the contrast between past and present. A disproportionate focus on the short list of Hague Convention inquiry bodies gives insufficient credit to the broad range of other inquiry practice from the League of Nations onward; OAS and early UN practice are largely overlooked.[122] The "turn to inquiry" that begins in the 1990s may seem somewhat less remarkable when viewed as part of a longer continuum. Second, the exercise shows that the conventional narrative not only glosses over a substantial amount of pre-1992 practice but also tends to selectively count post-1992 practice, both within and beyond the core UN bodies. Overall, the exercise highlights the diversity of practice that might be characterized as inquiry and the methodological challenge of finding and applying a definition of inquiry bodies that is neither overinclusive nor underinclusive.

III. PROPOSITION NO. 2: THE EVOLUTION FROM "PURE" FACT-FINDING TO LEGAL ASSESSMENT

The second strand of the conventional narrative is the proposition that inquiry bodies have begun only recently to engage with questions of international law. The literature is replete with references to a shift by inquiry bodies from "pure" fact-finding to the interpretation and

122. Focused on UN practice only, Le Moli also confirms the increase in recourse to inquiry bodies (albeit on the basis of considerably lower pre-1992 numbers than are presented here). Le Moli, *supra* note 7, at 663–64.

application of international law.[123] Commentators refer to the "juridification" of inquiry[124] and the crystallization of inquiry bodies into "distinctly legal bodies (if they were not so before)."[125] Inquiry bodies are presented as a "new form of legal adjudication"[126] or a substitute for "improbable and/or lengthy adjudication."[127] This depiction is set against the "transactional" inquiry bodies established by states under the Hague Convention model or by the League of Nations or United Nations in its early years,[128] when inquiry bodies were "only concerned with facts"[129] and were "rarely permitted to draw legal conclusions,"[130] resort to international law was "modest,"[131] and legal analysis played a "minor role, if any at all."[132] The 1991 Declaration on Fact-Finding, which stated that reports should "be limited to a presentation of findings of a factual nature," reflected the same view.[133] By contrast, recent projects to develop standards and guidelines for inquiry bodies discard the fact/law distinction and define fact-finding to include examining alleged violations of international law and reaching conclusions of law.[134] This change reinforces the idea that engagement with law is a recent phenomenon; inquiry bodies are seen as invested with a range of normative powers that they did not previously possess or exercise.[135]

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123. *See, e.g.*, Henderson, *supra* note 17, at 290; van den Herik, *supra* note 69, at 508; Dov Jacobs & Catherine Harwood, *International Criminal Law Outside the Courtroom: The Impact of Focusing on International Crimes for the Quality of Fact-Finding*, *in* QUALITY CONTROL IN FACT-FINDING, *supra* note 92, at 346.

124. van den Herik, *supra* note 69, at 508.

125. Michael Nesbitt, *Re-Purposing U.N. Commissions of Inquiry*, 13 J. INT'L L. & INT'L RELS. 83, 90 (2017).

126. Henderson, *supra* note 17, at 290; *see also* Akande & Tonkin, *supra* note 5; D'Alessandra, *supra* note 20, at 61 (remarking that inquiry bodies are now even being asked to consider questions of law); Geoffrey Palmer, *Perspectives on International Dispute Settlement from a Participant* 43 VICTORIA UNIV. WELLINGTON L. REV. 39, 67 (2012) (describing the "quasi-legal role" of recent inquiry bodies).

127. Frederic Mégret, *Do Facts Exist, Can They Be "Found", and Does It Matter?*, *in* THE TRANSFORMATION OF HUMAN-RIGHTS FACT-FINDING, *supra* note 17, at 28; *see also* ALEXANDER ORAKHELASHVILI, COLLECTIVE SECURITY 121 (2011).

128. van den Herik, *supra* note 69, at 509.

129. Le Moli, *supra* note 7, at 664.

130. Larissa J. van den Herik & Catherine Harwood, *Commissions of Inquiry and the Charm of International Criminal Law: Between Transactional and Authoritative Approaches*, *in* THE TRANSFORMATION OF HUMAN-RIGHTS FACT-FINDING, *supra* note 17, at 233, 237.

131. van den Herik, *supra* note 69, at 509.

132. Catherine Harwood, International Commissions of Inquiry As Law-Makers 5 (Apr. 2016) (ESIL Conference Paper Series No. 1/2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2911962 [https://perma.cc/C7CS-2KPN] (archived May 23, 2022).

133. Fact-Finding Declaration, *supra* note 89, at Annex ¶ 17.

134. *See* Corinne Heaven, *A Visible College: The Community of Fact-Finding Practice*, *in* COMMISSIONS OF INQUIRY: PROBLEMS AND PROSPECTS, *supra* note 9 at 337, 346–47 (excerpting relevant examples).

135. *See* Le Moli, *supra* note 7, at 663–64.

There is no question that many contemporary inquiry bodies have mandates that refer directly to international law and ask for determinations about whether violations of international law have taken place.[136] Express references to international law were less frequent in past mandates, but international law was not absent from the work of earlier inquiry bodies.[137] An examination of historical practice shows that engagement with international legal questions has been part of inquiry practice from the beginning and that debates about whether contemporary inquiry bodies "are overstepping their traditional mandate as fact-finding bodies" reveal a level of misunderstanding.[138] Engagement with inter-national law did not necessarily take the form of doctrinal analysis, but international legal norms informed (and were informed by) the findings, arguments, and conclusions of historical inquiry bodies. There is a strong case that inquiry bodies have long been participants in the discursive and argumentative practice that constitutes international law.[139] To show this, Part II provides context and detail across a broad range of examples to illustrate how inquiry bodies engaged with international legal norms prior to the "juridification" associated with inquiry practice from the 1990s onwards. Although a sentence or two from a few cases might illustrate the point, the intention here is to provide a broad-ranging account that conveys more fully the variegated role that international law has played in practice.

A. *Inquiry Bodies under the Hague Convention Model*

The 1899 Hague Convention provided that a commission of inquiry's report was to be "limited to a statement of facts."[140] But the first inquiry body under the 1899 Hague Convention—a commission of inquiry established by Russia and the United Kingdom following the

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136. *See* van den Herik, *supra* note 69, at 508–10.

137. Some authors acknowledge this. Larissa van den Herik, for example, observes that the main difference between traditional and contemporary inquiry bodies does "not correspond to the fact/law distinction in the sense that traditional commissions were pure fact-finders and contemporary commissions are law-appliers. The fact/law distinction is simply not that easy to make." *Id* at 536; *see also* Mégret, *supra* note 127, at 27.

138. Jan M. Lemnitzer, *International Commissions of Inquiry and the North Sea Incident: A Model for a MH17 Tribunal?*, 27 EUR. J. INT'L L. 923, 923–24 (2017).

139. There is an immense literature on the concept of international law as a discursive process and argumentative practice. *See, e.g.*, Martti Koskenniemi, *Methodology of International Law, in* MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum, ed., 2007). For other accounts, see ABRAM CHAYES & ANTONIA CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 118–23 (1995); JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT 5–9, 56–77 (2010); IAN JOHNSTONE, THE POWER OF DELIBERATION: INTERNATIONAL LAW, POLITICS AND ORGANIZATIONS 20–27 (2011); Monica Hakimi, *The Work of International Law*, 58 HARV. INT'L L.J. 1, 10–13 (2017).

140. 1899 Hague Convention, *supra* note 21, art. 14.

1904 Dogger Bank incident—had a mandate to investigate "the questions of fact connected with the incident," "the question as to where the responsibility lies," and "the degree of blame attaching to the subjects" of Russia, the United Kingdom, or any other country.[141] From the outset, the "pure" fact-finding ideal was displaced by a mandate that combined questions of fact and law.

The Dogger Bank inquiry arose out of an incident in which Russian warships opened fire on British fishing vessels in the North Sea, sinking one vessel, damaging several others, and killing two crew members.[142] The commission's report duly recounted its findings of fact, including the Russian admiral's order to "shoot on sight" any approaching vessels, a decision based on intelligence reports alleging a Japanese plot to attack Russian vessels in the North Sea.[143] A majority of the commissioners, excluding the member appointed by Russia, concluded that although the Russians had mistaken the British trawlers for torpedo boats, the Russian admiral bore responsibility for a decision to open fire that was "not justifiable."[144] The commissioners agreed unanimously that none of the British trawlers had committed "any hostile act," and, by a majority, that the Russian squadron's use of force continued "longer than was necessary."[145] These were conclusions to mixed questions of law and fact, and the commission was viewed at the time as having assumed a "judicial function" by reaching such conclusions.[146] However, the commission also found that the Russian admiral "personally did everything he could . . . to prevent trawlers, recognized as such, from being fired upon" and that nothing had discredited the "military qualities" or "humanity" of the admiral or his crew (although the Russian squadron should have informed nearby states that vessels were in distress before leaving the scene).[147]

Overall, the Dogger Bank commission addressed matters relating to legal concepts such as necessity and proportionality in the use of force, command responsibility and criminal intent, good faith, and mitigation of harm.[148] The report contained factual findings that had clear legal implications. But it did not adopt legal terminology or expressly identify applicable law. It did not feature the type of legal analysis or reasoning that a court judgment would typically include, nor did it include a final operative clause or *dispositif*. This might seem to support the proposition that early inquiry bodies did not genuinely

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141. For the text of the agreement, see *Judicial Decisions Involving Questions of International Law*, 2 AM. J. INT'L L. 929–30 (1908).

142. *See* BAR-YAACOV, *supra* note 22, at 45–88.

143. Lemnitzer, *supra* note 138, at 935.

144. Rep. of the International Commission of Inquiry between Great Britain and Russia Arising out of the North Sea Incident ¶ 11, 13 (1904), *reprinted in* 2 AM. J. INT'L L. 931, 935 (1908) [hereinafter Dogger Bank Report].

145. *Id.* ¶¶ 13, 15.

146. *See* BAR-YAACOV, *supra* note 22, at 72–74.

147. Dogger Bank Report, *supra* note 144, ¶¶ 15–17.

148. *See* Lemnitzer, *supra* note 138, at 929, 935.

engage with international law and instead styled findings of legal fault or responsibility as factual conclusions.[149] These are grounds on which to distinguish the Dogger Bank commission from contemporary inquiry bodies that engage in detailed legal analysis, but they are not a satisfactory defense of the idea that early inquiry bodies engaged in "pure" fact-finding in a legal vacuum. Dogger Bank provides a clear example of an inquiry body departing from the ideal type of "pure" fact-finding envisaged by the Hague Conventions.

Additional examples demonstrate the difficulty of separating fact-finding by inquiry bodies from engagement with international legal norms, whether or not they use legal reasoning or terminology.[150] Take the *Tiger* case (1918) between Germany and Spain. The issue was whether the arrest and sinking of a Norwegian vessel by a German submarine took place in Spain's territorial waters or on the high seas.[151] At first glance, this suggests a case of "pure" fact-finding: the parties agreed in advance that whether the seizure was unlawful and engaged Germany's international responsibility depended on whether it had occurred in Spanish waters.[152] However, the maps relied upon by Germany to fix the limits of the territorial sea did not properly account for certain island features. As a result, the commission made a determination about the legal limits of Spain's territorial sea.[153] The commission also found that the German submarine captain had miscalculated the bearings of the vessels—by using low-lying coastal features rather than well-determined landmarks—in a situation governed by neutrality rules that required the utmost accuracy.[154] This was tantamount to a finding of negligence. The case typified how some "decisions on fact cannot be separated from decisions in law."[155]

The *UB-6* and *UB-3* case (Netherlands/Germany) (1917) provides another example. In two separate incidents, Dutch authorities detained German submarines within the territorial sea of the Netherlands. The commission of inquiry determined that one

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149. Nikolaos Politis considered the commission's attempt "to regard questions of responsibility and blame as questions of fact" as "an abuse of language." Nikolaos Politis, *Les Commissions Internationales d'Enquêtes*, 19 R.G.D.I.P. 163 (1912); *cf.* BAR-YAACOV, *supra* note 22, at 76–77 (defending the fact-law distinction navigated by the Dogger Bank commission).

150. Commentators at the time acknowledged the porous fact-law distinction and that a commission of inquiry might investigate "questions of fact over which controversy has arisen" and "questions of law on which there is also disagreement." Hyde, *supra* note 48, at 96.

151. *See* BAR-YAACOV, *supra* note 22, at 160, 167–68. Spain initially claimed that the *Tiger* was struck at a location just over one mile from the coast and that German sailors piloted the abandoned vessel beyond the three-mile limit to sink it. Germany claimed that the entire incident occurred beyond the three-mile territorial sea limit. *See id.* at 156–57.

152. *See id.* at 168; *see also* MERRILLS, *supra* note 19, at 45–46.

153. *See* BAR-YAACOV, *supra* note 22, at 166–67.

154. *See id.* at 166.

155. *Id.* at 168.

submarine's presence resulted from willful neglect and that the second vessel's entry was accidental; the Dutch authorities had detained the first vessel but released the second. The implication of the commission's report was that the Netherlands had acted within its rights because the first submarine had acted unlawfully.[156]

The *Igotz Mendi* case (Germany/Denmark) (1918) also had a legal character. A German prize crew (from the notorious SMS *Wolf*, a "merchant raider" of the Germany navy) had captured the Spanish vessel *Igotz Mendi* in the Indian Ocean.[157] Heading for Germany, the *Igotz Mendi* ran aground in Danish territorial waters in bad weather. When Danish authorities discovered that the vessel was under the control of a prize crew, it released the original crew, interned the prize crew, and refused to permit Germany to rescue the vessel. Instead, Denmark returned the vessel to its Spanish owners.[158] Germany characterized Denmark's actions as a "serious violation of international law," while Denmark asserted an international legal obligation to intern the prize crew.[159] The commission of inquiry examined whether Denmark's conduct ran afoul of the laws of neutrality, especially in view of Denmark's handling of a different case involving British officers. The commission distinguished that case and affirmed Denmark's decision to intern the German prize crew.[160] The legal character of the commission's work was unmistakable.

The better-known *Red Crusader* case (1962) between Denmark and the United Kingdom again demonstrated fact-finding intertwined with international law. The dispute concerned a Danish frigate's arrest of the *Red Crusader*, a Scottish fishing vessel, off the coast of the Faröe Islands.[161] As the Danes escorted the *Red Crusader* to port, the trawler changed course and tried to escape, even with a Danish boarding party onboard. The Danish frigate pursued and opened fire, causing extensive damage. The United Kingdom and Denmark established a commission of inquiry to investigate the incident, including whether the *Red Crusader* had been engaged in unlawful fishing. The mandate did not expressly pose questions of law, but specified questions of fact

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156. *See* HACKWORTH, *supra* note 34, at 462 (discussing the UB-6 and UB-3 commission).

157. *See id.* at 582 (discussing the *Igotz Mendi* commission).

158. *See id.* at 583; *see also* RICHARD GUILLIATT & PETER HOHNEN, THE WOLF: HOW ONE GERMAN RAIDER TERRORIZED THE ALLIES IN THE MOST EPIC VOYAGE OF WWI 256–65, 270–72 (2009).

159. Invoking the terms of the 1907 Hague Convention (XIII) to justify its detention of the prize crew, Denmark maintained that the *Igotz Mendi* had ceased to be a German prize when the prize crew was "forced by a heavy storm to go ashore in Danish lifeboats." *German Press Is Threatening Denmark For Interning the Igotz Mendi Prize Crew*, N.Y. TIMES, Mar. 8, 1918, at 1.

160. HACKWORTH, *supra* note 34, at 583.

161. *See* Report of 23 March 1962 of the Commission of Enquiry established by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Denmark on 15 November 1961 XXIV 524, 526–27, 533–34 (1962) [hereinafter Red Crusader Report].

that had clear legal implications. Two eminent international lawyers, Charles de Visscher and André Gros, served on the commission.[162] First, the commission found that the commanding officer of the Danish vessel had endangered human life "without proved necessity" and "exceeded legitimate use of armed force" by firing on the *Red Crusader* without sufficient warning, notwithstanding the "flagrant violation" by the *Red Crusader* following a lawful arrest.[163] The report did not identify the applicable law or explain why the Danish use of force was not "legitimate." Referring to "legitimacy" rather than "legality" may have been a deliberate effort to maintain the appearance of strict fact-finding, but de Visscher later indicated that the commissioners had understood themselves to be making legal determinations.[164]

In sum, commissions of inquiry established under the 1899 and 1907 Hague Conventions departed from the ideal of "pure" fact-finding.[165] Their reports reflected prevailing legal norms and their findings were tantamount to legal conclusions—even if the reports did not resemble court judgments or arbitral awards in terms of legal analysis.

B. *League of Nations Inquiry Bodies*

League of Nations inquiry bodies further demonstrated the interplay between inquiry and international law. Such bodies undoubtedly engaged in fact-finding; they often conducted extensive in-country surveys of economic, political, and social conditions. They also made determinations of a legal nature that helped to define the terms on which settlement might be imposed. Several examples show how fact-finding was enmeshed with legal considerations.

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162. Hague Convention inquiry bodies typically included party-appointed members alongside neutrals, but this commission did not include British or Danish nationals.

163. Red Crusader Report, *supra* note 161, at 538. Although Denmark withdrew a claim accusing the British navy of acting unlawfully, the commission described the conduct of British vessel that intervened to return the Danish boarding party as "impeccable." *Id.* at 539.

164. *See* BAR-YAACOV, *supra* note 22, at 192–93 (citing CHARLES DE VISSCHER, ASPECTS RECENTS DU DROIT PROCEDURALS DE LA COURT INTERNATIONALE DE JUSTICE 215–16 (1966)). Whereas Bar-Yaacov argued in the context of Dogger Bank that an inquiry body might describe an action as "justified" in a non-legal sense (*see supra* note 149), he conceded that the language in *Red Crusader* could not be understood as anything but a conclusion that Denmark had violated international law. *Id.*

165. The Letelier and Moffitt commission, which heard a U.S. claim against Chile for compensation relating to the 1976 assassination of the Chilean former foreign minister in Washington, D.C., is frequently included in textbook summaries of inquiry. *See, e.g.*, MERRILLS, *supra* note 19, at 51–53. That commission, which was based on a 1914 dispute settlement agreement, functioned as an arbitral tribunal rather than an inquiry body; Chile agreed beforehand to make an *ex gratia* payment to the victims on the basis of whatever amount the commission determined international law required. *See* Dispute Concerning Responsibility for the Deaths of Letelier and Moffitt (U.S-Chile), 25 R.I.A.A. 1, 4–5 (1992).

Aaland Islands (1920). This controversy concerned minority rights and sovereignty over the Aaland Islands, an archipelago located at the entrance to the Gulf of Bothnia in the Baltic Sea. The main question was whether the Aalanders were entitled to a referendum on separation from Finland to become part of Sweden. First, the Council appointed a Committee of Jurists to examine whether the question was a domestic matter beyond the Council's remit. In addressing that issue, the committee determined that the principle of self-determination was not yet "a positive rule of the Law of Nations" and did not afford national groups a right of secession, although such a right might arise from "a manifest and continued abuse of sovereign power."[166] However, "international legal conception" did require safeguarding minority rights.[167] Ultimately, Finland's sovereignty over the territory was uncertain "as a result of revolutions and wars,"[168] and Finland's admin-istration of the Aaland Islands under Russian rule did not compel the territory's incorporation into newly independent Finland. This meant that the controversy lacked an exclusively domestic character.[169] Finally, the committee found that treaty obligations concerning the demilitarized status of the islands remained in force and that "every State interested has the right to insist upon compliance"—an early manifestation of obligations *erga omnes partes*.[170] These were quintessentially legal assessments (as to be expected from a committee of jurists).[171]

Having established its competence, the Council appointed a Commission of Rapporteurs to propose a solution favorable to the maintenance of peace, taking the legitimate interests of all parties into consideration.[172] This commission's report, which addressed fundamental questions of statehood, recognition, and sovereignty, also had a legal character.[173] After considering the controversy's historical, economic, and social aspects, the commission returned to the essential "legal" issue: Finland's right of sovereignty over the archipelago, which

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166. *Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*, 3 LEAGUE OF NATIONS O. J., SPEC. SUPP. 3, 5 (1920). Lauterpacht cited this report for the proposition that the prohibition of abuse of rights was a general principle of international law. LAUTERPACHT, *supra* note 54, § 15.

167. *Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*, 3 LEAGUE OF NATIONS O. J., SPEC. SUPP. 3, 6 (1920).

168. *Id.*

169. *See id.* at 14.

170. *Id.* at 19.

171. *See* Oliver Diggelmann, *The* Aaland *Case and the Sociological Approach to International Law*, 18 EUR. J. INT'L L. 135, 141–43 (2007) (explaining how the report reflected Max Huber's conceptual approach to determining the legal quality of a rule).

172. *Report Presented to the Council of the League of Nations by the Commission of Rapporteurs*, League of Nations Doc. B7 21/68/106 (1921).

173. *Id.* at 1–3.

the commission viewed as "incontestable."[174] It rejected any "absolute rule" that a minority population might separate itself from one state "to be incorporated in another State or to declare its independence," as this would "destroy order and stability" and "uphold a theory incompatible with the very idea of the State as a territorial and political unity."[175] The commission could not endorse the plebiscite that the Aalanders sought (and that Sweden supported) because detaching the Aaland Islands from Finland would be an alteration of its status without legal basis.[176] Yet Finnish sovereignty had to be reconciled with the principle of self-determination, which meant guaranteeing the rights of minority groups "in a reasonable manner" and "as much as possible."[177] To that end, the commission recommended extensive autonomy for the islands, including the right to preserve exclusive Swedish language instruction in schools, amidst other legal guarantees.[178] Notably, the commission suggested that a right of secession might be "a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees" or where incorporation into another state is the only means to preserve an ethnical or linguistic heritage—conditions that did not, however, apply to the situation of the Aaland Islands.[179] The commission also urged that the archipelago should remain demilitarized, preferably under international supervision.[180] In sum, the inquiry bodies for the Aaland Islands dispute did not undertake "pure" fact-finding. They engaged at length with extant and emerging international legal norms, even if this took the form of denying that certain norms had customary status—and even as, in hindsight, they sketched out the modern legal concepts of "internal" and "external" self-determination.[181]

Question of Memel (1924). Lithuania and Poland disputed the status of Memel (Klaipėda), a port city on the Baltic Sea over which Germany had exercised sovereignty prior to the First World War and that maintained a large post-war German population.[182] In 1923,

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174. *Id.* at 6.

175. *Id.* at 4.

176. *Id.* at 6.

177. *Id.* at 4.

178. *Id.* at 11.

179. *Id.* at 4. The commission also carefully explained why Finland's own separation from Russia could not be analogized to the situation of the Aaland Islands, including, among other factors, that Finland had suffered oppression and persecution under Russian rule. *Id.* at 3, 8.

180. *Id.* at 13.

181. *See* James Summers, *The Internal and External Aspects of Self-Determination Reconsidered*, *in* STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW 229 (Duncan French, ed., 2013). For a recent assessment of how the Aaland Island inquiry bodies engaged with international law, see KAMAL MAKILI-ALIYEV, CONTESTED TERRITORIES AND INTERNATIONAL LAW: A COMPARATIVE STUDY OF THE NAGORNO-KARABAKH CONFLICT AND THE ALAND ISLANDS PRECEDENT 36–57 (2020).

182. *See* Thorsten Kalijarvi, *The Problem of Memel*, 30 AM. J. INT'L L. 204, 204–06 (1936).

Lithuania seized Memel from the provisional military administration—an act that met no resistance from the Conference of Ambassadors operating pursuant to the Treaty of Versailles.[183] The League Council established a commission to consider an existing settlement proposal concerning the future status of the city. Following a site visit, the commission endorsed the formal transfer of sovereignty over Memel, which was to remain autonomous, to Lithuania, with minor changes (such as a Polish right of access to the port).[184] The recommendation turned on Lithuania's demonstrated willingness to "give fullest protection to non-Lithuanians in the territory" as required by the "large body of international law in regard to the rights and duties of racial minorities."[185]

Mosul Affair (1924). The issue was whether Mosul and its environs fell under the sovereignty of Turkey or Iraq (then a British mandatory), and whether to hold a plebiscite on its future status.[186] The commission rejected the British argument that the United Kingdom was legally bound by a wartime guarantee it had made to the King of Iraq that no territory would be ceded to Turkey or any other state; Turkey derided the guarantee as a "purely unilateral act" that was "entirely invalid in law."[187] The commission found the "superior force" of Turkey's argument "obvious."[188] It also rejected a UK/Iraqi claim to Mosul based on a purported "right of conquest" and highlighted the Turkish arguments promoting a "durable peace" aimed at minimizing grievances on either side.[189] The British position that Turkey had renounced its territorial rights by indicating a "readiness to give up the purely Arab territories" and to maintain sovereignty over only "those districts which wish to return to her" was merely a "contingent moral renunciation."[190] Turkey therefore maintained sovereignty over the disputed territory, regardless of the British mandate.[191] The commission left it to the Council to decide "what

183. *See id.* at 206.

184. *See Report of the Commission on the Memel Territory*, League of Nations Doc. C.116.1924.VII. 7–14 (1924).

185. *See id.* The subsequent expulsion of certain German nationals from Memel was the subject of a conciliation commission between Germany and Lithuania in 1931. COT, *supra* note 47, at 91.

186. *See Report Submitted to the Council by the Commission Instituted by the Council Resolution of September 30, 1924 on the Question of the Frontier Between Turkey and Iraq*, League of Nations Doc. C.400.M.147.1925.VII (1925) [hereinafter Mosul Report]. Part of the dispute was referred to the PCIJ. Treaty of Lausanne (Frontier Between Turkey and Iraq), Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 12, at art. 3, ¶ 2 (Nov. 21); *see also* Quincy Wright, *The Mosul Dispute*, 20 AM. J. INT'L L. 453 (1926).

187. Mosul Report, *supra* note 186, at 84.

188. *Id.*

189. *Id.* at 84–85; *cf.* HATHAWAY & SHAPIRO, *supra* note 26, at 45–48, 97, 169, 313–23 (identifying the subsequent 1928 Paris Peace Pact and the adoption of the Stimson doctrine by the League of Nations in 1933 as marking the repudiation of lawful conquest).

190. Mosul Report, *supra* note 186, at 84–85.

191. *Id.* at 88.

weight should be given to these legal considerations," and, on the basis of geographical, historical, and strategic factors—and the goal of a "durable peace"—proposed the formal cessation of most of the Mosul territory to Iraq after a twenty-five year period under British mandate.[192] In the commission's view, the newly-created Iraqi entity was "morally entitled" to seek frontiers that "would allow it to live, both politically and economically" but acknowledged that the disputed territory had to be legally regarded as "an integral part of Turkey" unless or until Turkey renounced its rights.[193] The commission therefore rejected UK/Iraqi legal arguments in support of title but advocated that geopolitical and moral considerations required an adjustment to the result dictated by international law—a type of engagement with international law in its own right. The commission's experience in multicultural and polylingual Mosul also led it to find that "nationalism and language are not always reliable evidence of political views,"[194] a discovery that cast doubt upon the Wilsonian notion that "identity affiliations" were determinate of political interest.[195] However, this did little to offset the enduring association between ethnic identity and the legal contours of self-determination.

Demir-Kapu (1925). A skirmish between soldiers at remote border posts on the Greco-Bulgarian frontier resulted in the death of a Greek sentry and captain. Greece then briefly invaded and occupied part of Bulgaria, claiming that a Bulgarian attack was imminent.[196] Within days, the Council created a commission of inquiry "to establish the facts enabling responsibility to be fixed, and to supply the necessary material for the determination of any indemnities or reparation which might be considered appropriate."[197] Following an on-site

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192. *Id.*

193. *Id.* at 85, 88.

194. *Id.* at 78.

195. *See* Sarah Shields, *The League of Nations and the Transformation of Representation*, *in* THE INSTITUTION OF INTERNATIONAL ORDER: FROM THE LEAGUE OF NATIONS TO THE UNITED NATIONS 163, 168–71 (Simon Jackson & Alanna O'Malley, eds., 2018). Commissioners were surprised to discover that the inhabitants of Mosul had political interests unrelated to ethnic, religious, or linguistic identity and decided that opposition to the British mandate signified "Arabness"—"a remarkable inversion of the League of Nations formula that identity should predict political destiny." *Id.* at 170–71.

196. The episode recalled the 1923 ambush and murder in Corfu of an Italian general on the Albania-Greece boundary delimitation commission. A commission of inquiry concluded that the murder was premeditated. *Dispute Between Italy and Greece: Final Repot of the Inter-Allied Commission Sent to Epirus*, League of Nations Doc. C.781.M.320.1923, 4 (1923). It also concluded that Greek authorities had failed to investigate diligently and should have insisted on better security measures for the delimitation commission. *Id.* at 5–6. Evidence later emerged that the commission of inquiry was unduly influenced by Mussolini's regime and had not in fact considered the Greek authorities at fault. *See* FEDERICA PADDEU, JUSTIFICATION AND EXCUSE IN INTERNATIONAL LAW: CONCEPT AND THEORY OF GENERAL DEFENCES 241 n.91 (2018).

197. *Report of the Commission of Enquiry into the Incidents on the Frontier Between Bulgaria and Greece*, League of Nations Doc. C.727.1925.VII, 1 (1925) [hereinafter Demir-Kapu Report].

investigation, the commission concluded that Greece's incursion into Bulgaria was "not technically justified" and constituted an act of war in violation of the Covenant.[198] There was no "premeditation" on either side, however, and the fact that Bulgarian soldiers at Demir-Kapu had "at one moment penetrated a few yards into Greek territory" could not be considered a violation of Greece's territorial integrity.[199] Moreover, while the maintenance of local militias by Bulgaria was unlawful under the post-war peace agreement, Bulgaria had acted in conformity with the Covenant.[200] The commission did not address whether Greece's invasion might have been lawful if a Bulgarian attack had, in fact, been imminent; the inquiry instead showed that Greece had acted on false information.[201] However, the Council, on accepting the commission's report, rejected any suggestion that a unilateral decision to make war could have been a justifiable act of self-defense—a position that underscored efforts to repudiate the practice of "self-help" in international relations.[202]

Having established Greece's responsibility, the commission recommended that Greece pay an indemnity of 10 million lev for moral damages relating to "losses and suffering" (significantly less than the 52.5 million lev sought by Bulgaria) and a further 20 million lev to cover material damage.[203] The commission also made recommendations to address factors that had contributed to the incident: deficient telephone links to frontier posts, inadequately trained personnel, and overly permissive rules of engagement.[204] Finally, the commission considered the root causes of tension in the frontier region, a situation marked by displaced populations and simmering resentment, mistrust, and occasional brigandage.[205] In

198. *Id.* at 7–8. The phrase "not technically justified" appears to have meant that no circumstances precluding the unlawfulness of Greece's actions were present.

199. *Id.* at 8. This assessment finds echoes in contemporary debates about whether low-level cross-border activity constitutes a use of force. *See* Tom Ruys, *The Meaning of "Force" and the Boundaries of the Jus Ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?*, 108 AM. J. INT'L L. 159 (2014).

200. Demir-Kapu Report, *supra* note 197, at 4, 8.

201. *Id.* at 4–6, 8.

202. *See* WAINHOUSE, *supra* note 60, at 53.

203. Demir-Kapu Report, *supra* note 197, at 8–10. The commission based the quantum of compensation on the deaths of five soldiers and seven civilians on the Bulgarian side, plus several wounded. It also considered three reported incidents of rape by Greek soldiers and other acts of ill-treatment. Costs incurred by those forced to flee were taken into account, but deaths suffered by unlawful militia groups were disregarded. The final amount was reduced, however, because of the Greek captain's death. *Id.* at 8–9. The Bulgarian Lev had a value of USD $0.73 in 1925. FED. RSRV. BULL Jan. 1929, at 1, 35. The total recommended compensation of 30 million levs was therefore around USD $21.9 million. Adjusted for inflation, this is equivalent to USD $325,000,000 in 2021. *See Inflation Calculator*, FED. RSRV. BANK MINNEAPOLIS, https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator (last visited Feb. 10, 2022) [https://perma.cc/6RCY-J8UV] (archived Feb. 10, 2022).

204. Demir-Kapu Report, *supra* note 197, at 5, 12–13.

205. *Id.* at 10–11.

particular, the commission discussed the post-war agreements relating to Greece and Bulgaria that conferred nationality and property rights.[206] Because it had become impractical for a considerable number of persons in Bulgaria to reclaim their property in Greece, even where the post-war agreements provided for such a right, the commission reasoned that it was "only just" that such persons be compensated and that the value of any property left behind be calculated "on a liberal scale" in the interest of reconciliation.[207]

Manchuria (1931). Fighting erupted between Chinese and Japanese forces in Manchuria in September 1931 after Japan advanced beyond the "railway zone" where it was permitted by treaty to operate. Three months later—as Japanese forces seized territory and moved towards controlling the whole of Manchuria—the Council established a commission of inquiry, chaired by Lord Lytton of the United Kingdom, to visit the region and report "on any circumstance which, affecting international relations, threatens to disturb peace between China and Japan."[208] One key question was whether Japan's actions constituted "an unwarranted aggression on the part of the Japanese troops or whether they were acting in self-defence."[209] Upon the commission's establishment, several delegates to the League underlined the need to uphold applicable rules of international law, including those relating to nonintervention, the occupation of territory, and the pacific settlement of disputes.[210] These statements were suggestive of the types of facts that might have been relevant to the commission's work.

The Lytton Commission moved slowly but produced a voluminous account of the evolving conflict by the following summer.[211] The report identified several legal issues, such as whether a 1905 meeting on railway construction resulted in a legally binding agreement. Although this was "properly a matter for judgment by an impartial judicial tribunal," the commission concluded that China's subsequent conduct

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206. *Id.* at 13–14.

207. *Id.* at 14.

208. *Report of the Commission of Enquiry on the Appeal by the Chinese Government*, League of Nations Doc. C.663.M.320.1932.VII, 6 (1932) [hereinafter Lytton Commission Report]. Both China and Japan expressed support for the establishment of an inquiry body. *Appeal from the Chinese Government under Article 11 of the Covenant*, 13 LEAGUE OF NATIONS O.J. 283, 283 (1932). Japan speculated that an investigation would expose the inadequacy of Chinese administration and the threat that Chinese disintegration posed to the major powers. *See* THOMAS W. BURKMAN, JAPAN AND THE LEAGUE OF NATIONS: EMPIRE AND WORLD ORDER, 1914-1938 168 (2008).

209. Arthur K. Kuhn, *The Lytton Report on the Manchurian Crisis*, 27 AM. J. INT'L L. 96, 98 (1933).

210. *Appeal from the Chinese Government under Article 11 of the Covenant (continuation)*, LEAGUE OF NATIONS O.J. 2376, 2378–83 (1931). Delegates from Guatemala and Peru emphasized the importance of upholding the legal prohibition against using military occupation to compel treaty modifications or to recover debts. *Id.* at 2380–83.

211. *See* WAINHOUSE, *supra* note 60, at 63–64.

had demonstrated acceptance of an obligation not to construct railways "patently and unreasonably prejudicial" to Japan's railway interests in Manchuria.[212] Another key issue concerned boycotts that targeted Japanese nationals and economic interests inside China. The commission found that such actions, as carried out, were inconsistent with Chinese law and "incompatible with treaty obligations to protect life and property and to maintain liberty of trade."[213] Whether such boycotts were lawful instruments of state policy (for example, to resist military aggression by a stronger country) and "consistent with friendly relations or in conformity with treaty obligations" was "rather a problem of international law than a subject for our enquiry."[214]

The Lytton Commission was more forthright when it concluded that Japan had used a minor explosion in the railway zone as a pretext for the disproportionate military response. This was not "legitimate self-defence" in the commission's view, although it allowed for the possibility that "officers on the spot may have thought they were acting in self-defence."[215] Japan claimed to be acting in conformity with international law, but the forcible seizure and occupation of Chinese territory—and the orchestration of a sham declaration of independence to establish "Manchukuo"—were violations of the Covenant and other international agreements that sought "to prevent action of this kind."[216] The commission also found that "maintenance and recognition of the present regime in Manchuria" were not compatible "with the fundamental principle of existing international obligations."[217] These were legal conclusions, even as the commission explained that its focus was "less on the responsibility for past actions" and more on "finding means to avoid their repetition."[218] Its aim was to inform the Council, not "to argue the issue," but the commission's position on Japanese aggression was clear.[219] The final report proposed ten broad principles to guide a solution to the controversy, including the need to uphold the provisions of the Covenant, the Pact of Paris,

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212. Lytton Commission Report, *supra* note 208, at 44–45. Contemporary inquiry bodies commonly offer provisional legal conclusions while recommending that a formal judicial body examine the question. *See, e.g.*, Rep. of the International Commission of Inquiry on Darfur to the U.N. Security-General, at 641–45 (Jan. 25, 2005).

213. Lytton Commission Report, *supra* note 208, at 119.

214. *Id.* at 119–20.

215. *Id.* at 71.

216. *Id.* at 127. Japan argued that it had acted consistently with all resolutions adopted by the Council since September; all such actions were "legitimate acts of self-defence" and international law did not prohibit a "genuine independence movement" such as that leading to Manchuria's separation from China. *Id.*

217. *Id.* at 128. The commission emphasized, however, that the problem was also a matter of practical, economic, and strategic considerations. *Id.*

218. *Id.* at 12. Lord Lytton's private notes indicated consensus on this point, but also his personal view that Japan should not escape "strong condemnation." Cloet, *supra* note 59, at 224.

219. Lytton Commission Report, *supra* note 208, at 127.

and the Nine-Power Treaty of Washington.[220] It included a detailed "blueprint" that suggested how various aspects of the situation might be memorialized in different legal instruments.[221]

Notwithstanding the report's constructive tone, Japan's delegate to the League described the Lytton Commission as having put Japan "on trial" with the US and European powers poised to "crucify Japan."[222] Japan withdrew from the League following the unanimous adoption of the report.[223] Although the Lytton Commission came to be associated with the ultimate failure of the League of Nations, the eminent jurist Manley Hudson described the report at the time as "an epoch-making document" that marked "a triumph for the collective system of handling international disputes."[224]

Iraq-Syria Frontier (1932). To resolve a dispute relating to the location of the boundary between Iraq and Syria, the League mandated a commission (at the request of the British and French governments, which held mandates over those territories) to consider the meaning of Article I of the Franco-British Convention of 1920, which described the boundary, and to propose a line "modified as required" by local circumstances.[225] In its report, the commission provided its own interpretation of Article I, informed by a site visit.[226] Based on economic, ethnographic, geographic, and strategic factors, the commission then proposed a frontier that departed from the Article I line.[227] Among other things, it recommended assigning the entire Jebel Sinjar sector (home to the Yezidi people) to Iraq, rather than dividing it.[228] In dissent, one commissioner argued that the 1920 treaty was unequivocal on the location of the frontier in Jebel Sinjar and that economic considerations could not, as a legal matter, override what had been "so definitely claimed by one side and accepted by the other in the course of the negotiations."[229]

Grand Chaco (1933). An earlier commission in 1929 delayed the outbreak of armed conflict between Bolivia and Paraguay over the

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220. *Id.* at 130–31.

221. *Id.* at 132–39.

222. HATHAWAY & SHAPIRO, *supra* note 26, at 156.

223. *Id.* at 157.

224. Manley O. Hudson, *The Report of the Assembly of the League of Nations on the Sino-Japanese Dispute*, 27 AM. J. INT'L L. 300, 300 (1933). Hudson went so far as to describe the report as "worth a whole library of volumes on the law as to international disputes." *Id.* at 301. For a less sanguine assessment, *see* Cloet, *supra* note 59, at 235–36 (observing that "[t]he ideal of fact-finding and impartial knowledge that could decide a dispute and punish transgressions of international law, in practice only aided to delay the political decision-making process").

225. *Report of the Commission Entrusted by the Council with the Study of the Frontier Between Syria and Iraq*, League of Nations Doc. C.578M.285.1932.VI, 11 (1932).

226. *Id.* at 15–21.

227. *Id.* at 38–41.

228. *Id.* at 40.

229. *Id.* at 41.

Chaco region,[230] but the countries were at war by 1933.[231] The Council dispatched a commission of inquiry and conciliation to negotiate a ceasefire and an agreement to arbitrate, while also investigating each side's part in the conflict.[232] After the parties rejected the commission's settlement proposals, however, the commission concluded that further conciliation would be "unprofitable."[233]

Instead of then inquiring into "responsibility for the war and into the violations of international law" pursuant to its mandate, the commission demurred.[234] It refused "to be drawn into official enquiries," since this might distract from the "essential task" of settlement and "make the performance of that task still more difficult by further embittering the polemics on the subject of violations of international law which had been continuing almost without interruption since the outbreak of hostilities."[235] The commission accepted that "acts of violence contrary to the generally accepted rules of international law" had taken place and were likely to continue. [236] It viewed ending the war as the only solution; both parties bore responsibility for the failure to achieve peace, whatever the original source of conflict.[237] The commission explained that it had avoided the matter of legal responsibility in its settlement proposal because this "could not fail to stir up controversies as to the past" and would have

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230. Bolivia and Paraguay, each of which accused the other of aggression, established the first body in a protocol to the Final Act of the 1929 International Conference of American States on Conciliation and Arbitration. *Official Documents: International Conference of American States on Conciliation and Arbitration*, 23 AM. J. INT'L L. SUPP. 76, 98–100 (1929). The nine-member commission of investigation and conciliation was mandated to examine questions of fact and law in order "to establish upon which country responsibility falls and which one of them is bound to make the proper reparations" for having "brought about a change in the peaceful relations between the two countries."*Id.* at 99. On the basis of its investigation, the commission was to submit proposals to the parties aimed at an amicable settlement. *Id.* The protocol stipulated that even if the commission could not effect conciliation it was empowered "to establish both the truth of the matter investigated and the responsibilities which, in accordance with international law, might appear as a result of its investigation." *Id.* The commission brokered a ceasefire agreement under which Bolivia and Paraguay agreed to the "mutual forgiveness of the offenses and injuries caused," re-establishment of the status quo ante in the Chaco region, and renewal of diplomatic relations. L.H. Woolsey, *The Bolivia-Paraguay Dispute*, 24 AM. J. INT'L L. 122, 123 (1930). However, the commission declined to render a report establishing legal responsibility. *Id.*

231. *Report of the Chaco Commission into the Dispute Between Bolivia and Paraguay*, League of Nations Doc. C.154.M.64.1934.VII, 5 (1934) [hereinafter *Chaco Report*].

232. *Id.* at 40. The mandate was renewed in 1934 with instructions to study all aspects of the problem and "to do whatever it takes to end the hostilities." Reconciliation and inquiry were to be pursued simultaneously "despite the inherent tension between these participatory and observatory roles." Cloet, *supra* note 59, at 273.

233. *Chaco Report*, *supra* note 231, at 47–48.

234. *Id.* at 48–49.

235. *Id.* at 48.

236. *Id.* at 49.

237. *Id.* League members reproached the commission for shirking its responsibility. Cloet, *supra* note 59, at 281–83.

introduced "a new cause of discord into a situation already clouded by mutual misunderstanding and hatred."[238] It also suggested that legal responsibility might have been impossible to determine since neither party had clear title to the disputed area: "Each party . . . maintains that it is waging a defensive war in its own territory. How is the aggressor to be determined in such a conflict?"[239] It would be

> a tragic error to go to the trouble of sifting the records or collecting evidence for the sole purpose of ascertaining in what circumstances the attack on a patrol in the heart of the bush led, two years ago, to the initial incident, or by what person in authority the first irreparable words of war were then pronounced.[240]

This reasoning reflected an effort to marginalize the relevance of international law to the dispute. The Chaco commission could be said to have engaged with international law by seeking to set it aside, taking the position that law and justice were obstacles, rather than prerequisites, to peace and stability.[241]

In sum, League of Nations inquiry bodies showcased a complex interplay between factual and legal questions, with important consideration given to matters of minority rights and self-determination, the limits of sovereignty, state responsibility, and the consequences of violating international law. Commissions navigated this interplay in different ways and, perhaps consistent with the conventional narrative, avoided legal determinations in some circumstances. But overall these bodies engaged with international legal norms and made findings and recommendations that contributed to their further development.

C. *Inquiry Bodies Established by International Organizations during the Cold War*

Fact-finding tied up with international legal questions also characterized the practice of inquiry bodies during the Cold War. The following examples further demonstrate the difficulty of detaching fact-finding from its international legal context, even when inquiry bodies did not necessarily support their legal conclusions with legal analysis.

Greek Frontiers (1946). Invoking Article 34 of the UN Charter, the UN Security Council established a commission of investigation in 1946 "to ascertain the facts relating to the alleged border violations along the frontier between Greece on the one hand and Albania, Bulgaria,

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238. *Chaco Report*, *supra* note 231, at 50–51.

239. *Id.* at 52. This ignored the potential relevance of past efforts to establish settlements in the territory and the role of domestic politics in the escalation of hostilities. Cloet, *supra* note 59, at 244, 251.

240. *Chaco Report*, *supra* note 231, at 52.

241. This attitude may have reflected a desire for expediency (based on the personal circumstances of the commissioner) rather than principle. Cloet, *supra* note 59, at 274.

and Yugoslavia on the other."[242] In examining more than thirty incidents, the commission considered whether Greece's neighbors were supporting guerrilla activity to pursue irredentist claims and whether Greece itself was provoking frontier incidents as part of an expansionist foreign policy.[243] A majority of the commission concluded that Yugoslavia, and to a lesser extent, Albania and Bulgaria, bore "direct responsibility for their support of the Greek guerrillas."[244] It also found that Greece's neighbors had a "duty under international law to prevent and suppress subversive activity on their territory" aimed at Greece, notwithstanding any role that Greece had played in provoking such activity.[245] The commission recommended that the Security Council treat state-supported cross-border activity by armed bands as threats to the peace under Article 39 of the Charter—a significant recommendation on a fundamental question of international law.[246] Internal debates within the commission underscored the legal nature of its conclusions.[247]

Dominican Republic/Haiti (1950). The OAS established a committee of investigation to examine allegations that the Dominican Republic sought to overthrow the Haitian government and had allowed Haitian dissidents to make radio broadcasts aimed at inciting rebellion.[248] The committee found that the Dominican Republic needed to exercise "strict vigilance" over Haitian exiles in its territory (suggesting a due diligence-type obligation) but had instead aided such individuals in contravention of a 1949 joint declaration.[249] The committee rejected the argument that Haiti's own alleged violations of the declaration justified the Dominican Republic's conduct.[250] It also discussed the 1928 Convention on the Duties and Rights of States in the Event of Civil Strife, which concerned the activities of political

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242. S.C. Res. 15, at 6 (Dec. 19, 1946). This was a large commission whose operations blurred the lines among inquiry, monitoring, and peace-keeping.

243. WAINHOUSE, *supra* note 60, at 231.

244. Rep. by the Comm'n of Investigation Concerning Greek Frontier Incidents to the S.C., U.N. Doc. S/360, at 181 (May 27, 1947).

245. *Id.* at 181.

246. *Id.* at 248.

247. Belgian, French, and Colombian delegates urged the commission not to address "the possible responsibility" of any state given the "spirit of conciliation" behind the commission's establishment; Soviet and Polish delegates rejected the commission's conclusions. *Id.* at 239–45. The French delegate cautioned against assuming that the commission could establish "a body of evidence in the juridical sense of the word." *Id.* at 242.

248. ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN TREATY OF RECIPROCAL ASSISTANCE, APPLICATIONS, VOLUME I (1948-1959) 109–10 (3d ed. 1973) [hereinafter APPLICATIONS, VOL. I].

249. *Id.* at 113, 118–21, 136.

250. *Id.* at 114. In essence, the committee rejected a countermeasures or *exceptio non adimpleti contractus* argument. On the latter, *see* Application of the Interim Accord of 13 September 1995 (Maced. v. Greece), Judgment, 2011 I.C.J. 644, ¶¶ 115–17, 161 (Dec. 5).

exiles against their home governments, and urged OAS members to update that instrument.[251]

Nicaragua/Honduras (1957). Armed hostilities broke out when Honduras attempted to exert control over border areas awarded to it by a 1906 arbitral award but still under Nicaraguan administration. Honduras claimed that Nicaragua had committed an act of aggression by sending forces into Honduran territory and had failed to protect the Honduran embassy in Managua.[252] The OAS committee was mandated to investigate the facts with a view to settlement.[253] Nonetheless, after arranging a ceasefire, the committee heard legal arguments from both sides regarding the territorial dispute and the legal validity of the 1906 award. It also received complaints from both sides about ceasefire violations and advised the OAS to establish a monitoring body (which it did).[254] Ultimately, the committee found that it could not determine state responsibility for alleged acts of aggression; the evidence showed that both sides had exercised control over parts of the disputed territory, and the parties' reservations to the 1947 Inter-American Treaty of Reciprocal Assistance disapplied the provisions on invasion of territory.[255] However, the investigating committee helped to persuade the parties to submit the dispute to the International Court of Justice.[256]

Situation in Angola (1961). Faced with civil unrest in Angola (then a Portuguese colony), the UN General Assembly established a subcommittee to inquire into allegations of armed suppression and the denial of political rights to the Angolan people.[257] The subcommittee rejected Portugal's claim that neighboring states were providing military assistance to rebel groups in Angola in violation of international law.[258] It urged Portugal to abide by its UN Charter

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251. APPLICATIONS, VOL. I, *supra* note 248, at 134. Disputes involving plots to overthrow governments featured in OAS inquiry practice, including a fact-intensive 1960 committee of investigation that confirmed the Dominican Republic's role in a plot to assassinate the Venezuelan president. ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN TREATY OF RECIPROCAL ASSISTANCE, APPLICATIONS, VOLUME II (1960-1972) 17–27 (3d ed. 1973) [hereinafter APPLICATIONS, VOL. II]; *see also* APPLICATIONS, VOL. I, *supra* note 248, at 338–49, 381–95 (regarding inquiries for Nicaragua and Panama).

252. *Id.* at 282, 286.

253. WAINHOUSE, *supra* note 60, at 137.

254. *Id.* at 138.

255. APPLICATIONS, VOL. I, *supra* note 248, at 289–90.

256. WAINHOUSE, *supra* note 60, at 139–40; Arbitral Award made by the King of Spain on 23 December 1906 (Hond./Nicar.), 1960 I.C.J. Rep. 192 (Nov. 18).

257. G.A. Res. 1603 (XV) (Apr. 20, 1961). Portugal rejected the sub-committee's request to visit Angola to obtain first-hand information. The sub-committee instead met with refugees and representatives from Angolan groups in the Congo. Rep. of the Subcomm. On the Situation in Angola, ¶¶ 46–57, U.N. Doc. A/4978 (Nov. 27, 1961) [hereinafter Angola Report]. Contemporary inquiry bodies frequently encounter similar obstacles and gather information from sources outside the relevant territory. *See, e.g.*, Rep. of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, ¶¶ 23–24, U.N. Doc. A/HRC/39/CRP.2, (Sept. 17, 2018).

258. Angola Report, *supra* note 257, ¶429.

obligations and to respect the right of self-determination, including the General Assembly's demand in Resolution 1514 that armed action against dependent peoples cease.[259] Portugal's "severe repression" of the local population raised fears of "a racial conflict of a genocidal nature," and Portugal's failure "to fulfil the legitimate aspirations of the peoples of Angola" required the United Nations to remain engaged.[260]

Dominican Republic/Haiti (1963). The OAS established a committee of investigation in response to a claim that Haiti had breached the inviolability of the Dominican embassy in Port-au-Prince; Haiti alleged that the Dominican Republic was preparing military action against it.[261] The committee concluded that two Haitian police officers had unlawfully entered the Dominican embassy and that exiles in Haiti posed a security threat to the Dominican Republic. It also confirmed that Haitian nationals seeking to overthrow the Haitian government had attempted an "invasion" from Dominican territory, but it could not confirm governmental involvement.[262] Neither Haiti nor the Dominican Republic had breached any legal obligation by granting asylum to each other's political enemies, but a more careful approach was advisable.[263] The committee urged both parties to live up to their international obligations.[264]

Oman (1963). From 1955, the Sultan of Muscat sought to exert authority over interior areas that were previously autonomous. The campaign included suppressing local uprisings with assistance from British troops; fighting took place on a significant scale. In 1963, the UN General Assembly established an ad hoc committee to investigate the situation, including whether the interior regions fell under the sovereignty of the Sultanate.[265] The committee concluded that the United Kingdom's conduct, motivated by oil interests, was "extreme and difficult to justify" and that the United Kingdom had failed to meet its obligation "to consider with great care the effects of its intervention."[266] The committee criticized the British position that it had intervened by invitation and that the "putting down of a rebellion by a lawful authority [was] no violation of human rights."[267] It called upon the United Kingdom to use its close relationship with the Sultan to push for a peaceful settlement but observed simultaneously that the problem derived "from imperialistic policies and foreign intervention

259. *Id.* ¶¶ 431–32; *see* G.A. Res. 1514 (XV), ¶ 4 (Dec. 14, 1960).
260. Angola Report, *supra* note 257, ¶¶ 436–37, 446, 474.
261. APPLICATIONS, VOL. II, *supra* note 251, at 165–207.
262. *Id.* at 177.
263. WAINHOUSE, *supra* note 60, at 170.
264. *Id.*
265. Rep. of the Ad Hoc Comm. on Oman, ¶ 657, U.N. Doc. A/5846, (Jan. 22, 1965)
266. *Id.* ¶¶ 669, 672.
267. *Id.* ¶¶ 668–69.

in Muscat and Oman"—a clear reference to the role of the United Kingdom, whose conduct was shadowed by the spectre of illegality.[268]

Benin (1977). After a failed attempt by mercenaries to topple the government, Benin alleged that foreign powers were behind the attack and requested an investigation to ascertain the facts and responsibility. The UN Security Council established a special mission.[269] It confirmed that the incident had caused eight fatalities and injuries to more than fifty people during a three-hour battle at the airport, after which Benin's armed forces had forced the attackers to flee. The mercenary attack was an act of aggression.[270] Although evidence pointed to Gabon's involvement, the mission stated that its time-limited mandate prevented verification.[271] As a result, the mission did not reach the question of attribution, even having established that an internationally wrongful act took place.

Seychelles (1981). Following a failed coup attempt in Seychelles, again involving mercenaries, the UN Security Council established a commission of inquiry.[272] It confirmed that mercenaries had entered Seychelles on a commercial flight from South Africa, airport security personnel had uncovered the plot, and fighting broke out as the mercenaries sought to take control of the airport.[273] Some of the group then escaped back to South Africa by commandeering an Air India plane.[274] Seychelles alleged material damage of US$40 million, but the key question was whether South Africa bore responsibility. In an initial report, the commission noted that South African officials denied knowledge of the plot and claimed to have rebuffed general requests for support from Seychellois exiles, but it could not "reach a definitive conclusion on the extent or level of South African knowledge or responsibility."[275] The commission called for stronger international legal prohibitions on mercenary activity and improved measures to prevent the transport of weapons in checked baggage.[276] After the Security Council extended its mandate, the commission reported that trial evidence from South Africa (where some mercenaries faced hijacking charges) pointed to the involvement of South African officials.[277] It was indisputable that the mercenaries had approached South African intelligence personnel to seek logistical support and had

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268. *Id.* ¶¶ 694–99.

269. S.C. Res. 404 (Feb. 8, 1977).

270. Rep. of the S.C. Special Mission to the People's Republic of Benin Established under Res. 404 (1977), ¶¶ 141–42 U.N. Doc. S/12294/Rev.1 (1977).

271. *Id.* ¶ 145.

272. S.C. Res. 496 (Dec. 15, 1981).

273. Rep. of the S.C. Comm'n of Inquiry Established under Res. 496 (1981), ¶ 258–65, U.N. Doc. S/14905/Rev.1 (1981).

274. *Id.* ¶ 256.

275. *Id.* ¶¶ 280–82.

276. *Id.* ¶ 293.

277. S.C. Res. 507 (May 28, 1982); Supplemental Rep. of the S.C. Comm'n of Inquiry Established under Res. 496 (1981), ¶¶ 34–37, 58, U.N. Doc. S/15492 (1982).

later received weapons and equipment.[278] Furthermore, members of a South African paramilitary unit had participated in the operation, even as the full extent of South African involvement remained murky.[279] The commission implored states with information about mercenary operations to communicate with the governments concerned; South Africa had a "particular obligation" to prevent such operations from taking form in its territory.[280]

International Labour Organization inquiries. With reports that featured detailed legal analysis, ILO commissions of inquiry played the type of quasi-judicial role often associated with contemporary inquiry bodies. The first ILO commission of inquiry in 1962 examined whether Portugal was in breach of its obligations under the 1957 Abolition of Forced Labour Convention in its colonial territories (Mozambique, Angola, and Guinea).[281] The commission detailed the situation in each territory and Portugal's positions on the relevant ILO instruments. A key issue concerned the alleged use of forced labor for economic development.[282] The commission analyzed the legal distinctions among terms such as forced labor, recruited labor, and contract labor; it concluded that some cases of recruitment by public officials constituted forced labor in violation of the 1957 Convention.[283] It also found that Portugal had an obligation under that treaty to ensure freedom of expression and association, since these were necessary to the redress of grievances.[284] The commission rejected the argument that Portugal had ratified the convention "as a cover to continue her ruthless labour policies" but agreed that Portugal had failed to implement legislation enacted to give the convention effect.[285] It exonerated a railway company in Angola of forced labor allegations but found that other companies had used recruitment practices "liable to involve compulsion and therefore to constitute forced labour."[286] The

278. Supplemental Rep. of the S.C. Comm'n of Inquiry Established under Res. 496 (1981), ¶ 73, U.N. Doc. S/15492 (1982). Further details outlining South Africa's involvement emerged later in a first-person account by the notorious mercenary Mike Hoare, who led the coup attempt. *See generally* MIKE HOARE, THE SEYCHELLES AFFAIR (1986).

279. Supplemental Rep. of the S.C. Comm'n of Inquiry Established under Res. 496 (1981), ¶¶ 75, 78–79, U.N. Doc. S/15492 (1981).

280. *Id.* ¶¶ 83–84.

281. Rep. of the Comm'n Appointed under Article 26 of the Constitution of the International Labour Organisation to Examine the Complaint Filed by the Government of Ghana concerning the Observance by the Government of Portugal of the Abolition of Forced Labour Convention, 1957 (No. 105), 1–2 (1962). The three-member panel included two former judges and was assisted by international lawyer Wilfred Jenks. *Id.* at 6.

282. *Id.* ¶ 711.

283. *Id.* ¶¶ 713–14.

284. *Id.* ¶¶ 716–19.

285. *Id.* ¶ 725.

286. *Id.* ¶¶ 737–38.

commission characterized its assessment as "legal considerations and observations."[287]

This initial ILO commission of inquiry went far beyond "pure" fact-finding and typified the approach taken by subsequent ILO commissions. In 1968, an ILO commission determined that Greece's contention that a state of emergency justified its derogation from certain treaty obligations was unfounded.[288] In 1975, an ILO commission of inquiry examined whether actions by the military junta in Chile following the 1973 coup violated the 1919 Hours of Work (Industry) Convention and the 1958 Discrimination (Employment and Occupation) Convention.[289] The commission determined that post-coup dismissals had lacked safeguards to prevent terminations based on political opinion, therefore violating the latter.[290] These examples combined fact-finding with extensive legal analysis.

D. *Conclusion on the Second Proposition*

This disquisition on the practice of inquiry bodies prior to the 1990s calls into question the proposition that inquiry bodies moved only recently from "pure" fact-finding to engaging with international law.[291] International law featured in inquiry practice from the beginning, even if that engagement was sometimes indirect or oblique.[292] Looking back at the historical practice of inquiry bodies

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287. *Id.* ¶ 726.

288. *See* Int'l Lab. Off., Report of the Commission Appointed under Article 26 of the Constitution of the International Labour Organisation to Examine the Complaints concerning the Observance by Greece of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Made by a Number of Delegates to the 52nd Session of the International Labour Conference, ¶¶ 112, 271 (1968).

289. *See* Int'l Lab. Off., Report of the Commission appointed under article 26 of the Constitution of the International Labour Organisation to examine the observance by Chile of the Hours of Work (Industry) Convention, 1919 (No. 1), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), ¶ 2 (1975).

290. *See id.* ¶¶ 61–67, 174.

291. *See infra* Part IV (providing further examples of inquiry bodies that engaged with international law, specifically relating to human rights and IHL).

292. This is not made any less true by the fact that participants or observers at the time would not necessarily have characterized the work of such inquiry bodies as relating to international law. This study's notion of what counts as engagement with international law might be criticized on grounds of presentism or anachronism (for example, if a concept such as self-determination were viewed as beyond the scope of international law at the relevant time, or because engagement with international law might have been construed narrowly in the past to mean only determinations about whether conduct was lawful or not), but the goal has been to identify common ground in the work of inquiry bodies across time—that is, to examine the substance of their activities and conclusions, not simply how the work was portrayed, described, or even understood in its own historical context. On the legitimate role of anachronism in international legal scholarship, see Anne Orford, *On International Legal Method*, 1 LONDON REV. INT'L L. 166, 174–75 (2013); *see also* Martti Koskenniemi, *Histories of International Law: Significance and Problems for a Critical View*, 27 TEMP. INT'L &

from a twenty-first-century vantage point, international legal norms shaped the issues that inquiry bodies were asked to address, the arguments made by states to support their positions, the attention given to certain facts over others, and the evaluations and recommendations that inquiry bodies made.[293] Even without necessarily invoking international law, inquiry bodies were contributing to a shared understanding of existing or emerging legal norms. To frame certain facts as significant or consequential was sometimes akin to designating such facts as legally effective, even if the corresponding legal norms were left implied or unsaid.[294] Furthermore, the "evaluative reasoning" associated with modern-day inquiry bodies was part of this earlier practice as well.[295] This challenges the strand of the conventional narrative that sees the exercise of normative power by inquiry bodies as essentially a post–Cold War phenomenon.

This is not to say that nothing has changed in the practice of inquiry bodies over time. Many modern-day inquiry bodies have mandates that foreground international legal questions and expressly seek conclusions of law; this departs from much of the historical practice.[296] When modern-day inquiry bodies have law-focused mandates, their reports may resemble modern-day court judgments, with detailed and lengthy sections on applicable law, the legal arguments of the parties, and reasoned legal analysis. As the mandates of inquiry bodies have become "juridified," so too have their modes of presentation and analysis. Extensive legal reasoning was less common in the practice of earlier inquiry bodies, and legal conclusions—whether or not inquiry bodies were mandated to reach them—were sometimes underdeveloped, implied, or portrayed as the obvious consequence of ascertained facts. Efforts to avoid compromising "the

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COMP. L.J. 215, 234–35 (explaining how international legal history requires making consequential choices about what counts as "law").

293. Of course, one can debate whether engaging with international law goes beyond doctrinal analysis. At least one school of thought would suggest that "the whole process of competent persons making authoritative decisions in response to claims which various parties are pressing upon them, in respect of various views and interests" is part of the dynamic international law-making process. Rosalyn Higgins, *Policy Considerations and the International Judicial Process*, 17 INT'L & COMP. L.Q. 58, 59 (1968).

294. "[T]he designation of a fact as legally effective goes beyond merely aligning law to fact but is a normative act, one that structurally captures a fact within the law." Gleider Hernández, *Effectiveness*, *in* CONCEPTS FOR INTERNATIONAL LAW: CONTRIBUTIONS TO DISCIPLINARY THOUGHT 237, 238 (Jean d'Aspremont & Sahib Singh, eds., 2019)

295. Le Moli describes "evaluative reasoning" as "the assessment of conduct in the light of a prescription/prohibition derived from international law" and notes that some pre-1992 UN inquiry bodies exercised normative power by engaging with international law. *See* Le Moli, *supra* note 7, at 640–41, 644.

296. *See* HARWOOD, *supra* note 7, at 114–17, 236–37; Le Moli, *supra* note 7, at 642–43.

factual purity" of the exercise could mean obscuring, rather than emphasizing, the legal underpinning of the analysis.[297]

By contrast, the overt emphasis on international law in the work of contemporary inquiry bodies is based on different assumptions, including that drawing upon "the authority of law" will make an inquiry body's report more persuasive, credible, and likely to provoke desired responses.[298] Mandates and reports that emphasize legal analysis are seen as transforming inquiry bodies into quasi-judicial bodies and confirming or constituting their normative authority;[299] this "lego-centrism" is a key part of the "progress narrative" that dominates the inquiry literature.[300] Ironically, earlier inquiry bodies (at least those established under the Hague Convention model) exhibited more "court-like" procedures than do most contemporary inquiry bodies (e.g., the submission of memorials, formal hearings with the parties represented by counsel, receiving witness testimony in a structured format).[301] Yet as the mandates and reports of contemporary inquiry bodies have "juridified," their operations have emphasized site visits and field interviews, meetings with stakeholders, and open-source data—rather than party submissions and formal hearings (although this "modern" approach describes many historical examples, as well).[302]

In sum, it is important not to overstate the degree of commonality between past and present. There are real differences between law-focused contemporary inquiry bodies and most of the historical examples surveyed above. The point is rather that it is a mistake to assume that historical inquiry bodies entirely avoided legal questions, operated in a legal vacuum, or, by virtue of a less overt focus on international law, lacked authority (normative, semantic, or otherwise)—just as it is a mistake to assume that all contemporary inquiry practice is juridified, law-centric, and, therefore, authoritative.[303] Inquiry bodies have not evolved in linear fashion from

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297. Mégret, *supra* note 127, at 33–34; *see also* Politis, *supra* note 149.

298. *See* Larissa van den Herik, *Accountability Through Fact-Finding: Appraising Inquiry in the Context of Srebrenica*, 62 NETH. INT'L L. REV. 295, 297 (2015); van den Herik, *supra* note 69, at 510, 535 (describing that view). For critical assessments of those assumptions, *see generally* Krebs, *supra* note 20; Parisi, *supra* note 12, at 150.

299. *See* Le Moli, *supra* note 7, at 632, 644.

300. "Lego-centrism" refers to the idea that "law is treated as a given and a necessity, as the natural path to ideal, rational or optimal conflict resolutions and ultimately to a social order guaranteeing peace and harmony." Gunter Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 26 HARV. INT'L L. J. 411, 445 (1985).

301. See the detailed procedural provisions of the 1907 Hague Convention, *supra* note 29; *see also* BAR-YAACOV, *supra* note 22, at 89–108.

302. By contrast, site visits by international courts and tribunals are rare. *See* Michael A. Becker & Cecily Rose, *Investigating the Value of Site Visits in Inter-State Arbitration and Adjudication*, 8 J. INT'L DISP. SETTLEMENT 219, 219 (2017).

303. On normative and empirical authority claims in international law, see Başak Çali, *Authority, in* CONCEPTS, *supra* note 294, at 39. On semantic authority, *see* Ingo Venzke, *Semantic Authority, in* CONCEPTS, *supra* note 294, at 815.

"pure" fact-finding bodies into quasi-judicial bodies that address international law. Their evolution has been nuanced and granular—more a case of international law coming out of the shadows than appearing suddenly out of thin air. The narrative is further complicated by the fact that not all modern-day inquiry bodies are focused on alleged violations of international law,[304] and some actively downplay the feasibility or usefulness of its application.[305] Historical and modern-day practice contains a wide range of examples that fall at different points along a fact-law continuum.

IV. PROPOSITION NO. 3: FROM DIPLOMATIC DISPUTE SETTLEMENT TO NORM ENFORCEMENT

The idea that inquiry bodies have shifted from finding facts to applying law is tied up with the third strand of the conventional narrative: that the function of inquiry has evolved from diplomatic dispute settlement into the promotion and enforcement of international legal norms, with a focus on human rights, inter-national humanitarian law, and individual criminal responsibility. The proposition is that inquiry began as a consent-based procedure for the diplomatic settlement of minor disputes and has since become a nonconsensual means to enforce legal norms and pursue accountability in the face of gross human rights violations and mass atrocities.[306] From this perspective, the post–Cold War focus on accountability and rule of law has driven the innovative use of inquiry bodies to meet the expectations associated with these animating features of global governance.[307] Studies have examined how frequently the mandates of contemporary inquiry bodies refer to accountability,[308] and

304. *See, e.g.*, Rep. of the Independent Panel for Pandemic Preparedness & Response, *supra* note 2; Rep. of the United Nations Fact-Finding Mission on the Djibouti-Eritrea Crisis, UN Doc. S/2008/602 (Sept. 12, 2008).

305. *See, e.g.*, Rep. of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, ¶¶ 14–15 (Sept. 2, 2011).

306. *See* van den Herik, *supra* note 298, at 297; van den Herik & Harwood, *supra* note 130, at 237–39; Mégret, *supra* note 127, at 28; Le Moli, *supra* note 7, at 626.

307. *See* Aksenova & Bergsmo, *supra* note 92, at 1; M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 L. & CONTEMP. PROBS. 9, 20 (1996); CHINKIN & KALDOR, *supra* note 17, at 22, 72–73, 120–22; D'Alessandra, *supra* note 20, at 61–63; Catherine Harwood, *Contributions of International Commissions of Inquiry to Transitional Justice*, *in* RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE 401, 406–08 (Cheryl Lawther, Luke Moffett, & Dov Jacobs, eds., 2019); Cecilie Hellestveit, *International Fact-Finding Mechanisms: Lighting Candles or Cursing Darkness?*, *in* PROMOTING PEACE THROUGH INTERNATIONAL LAW, 368, 368–70, 393–94 (Cecilia M. Bailliet & Kjetil M. Larsen, eds., 2015); Henderson, *supra* note 17, at 289; Nesbitt, *supra* note 125, at 110.

308. *See, e.g.*, van den Herik & Harwood, *supra* note 130, at 239; Rob Grace, *An Analysis of the Impact of Commissions of Inquiry*, *in* HPCR PRACTITIONER'S HANDBOOK ON MONITORING, REPORTING, AND FACT-FINDING: INVESTIGATING INTERNATIONAL LAW VIOLATIONS 279, 294–303 (Rob Grace & Claude Bruderlein, eds., 2017); Le Moli, *supra* note 7, at 670–80; Mariniello, *supra* note 92, at 176–78.

commentators point to the rise of inquiry bodies with mandates to determine whether international crimes have taken place, identify perpetrators, and assess whether prosecutions are warranted.[309]

The "alerting" and "accountability" functions of inquiry bodies highlight their role in transnational campaigns that aim to publicize wrongdoing and illegality.[310] The premise is that documenting and publicizing abuses—and framing such conduct as violations of law—will persuade bad actors to reform themselves (because of the political costs of inaction) or will mobilize other actors to respond with meaningful action.[311] Many modern-day inquiry bodies, especially those established by the UN Human Rights Council (HRC), participate in a form of public diplomacy that relies upon naming and shaming to enforce norms.[312] Larissa Van den Herik contrasts the practice of early inquiry bodies designed "to conciliate and pacify" with their modern brethren that "condemn and provoke."[313] In her view, modern-day commissions that seek to bring attention to human rights violations "do not resemble their Hague predecessors at all."[314]

By its own terms, that assessment is fair enough: inquiry bodies established by the HRC, in particular, differ in many ways from the inquiry bodies established under the Hague Conventions. But the historical practice of inquiry bodies, as this study has shown, extends far beyond the Hague Convention model. It risks overstatement to suggest—as the conventional narrative does—that inquiry has been used only in the post–Cold War era, starting with the 1992 Yugoslavia Commission of Experts, "as a mechanism for securing better

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309. *See* Mariniello, *supra* note 92, at 173, 178; Carsten Stahn & Dov Jacobs, *The Interaction Between Human Rights Fact-Finding and International Criminal Proceedings: Toward a (New) Typology*, *in* THE TRANSFORMATION OF HUMAN-RIGHTS FACT-FINDING, *supra* note 17, at 255.

310. *See* van den Herik & Harwood, *supra* note 130, at 236–39. David Kennedy locates this trend in the humanitarian commitments of the UN Charter, which led UN organs to partner with non-governmental organizations "to mobilize world public opinion behind humanitarian objectives through inspections, reports, inquiries, and the politics of shame." DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM 258 (2004).

311. *See* Christine Chinkin, *U.N. Human Rights Council Fact-Finding Missions: Lessons From Gaza*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 471, 494 (Mahnoush H. Arsanjani, Jacob Cogan, & Robert Sloane, eds., 2010).

312. But the "public airing of grievances" may polarize affected parties. Steven R. Ratner, *Image and Reality in the UN's Peaceful Settlement of Disputes*, 6 EUR. J. INT'L L. 426, 436 (1995); *see also* Becker & Nouwen, *supra* note 11, at 834–36 (2019); Shiri Krebs, *Designing International Fact-Finding: Facts, Alternative Facts, and National Identities*, 41 FORDHAM INT'L L.J. 337, 365–68, 379–80.

313. van den Herik, *supra* note 69, at 537.

314. van den Herik, *supra* note 298, at 297. Similar observations have been made before. One commentator, writing in the 1970s, distinguished Hague Convention inquiries from early UN practice based on the difference between inquiry bodies established by agreement and inquiry bodies established unilaterally, where investigation is likely to be characterized "by the overwhelming influence of political factors." BAR-YAACOV, *supra* note 22, at 292.

compliance with international standards—a structure that is divorced from the will of particular states."[315] Or that inquiry bodies have been asked only recently to focus on alleged human rights violations or to serve as mechanisms of public accountability, even if these objectives have become more explicit.[316] The sheer "possibility of international criminal justice" that emerged in the 1990s is undoubtedly linked to more inquiry bodies having a focus on international criminal law, but even this phenomenon has historical roots.[317]

A. *Human Rights in the Practice of Historical Inquiry Bodies*

The use of inquiry bodies to deal with human rights violations dates at least to the end of the nineteenth century, and it continued at the League of Nations. Inquiry practice also reflected the fact that the United Nations early on found itself facing matters that "were likely increasingly to be human rights rather than war and peace questions."[318] By the 1970s, commentators were already discussing the use of inquiry bodies to address human rights violations.[319] In short, inquiry bodies addressed to human rights are not exclusively a post–Cold War phenomenon.

1. Early Examples of Norm Enforcement and Accountability Inquiries

The first prominent example preceded the 1899 Hague Peace Conference. At the urging of civil society campaigners, the United Kingdom pressured the Ottoman Empire in 1894 to establish a "mixed commission of inquiry" to investigate alleged massacres of Armenian Christians in Turkish territory at Sasoun.[320] The commission included

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315. Aksenova & Bergsmo, *supra* note 92, at 4–5.

316. *See* Buchan, *supra* note 17, at 260; Patrick Butchard & Christian Henderson, *A Functional Typology of Commissions of Inquiry*, *in* COMMISSIONS OF INQUIRY: PROBLEMS AND PROSPECTS, *supra* note 9, at 11, 22; Le Moli, *supra* note 7, at 642.

317. Alston & Knuckey, *supra* note 17, at 14; *see also* Micaela Frulli, *Fact-Finding or Paving the Road to Criminal Justice? Some Reflections on United Nations Commissions of Inquiry*, 10 J. INT'L. CRIM. JUST. 1323 (2012); Jacobs & Harwood, *supra* note 123, at 325.

318. LUARD, *supra* note 82, at 118 (mentioning Hungary, Lebanon, Congo, Yemen, and Cyprus).

319. *See* Felix Ermacora, *Partiality and Impartiality of Human Rights Enquiry Commissions of International Organisations*, *in* AMICORUM DISCIPULORUMQUE LIBER I: PROBLÈMES DE PROTECTION INTERNATIONALE DES DROITS DE L'HOMME 64 (1969); Roger Miller, *United Nations Fact-Finding Missions in the Field of Human Rights*, 5 AUSTL. Y.B. INT'L L. 40 (1970); Sydney Bailey, *UN Fact-Finding and Human Rights Complaints*, 48 INT'L AFF. 250 (1972); Theo van Boven, *Fact-Finding in the Field of Human Rights*, 3 ISRAELI Y.B. 93 (1973); Thomas M Franck & H. Scott Fairley, *Procedural Due Process in Human Rights Fact-Finding by International Agencies*, 74 AM. J. INT'L L. 308 (1980).

320. Jan M. Lemnitzer, *International Legal History: From Atrocity Reports to War Crimes Tribunals—The Roots of Modern War Crimes Investigations in Nineteenth-Century Legal Activism and First World War Propaganda*, *in* WAR CRIMES TRIALS AND INVESTIGATIONS 111, 132–34 (Jonathan Waterlow & Jacques Schuhmacher, eds., 2018).

five Turkish members alongside British, French, and Russian delegates and had a mandate to determine the origin of the massacres, the facts surrounding fatalities and property destruction, and responsibility.[321] Following a six-month investigation (including site visits and testimony from nearly 200 witnesses), the non-Turkish delegates authored a report that confirmed the indiscriminate mass murder of around 900 Armenians—a figure far lower than the 10,000 deaths reported by the press, however, which had fuelled the public outcry.[322] The report examined the strategic use of sexual violence, challenged the implausible account of the local Turkish commander, and condemned his failure to intervene.[323] As Jan Lemnitzer has pointed out, these aspects of the report bear a striking resemblance to contemporary inquiry body reports.[324] After the inquiry, a coordinated diplomatic campaign pressured the Ottoman authorities to implement reforms in the Armenian provinces, although this failed to provide long-term security for the Armenian minority.[325]

Additional human rights and atrocity-focused inquiry bodies followed at the state level.[326] For example, in 1904 the British parliament published an official report by British consul Roger Casement that documented atrocities waged against the indigenous population of the Congo Free State amidst a brutal system of forced labor.[327] Under foreign pressure, King Leopold II of Belgium then

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321. BAR-YAACOV, *supra* note 22, at 35. The Ottoman commissioners and the consular delegates operated with different agendas. The consular delegates sought to verify the massacres and the number of fatalities; the Turkish officials focused on Armenian rebel groups and their foreign links. *See* Owen Miller, Sasun 1894: Mountains, Missionaries and Massacres at the End of the Ottoman Empire 283–84 (Oct. 2, 2015) (Ph.D. dissertation, Columbia University), https://academiccommons.columbia.edu/doi/10.7916/D8CF9PJS [https://perma.cc/Y55P-F7RC] (archived Mar. 16, 2022).

322. *See* Miller, *supra* note 321, at 283–84. When the Turkish delegates refused to visit certain sites, the consular delegates went without them—and discovered mass graves. Lemnitzer, *supra* note 320, at 131.

323. Lemnitzer, *supra* note 320, at 132–33.

324. *Id.* The international pressure to establish the inquiry foreshadowed the rise of non-consensual inquiry bodies, although the Ottoman authorities ultimately consented to the commission. Domestic inquiry bodies established in response to international pressure, such as the 2011 Bahrain Commission, provide a better comparison. *See* Mohamed S. Helal, *Two Seas Apart: An Account of the Establishment, Operation and Impact of the Bahrain Independent Commission of Inquiry (BICI)*, 30 EUR. J. INT'L L. 903, 907–11 (2019).

325. *See* BAR-YAACOV, *supra* note 22, at 36. Martens did not refer to Sasoun when making the case for international commissions of inquiry at the 1899 Hague Peace Conference; the example might have exacerbated concerns that an inquiry mechanism would encourage unwanted foreign interventions. *See id.* at 33, 37.

326. *See* HARWOOD, *supra* note 7, at 23–24; Lemnitzer, *supra* note 320, at 133–42.

327. *See* ADAM HOCHSCHILD, KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR AND HEROISM IN COLONIAL AFRICA 203–04 (1999). The Casement report followed years of reports and testimonies by humanitarian groups and activists. *See* Berber Bevernage, *The Making of the Congo Question: Truth Telling, Denial, and 'Colonial Science' in King*

established a commission of inquiry made up of jurists from Italy, Switzerland, and Belgium, with the goal of pushing back against international criticism and proving "the legality of his Congo rule in terms of international and public law."[328] The commission held numerous sessions in the Congo, during which it received harrowing testimony from hundreds of witnesses.[329] The resulting report broadly defended Leopold's reign over the territory in legal and moral terms and invoked various ill-informed and racist "observations" alongside arguments infused with cultural particularism based on a quasi-ethnographic approach.[330] But the commission simultaneously laid bare, perhaps inadvertently, a system of "merciless commercial exploitation" that confirmed—rather than refuted—the allegations of widespread atrocity.[331] By one account, the commissioners were "stunned by the amount of incriminating material which they found," notwithstanding their explicitly racist approach to witness testimony.[332] By another account, the report's "damning effect would be hard to exaggerate" and contributed to Leopold's decision to end his personal rule over the Congo, which became a Belgian colony.[333]

The First World War also led to atrocity-focused inquiry bodies. The 1919 Paris Peace Conference dispatched a commission of inquiry to investigate atrocities by Greek forces during the occupation of Smyrna in Turkey.[334] That inquiry body found that Greek soldiers

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Leopold's Commission of Inquiry on the Rubber Atrocities in the Congo Free State (1904-1905), 22 RETHINKING HIST. 203, 208–09 (2018).

328. Bevernage, *supra* note 327, at 209.

329. *See* HOCHSCHILD, *supra* note 327, at 250.

330. Bevernage, *supra* note 327, at 214.

331. *See* John Daniels, *The Congo Question and the "Belgian Solution"*, 188 N. AM. REV. 891, 893–96 (1908). To control the narrative, King Leopold's team had a "summary" of the commission's findings sent to major British newspapers on the eve of the report's public release, using a sham organization—the "West African Missionary Organization"—to do so. The "summary" distorted the commission's findings but was widely published in the United Kingdom and the United States before the deception was uncovered. *See* HOCHSCHILD, *supra* note 327, at 251–52. There were echoes of this episode in the controversy surrounding the March 2019 release by U.S. Attorney General Bill Barr of a misleading summary of Special Counsel Robert Mueller's final report on Russian interference in the 2016 U.S. presidential election, prior to the report's public release. *See* Charlie Savage, *Judge Asserts Barr Distorted Mueller Report,* N.Y. TIMES, Mar. 6, 2020, at A1.

332. Bevernage, *supra* note 327, at 212.

333. Daniels, *supra* note 331, at 893. The "animadversions upon his administration" could not be dismissed as "the exaggerated expressions of a political pamphlet" since Leopold has established the commission itself. Jesse Reeves, *The Congo: A Report of the Commission of Enquiry Appointed by the Congo Free State Government*, 2 AM. POL. SCI. REV. 89, 89 (1907); *see also* Bevernage, *supra* note 327, at 205, 207, 218–23 (arguing that the commission's impact "did not result from a heroic speaking truth to power" but by enabling a Belgian elite "to appropriate the colonial project" in the name of social reform).

334. *See* Report of the Inter-Allied Commission of Inquiry on the Greek Occupation of Smyrna and Adjacent Territories (1919), *reprinted in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, THE PARIS PEACE CONFERENCE, 1919, VOL. IX 44–73 (1919) [hereinafter Smyrna Report]. This was not a case of victors'

committed acts of brutality against prisoners, arbitrarily detained over 2,500 people, and joined civilian Greeks in a campaign of murder, sexual violence, and pillage against the local Turks.[335] It faulted Greek military authorities for failing to restrain armed Greek civilians who "committed all kinds of excesses" under the "pretext of aiding the Greek troops."[336] The Turkish national movement and the Turkish government were also blamed for failing to control armed gangs.[337] The commission did not address the direct consequences of these determinations about responsibility or refer to applicable law, even as it was clearly evaluating facts against a legal benchmark. It did, however, conclude that the continuing occupation of Smyrna had "assumed all the forms of an annexation," was "not justifiable,"[338] and that the occupying Greek forces should be replaced by a small multilateral contingent.[339] This signaled that the Greek presence in Smyrna could not be used to establish any "new right for the future" in terms of annexation of territory.[340]

Along different lines, the Paris Peace Conference also created the Inter-Allied Commission on Mandates in Turkey (the "King-Crane Commission") to advise on the assignment of mandates and the readiness of former Ottoman territories (including Palestine) to move towards independence.[341] By one account, the King-Crane Commission "rolled out international law as if it were a red carpet" and encountered local populations whose demands for independence were infused with an "ideology of universal rights" based on Wilsonian ideals.[342] Against this backdrop, the commission made a series of recommendations that

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justice: Greece was allied with the investigating powers that had dispatched its forces to Smyrna. HARWOOD, *supra* note 7, at 27–29. A separate commission examined the conduct of enemy forces in occupied Serbia. *See infra* note 412.

335. *See* Smyrna Report, *supra* note 334, at 49–51.

336. *See id.* at 51, 53–56. The commission found that Greek troops carried out "brutal" reprisals but observed that they "may have been justified by the military situation." *Id.* at 52.

337. *See id.* at 70.

338. Peter M. Buzanski, *The Interallied Investigation of the Greek Invasion of Smyrna, 1919*, 25 HISTORIAN 325, 335 (1963). Among other factors, the commissioners rejected a Greek self-determination argument because Greek claims about the regional demographics were inaccurate. *See id.* at 336.

339. *See id.* at 338.

340. *Id.* at 340. Notably, the Inter-Allied Supreme Council did not follow the commission's recommendation to remove the Greek troops, and the United Kingdom blocked the public release of the full report for several years. *See id.* at 341–42.

341. *See* Report of the American Section of the International Commission on Mandates in Turkey (Aug. 28, 1919), *reprinted in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, THE PARIS PEACE CONFERENCE, 1919, VOL. XII 751 (1919) [hereinafter King-Crane Report]. The League of Nations Covenant provided that certain communities of the former Ottoman Empire could be "provisionally recognized" as "independent nations . . . subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone." LEAGUE OF NATIONS, *supra* note 56, art. 22.

342. LORI ALLEN, A HISTORY OF FALSE HOPE: INVESTIGATIVE COMMISSIONS IN PALESTINE 34, 40 (2021).

fell on deaf ears, including that the overwhelming Palestinian opposition to establishment of a "national home for the Jewish people" be fully acknowledged[343] and that setting up a Jewish homeland would require "force of arms"—a decision "not gratuitously to be taken in the interests of a serious injustice."[344] It recommended limiting Jewish immigration and abandoning plans to convert Palestine into a Jewish commonwealth.[345] This was arguably an attempt to realize the norms encapsulated in President Wilson's "Fourteen Points" speech ("equality of nations, consent of the governed, and self-determination"), although the commission was unwilling to dispense with the mandate system and demonstrated its biases as well.[346] Its recommendations were not followed, but the King-Crane Commission was the first of many inquiry bodies put to the service of enforcing emerging norms of self-determination and group rights.

2. League of Nations Practice

Aside from the inquiry bodies that dealt with minority rights, human rights and social welfare featured in some additional League of Nations inquiry bodies. For example, the League established two separate inquiry bodies on narcotics. A 1926 inquiry body investigated the "problem of opium production" in Persia, with a view to advising the government on how to transition away from opium to other agricultural products.[347] A separate inquiry body in 1930 examined opium use and production in East Asia, with a mandate to investigate its level of use in various countries and the extent of illicit traffic.[348] That commission's report detailed the habits and economics of opium use, addressed state measures to implement the 1912 Hague Opium Convention and the 1925 Geneva Opium Agreement, and suggested ways to strengthen existing international legal authorities.[349]

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343. King-Crane Report, *supra* note 341, at 792.

344. *Id.* at 794.

345. *See id.* at 794–95; *see also* ALLEN, *supra* note 342, at 68.

346. *See* Lori A. Allen, *Determining Emotions and the Burden of Proof in Investigative Commissions to Palestine*, 59 COMPAR. STUD. SOC'Y. & HIST. 385, 394, 398 (2017).

347. *Commission of Enquiry into Opium Production in Persia: Report of the Inquiry Commission to the Council of the League of Nations*, League of Nations Doc. C.580.M.219.1926.XI 38 (1926). The League established the enquiry on "social, health and overall humanitarian grounds." *See* Cloet, *supra* note 59, at 64. Specifically, the enquiry sought to address a tension between a US proposal that opium-producing countries "limit their production" of opium to counter its "illicit traffic" and the concerns of opium-producing countries, including Persia, that such limitations were not economically feasible. *Report of the Fifth Committee to the Sixth Assembly: Traffic in Opium*, League of Nations Doc. A.127.1925.XL (1925).

348. *See Commission of Enquiry into the Control of Opium-Smoking in the Far East, Report to the Council*, League of Nations Doc. C.635.M.254.1930.XI. (1930).

349. *Id.* at 135–47.

The League also sought to combat human trafficking for prostitution. Two inquiry bodies examined the international sex trade and evaluated national measures to combat the practice.[350] In 1927, the Council established the Special Body of Experts on Traffic in Women and Children.[351] It focused on the Americas, Europe, and North Africa, and used "trained and experienced persons" to carry out inquiries on-site, including interviews with police, immigration officials, and some "five thousand underworld characters" (rather than relying solely on government-provided information).[352] It also submitted individual country reports to governments for their responses, which were included alongside replies from the experts in the final report.[353] In 1930, the League established the Commission of Enquiry on Traffic in Women and Children in the East, which conducted a similar study in the Middle East and Asia.[354] That body included a "travelling commission" of three experts from the United States, Poland, and Sweden alongside a larger group of state delegates; its findings highlighted gaps between treaty obligations and practice.[355]

The League of Nations also participated in the International Commission of Enquiry on Slavery and Forced Labor in Liberia, which Liberia established in 1929 to determine whether practices in that country constituted slavery under the 1926 Convention to Suppress the Slave Trade and Slavery.[356] The three-person panel comprised a former President of Liberia, an American sociologist, and a British doctor (appointed by the League).[357] After travelling throughout Liberia to collect testimony, the commission determined that "classic slavery" with "slave markets and slave dealers" no longer existed, but

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350. *Report of the Special Body of Experts on Traffic in Women and Children*, 1 SOC. SERV. REV. 354, 355 (1927); *see generally* Paul Knepper, *The Investigation into the Traffic in Women by the League of Nations: Sociological Jurisprudence as an International Social Project*, 34 LAW & HIST. REV. 45 (2016).

351. *See* Report of the Special Body of Experts on Traffic in Women and Children, Part I, League Of Nations Doc. C.52.M.52.1927.IV (1927) and Part II, League of Nations Doc. C.52(2).M.52(1).1927.IV (1927).

352. *See Report of the Special Body of Experts on Traffic in Women and Children, Part II*, 2 SOC. SERVICE REV. 166, 166–68 (1928). These methods resemble those used by contemporary inquiry bodies seeking to document widescale human rights abuses.

353. *See id.*

354. *See League of Nations Commission of Enquiry into Traffic in Women and Children in the East, Report to the Council*, League of Nations Doc. C.849.M.393.1932.IV (1932).

355. *See id.*; *League of Nations Commission of Enquiry into Traffic in Women and Children in the East, Report to the Council*, League of Nations Doc. C.50.1933.IV (1933).

356. *See International Commission of Enquiry into the Existence of Slavery and Forced Labour in Liberia*, League of Nations Doc. C.658.M.272.1930.VI (1930) [hereinafter Liberia Report]. Liberia and the United States negotiated the commission's establishment. American officials sought an investigation that might absolve the United States for not having intervened earlier; European colonial powers were less enthusiastic. *See* Cloet, *supra* note 59, at 125, 135, 142.

357. *See* Cloet, *supra* note 59, at 143–48.

that forms of "inter- and intra-tribal domestic slavery" within the treaty definition persisted.[358] The Liberian government formally discouraged such practices but countenanced forced labor, including for public works; however, the commission exonerated the Firestone Plantation Company, the largest private enterprise in Liberia and a major supplier of rubber to the United States.[359] The report prompted high-level resignations in Liberia, and the League established a follow-up committee to provide technical advice on reforms.[360]

The Commission for the Investigation of Air Bombardments in Spain provides a further example of early inquiry bodies engaged with norm enforcement—in this case, regarding IHL. The United Kingdom established a commission in 1938 to investigate aerial bombing attacks in the Spanish Civil War.[361] Numerous attacks (including the bombing of Guernica in April 1937) had already caused large-scale civilian deaths and provoked worldwide opprobrium. The British decision to deny belligerent status to Nationalist forces in Spain had also prevented General Franco from legally imposing a naval blockade, which perversely led to a more destructive tactic—the aerial bombing of British ships in Spanish waters.[362] Against this backdrop, the United Kingdom presented the commission as a neutral facility that either Franco's Nationalists or the besieged Spanish Republicans might call upon to establish the facts surrounding specific incidents; the British government suggested that simply establishing the inquiry body might deter unlawful attacks against civilians.[363] In a tone-deaf manner, the Assembly of the League "congratulated" the British government for this "happy initiative on international lines that might do much to render effective the condemnation of this method of warfare by public opinion and to bring about its discontinuance."[364] Ultimately, only the embattled Republican forces called upon the commission, which found in most cases that bombings were either deliberate attacks against civilians or poorly-executed attacks against legitimate military targets.[365] In one instance, the commission found that a high-

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358. Liberia Report, *supra* note 356, at 7–8, 14–16, 83–84. The report discussed the negotiating history of the 1926 Convention and implicitly considered its object and purpose to interpret the treaty definition of slavery. *Id.* at 11–12.

359. *Id.* at 83–84.

360. Cloet, *supra* note 59, at 175.

361. *Resolutions adopted by the Assembly at its Twelfth Meeting*, 183 LEAGUE OF NATIONS O.J., SPEC. SUPP. 103, 135–36 (1938) (attaching Reports of the Commission for the Investigation of Air Bombardments in Spain, Nos. 1–4) [hereinafter Air Bombardments Report (1–4)].

362. *See* FOREIGN RELATIONS OF THE UNITED STATES (1938), VOL. I (GENERAL) 222–23 (1955).

363. *Id.* at 214–15. The United States was undecided about the proposal's practicality or desirability. *Id.* at 213.

364. Air Bombardments Report (Nos. 1–4), *supra* note 361, at 136.

365. *See id.*; *Air Bombardments in Spain*, 20 LEAGUE OF NATIONS O.J. 28 (1939) (attaching Reports of the Commission for the Investigation of Air Bombardments in Spain, Nos. 5–9) [hereinafter Air Bombardments Report (5–9)].

altitude attack on the port of Barcelona had made the loss of civilian life inevitable and was tantamount to a deliberate attack against the civilian population.[366] This commission—scarcely mentioned in the literature on inquiry—stands as a precursor to the many contemporary inquiry bodies focused on alleged violations of IHL, including the targeting of civilians.[367]

In sum, states and international organizations had already begun to use inquiry bodies as a means to enforce fundamental human rights and humanitarian law during this early period.

3. UN Practice during the Cold War

Early UN inquiry bodies also had a familiar human rights component when viewed against more recent practice. For example, in 1948 the Security Council established the UN Commission for India and Pakistan (UNCIP) to investigate allegations by both sides in the context of partition.[368] Pakistan alleged that India was committing acts of genocide and crimes against humanity against Muslims.[369] India considered the presence of Pakistani troops within Kashmir an act of aggression.[370] As the situation rapidly evolved, UNCIP ended up playing a mediatory role on the back of extensive on-the-spot fact-finding.[371] It brokered a ceasefire and laid the groundwork for the UN Military Observer Group for India and Pakistan, an early iteration of UN peacekeeping.[372] UNCIP's reports did not focus on the human rights allegations that surrounded its establishment, but its origins showed that inquiry bodies were already seen as a means to respond to human rights violations and mass atrocities.

Following the Soviet invasion of Hungary in 1956, the UN General Assembly established the Special Committee on the Problem of Hungary to provide "the fullest and best available information regarding the situation created by the [Soviet Union], through its use

366. Air Bombardments Report (Nos. 5–9), *supra* note 365, at 33–34; *cf.* Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT'L L. 79 (2013) (discussing ongoing debate about whether reckless attacks violate the principle of distinction).

367. The Council also rejected two proposals by China, then emmeshed in conflict with Japan, for additional inquiry bodies: one to examine Japan's alleged use of chemical weapons and another to investigate alleged targeting of Chinese civilians during Japanese air attacks. *Second Meeting (Private, Then Public)*, 19 LEAGUE OF NATIONS O.J. 869, 881–82 (1938).

368. S.C. Res. 39 (Jan. 20, 1948).

369. U.N. Commission for India and Pakistan Interim Report, ¶¶ 59–60, U.N. Doc. S/1100 (Nov. 9, 1948).

370. *Id.* ¶ 60.

371. WAINHOUSE, *supra* note 60, at 360.

372. S.C. Res. 91 (Mar. 30, 1951).

of armed force and other means, in the internal affairs of Hungary."[373] The committee interpreted its mandate to include assessing the impact of the Soviet intervention on "the rights of the Hungarian people."[374] Although prevented from visiting Hungary, the committee established a detailed factual timeline and refuted Soviet claims that Hungarian authorities had requested the Soviet intervention—a finding that bore on whether the intervention was lawful.[375] The committee analyzed the legal definition of aggression and determined that the Soviet actions qualified, while also confirming widespread human rights abuses during the crackdown.[376] Support for establishing the inquiry body was based on the hope that it "would exert moral pressure on the Soviet Union" and mobilize public opinion to the benefit of Hungary, and the West, in the long run.[377] In this light, the Hungary case was a clear forerunner to subsequent inquiry bodies that have sought to drive public opinion and provoke and legitimize an international response.

In 1963, the General Assembly dispatched a fact-finding mission to South Vietnam in response to alleged violations of religious freedom (the practice of Buddhism) under Article 18 of the Universal Declaration of Human Rights.[378] The fact-finding mission specifically addressed the applicable law in its report, identifying UN Charter provisions and General Assembly resolutions against which the allegations needed to be considered, but it ultimately refrained from reaching legal conclusions on the basis of the evidence collected.[379]

Further examples of human rights-related inquiry bodies from the Cold War era included UN General Assembly committees to address the situation in South Africa, including the 1962 Special Committee on the Apartheid Policies of the Government of South Africa.[380] The General Assembly also created a Special Committee for South West Africa (Namibia) in 1962 that conducted a site visit to investigate the oppression of the indigenous population by South Africa.[381] This was

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373. G.A. Res. 1132 (XI) (Jan. 10, 1957); *see also* Rep. of the Special Comm. on the Problem of Hungary, ¶ 2, U.N. Doc. No. A/3592 (1957) [hereinafter Hungary Committee, Final Report].

374. Interim Rep. of the Special Comm. on the Problem of Hungary, ¶ 15, U.N. Doc. No A/3546, (Feb. 20, 1957). Hungary's legal obligation to ensure human rights under post-war peace agreements meant the situation was not exclusively a domestic matter. Hungary Committee, Final Report, *supra* note 373, ¶¶ 742, 785 (xiii).

375. *Id.* ¶ 785 (iv-vi).

376. *Id.* ¶¶ 306–24, 785 (xiii)–(ix).

377. Eliav Lieblich, *At Least Something: The UN Special Committee on the Problem of Hungary, 1957-1958*, 30 EUR. J. INT'L L. 843, 850–51 (2019).

378. U.N. General Assembly, Request for the Inclusion of an Additional Item in the Agenda of the Eighteenth Session: The Violation of Human Rights in South Viet-Nam, U.N. Doc. A/5489/Add.1 (Sept. 13, 1963).

379. Rep. of the U.N. Fact-Finding Mission to South Viet-Nam, ¶¶ 66–71, U.N. Doc. A/5630 (Dec. 7, 1963). South Vietnam's government was overthrown during the mission's visit.

380. G.A. Res. 1761 (XVII) (Nov. 6, 1962).

381. G.A. Res. 1702 (XVI) (Dec. 19, 1961).

followed by the establishment of the Group of Experts on South Africa in 1964 by the Secretary-General,[382] acting upon a Security Council request,[383] and the parallel establishment by the Security Council of an expert committee on the feasibility and implications of imposing sanctions to combat apartheid.[384] In 1967, the UN Commission on Human Rights (CHR) established its first expert working group, with a mandate to investigate allegations of torture and ill-treatment of prisoners and detainees in South Africa and to recommend action on concrete cases.[385]

The UN General Assembly and the CHR each established inquiry bodies following the 1967 Six-Day War to investigate allegations that the Israeli occupation of Palestinian territories included systematic human rights violations.[386] In a highly juridical report that specified and analysed the applicable law, the General Assembly inquiry concluded that Israeli practices in the occupied territories were in breach of Israel's human rights obligations under international law.[387] The Security Council later established a commission to examine Israeli settlements in the occupied territories.[388] It concluded that Israel was engaged in a "wilful, systematic and large-scale process of establishing settlements in the occupied territories for which it should bear full responsibility" and that Israel's conduct showed "disregard for basic human rights" and violated the Fourth Geneva Convention and Security Council resolutions.[389]

In 1973, the General Assembly established a commission of inquiry to examine alleged atrocities during Mozambique's war of independence against Portugal.[390] That commission invoked the 1948 Universal Declaration of Human Rights, the 1948 Genocide Convention, and the 1965 International Convention for the Elimination of All Forms of Racial Discrimination[391] and methodically discussed alleged torture, massacres, and sexual violence—conduct that was largely attributed to Portuguese troops.[392] The commission

382. Rep. by the Secretary-General in Pursuance of the Resolution Adopted by the Security Council at its 1078th Meeting on 4 December 1963 (S/5471), Annex, U.N. Doc. S/5658 (Apr. 20, 1964).

383. U.N. Security Council, Resolution Adopted by the Security Council at its 1078th Meeting on 4 December 1963, U.N. Doc. S/5471 (Dec. 4, 1963).

384. S.C. Res. 191 (June 18, 1964).

385. Comm'n on Hum. Rts. [C.H.R], Res. 2 (XXIII) (Mar. 6, 1967).

386. G.A. Res. 2443 (XXIII) (Dec. 19, 1968); Comm'n on Hum. Rts. [C.H.R], Res. 6 (XXV) (1969).

387. Rep. of the Special Comm. to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, ¶ 145, U.N. Doc. A/8089 (Oct. 26, 1970).

388. S.C. Res. 446 (Mar. 22, 1979).

389. Rep. of the Security Council Comm'n Established under Resolution 446 (1979), ¶¶ 228, 230, 234, U.N. Doc S/13450 (July 12, 1979).

390. Rep. of the Comm'n of Inquiry on the Reported Massacres in Mozambique, ¶ 7 U.N. Doc. A/9621 (1974).

391. *Id.* ¶¶ 138–42.

392. *Id.* ¶¶ 69–128.

determined that the situation differed from the "prototype of genocide, the Nazi extermination of the Jews," but that some of the massacres met the treaty definition of genocide or came "very close to it."[393] They were certainly "grave breaches triggering the obligation to prosecute the offenders" under the 1949 Geneva Conventions.[394] The commission commended the decision of Portugal's new government to prosecute offenders but urged compensation for victims as well.[395]

In 1975, the CHR established an ad hoc working group to examine human rights violations in Chile following the 1972 military coup led by General Augusto Pinochet.[396] In a series of detailed reports that combined fact-finding with legal analysis, the working group made extensive findings on arbitrary arrest and detention, forced disappearances, torture, travel restrictions, and the disregard of a broad range of political, economic, and social rights.[397] This was widely perceived as a "breakthrough" in the CHR's shift from standard-setting to norm implementation.[398]

Other UN inquiry bodies addressed political and civil rights relating to self-determination and free elections. The General Assembly established the UN Commission for Eritrea in 1949 to ascertain the wishes of the inhabitants of Eritrea as to "their future welfare."[399] The commission proposed a set of recommendations, all of which ignored the evidence that most Eritreans preferred immediate and full independence.[400] In 1963, the UN Secretary-General established an inquiry body on the proposed transfer of certain territories under British control to Malaysia; Indonesia and the Philippines, each of which had territorial claims, opposed the plan.[401] The inquiry body concluded that local support for the proposal reflected the "freely expressed wishes of the territories' peoples" and that the

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393. *Id.* ¶¶ 144–46. Portugal was not a party to the Genocide Convention, but the commission asserted that genocide was punishable under customary international law. *Id.*

394. *Id.* ¶¶ 151–52.

395. *Id.* ¶ 157.

396. Comm'n on Hum. Rts. [C.H.R], Res. 8 (XXXI) (Feb. 27, 1975).

397. Economic and Social Council, Protection of Human Rights in Chile, Annex, U.N. Doc. A/10285 (Oct. 7, 1975); Economic and Social Council, Study of Reported Violations of Human Rights in Chile, with Particular Reference to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Commission Resolution 8 (XXXI)), U.N. Doc. E/CN.4/1188 (Feb. 4, 1976); Economic and Social Council, Study of Reported Violations of Human Rights in Chile, with Particular Reference to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/1221 (Feb. 10, 1977).

398. RAMCHARAN, *supra* note 74, at 33, 181–84.

399. G.A. Res. 289 (IV)(C) (Nov. 21, 1949).

400. *See* LUARD, *supra* note 82, at 135–37.

401. *Id.* at 349–54. The UN body was preceded by a British commission whose recommendations informed its government's decision to endorse the federation proposal. *Id.* at 349–50.

conditions under General Assembly Resolution 1541 for the integration of a non-self-governing territory into an independent state were met.[402]

In sum, inquiry bodies with a focus on human rights violations and norm enforcement did not emerge only in the post–Cold War era, and inquiry as a form of public diplomacy is not a new phenomenon.

B. *International Criminal Law in the Historical Practice of Inquiry Bodies*

There is a stronger case that the conventional narrative correctly emphasizes the novelty of the modern-day focus by inquiry bodies on international criminal law. The establishment of international criminal courts and tribunals since the 1990s helps to explain the fact that many inquiry bodies are asked to determine whether international crimes have taken place, and sometimes to identify individual perpetrators. There is an interest in finding ways to make use of the international criminal legal system that now exists. Inquiry bodies may confirm or legitimize decisions to establish new criminal tribunals or to refer situations to the International Criminal Court; they may also collect evidence—or at least assemble relevant leads—for prosecutors to pursue.[403] The investigative mechanisms for Syria, the Islamic State, Myanmar, and, most recently, for the conflict in Ukraine, with mandates to prepare files for eventual criminal proceedings, go even further,[404] as does the latest HRC inquiry body for the Israeli-Palestinian conflict.[405] It has a mandate to "[c]ollect, consolidate and analyse evidence" of alleged violations and abuses and to "systematically record and preserve all information, documentation and evidence . . . in order to maximize the possibility of its admissibility in legal proceedings."[406] But the international criminal justice focus of contemporary practice has historical roots as well.

For example, one commentator has characterized the Dogger Bank inquiry as an exercise seeking the "punishment of individuals,"

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402. *Id.* at 355. G.A. Res. 1541 (XV) (Dec. 15, 1960).

403. They might also forestall action such as an ICC referral. Becker & Nouwen, *supra* note 11, at 833.

404. *See* G.A. Res. 71/248 (Dec. 21, 2016) (establishing the International, Impartial and Independent Mechanism for Syria); S.C. Res. 2379 (Sept. 21, 2017) (authorizing the U.N. Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL); Human Rights Council Res. 39/2 (Sept. 27, 2018) (establishing the Independent Investigative Mechanism for Myanmar); H.R.C. Res. 49/1, *supra* note 3, ¶ 11 (establishing an international commission of inquiry into Russian aggression in Ukraine with a mandate that includes recording and preserving evidence for use in future legal proceedings, including criminal proceedings); *see also* Le Moli, *supra* note 7, at 644, 661–62 (identifying a shift towards "prosecutorial reasoning" and a role beyond "mere recommendation" regarding international criminal law).

405. *See* H.R.C. Res. S-30/1, *supra* note 3.

406. *Id.* ¶ 2(b).

not merely a case of interstate dispute settlement.[407] Years later, delegates to the 1919 Paris Peace Conference established a commission to examine responsibility for the Great War of 1914–1918, including the breaches of the laws and customs of war committed by the German Empire and its allies and "the degree of responsibility for these offences attaching to particular members of the enemy forces."[408] That commission took an innovative and controversial approach to identifying primary norms of international law; it recommended that heads of state be stripped of immunity and that high-ranking officials face criminal responsibility for the crimes of their subordinates.[409] It also proposed a "high tribunal" to prosecute individuals for "violations of the laws and customs of war and the laws of humanity."[410] The concept of crimes against humanity finds its origins in the work of the commission,[411] which, by one account, was "the first international inquiry to promote criminal responsibility for violations of international law."[412] The UN War Crimes Commission, an inquiry body established by the Allied powers in 1942 to lay the foundations for post-war prosecutions, drew upon this earlier work to fulfil its mandate to investigate and record evidence of war crimes and to identify perpetrators. It also advised the Allied governments on substantive crimes and modes of liability, including aggression and crimes against humanity.[413]

There were also inquiry bodies created at the state level to pursue individual accountability for international crimes. Consider the multiple inquiries into the 1940 Katyń Forest Massacre—a massacre

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407. Lemnitzer, *supra* note 138, at 931; *see also supra* text accompanying notes 141–49.

408. Report of the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, *reprinted in* 14 AM. J. INT'L L. 95 (1920) [hereinafter 1919 Report]; *see* Jackson N. Maogoto, *The 1919 Paris Peace Conference and the Allied Commission: Challenging Sovereignty Through Supranational Criminal Jurisdiction*, *in* HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW, VOL. 1 171, 175–76 (Morten Bergsmo, Cehah Wui Ling, & Yi Ping, eds., 2014).

409. Japan and the United States raised objections. 1919 Report, *supra* note 408, at 127–51; *see* Shane Darcy, *Laying the Foundations: Commissions of Inquiry and the Development of International Law*, *in* COMMISSIONS OF INQUIRY: PROBLEMS AND PROSPECTS, *supra* note 9, at 231, 236–37.

410. 1919 Report, *supra* note 408, at 123–24.

411. Maogoto, *supra* note 408, at 178.

412. HARWOOD, *supra* note 7, at 27–30. Its conclusions were informed by a separate commission's report on abuses committed by Bulgarian forces in Serbia. 1919 Report, *supra* note 408, at 113, 115. This commission resembled modern-day inquiries in its "working methods, evaluation of IHL violations and consideration of responsibilities." HARWOOD, *supra* note 7, at 28. It concluded there was not "a single article of the Convention of The Hague or principle of international law that the Bulgarians did not violate." Milovan Pisarri, *Bulgarian Crimes Against Civilians in Occupied Serbia During the First World War*, 44 BALCANICA 357, 364 (2013).

413. Darcy, *supra* note 409, at 241–43.

of Polish officers and political leaders during World War II.[414] Following the discovery of mass graves in 1943, Nazi Germany established a commission of inquiry which determined (correctly, as it turned out) that the Soviet Union was responsible. After Germany's defeat, the Soviets established their own commission of inquiry, which blamed the Nazis.[415] In the early 1950s, the United States established yet another inquiry, which blamed the Soviet Union and advocated for international prosecutions, but this proposal went nowhere. It was only in 1990 that Boris Yeltsin admitted Soviet responsibility.[416] The saga reinforces the deep connections between inquiry bodies and international criminal law—a relationship that has greatly expanded in the post–Cold War era alongside "the emergence of international criminal law as a discipline,"[417] but which has ties to the past.

C. *Conclusion on the Third Proposition*

The conventional view that accountability and norm enforcement have displaced dispute settlement as the function of inquiry—exemplified by mandates focused on alleged human rights violations and individual criminal responsibility—presents a simplified narrative. States and international organizations have long used inquiry bodies to investigate alleged violations of human rights; inquiry bodies also sometimes addressed international criminal law. By shaping public opinion or mobilizing outrage with the ultimate goal of enforcing international legal norms, these earlier inquiry bodies operated in ways that observers of contemporary practice should recognize. Those objectives have become more common and explicit in the mandates of inquiry bodies over the past quarter century as accountability, anti-impunity, and rule of law have become familiar watchwords. But on closer inspection contemporary practice may seem more like a case of old wine in new bottles (with, perhaps, better marketing and more eye-catching labels). However, even if that evidence were unconvincing—whether because the examples of accountability-focused inquiry bodies are too few or the references to human rights and international criminality are too sparse—it would

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414. *See* WILLIAM SCHABAS, UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNALS 153–56 (2012). Also consider India's commission of inquiry into the September 1948 "police action" in Hyderabad that unleashed a wave of violence against Muslims, including 27,000-40,000 deaths, widescale sexual violence, pillage and looting, and the forced conversion of surviving Muslim women and children to Hinduism. The commission confirmed participation by members of the Indian army and police, characterized the atrocities as criminal, and supported the round-up of perpetrators, but did not invoke international law. The full report was suppressed until 2013. *See* Sunil Purushotham, *Internal Violence: The "Police Action" in Hyderabad*, 57 COMP. STUD. SOC'Y & HIST. 435, 450–61 (2015).

415. SCHABAS, *supra* note 414, at 154–55. This led Soviet prosecutors at Nuremberg to insist on charges relating to the massacre. *Id.*

416. *Id.* at 13, 155–56.

417. Schwöbel-Patel, *supra* note 9, at 145, 152.

still make better sense to speak of a broadening of, rather than a shift in, the function of inquiry.[418] Contemporary inquiry bodies run the gamut, with some mandates placing greater emphasis on non-recurrence or reconciliation and others focused on establishing violations and assigning blame.[419] Yet all of this can still be considered dispute settlement.

Contemporary inquiry practice ultimately reflects an expanded notion of what constitutes a "dispute." The traditional "dispute" in international law is bilateral: "a disagreement on a point of law or fact, a conflict of legal views or of interests *between two persons*."[420] Because international courts and tribunals remain organized around bilateral disputes, multilateral disputes—for example, a dispute about one state's compliance with obligations *erga omnes*—still need to be channeled through a state-to-state action to obtain a judicial determination.[421] There is scant evidence that the drafters of the 1899 and 1907 Hague Conventions had anything other than bilateral disputes in mind. Yet when states coordinate through an international organization to establish an inquiry body into alleged violations of human rights or the commission of international crimes, they are, in effect, engaged in a multilateral dispute.[422]

Inquiry bodies arguably provide an alternative means by which to seek to settle (as well as "litigate") such disputes. Even if the inquiry body operates to "provoke and condemn," it is still aimed at resolving the underlying dispute. In this light, the line between the accountability or norm-enforcement function and the dispute settlement function of inquiry seems blurry or even unviable. This also raises questions about what dispute *settlement* has come to mean; an inquiry body is typically one step in a broader process, not a one-stop shop that leads directly to peaceful settlement. But international courts also operate within a broader process of dispute settlement that

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418. *See* Butchard & Henderson, *supra* note 316, at 24 (referring to a broadening of the function of inquiry, rather than "a single type of commission of inquiry that has simply changed in nature").

419. That some relatively recent multilateral treaties include provisions for inquiry suggests the continuing attraction of inquiry as a form of dispute settlement. *See* Convention on Environmental Impact Assessment in a Transboundary Context art. 3(7), Feb. 25, 1991, 30 I.L.M. 800; Convention on the Law of Non-Navigational Uses of Internal Watercourses arts. 33(4)–(9), May 21, 1997, 36 I.L.M. 700.

420. Mavrommatis Palestine Concessions (Greece v. U.K.), Judgment, 1924 P.C.I.J. (ser. A) No. 2, at 11 (Aug. 30) (emphasis added).

421. Federica Paddeu, *Multilateral Disputes in Bilateral Settings: International Practice Lags Behind Theory*, 76 CAMBRIDGE L.J. 1 (2017).

422. By seeking to enforce a collective interest, they are also acting consistently with the norm reflected by Article 48 of the Articles on the Responsibility of States for Internationally Wrongful Acts (on the invocation of responsibility by non-injured states). U.N. GAOR, 56th Sess., Agenda Item 162, Supp. No. 10, U.N. Doc A/56/10, ch. IV(E)(1), art. 48 (2001).

may involve multiple steps and institutions.[423] As inquiry bodies have become a regular feature of conflict management and transitional justice, it seems plausible to consider inquiry bodies—in all their permutations—as having accountability and dispute settlement functions that coexist.

V. SUMMATION

The conventional narrative surrounding the evolution of inquiry requires adjustment. First, it is correct that inquiry bodies have proliferated since the 1990s, but the standard account downplays or omits a significant amount of relevant past practice. This distorts the extent to which contemporary practice is novel or unprecedented. Historical inquiry bodies reveal striking parallels with their modern-day counterparts in terms of objectives, methods, and limitations. The standard account also obscures the challenges involved in determining what types of activity constitute "inquiry" in the first place and therefore merit a place in the conversation.

Second, the proposition that inquiry bodies began as instruments of "pure" fact-finding and only recently have begun to engage with international law, or to operate as quasi-judicial mechanisms, is misleading. It overlooks that some historical inquiry bodies had express mandates to reach legal conclusions, while others were charged with answering mixed questions of fact and law or made factual findings with obvious legal consequences. Historical inquiry bodies operated within a broader context of international legal norms that shaped—and, in some cases, was shaped by—their activities. Further work could be done to assess whether the ways in which earlier inquiry bodies engaged with international law were more or less effective (from various perspectives) than contemporary inquiry bodies operating with "juridified" mandates.

Third, the assertion that contemporary inquiry practice, with a focus on human rights violations and international crimes, represents a break with the past requires nuance. Historical inquiry bodies also dealt with alleged violations of human rights norms; some played a formative role in the development of international criminal law.

Yet as noted at the outset, the key strands of the conventional narrative contain important insights. It is true that inquiry bodies have been a high-profile response to international conflict over the past quarter century, and states and civil society groups regularly call for the establishment of commissions of inquiry in response to new incidents and crises. It is also true that many contemporary inquiry bodies foreground questions of international law in ways that go beyond past practice. Such inquiry bodies (or their mandate providers)

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423. *See* Joan Donoghue, *The Role of the World Court Today*, 47 GA. L. REV. 181, 192–96 (2012).

are more forthright in seeking to leverage the authority of international law, even if earlier inquiry bodies also engaged with international law or operated in its shadow. Finally, the emphasis on human rights and IHL, alongside the fact that inquiry may operate as a precursor to international criminal law responses, is more pronounced in modern practice, even if links among inquiry, human rights, and international criminal law are not new.

It is less certain, however, that this evolution in the practice of inquiry bodies, based on the adjusted narrative presented here, represents "progress." Nor is it clear that modern-day inquiry bodies live up to the role that popular and scholarly imagination assign to them—as objective and impartial arbiters of truth whose findings and recommendations are authoritative. Contemporary practice may be less novel and pathbreaking than it at first appears, including with respect to the constraints and limitations that modern-day inquiry bodies face. Is it reasonable to presume (as the "progress narrative" suggests) that modern-day inquiry bodies exercise greater authority than did earlier inquiry bodies established bilaterally or by international organizations? To the extent such a presumption is also part of the conventional narrative, it too should be questioned. The broad range of practice surveyed in this study suggests that historical practice has insights to offer for contemporary practice, whether in terms of inquiry-body design, working methods, or approaches to international law. For example, should contemporary inquiry bodies include party representatives? Should inquiry bodies be established primarily for discrete incidents rather than broad-ranging conflicts? Should the reports of inquiry bodies pay relatively more attention to political economy, culture, or local preferences—and relatively less attention to applicable law? Should the limits or indeterminacy of the law be highlighted or obscured?

The normative lessons to be drawn from this revised account of inquiry practice are a subject for further study. The immediate claim is not that policy makers and international lawyers should seek to steer inquiry practice back towards some "golden age" of inquiry, even if past practice might contain valuable lessons about how inquiry bodies can be effective or what types of objectives inquiry bodies might best be used to pursue. This account has instead tried to make the case that as debates about the usefulness and efficacy of inquiry bodies continue, and as new inquiry bodies are proposed and established, there is value in delving deeper into the historical practice of inquiry to better appreciate the ways in which inquiry bodies can or cannot fulfil their mandates or serve their intended purposes.

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