

Commissions of Inquiry

Problems and Prospects

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Laying the Foundations: Commissions of Inquiry and the Development of International Law

SHANE DARCY

9.1. INTRODUCTION

COMMISSIONS OF INQUIRY are a common feature of the present international legal and political system and have frequently been deployed since the emergence of international law as a means for regulating international affairs. Although primarily concerned with the establishment of facts, such entities will often engage with international law, either by choice or design. While commissions of inquiry for the most part have tended to adhere to conventional interpretations and understandings of international law, there may have been times where such bodies can be said to have contributed to the substantive development of international law. In particular, the legal analysis conducted by fact-finding bodies created prior to the establishment of international criminal tribunals in the past century can be said to have had some influence on the drafting of their constitutive instruments and provided a useful resource for the judges sitting in the subsequent trials. Fact-finding by a commission of inquiry, and the attendant application of international law to those facts, has been a precursor to many contemporary international criminal trials. Nonetheless, the value to be ascribed to their factual and legal findings by judicial bodies remains somewhat contested.

This chapter draws on a number of prominent examples of commissions of inquiry to assess whether they can be considered to have made a contribution to the development of international law, specifically international criminal law. It considers illustrative instances of the application of international law by the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties (1919), the United Nations War Crimes Commission (1943–48) and the Commission of Experts established by the Security Council to examine alleged

violations of international humanitarian law in the Former Yugoslavia (1992–94). The question of whether commissions of inquiry can be said to have developed, rather than merely applied, international law, is the central concern of this chapter. Consideration will first be given to the legal weight to be ascribed to the findings of commissions of inquiry within the international legal system, before turning to an examination of the three chosen commissions. These examples have been selected primarily because these commissions operated at the beginning of periods that have proven significant for the development of international law, particularly international criminal law. The chapter's analysis will draw upon the jurisprudence of relevant international courts and tribunals, and other sources of international law, in considering the contribution of commissions of inquiry to the development of international law.

9.2. COMMISSIONS OF INQUIRY AND INTERNATIONAL LAW

Commissions of inquiry serve to provide a factual account of disputed events, but are often accompanied by legal analysis which can inform and guide subsequent political, legal and even judicial undertakings. While in theory, 'fact-finding commissions should not engage with law at all', there is an increasing 'juridification or even criminalization' of the work of commissions of inquiry.¹ For example, the International Commission of Inquiry on Darfur, established by the United Nations (UN) to examine reports of violations of international human rights and humanitarian law, undertook an analysis of the facts through the lens of international criminal law, which it acknowledged was 'an approach proper to a judicial body', even though the Commission was clearly not such an entity.² Given the mandates of contemporary commissions of inquiry, the application and therefore interpretation of international law can hardly be avoided. Legal knowledge and expertise are essential requirements for the fulfillment of the mandates of commissions of inquiry. Théo Boutruche has stated that it is 'virtually impossible to conduct fact-finding without knowledge of the law because it is only through legal expertise that one can select the relevant facts from the huge quantity of information around a given incident'.³ As the examples below will demonstrate, commissions of inquiry have

¹ LJ van den Herik, 'An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of International Law' (2014) 13 *Chinese Journal of International Law* 507, 508.

² *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (Geneva, 25 January 2005) para 14 (*Darfur Report*).

³ T Boutruche, 'Selecting and Applying Legal Lenses in Monitoring, Reporting and Fact-Finding Missions', *HPCR Working Paper* (October 2013) 1.

not limited their use of international law to a framework for the establishment of relevant facts. They have also engaged in detailed analysis of the law itself, at times offering progressive interpretations of its scope and content, and even suggesting novel legal means of accountability.

The approach of contemporary commissions of inquiry to the application and interpretation of international law is said to be 'generally fairly flexible and progressive'.⁴ Aspects of their reports might be seen to progressively develop the law on a range of matters, such as the application of international human rights law to non-state actors, the joint application of international humanitarian and human rights law during armed conflict and the interpretation of international crimes.⁵ Such claims are heard frequently, even though practitioners in the field of fact-finding, monitoring and reporting have demonstrated a 'cautious approach' to participating in the development of international law.⁶ Research by Boutruche reveals that a significant majority of such individuals felt that

as a matter of principle, [monitoring, reporting and fact-finding] bodies should not engage in any progressive development of international law, nor would MRF actors decide on a progressive interpretation with regard to an unsettled area of international law. The interviewees stressed the critical need to apply existing law to avoid unnecessary critiques and to ensure the credibility and legitimacy of the mission's findings.⁷

Strict adherence to this principle is challenged by fact-finders being tasked with inquiring into the alleged commission of international crimes, and the attendant range of legal issues with which commissions are confronted. This difficulty was even more pronounced in the past when international law itself was far less developed, with recourse often made to ever-changing customary international law. Contemporary commissions of inquiry have had a tendency 'to shy away from customary law, except when practitioners felt required to rely on this source of law due to a lack of applicable treaty provisions'.⁸

The legal analyses to be found in the reports of commissions of inquiry may prove to be a useful resource, particularly where the subject matter they have engaged with has not been previously addressed by an official body. Amongst the formal sources of international law, reports of commission of inquiry would seem comparable to those set out in Article 38(1)(d) of the Statute of the International Court of Justice, which describes 'judicial

⁴ van den Herik (n 1) 533.

⁵ Boutruche (n 3) 20–21; van den Herik (n 1) 534–35; T Rodenhäuser, 'Progressive Development of International Human Rights Law: The Reports of the Independent International Commission of Inquiry on the Syrian Arab Republic' (*EJIL: Talk!* 13 April 2013).

⁶ Boutruche (n 3) 15.

⁷ *ibid.*, 21.

⁸ *ibid.*, 15.

decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'. Commissions of inquiry might be considered as a hybrid of these recognised subsidiary sources. Their approach is quasi-judicial, in that they comprise a detached assessment of facts through the lens of applicable international legal standards, and the analysis is often undertaken by leading jurists in the field of international law.⁹ The reports produced by commissions of inquiry may 'inadvertently wind up serving jurisprudential purposes' if they have addressed disputed or uncertain international law questions.¹⁰ That being said, while the reports of contemporary commissions are frequently described as authoritative,¹¹ international courts have been quite conservative when it comes to relying upon their findings. Judge Ušacka of the International Criminal Court commented that the legal conclusions of such commissions 'may be relevant only by analogy', in the same way that the jurisprudence of the ad hoc tribunals 'is not directly applicable before this Court without "detailed analysis"'.¹² van den Herik and Harwood have similarly put it that:

no immediate precedential value should be attached to detailed legal findings of commissions of inquiry. [...] legal findings and interpretations from commissions of inquiry can only be transposed to the context of a criminal trial with a certain care and diligence.¹³

Although the legal findings of contemporary commissions of inquiry are less commonly relied upon by international courts and tribunals, the historical examples outlined below proved more influential on subsequent legal developments. The explanation may lie in the fact that members of the two earlier commissions comprised representative of states and thus acted on their behalf within the commissions. Accordingly, these bodies might not meet the standards espoused for fact-finding bodies today, in that they were not independent, and neither were they impartial, given that the states they represented were mostly the Allied nations.¹⁴ An

⁹ See D Akande and H Tonkin, 'International Commissions of Inquiry: A New Form of Adjudication?' (*EJIL: Talk!* 6 April 2012).

¹⁰ Boutruche (n 3) 21.

¹¹ M Frulli, 'Fact-Finding or Paving the Road to Criminal Justice? Some Reflections on United Nations Commissions of Inquiry' (2012) 10 *Journal of International Criminal Justice* 1323, 1329.

¹² *Prosecutor v Al Bashir*, Case No ICC-02/05-01/09, Pre-Trial Chamber I, (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Separate and Partially Dissenting Opinion of Judge Anita Ušacka) (4 March 2009) para 6 (footnotes omitted).

¹³ LJ van den Herik and C Harwood, 'Sharing the Law: The Appeal of International Criminal Law for International Commissions of Inquiry', *Grotius Centre Working Paper 2014/016-ICL* (2014), 2–3.

¹⁴ See, for example, UN General Assembly Resolution 46/50, *Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security*, UN Doc A/RES/46/59 (9 December 1991).

analysis of their work is relevant, nevertheless, to understanding how the reception given to the legal findings of commissions of inquiry often depends on the extent to which such holdings align with the views of the states or authorities that have created them.

9.3. COMMISSION ON THE RESPONSIBILITY OF THE AUTHORS OF THE WAR AND THE ENFORCEMENT OF PENALTIES (1919)

Prior to the First World War, official commissions of inquiry, such as those envisaged by the 1899 Hague Convention on the Peaceful Settlement of Disputes, were usually concerned with relatively minor incidents—‘differences of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact’, as the 1899 Convention put it.¹⁵ The International Commission to Inquire into the Causes and Conduct of the Balkan Wars, established in 1913, marked a departure from previous approaches, although it was not created by states, but rather by the Carnegie Endowment for International Peace.¹⁶ This Commission drew heavily on international law in its consideration of the lawfulness of the resort to armed force in the Balkans, the treatment of prisoners of war and other practices as occurred during the conflict.¹⁷ The Commission also foresaw and advocated for the deployment of commissions of inquiry during times of war by states:

Were it possible for there to be a commission of inquiry with the belligerent armies, during war, not in the shape of an enterprise provided by a private initiative, but as an international institution, dependant on the great international organization of governments, which is already in existence, and acts intermittently through Hague Conferences, and permanently through the Hague Tribunal,—the work of such a body would possess an importance and a utility such as cannot attach to a mere private commission.¹⁸

A standing commission of inquiry along these lines, the report stated, ‘could foresee offences, instead of condemning them after they take place’.¹⁹ No such international mechanism was to operate during the First World War.

¹⁵ Convention (I) for the Pacific Settlement of International Disputes (Hague I), 29 July 1899, Art 9.

¹⁶ *Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars*, Carnegie Endowment for International Peace (Washington DC, 1914) (*Report of the Commission on the Balkans War*). See further F Trix, ‘Peace-mongering in 1913: the Carnegie international commission of inquiry and its report on the Balkan wars’ (2014) 5 *First World War Studies* 2, 147.

¹⁷ *Report of the Commission on the Balkans War* (n 16) 208–34 (Chapter 5: ‘The War and International Law’).

¹⁸ *ibid.*, 234.

¹⁹ *ibid.*

After the War, and continuing with the retrospective approach of commissions of inquiry of the time, the Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties was created by a decision adopted at the Paris Peace Conference on 25 January 1919. The Commission was comprised of 15 members, two representatives each from the United States, Britain, France, Italy and Japan, and the five remaining members representing Belgium, Greece, Poland, Romania and Serbia.²⁰ The Commission was tasked with inquiring and reporting on the following:

1. the Responsibility of the authors of war;
2. the facts as to the breaches of the laws and customs of war committed by the forces of the German Empire and their Allies, on land, on sea and in the air during the present war;
3. the degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staffs and other individuals, however highly placed;
4. the Constitution and procedure of a tribunal appropriate to the trial of these offences; and
5. any other matters cognate or ancillary to the above which may arise in the course of the enquiry, and which the Commission finds it useful and relevant to take into consideration.²¹

With such a mandate, the 1919 Commission was required not only to consider existing international law, primarily the laws and customs of war, but also to propose how the law might evolve in the context of a potential judicial mechanism to try offences. Although the proposals put forward by the Commission were partially reflected in the Treaty of Versailles, and other subsequent legal developments, there was considerable divergence amongst the Commission's members on some of the key legal questions with which it was confronted.

The 1919 Commission issued its report on 29 March 1919, a little over two months after it had been brought into existence. The report's annexes included memorandums from both the United States and Japanese representatives, outlining their reservations to the findings of the majority. The legal innovations which the majority put forward were at times a departure from the admittedly rudimentary international law which existed at the time, even though in many respects they have now become part and parcel of the modern international legal landscape, albeit with some refinement. Key contested issues the Commission debated included the

²⁰ 'Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, March 19, 1919' (1920) 14 *American Journal of International Law* 95–96 (1919 Commission Report).

²¹ *ibid.*, 95.

proposal that an international tribunal be established, that heads of state should not be immune from prosecution and that high-ranking officials could be criminally responsible for the acts of their subordinates. The Commission included in its list of violations of the laws and customs of war practices which had not previously been explicitly outlawed, and the majority drew criticism, from the United States in particular, for suggesting the laws of humanity as a legal basis for criminal prosecution.

9.3.1. Head of State Immunity

The 1919 Commission's majority report began its discussion on the subject of criminal responsibility by dismissing the idea that 'rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal'.²² This would extend to heads of state, in the Commission's view, as to conclude otherwise would lay down a principle that some of the 'greatest outrages' ever committed could go unpunished.²³ This would 'shock the conscience of civilized mankind'.²⁴ Removing head of state immunity in this way was certainly an innovation in international law and one with which the United States members disagreed. Doing so would impose 'a degree of responsibility hitherto unknown to municipal or international law, for which no precedents are to be found in the modern practice of nations'.²⁵ The drafters of the Treaty of Versailles were persuaded by the majority, however, with the former German Emperor arraigned under Article 227 'for a supreme offence against international morality and the sanctity of treaties'.²⁶ According to the treaty, William II was to be tried by a 'special tribunal' made up of five judges, one from each of the Great Powers. This was a modification of the 1919 Commission's proposal for 'a high tribunal composed of judges drawn from many nations'.²⁷ The Japanese members had raised questions about this suggestion, while the United States members argued that there was a lack of precedent for creating 'an international criminal court for the trial of individuals'.²⁸ The Treaty of Versailles entailed a watered-down version of the

²² *ibid.*, 116.

²³ *ibid.*

²⁴ *ibid.*

²⁵ *ibid.*, 135.

²⁶ Treaty of Versailles, 28 June 1919, Art 227.

²⁷ 1919 *Commission Report* (n 20) 122.

²⁸ *ibid.*, 145, 151–52. See further H Rhea, 'The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties and its Contribution to International Criminal Justice after World War II' (2014) 25 *Criminal Law Forum* 147, 164.

Commission's proposed tribunal, one which never come into existence in any event.²⁹

9.3.2. Command Responsibility

The 1919 Commission also addressed the question of the criminal responsibility of superiors for offences committed by subordinates. In doing so, according to a leading text on international criminal law, the majority report of the Commission contains '[t]he foundation of the modern law of command responsibility'.³⁰ The majority considered that the German Emperor and others 'in high authority' were aware of violations taking place and they could 'at least have mitigated the barbarities committed during the course of the war'.³¹ With regard to violations of the laws and customs of war, the majority recommended charges against

all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of states, who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war.³²

The United States members refused to agree to this 'doctrine of negative criminality',³³ and stated in their memorandum of reservations that the delegation was 'unalterably opposed' to this form of liability:

It is one thing to punish a person who committed, or, possessing the authority, ordered others to commit an act constituting a crime; it is quite another thing to punish a person who failed to prevent, to put an end to, or to repress violations of the laws and customs of war. In one case the individual acts or orders others to act, and in doing so commits a positive offence. In the other he is to be punished for the acts of others without proof being given that he knew of the commission of the acts in question or that, knowing them, he could have prevented their commission.³⁴

The Japanese members emphasised the importance of strict interpretation in the context of penal law, as they opposed 'abstention' as a basis for criminal liability for war crimes.³⁵ Although the 1919 Commission's

²⁹ JN Maogoto, *War Crimes and Realpolitik: International Justice from World War I to the 21st Century* (Boulder, Lynne Rienner, 2004) 56.

³⁰ R Cryer, H Friman, D Robinson and E Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge, Cambridge University Press, 2014) 384.

³¹ 1919 Commission Report (n 20) 117.

³² *ibid.*, 121.

³³ *ibid.*, 129.

³⁴ *ibid.*, 143.

³⁵ *ibid.*, 152.

majority report provided an authoritative conceptual basis for superior responsibility, its recommendations on this count were not reproduced in the Treaty of Versailles, nor relied upon in the so-called *Leipzig* trials which followed. Nonetheless, the doctrine of superior responsibility has become well-established in international law.³⁶

9.3.3. Substantive Law

In addition to its innovative approach as to who could be prosecuted, and how this might be done, the 1919 Commission also sought to identify, in both factual and legal terms, what might form the substance of such prosecutions. The Commission devised a list of violations of the laws and customs of war and the laws of humanity which illustrated how Germany and its allies had 'piled outrage upon outrage' during the First World War.³⁷ The list of 32 violations drew on existing treaties, customary law and the 'dictates of the public conscience', a phrase taken from the Martens clause of the Hague Regulations. The Commission's view that these acts were punishable is in itself significant, given that the existing treaties of international humanitarian law had not expressly provided for criminal liability. Moreover, the list included violations that states had not prohibited in the clearest terms when drafting such treaties. The Hague Regulations were deliberately silent on the common wartime practice of hostage-taking for example, yet the 1919 Commission included 'putting hostages to death' as one of the violations of the laws and customs of war committed during the War.³⁸ The list of violations also addressed sexual violence more forthrightly than the law of war itself had, listing rape and the abduction of women and girls for enforced prostitution as violations.³⁹ The imposition of collective penalties was also designated as an offence for the first time, despite the ambiguous nature of the rule in Article 50 of the Hague Regulations.⁴⁰

The United States took issue with the majority's invocation of the laws of humanity in compiling the list of violations because this meant the Commission exceeded its given mandate and it also raised concerns regarding

³⁶ See, for example, G Mettraux, *The Law of Command Responsibility* (Oxford, Oxford University Press, 2009).

³⁷ 1919 Commission Report (n 20) 113. Annex I, containing the detailed list of violations was not reprinted in the *American Journal of International Law*, but can be seen in *Violations of the Laws and Customs of War: Reports of the Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919*, Carnegie Endowment for International Peace, Division of Law: Pamphlet No 32 (Oxford, Clarendon Press, 1919).

³⁸ 1919 Commission Report (n 20) 114.

³⁹ *ibid.*

⁴⁰ *ibid.*

nullum crimen sine lege.⁴¹ The delegation accepted that belligerent parties could prosecute offenders against the laws of war before national courts or military tribunals, but stated that:

The American representatives know of no international statute or convention making a violation of the laws and customs of war—not to speak of the laws or principles of humanity—an international crime, affixing a punishment to it, and declaring the court which has jurisdiction over the offence.⁴²

The Treaty of Versailles reflects the United States view, with Article 227 acknowledging the right of the Allied powers to try persons accused of violating the laws and customs of war before military tribunals. In practice, such trials never occurred and only relatively few individuals were ever tried by the defeated countries for crimes committed during the First World War.⁴³ Nevertheless, the list of violations devised by the 1919 Commission proved influential in subsequent legal endeavours. This so-called ‘Versailles List’ was used as a precedent by the United Nations War Crimes Commission established during the Second World War and was said to serve as an ‘inspiration for improving international efforts’ concerning accountability for war crimes.⁴⁴ Relying on the work of the 1919 Commission after the Second World War ‘diminished the risk of criticism on the grounds that the UN were inventing new crimes after the acts had been perpetrated’.⁴⁵ By providing a ‘starting point and practical basis for the immediate commencement of the work of the Commission’,⁴⁶ the 1919 Commission’s list of violations, as well as the various other contributions detailed in this section, provided a valuable foundation for the task of prosecuting the crimes of the Second World War.

9.4. UNITED NATIONS WAR CRIMES COMMISSION (1943–1948)

In line with the stated commitment of Allied governments to try suspected war criminals for the abuses of the Second World War, the United Kingdom and United States committed to the establishment of a ‘United Nations

⁴¹ *ibid*, 133–35, 144–46.

⁴² *ibid*, 146.

⁴³ See, generally, M Lewis, *The Birth of the New Justice: The Internationalisation of Crime and Punishment, 1919–1950* (Oxford, Oxford University Press, 2014).

⁴⁴ See D Plesch and S Sattler, ‘A New Paradigm of Customary International Criminal Law: The UN War Crimes Commission of 1943–1948 and its associated Courts and Tribunals’ (2014) 25 *Criminal Law Forum* 17, 20.

⁴⁵ AJ Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Chapel Hill, University of North Carolina Press, 1998) 96.

⁴⁶ *ibid*, 96.

Commission for the Investigation of War Crimes' in October 1942.⁴⁷ The Soviet Union joined with the other two major Allies in issuing the Moscow Declaration on 1 November 1943, which entrenched this commitment to prosecution and identified the need to compile information necessary for that purpose.⁴⁸ The United Nations War Crimes Commission (UNWCC) had been established a few days previously at a diplomatic conference of Allied and Dominion countries held at the Foreign Office in London.⁴⁹ The Commission had 17 members at the outset, comprising the delegates of the 14 represented states, but excluding the Soviets, who were said to be in general agreement with the Commission's establishment.⁵⁰ The narrow mandate given to the Commission belies the extent to which it engaged with international law:

1. it should investigate and record the evidence of war crimes, identifying where possible the individuals responsible;
2. it should report to the Governments concerned cases in which it appeared that adequate evidence might be expected to be forthcoming.⁵¹

It quickly became apparent that the Commission should also address legal matters concerning war crimes and not merely investigate the facts concerning their commission. The states that created the UNWCC in turn explicitly acknowledged its advisory role on questions of law and policy.⁵² Robert Wright, who served as Chair of the Commission, explained that fulfillment of its duty to advise governments on legal questions meant that the Commission 'had to deliberate on fundamental issues of international law, issues which were of practical importance in regard to war crimes'.⁵³ According to the official *History of the United War Crimes Commission*, this advisory role 'tended, in the course of time, to exceed in importance its original task of investigation'.⁵⁴

⁴⁷ The United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London, HM Stationery Office, 1948) 105–106.

⁴⁸ *Statement Signed by President Roosevelt, Prime Minister Churchill and Premier Stalin Regarding Atrocities*, Annex to 'Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22, 1945' (Document I), *Report of Robert H Jackson United States Representative to the International Conference on Military Trials* (Washington, US Government Printing Office, 1949) 11–12.

⁴⁹ *History of the United Nations War Crimes Commission* (n 47) 112–14.

⁵⁰ *ibid.*, 120.

⁵¹ *ibid.*, 113.

⁵² *ibid.*, 124–26.

⁵³ *ibid.*, 3.

⁵⁴ *ibid.*, 126.

While the UNWCC could only make recommendations to the Allied powers on matters of international law, Wright considered that its work in this area was of 'prime importance', as it had prepared the groundwork for the prosecution and punishment of war criminals once the war ended.⁵⁵ Recent scholarship has analysed the extent of the contribution of the Commission to the development of international law in general and international criminal justice in particular.⁵⁶ Without doubt the work of the Commission constitutes a rich source of information and legal analysis of international law as it relates to the prosecution of international crimes. At the 1945 London conference on military trials, which culminated in the adoption of the Nuremberg Charter, the United States representative Robert Jackson, later Chief Prosecutor at Nuremberg, acknowledged the work of the Commission:

We have felt very keenly that the War Crimes Commission has been doing excellent work and that the War Crimes Commission ought to have some opportunity to present its work if a way could be found.⁵⁷

Jackson and David Maxwell Fyfe, the British representative at the London conference, met with the Commission in July 1945 and discussed 'the problem of utilising the great mass of experience and information accumulated by the Commission'.⁵⁸ Despite this praise and engagement, key United States officials had earlier noted the considerable criticism of the Commission for 'the paucity of the results of its work', which had become characterised by disagreement amongst its members.⁵⁹ They considered in January 1945 that the Commission had fulfilled its purpose and suggested its dissolution.⁶⁰ The Commission did continue to operate until after the end of the war, but once the defeat of Germany was imminent, the four main Allied powers assumed overall control of the task of advancing the law relating to prosecuting international crimes. Nevertheless, the preparatory work of the Commission should not be discounted, for it was not without influence.

As with the 1919 Commission, the UNWCC's legal analysis mainly involved consideration of substantive crimes, potential modes of criminal liability and the constitution of a mechanism for prosecuting alleged war

⁵⁵ *History of the United Nations War Crimes Commission* (n 47) 3.

⁵⁶ See for example W Schabas et al, 'The United Nations War Commission and the Origins of International Criminal Justice' (2014) 25 *Criminal Law Forum* 1, which provides an overview to a special issue of the journal devoted to the work of the Commission.

⁵⁷ 'Minutes of Conference Session of July 13, 1945', *Report of Robert H Jackson* (n 48) 225.

⁵⁸ *History of the United Nations War Crimes Commission* (n 47) 456.

⁵⁹ 'Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22, 1945' *Report of Robert H Jackson* (n 48) 3.

⁶⁰ *ibid*, 8.

crimes. The Commission had conducted its work based on an acceptance of the existence of individual criminal responsibility under international law,⁶¹ even if this somewhat debatable proposition was not confirmed until the Nuremberg Charter and judgment, and their later endorsement by the UN General Assembly.⁶² In relation to the Commission's engagement with substantive law, this was primarily through its Legal Committee, which provided advice to member governments on numerous issues arising from German conduct during the war.⁶³ Considerable attention was focused on the definition of war crimes, the criminal nature of wars of aggression and what subsequently became known as crimes against humanity.⁶⁴ For war crimes, the Commission added to the 'Versailles List', by adopting an approach which entailed 'avoiding strict and binding definitions of the concept of war crimes'.⁶⁵ The Commission broke new ground in addressing sexual and gender-based war crimes.⁶⁶ Its flexible approach, which is not without problems in the context of criminal proceedings, where the principle of legality requires certainty, also allowed the Commission to address the new concept of crimes against humanity:

... the rule stressed during the first days of the Commission's activities, that narrow legalisms were to be disregarded and the field of the violations of the laws of war extended so as to meet the requirements of justice, was applied in respect of this class of crimes.⁶⁷

While the members of the Commission were initially divided on whether abuses against German nationals were within its jurisdiction, the Legal Committee devised a definition of crimes against humanity, which was 'adopted in substance in Article 6 of the Nuremberg Charter'.⁶⁸ Legal advice was offered by the UNWCC to a number of national governments concerning such crimes.⁶⁹

9.4.1. Crimes Against Peace

Crimes against peace proved to be a far more contested subject for the UNWCC. The question of whether criminal liability arose for aggressive

⁶¹ *History of the United Nations War Crimes Commission* (n 47) 9.

⁶² See UN General Assembly Resolution 95(1), 11 December 1946.

⁶³ *History of the United Nations War Crimes Commission* (n 47) 169–70, 485–98.

⁶⁴ *ibid.*, 170.

⁶⁵ *ibid.*, 170–74.

⁶⁶ See D Plesch, S Sàcouto and C Lasco, 'The Relevance of the United Nations War Crimes Commission to the Prosecution of Sexual and Gender-Based Crimes Today' (2014) 25 *Criminal Law Forum* 349.

⁶⁷ *History of the United Nations War Crimes Commission* (n 47) 174.

⁶⁸ *ibid.*, 176.

⁶⁹ *ibid.*, 176–80.

war was '[b]y far the most important issue of substantive law to be studied by the Commission and its Legal Committee', according to the official *History*, and one which generated a clear divergence of opinion amongst the Commission members.⁷⁰ A special sub-committee tasked with studying the issue produced majority and minority reports, an approach reminiscent of its 1919 predecessor, whose lack of unanimity the UNWCC had noted.⁷¹ The majority concluded that preparatory acts and the launching of a war of aggression were not 'war crimes' (which formed the basis of the Commission's mandate), and that '[i]t is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law'.⁷² The minority opinion of the delegate of Czechoslovakia was that international law had developed recently such that individual criminal responsibility arose for aggressive war.⁷³ His view found favour with other members of the Commission, including Wright, who sought to compare the development of international law to that of the English common law.⁷⁴ The Commission, however, remained divided and decided that resolution of this question rested with the governments themselves, and thus the subject was effectively dropped.⁷⁵ The absence of agreement does not devalue the work of the Commission on crimes against peace, as it provides a considered appraisal of the state of existing law, and foreshadowed the debates on aggression that were to take place at the London conference in 1945. Wright later wrote of the significance of the Commission's work on crimes against peace, and how he was told that 'these discussions were not without influence in determining the scope of the prosecution and in putting "crimes against peace" in the fore-front of the Charter of the Tribunal'.⁷⁶

9.4.2. Constitutive Law for a Potential International Criminal Court

The UNWCC also considered the constitutive law that might be required for an international criminal court to prosecute war crimes, in addition to national prosecutions by the Commission's member states.⁷⁷ Work on this subject included the preparation and detailed consideration of a draft statute for a UN War Crimes Court which might be established

⁷⁰ *ibid.*, 180.

⁷¹ *ibid.*, 181–82.

⁷² *ibid.*, 182.

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ *ibid.*, 184.

⁷⁶ *ibid.*, 10.

⁷⁷ *ibid.*, 442–54.

by treaty.⁷⁸ Despite the effort, this particular proposal received a 'lukewarm' response from the British government, which indicated its desire to work closely with the United States on this matter.⁷⁹ Both the Justice and War Departments of the United States had devised proposals regarding prosecutions of Nazi war criminals.⁸⁰ William Schabas has noted how the four major Allied powers took a different approach to the format of a tribunal as suggested by the Commission, and how the smaller countries which had contributed to the work of the UNWCC were excluded from the London conference.⁸¹ The four Allies were 'essentially ignoring the proposal of the United Nations War Crimes Commission as they concluded an agreement on the Nuremberg Tribunal behind closed doors'.⁸² The *History of the United Nations War Crimes Commission* concedes that the Commission only played only an 'indirect part' in the preparation of the London Agreement on the establishment of the International Military Tribunal.⁸³

9.4.3. Superior Orders and Potential Modes of Liability

The legal work undertaken by the UNWCC also included tackling thorny issues such as the doctrine of superior orders and potential modes of criminal liability. The 1919 Commission had left open the question of whether superior orders might be a defence in a criminal trial,⁸⁴ but the issue was considered of such importance at the UNWCC, that its Legal Committee appointed a special sub-committee to address it.⁸⁵ In the end, differing approaches to superior orders amongst the member states meant that the Commission could not propose a clear principle or rule on the matter. There was unanimity, however, that 'the mere fact of having acted in obedience to the orders of a superior does not of itself relieve a person who has committed a war crime from responsibility'.⁸⁶ The Nuremberg Charter reflected this approach and added that superior orders could be considered in mitigation of punishment, while the judges at Nuremberg

⁷⁸ For an overview see WA Schabas, 'The United Nations War Crimes Commission's Proposal for an International Criminal Court' (2014) 25 *Criminal Law Forum* 171.

⁷⁹ *ibid*, 186.

⁸⁰ See generally BF Smith, *The American Road to Nuremberg: The Documentary Record 1944–1945* (Stanford, Hoover Institution Press, 1982).

⁸¹ Schabas (n 78) 177.

⁸² *ibid*, 188.

⁸³ *History of the United Nations War Crimes Commission* (n 47) 454.

⁸⁴ *1919 Commission Report* (n 20) 117.

⁸⁵ *History of the United Nations War Crimes Commission* (n 47) 278.

⁸⁶ *ibid*, 280.

felt that superior orders had to be considered in tandem with the question of duress.⁸⁷ Modern international criminal law has modified the approach taken at Nuremberg, and allows the defence in limited circumstances.⁸⁸

9.4.4. Collective Responsibility

The collective nature of the mass commission of crimes during the Second World War had prompted consideration by the Commission of 'the problem of collective responsibility for war crimes', including the idea of criminal organisations.⁸⁹ Professor Andre Gros, who later represented France at the London conference, explained that the principle of individual culpability could not be applied to 'the entirely new phenomenon of mass crime':

One is led to the conception of a collective responsibility corresponding to the collective character of the crimes. The war has furnished plenty of examples of the collective character of the war crimes, of the fact that they have been committed not by isolated individuals but by groups, units or organised formations. Such crimes amount to organised collective violation of international public order.⁹⁰

Gros suggested that membership of criminal associations could be punishable, as provided for under the French Penal Code, although he seemed to favour membership serving to establish a presumption of guilt, in itself a highly controversial proposition, rather than as a stand-alone crime.⁹¹ The Commission debated these proposals and recognised that 'countless crimes have been committed by organised gangs, Gestapo groups, S.S. or military units'.⁹² Although it recommended prosecution of both planners of atrocities and members of such entities implicated therein, the Commission stopped short of calling for the trial of organisations themselves, or for declaring membership itself as a crime.⁹³ The criminal organisations proposal which had emanated from the United States War Department had suggested such an approach.⁹⁴ It was taken up at the London conference, eventually appearing in Articles 9 and 10 of the Nuremberg Charter, although the judges at Nuremberg showed notable

⁸⁷ See Charter of the International Military Tribunal, Art 8; International Military Tribunal (Nuremberg) *Judgment and Sentences*, 1 October 1946, reprinted in (1947) 41(1) *American Journal of International Law* 172, 221.

⁸⁸ See Rome Statute of the International Criminal Court, Art 33.

⁸⁹ United Nations War Crimes Commission 'Memorandum by Professor Andre Gros on the Problem of Collective Responsibility for War Crimes' (translation), Document C 85 (28 March 1945).

⁹⁰ *ibid* 1–2.

⁹¹ *History of the United Nations War Crimes Commission* (n 47) 294.

⁹² *ibid*, 296.

⁹³ *ibid*.

⁹⁴ See 'Subject: Trial of European War Criminals (by Colonel Murray C. Bernays, G-1)', 15 September 1944 (Document 16) in Smith (n 80) 33.

caution in their application of this concept.⁹⁵ The restraint demonstrated by the Commission on this controversial concept bolsters the argument that when it comes to certain modes of liability, the UNWCC's 'interpretive and precedential value is manifest'.⁹⁶

The work of the United Nations War Crimes Commission made an important contribution to the development of international law, albeit one that should not be overstated. It was sidelined by the main Allied powers when it came to the preparation of the Nuremberg Charter, and was not referenced in the Nuremberg judgment.⁹⁷ Nonetheless, the Commission's output and engagement with international law remains a valuable source for scholars and practitioners of international criminal law. Given that its members were representative of their states, albeit with a certain degree of distance, their ruminations can be considered as a source for determining customary international law:

... the Commission was both an international forum for informed diplomatic discussions about what the law is—or should be—on a plethora of issues relevant to war crimes prosecutions and a managing body that evaluated and counseled tens of thousands of war crimes prosecutions occurring around the world. Altogether, the Commission resulted in rich diplomatic debate about international law by a large and diverse group of states, as well as the evaluation of thousands of cases where principles were put into practice. As such, both the *opinio juris* and the state practice required to form customary international laws were contained within a single entity, a truly rare phenomenon, now and then.⁹⁸

The relatively uncertain state of the law concerning international crimes and the context of Nazi criminality loosened the strictures that would have otherwise prevailed on developing legal rules and advancing particular arguments or concepts. As the Commission itself put it, 'international law developed in this field under hard pressure of circumstances. It grew of the necessity to meet a new type of criminality which had never before faced human society or on so vast a scale'.⁹⁹ As international law developed rapidly by way of treaties adopted after the Second World War, the scope for pushing the development of the law in such a manner would diminish.

⁹⁵ For an overview see S Darcy, *Collective Responsibility and Accountability under International Law*, (Transnational, 2007) 257.

⁹⁶ K Hale and D Kline, 'Holding Collectives Accountable' (2014) 25 *Criminal Law Forum* 261, 289.

⁹⁷ *cf* Plesch and Sattler (n 44) 40.

⁹⁸ K Hale and D Kline, 'Holding Collective Accountable' (2014) 25 *Criminal Law Forum* 261, 264. See also D Plesch and S Sattler, 'Changing the Paradigm of International Criminal Law: Considering the Work of the United Nations War Crimes Commission of 1943–1948' (2013) 15(2) *International Community Law Review* 203.

⁹⁹ *History of the United Nations War Crimes Commission* (n 47) 289.

9.5. COMMISSION OF EXPERTS ESTABLISHED PURSUANT TO SECURITY COUNCIL RESOLUTION 780 (1992–1994)

In October 1992, the UN Security Council asked the Secretary General to establish a Commission of Experts to examine the alleged abuses occurring in the conflicts in the Former Yugoslavia.¹⁰⁰ The Council requested that an impartial commission be set up as a matter of urgency to examine the available information, ‘with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia’.¹⁰¹ In appointing the Commissioners, the Secretary General paid due regard to their qualifications in ‘human rights, humanitarian law as well as criminal law and prosecution’.¹⁰² It has been said that there was an ‘unspoken understanding’ that the creation of the Commission of Experts was the first step towards the establishment of an international criminal tribunal to prosecute crimes in the Former Yugoslavia.¹⁰³ In a resolution from November 1992, the Security Council extended the mandate of the Commission of Experts to include the practice of ‘ethnic cleansing’, and warned that those ordering or committing such violations would be held individually responsible.¹⁰⁴ Cherif M Bassiouni, who was to replace Frits Kalshoven as the Chair of the Commission in 1993, compared the Commission of Experts to the 1919 Commission and the United Nations War Crimes Commission. He wrote in 1994 that there had only been ‘three internationally established commissions to investigate war crimes and prepare for eventual prosecution before international and national judicial bodies’.¹⁰⁵ One key difference from the previous commissions of inquiry was that the members of the Commission of Experts were to serve in their personal capacity, and their appointment was to be based on their ‘integrity and absolute impartiality’.¹⁰⁶ That being said, the Commission received its mandate from a political body, in the form of the Security Council, albeit one which failed to ensure that sufficient resources were provided to the Commission for it to complete its task.¹⁰⁷

¹⁰⁰ UN Security Council Resolution 780, UN Doc S/RES/780 (6 October 1992).

¹⁰¹ *ibid*, para 2.

¹⁰² *Report of the Secretary-General on the Establishment of the Commission of Experts pursuant to paragraph 2 of Security Council Resolution 780*, UN Doc S/24657 (14 October 1992) para 8.

¹⁰³ WA Schabas, *The UN International Criminal Tribunals* (Cambridge University Press, 2006) 17.

¹⁰⁴ UN Security Council Resolution 787, UN Doc S/RES/787 (16 November 1992) paras 7–8.

¹⁰⁵ MC Bassiouni, ‘The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)’ (1994) 88(4) *American Journal of International Law* 784, 784.

¹⁰⁶ *Report of the Secretary-General* (n 102) paras 8–9.

¹⁰⁷ Bassiouni (n 105) 795–96, 801–802.

In its first Interim Report, the Commission of Experts addressed a number of legal issues, including the applicable law and 'its interpretation in light of the facts'.¹⁰⁸ It offered its view as to the application of international humanitarian law, which was relevant in both treaty and customary form. The Commission noted the divergence in the law of armed conflict concerning international and non-international armed conflicts, and adopted an approach, which it justified on the basis of the particular context in the Balkans, that applied the law of international armed conflicts 'to the entirety of the armed conflicts in the territory of the former Yugoslavia'.¹⁰⁹ The Commission suggested that '[s]pecial importance also attaches to the conventions and customary law on crimes against humanity', as well as the prohibition of genocide.¹¹⁰ It discussed briefly war crimes and crimes against humanity, and how 'ethnic cleansing' could fall under these headings, as well as the concepts of command responsibility and superior orders.¹¹¹ The Commission stated in its first report that it would examine how rape and other forms of sexual assault might be addressed as war crimes or crimes against humanity.¹¹² It concluded by turning to universal jurisdiction, which it felt could be applied to war crimes, crimes against humanity and genocide, and how states might combine their jurisdiction so that prosecutions could be undertaken by an international tribunal, along the lines as had been done at Nuremberg.¹¹³ The Commission considered that the creation of an ad hoc international criminal tribunal, as had been suggested elsewhere,¹¹⁴ would be 'consistent with the direction of its work'.¹¹⁵

By the time the Commission of Experts issued its second Interim Report in October 1993, the Security Council had already decided to create an international tribunal to try persons responsible for serious violations of international humanitarian law committed in the Former Yugoslavia since 1991.¹¹⁶ In Resolution 808, which put the ICTY's establishment in motion, the Council took note of the Commission's suggestion that a tribunal be created. The second Interim Report did not broach questions of international law, perhaps because of the imminent coming into existence of an

¹⁰⁸ *Interim Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, transmitted by a Letter from the Secretary-General to the President of the Security Council, UN Doc S/25274 (9 February 1993) para 36.

¹⁰⁹ *ibid*, para 45.

¹¹⁰ *ibid*, paras 40, 46.

¹¹¹ *ibid*, paras 47–57.

¹¹² *ibid*, paras 58–60.

¹¹³ *ibid*, para 72.

¹¹⁴ Schabas (n 103) 13–16.

¹¹⁵ *First Interim Report* (n 108) para 74.

¹¹⁶ See UN Security Council Resolution 808, UN Doc S/RES/808 (22 February 1993); UN Security Council Resolution 827, UN Doc S/RES/827 (23 May 1993).

international criminal tribunal.¹¹⁷ In its Final Report, the Commission of Experts expressed its deference to the ICTY on relevant legal questions, but explained why it had included some analysis of international law:

The Commission has chosen to comment on selected legal issues because of their particular significance for understanding the legal context related to violations of international humanitarian law committed in the territory of the former Yugoslavia. The Commission's mandate is to provide the Secretary-General with its conclusions on the evidence of such violations and not to provide an analysis of the legal issues. It will be for the International Tribunal to make legal findings in connection with particular cases.¹¹⁸

The Commission's final Report provides a précis of key substantive legal issues concerning international crimes and their prosecution.¹¹⁹ The legal analysis put forward by the Commission of Experts was considered and applied by the ICTY across a range of issues,¹²⁰ and although the ICTY effectively agreed with the Commission on several points, it took a different view at times, departing not just from the Commission's analysis, but from prevailing opinion at the time.

9.5.1. Command Responsibility

The Commission of Experts had elaborated on the concept of command responsibility, as provided for in Article 7 of the ICTY Statute, but only briefly touched upon in the Secretary General's Report on the draft statute.¹²¹ Having noted 'with satisfaction' the similarity between the formulation in the Statute and how the Commission described command responsibility in its first Interim Report, the Commission offered its view as to the mental element required for superior responsibility.¹²² On constructive knowledge, or the 'must have known' standard, the Commission put forward a number of indices which could be considered in

¹¹⁷ *Second Interim Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, transmitted by a Letter from the Secretary-General to the President of the Security Council, UN Doc S/26545 (1993) (6 October 1993).

¹¹⁸ *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council, UN Doc S/1994/674 (24 May 1994) para 41.

¹¹⁹ *ibid*, paras 42–109.

¹²⁰ See D Re, 'Fact-Finding in the Former Yugoslavia: What the Courts Did' in M Bergsmo (ed), *Quality Control in Fact-Finding* (Florence, Torken Opsahl, 2013) 279, 288–94; M Frulli, (n 11) 1327–28.

¹²¹ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc S/25704 (3 May 1993) para 56.

¹²² *Final Report of the Commission of Experts* (n 118) paras 56, 58.

determining the presence of such knowledge.¹²³ The ICTY relied on these indicia on more than one occasion¹²⁴ and was challenged for doing so in the *Galić* case. The defence considered that the Commission of Experts' report on this matter was based on 'assumptions and superficial information'.¹²⁵ The Commission had not cited any evidence to support its interpretation of constructive knowledge, yet the Appeals Chamber upheld the Trial Chamber's use of the indicia and dismissed the appeal:

The factors mentioned in the Report are not factual findings, they are indicia that can be used along with other factors. These indicia were not considered by the Trial Chamber to be in any way binding upon it because they were contained in the Report.¹²⁶

The Commission's report thus proved to be a persuasive precedent of sorts for the ICTY. It has also been cited approvingly by a Pre-Trial Chamber of the International Criminal Court on this particular issue.¹²⁷

9.5.2. Differences between the Commission and the ICTY

While the ICTY has relied upon the Commission of Experts to buttress its legal arguments on occasion, it has shown little hesitancy in adopting differing interpretations. In one of the first genocide cases, an ICTY Trial Chamber argued that protected groups could be defined negatively, that it 'concurs here with the opinion already expressed by the Commission of Experts'.¹²⁸ The Appeals Chamber expressly disagreed with this approach, and found that reliance on the Commission of Experts Report alone was 'not persuasive' here.¹²⁹ The Commission's view that targeting the leadership of a group might be sufficient for genocide has gained some traction in the jurisprudence.¹³⁰ For crimes against humanity, the Commission of Experts had taken the view that a nexus was required with an

¹²³ *Final Report of the Commission of Experts* (n 118) para 58.

¹²⁴ See for example *Prosecutor v Delalic et al*, Case No IT-96-21-T, Trial Chamber, (Judgment, 18 November 1998) para 386; *Prosecutor v Blaškić*, Case No IT-95-14-T, Trial Chamber, (Judgment, 3 March 2000) para 307.

¹²⁵ *Prosecutor v Galić*, Case No IT-98-29-A, Appeals Chamber, (30 November 2006) para 180.

¹²⁶ *ibid*, para 183.

¹²⁷ *Prosecutor v Bemba Gombo*, Case No ICC-01/05/-01/08, Decision Pursuant to Art 61(7) (a) and (b) of the Rome Statute on the Charges, Pre-Trial Chamber II, (15 June 2009) para 431.

¹²⁸ *Prosecutor v Jelisić*, Trial Chamber, Judgment, Case No IT-95-10-T, (14 December 1999) para 71.

¹²⁹ *Prosecutor v Stakić*, Appeals Chamber, Judgment, Case No IT-97-24-A, (22 March 2006) para 27. See, however, Partly Dissenting Opinion of Judge Shahabuddeen, paras 8–18.

¹³⁰ See *Final Report of the Commission of Experts* (n 118) para 94; *Jelisić* (n 128) para 82; Schabas (n 103) 170–71.

armed conflict, as specified in the ICTY Statute, although it considered that no link was needed with war crimes or crimes against peace, as had been the case at Nuremberg.¹³¹ The ICTY shunned such conventional legal wisdom regarding the nexus in the ground-breaking *Tadić* case, where the Appeals Chamber held that customary international law no longer required a connection between crimes against humanity and an international armed conflict, or perhaps with any armed conflict.¹³² The Commission had also seemingly considered that discrimination was a requirement for crimes against humanity, as had the Report of the Secretary General,¹³³ although the ICTY Statute had not included such an element. The ICTY Appeals Chamber held that discrimination was only an element of the crime against humanity of persecution.¹³⁴ David Re rightly notes that such differences of opinion are 'quite explicable as these issues were judicially undefined when the Commission expressed its opinion'.¹³⁵ The energetic judicial creativity demonstrated by the ad hoc international criminal tribunals might also explain such divergence.¹³⁶

The differing views of the Commission and the Tribunal is most apparent in the context of war crimes. In its Final Report, the Commission had reiterated its view that the law applicable to international armed conflicts should be applied to 'the entirety' of the armed conflicts in the Former Yugoslavia.¹³⁷ This stance may have been taken because of the accepted opinion at the time, which the Commission gave expression to, that 'there does not appear to be a customary international law applicable to internal armed conflicts which includes the concept of war crimes'.¹³⁸ The Commission considered that violations of the laws or customs of war as set out in Article 3 of the ICTY Statute were 'offences when committed in international, but not in internal armed conflicts'.¹³⁹ Both the Secretary General and the International Committee of the Red Cross shared this view.¹⁴⁰ The ICTY Appeals Chamber, once again in *Tadić*, argued to the

¹³¹ *Final Report of the Commission of Experts* (n 118) para 75.

¹³² *Prosecutor v Tadić*, Case No IT-9-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (2 October 1995) para 141.

¹³³ *Final Report of the Commission of Experts* (n 118) para 84; *Report of the Secretary-General* (n 121) para 48.

¹³⁴ *Prosecutor v Tadić*, Case No IT-94-1-A, Appeals Chamber, (Judgment, 15 July 1999) paras 282–305.

¹³⁵ D Re (n 120) 288.

¹³⁶ See generally S Darcy and J Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford, Oxford University Press, 2010).

¹³⁷ *Final Report of the Commission of Experts* (n 118) para 44.

¹³⁸ *ibid*, para 52.

¹³⁹ *ibid*, para 54.

¹⁴⁰ See *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994)*, UN Doc S/1995/134 (13 February 1994) para 12; 'Some Preliminary Remarks by the International Committee of the Red Cross', DDM/JUR/442 b (25 March 1993) para 4, reprinted in V Morris and MP Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, vol 2 (New York, Transnational Publishers, 1995) 391.

contrary and concluded that customary international law had evolved such that 'serious violations of international humanitarian law governing internal armed conflicts entail individual criminal responsibility'.¹⁴¹ The Commission's Final Report was relied upon by Judge Li in his dissenting opinion on the interpretation of Article 3 of the ICTY Statute.¹⁴² What he saw as an 'unwarranted assumption of legislative power' by the *Tadić* majority,¹⁴³ undoubtedly contributed to the extension of war crimes to non-international armed conflict when states exercised their legitimate legislative authority at the Rome Conference in 1998.¹⁴⁴

The Commission of Experts operated as international criminal law was entering a period of rapid growth and, as had happened with the UNWCC, its efforts were overtaken by other legal developments. The establishment of the ICTY during the mandate of the Commission was a milestone in the evolution of international criminal law which overshadowed the Commission's work, even if it offered the Commission a clearer legal framework within which to conduct its analysis of applicable international law. The Commission's reports proved useful as official and authoritative documents which could be referred to by the ICTY where necessary, given the relatively rudimentary state of international criminal law as the trials began. The Tribunal's judges were not tied by the views of the Commission, of course, and they departed from its legal analysis more than once. This is not a negative reflection on the legal activity of the Commission itself, for it arguably provided an interpretation of certain legal issues that was more faithful to the views of states, and in keeping with the principle of legality, than that entailed in the progressive approach of the ICTY. While the Tribunal's jurisprudence prompted certain significant changes in international law, it has not always been successful in this regard and the more conservative view of the Commission of Experts has prevailed on occasion.¹⁴⁵ The legal work of the Commission was not 'overly influential' at the Tribunal, especially when compared with the extensive fact-finding which it had also undertaken.¹⁴⁶ It can also be seen as an example

¹⁴¹ *Tadić* (n 132) para 135.

¹⁴² *ibid*, Separate Opinion of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction, para 8.

¹⁴³ *ibid*, para 13.

¹⁴⁴ See Rome Statute of the International Criminal Court, Art 8.

¹⁴⁵ For example, with regard to the concept of belligerent reprisals. See *Final Report of the Commission of Experts* (n 118) paras 63–66; S Darcy, *Judges, Law and War; the Judicial Development of International Humanitarian Law* (Cambridge, Cambridge University Press, 2014) 257–263.

¹⁴⁶ D Re (n 120) 286; R Kerr, *The International Criminal Tribunal for the Former Yugoslavia; An Exercise in Law, Politics and Diplomacy* (Oxford, Oxford University Press, 2004) 56.

of the declining influence of commissions of inquiry on the development of international law, as the law itself has become more well-established, and more emphasis is placed on the fact-finding role of these bodies.

9.6. CONCLUSION

In the international legal system, only states are formally endowed with lawmaking power. Nevertheless, the development of international law is not solely the domain of states in practice, and commissions of inquiry can be counted amongst the various other entities, such as international courts, which have contributed to this multi-faceted process. The historical examples considered in this chapter demonstrate that the legal analysis undertaken by commissions of inquiry can serve to clarify the application, scope and meaning of international law in particular contexts. Their reports comprise official and authoritative sources which can inform, guide and even push states, judges and practitioners in their application of international law. This chapter has sought to consider both the treatment of international law by the chosen commissions, as well as subsequent adherence, or otherwise, to their findings. In each case, the commissions can be said to have made discrete contributions to the development of international law, as evidenced, for example, by the subsequent reliance on those legal analyses by international courts and tribunals. The reports of these commissions of inquiry continue to be cited many years after the fulfillment of their mandates. In a 2011 decision of the International Criminal Court, for example, the Pre-Trial Chamber cited the 1919 Commission's report to bolster its argument that international law does not afford immunity to heads of state before international courts.¹⁴⁷

The reports of commissions of inquiry can be compared to the recognised subsidiary sources of international law—judicial decisions and scholarly writings—and as such, can carry significant persuasive value and prove influential in the development of international law. States would likely be more receptive to the legal findings of a commission of inquiry if they were to accord with their own understandings of the state of international law. Certain progressive interpretations by commissions of inquiry may be more palatable for states, such as, for example, when they expand the obligations of certain non-state actors under international law.¹⁴⁸

¹⁴⁷ *Prosecutor v Al Bashir*, Pre-Trial Chamber I, Decision Pursuant to Art 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139, 12 December 2011, para 23.

¹⁴⁸ Boutruche (n 3) 32.

At the same time, as with the established subsidiary sources, other entities may not be convinced of the interpretations adopted and may choose to depart from them or simply ignore them. This is evident for each of the three commissions examined in this chapter. It is not inconceivable either that commissions of inquiry make erroneous or unfounded statements concerning international law.¹⁴⁹ The concern about the fragmentation of international law because of differing interpretations by international courts could also be applied to commissions of inquiry; the two commissions of inquiry established by the UN to investigate the attack on the Gaza Flotilla came to opposite conclusions regarding the legality of Israel's blockade of the territory.¹⁵⁰ Such divergence of opinion is unfortunate but not surprising. Just as judges are not reticent about lodging separate or dissenting opinions, members of commissions of inquiry have also disagreed on matters of law, including internally, as happened at both the 1919 Commission and the United Nations War Crimes Commission.

The development of international law has become an infrequent by-product of the work of contemporary commissions of inquiry. It is notable that the International Criminal Court makes little use of the legal analyses by commissions of inquiry which have addressed situations over which the Court has jurisdiction.¹⁵¹ The International Criminal Court did not follow the Darfur Commission's analysis that protected groups in the context of genocide could include any 'stable and permanent groups', as had been mooted by the ICTR in *Akayesu*, or, more broadly, that there was sufficient evidence of a genocidal policy on the part of the Sudanese government.¹⁵² The detailed nature of the legal instruments of the International Criminal Court diminish its need to consult external sources, although this has not prevented extensive reliance by the Court on the jurisprudence of the ad hoc tribunals. The fact-finding efforts of commissions of inquiry remain a valuable reference for the Prosecutor and judges in the preliminary stages of proceedings. Nevertheless, the credibility of their work also depends on

¹⁴⁹ See for example KJ Heller, 'The International Commission of Inquiry on Libya: A Critical Analysis' in J Meierhenrich (ed), *International Commissions: The Role of Commissions of Inquiry in the Investigation of International Crimes* (forthcoming) 30; V Koutrolis, 'The Prohibition of the Use of Force in Arbitrations and Fact-Finding Reports' in M Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford, Oxford University Press, 2015) 619–20; Boutruche (n 3) 18–21; van den Herik (n 1) 534.

¹⁵⁰ See *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, September 2011*, paras 69–82; *Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance*, UN Doc A/HRC/15/21 (27 September 2010) paras 51–54.

¹⁵¹ For an example, see Office of the Prosecutor, *Situation on Registered Vehicles of Comoros, Greece and Cambodia; Article 53(1)* (6 November 2014) para 27.

¹⁵² *Darfur Report* (n 2) paras 498–501, 513–18.

the quality of the legal analysis, which could be undermined by an overly creative approach which seeks to progress the law's development.¹⁵³ As Larissa van den Herik has put it:

... in the most politically sensitive dossiers, there is a set need to interpret and apply the law quite meticulously and to develop legal reasoning at some length. Such rigor adds to the authority of the report and is also required by the general inclination of the States concerned not to co-operate and subsequently dismiss the report. Rigorous legal reasoning may help to forestall, or at least de-legitimize, unilateral dismissal on legal grounds.¹⁵⁴

The development of international law is not one of the purposes behind the contemporary establishment of international commissions of inquiry. If a historical view is taken, however, it can be seen that commissions have at times made valuable contributions to the evolution of international law, in particular international criminal law as examined above. While this may have been deliberate and feasible in the earlier stages of the law's development, such an approach is now cautioned against and less likely as the law has advanced. The contribution of commissions of inquiry to the future development of international law is more likely to be inconspicuous and inadvertent.

¹⁵³ Boutruche (n 3) 1.

¹⁵⁴ van den Herik (n 1) 535 (footnotes omitted).