
International Commissions of Inquiry and the North Sea Incident: A Model for a MH17 Tribunal?

Jan Martin Lemnitzer*

Abstract

After spending more than a century on the fringes of international legal discourse, international commissions of inquiry have recently begun to feature more prominently in academic and political debate. Their embrace of international criminal law has prompted a debate whether they are stepping outside their traditional mandate as fact-finding bodies. As this article will show, this dispute misunderstands the Hague tradition and ignores the historical role of early commissions of inquiry in shaping our ideas of holding perpetrators of mass atrocities to account or of letting international bodies decide the responsibility and guilt of individuals involved in controversial incidents. While being almost completely unknown today, the North Sea Incident Commission of 1905 had explicit authority to decide upon the responsibility, blame and punishment for an incident in which the Russian Navy had killed and injured British fishermen while engaged in operations linked to the Russo-Japanese war. It pioneered an adversarial model of a commission of inquiry that could serve as a useful model for an investigation into the downing of flight MH17 over eastern Ukraine in July 2014 since it meets all Russian objections against the UN Security Council draft that was vetoed in July 2015.

1 Introduction: What Is New about the ‘New’ Commissions of Inquiry?

After spending more than a century on the fringes of international legal discourse, commissions of inquiry have recently begun to feature more prominently in academic and political debate. They are not only used much more often than was the case 10 or 20 years ago, but they have embraced international criminal law to such a degree that it has prompted a debate whether they are overstepping their traditional mandate as

* Pembroke College, Oxford University, Oxford, United Kingdom. Email: Jan.Lemnitzer@pmb.ox.ac.uk.

fact-finding bodies. As this article will show, this dispute misunderstands the variety within the history of the Hague conventions and ignores the historical role of early commissions of inquiry in shaping our ideas of holding perpetrators of mass atrocities to account or of letting international bodies decide the responsibility and guilt of individuals involved in controversial incidents. Crucially, one early precedent could provide a model for a viable inquiry into the downing of Malaysian Airlines Flight 17 (MH17) over eastern Ukraine in July 2014.

Today, the most prolific sponsor of international commissions of inquiry is the United Nations (UN) Human Rights Council, established in 2006 to replace the earlier UN Human Rights Commission.¹ In addition to inquiring into allegations of mass violations of human rights, the Human Rights Council's commissions have increasingly applied international criminal law and moved towards preparing the prosecution of possible perpetrators. In the case of North Korea and Syria, its commissions of inquiry have been explicitly given the task to 'investigate crimes against humanity'.² But this phenomenon is not restricted to the Human Rights Council: numerous commissions of inquiry sent by the UN secretary-general or the UN Security Council (UNSC) have also been asked to ensure 'accountability' for the crimes they have observed. This new focus on 'accountability' compels these commissions to make serious and far-reaching legal decisions – for example, whether the conflict under investigation is international in character or not or which principles of international criminal law or international humanitarian law are applicable.³ This is why the push for 'accountability' has led to fears of fragmentation in international criminal law and potential inconsistency in the application of norms and definitions.⁴ In addition, there are no clear rules of procedure to protect the interests of those accused of grave crimes.⁵ Therefore, the question is whether this embrace of 'accountability' is stretching the remit of a traditional commission of inquiry to breaking point.

More recently, other authors have suggested that pluralism in international criminal law should be embraced, not feared.⁶ They often refer to the decision of the

¹ See the GA Res. 60/251, 3 April 2006.

² International Commission of Inquiry for the Democratic People's Republic of Korea, Doc. A/HRC/RES/S-22/13 (2013); Independent International Commission of Inquiry on the Syrian Arab Republic, Doc. A/HRC/RES/S-17/1 (2011).

³ T. Rodenhäuser, *Progressive Development of International Human Rights Law: The Reports of the Independent International Commission of Inquiry on the Syrian Arab Republic*, 13 April 2013, available at www.ejiltalk.org/progressive-development-of-international-human-rights-law-the-reports-of-the-independent-international-commission-of-inquiry-on-the-syrian-arab-republic/ (last visited 11 October 2016).

⁴ 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 Yearbook of International Law* (2015) 71. See also C. Stahn and L. van den Herik (eds), *The Diversification and Fragmentation of International Criminal Law* (2012).

⁵ D. Akande and H. Tonkin, *International Commissions of Inquiry: A New Form of Adjudication?*, 6 April 2012, available at www.ejiltalk.org/international-commissions-of-inquiry-a-new-form-of-adjudication/ (last visited 11 October 2016).

⁶ Van Sliedregt and Vasiliev, 'Pluralism: a New Framework for International Criminal Justice', in E. van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (2014) 3. Christian Henderson suggests a permanent commission of inquiry to maintain standards in gathering evidence against

International Criminal Court's (ICC) Pre-Trial Chamber to grant the prosecutor's request to indict Sudanese president Omar al-Bashir with genocide in 2010, since the findings of the international commission of inquiry looking at the situation in Darfur were cited as important evidence.⁷ Moreover, Antonio Cassese has highlighted that modern commissions of inquiry are very different beasts from their predecessors in the Hague conventions and that they have 'a lot of potential' in establishing accountability.⁸ Therefore, the one thing that both Cassese and other authors who are more critical of this development are in agreement about is that the new commissions of inquiry mark a clear break with the Hague tradition and are 'fundamentally different from their ancestors'. As Larissa van den Herik puts it, 'whereas the traditional commissions of inquiry were principally meant to pacify and defuse a conflict, contemporary human rights commissions rather aim to stir, to evoke action, to opine and to condemn'.⁹

This view shows a misunderstanding of how the rules of the Hague conventions relate to contemporary practice and how varied it was even before World War I. As will be shown later, the drafters of the 1907 Hague Convention for the Pacific Settlement of International Disputes (1907 Hague Convention) were concerned that the then recent 'criminalisation of fact-finding', to use Philip Alston's modern phrase, would lead to the development of a coherent body of international criminal law and ultimately to an international criminal court.¹⁰ Therefore, despite their deliberately restricted mandate in the Hague conventions, very little about the way the 'new' commissions of inquiry try to deal with mass violations of human rights is actually new. Their main features were not invented in the 1990s but, rather, were an established part of how international society thought about investigating reports of mass atrocities by the 1890s.

To give just one example, the massacres committed against Armenian Christians in 1894 near Sassoun (modern Sason, Turkey) are recognized as part of the pre-history of the Armenian genocide, but it is often forgotten that much of what we know about these events stems from the work of a commission of inquiry. Set up by the Ottoman

perpetrators. See Henderson, 'Commissions of Inquiry: Flexible Temporariness or Permanent Predictability?', 45 *Netherlands Yearbook of International Law* (2014) 287, at 309; Stahn and Jacobs, 'Human Rights Fact-Finding and International Criminal Proceedings: Towards a Polycentric Model of Interaction', in S. Knuckey and P. Alston (eds), *Human Rights Fact-Finding in the 21st Century* (2016) 255.

⁷ Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, *Prosecutor v. Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09-25), Pre-Trial Chamber I, 12 July 2010, available at www.icc-cpi.int/iccdocs/doc/doc907140.pdf (last visited 11 October 2016).

⁸ Cassese, 'Fostering Increased Conformity with International Standards: Monitoring and Institutional Fact-Finding', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012) 295, at 303.

⁹ 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 Journal of International Law* (2014) 507, at 535.

¹⁰ Philip Alston coined the phrase 'criminalisation of fact-finding' in a lecture given in 2011. See Alston, 'The Criminalisation of International Human Rights Fact-Finding: Summary of Keynote Speech', available at www.jus.uio.no/smr/english/research/areas/conflict/events/conferences/fact-finding/alston.html (last visited 11 October 2016). Hague Convention for the Pacific Settlement of International Disputes (1907 Hague Convention) 1907, 2 AJIL 43 (1908).

authorities following warnings that disgust at the atrocities in Europe could lead to ‘active interference’ if the crimes remained unpunished, British pressure assured the active involvement of delegates from Britain, France, and Russia.¹¹ While their instructions only asked them to ‘superintend’ the Ottoman inquiry,¹² the three foreign delegates immediately ensured the dismissal of the local governor and discovered numerous mass graves.¹³ The report jointly produced by the three foreign delegates reads very much like a modern investigation into mass atrocities. It clearly established that the account of the events given by the local military commander was implausible, emphasized the strategic use of sexual violence against minorities, and included pages of tables linking the specific victims, the alleged perpetrators, and the witnesses implicating them.¹⁴

This action by the commission is very similar to the attempts by current commissions of inquiry to compile lists of suspects for future prosecution.¹⁵ The criminal prosecution that the authors of this report so clearly desired never happened, but while it is well known that the persecution of the Armenian minority in the Ottoman Empire was a crucial factor in the development of the formal definition of ‘crimes against humanity’ and ultimately genocide, it is often forgotten that this particular commission of inquiry shaped the perception of these events and of the Ottoman responsibility in European capitals.¹⁶ Like the ‘new’ commissions of inquiry, the delegates amassed evidence without any certainty that prosecution would follow. The proximity of their instincts to modern feelings about human rights is further highlighted by their attempt to set up a rudimentary witness protection programme and to organize a relief effort for destitute refugees.¹⁷ Commissions of inquiry clearly have a history of

¹¹ P. Currie to the Earl of Kimberley, 26 November 1894, reprinted in *Parliamentary Papers, Correspondence Relating to the Asiatic Provinces of Turkey, Part 1: Events at Sassoun, and Commission of Inquiry at Moush (Parliamentary Papers: Asiatic Provinces of Turkey)* (1905), Cd 7894, vol. CIX, 239, no. 66, 41; Earl of Kimberley to P. Currie, 13 December 1894, reprinted in *Parliamentary Papers: Asiatic Provinces of Turkey*, no. 93, 49.

¹² Inclosure to P. Currie to Earl of Kimberley, 26 December 1894, reprinted in *Parliamentary Papers: Asiatic Provinces of Turkey*, no. 126, 62; P. Currie to Earl of Kimberley, 10 January 1895, reprinted in *Parliamentary Papers: Asiatic Provinces of Turkey*, no. 134, 68.

¹³ P. Currie to Earl of Kimberley, 26 January 1895, reprinted in *Parliamentary Papers: Asiatic Provinces of Turkey*, no. 144, 74; P. Currie to Earl of Kimberley, 28 January 1895, reprinted in *Parliamentary Papers: Asiatic Provinces of Turkey*, no. 146, 75; P. Currie to Earl of Kimberley, 13 May 1895, reprinted in *Parliamentary Papers: Asiatic Provinces of Turkey*, no. 204, 111.

¹⁴ See List of Victims with Table, Annex to the Report of Consular Delegates on the Sassoun Commission, 20 July 1895, reprinted in *Parliamentary Papers: Asiatic Provinces of Turkey*, no. 93, 155–161.

¹⁵ See van den Herik and Harwood, ‘Sharing the Law: The Appeal of International Criminal Law for International Commissions of Inquiry’, in S. Knuckey and P. Alston (eds.), *Human Rights Fact-Finding in the 21st Century* (2016) 233, at 249, for a discussion of this practice.

¹⁶ See D. Rodogno, *Against Massacre: Humanitarian Interventions in the Ottoman Empire 1815–1914* (2012), at 194.

¹⁷ P. Currie to Earl of Kimberley, 21 May 1895, reprinted in *Parliamentary Papers: Asiatic Provinces of Turkey*, no. 209, 117; Earl of Kimberley to P. Currie, 3 June 1895, reprinted in *Parliamentary Papers: Asiatic Provinces of Turkey*, no. 221, 122; P. Currie to the Marquess of Salisbury, 27 July 1895, reprinted in *Parliamentary Papers: Asiatic Provinces of Turkey*, no. 245, 130; P. Currie to Marquess of Salisbury, 23 August 1895, reprinted in *Parliamentary Papers: Asiatic Provinces of Turkey*, no. 254, 190.

dealing with matters of international criminal law that predates the Hague conventions. What is more, this article wants to point towards a particular example where a commission of inquiry solved a major international dispute by pioneering a new adversarial format.¹⁸ Due to its proven efficiency in dealing with complex technical evidence in a politically charged environment, it could serve as a model for a viable tribunal establishing accountability for the downing of MH17.

MH17 from Amsterdam to Kuala Lumpur was shot down over Eastern Ukraine on 17 July 2014 and crashed into an area controlled by rebels fighting the Ukrainian government. Four days after the disaster, the UNSC demanded 'that those responsible for this incident be held to account and that all States cooperate fully with efforts to establish accountability'.¹⁹ Yet a draft UNSC resolution establishing a special criminal tribunal was vetoed by Russia in July 2015. Russia's UN delegate Vitaly Churkin claimed his country remained committed to a 'genuine international and independent investigation', but he complained that the draft resolution copied the format of the international criminal tribunal on Yugoslavia that Russia felt was excessively time-consuming and too expensive to investigate a single incident. Moreover, it did not ensure that Russia would obtain full access to all relevant evidence and unnecessarily categorized the incident as a threat to international security under Chapter VII of the Charter of the United Nations (UN Charter).²⁰

The countries sponsoring the resolution (Ukraine, Malaysia, Australia, Belgium and the Netherlands) have vowed to continue exploring 'other options for trying the perpetrators, at both international and national level', but it is far from clear what these might be.²¹ Some scholars argue that these states should persuade the UN General Assembly to 'unite for MH17' and overrule the UNSC by setting up a tribunal under its own authority.²² However, it is difficult to see how a move that would so openly antagonize Russia could serve international justice and lead to a successful outcome, including the conviction of the perpetrators. Likewise, Russia is highly likely to reject any national investigations by the states concerned as being illegitimate since it has described even the Dutch Safety Board's report on the reasons for the crash as 'biased in nature'.²³ This investigation was set up according to the rules of the International Civil Aviation Organization and was therefore explicitly barred from making any statements on responsibility and guilt. A report published by the Dutch-led Joint

¹⁸ See Sluiter, 'Adversarial v. Inquisitorial Model', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009) 227.

¹⁹ SC Res. 2166 (2014). It was adopted unanimously on 21 July 2014.

²⁰ Draft SC Res. 2015/562, 29 July 2015; Minutes of the 7498th Meeting of the Security Council, Doc. S/P V.7498, 29 July 2015.

²¹ See 'Prime Minister Rutte's Response to Veto of Security Council Resolution on MH17 Tribunal', available at www.government.nl/topics/mh17-incident/news/2015/07/29/prime-minister-rutte-s-response-to-veto-of-security-council-resolution-on-mh17-tribunal (last visited 11 October 2016).

²² Ramsden, 'Uniting for MH17', 6 *Asian Journal of International Law* (2016) (forthcoming).

²³ 'MH17 Ukraine Disaster: Dutch Safety Board Blames Missile', available at www.bbc.co.uk/news/world-europe-34511973 (last visited 11 October 2016); "'Biased, Low Quality, Full of Omissions': Russia Launches Fresh Attack on Dutch MH17 Report", available at www.rt.com/news/329494-mh17-investigation-biased-omissions/ (last visited 11 October 2016).

Investigation Team claiming that the flight was downed by a rocket fired from rebel-held territory was swiftly rejected by Kremlin spokesman Dmitry Peskov as proof of 'bias and political motivation'.²⁴ The news network *Russia Today*, often closely aligned to the Russian government, criticized the investigation for excluding Russia and, thus, potentially allowing Ukraine to interfere with the evidence.²⁵

The ICC might attempt to deliver justice, but both Ukraine and Russia are non-ratifying signatories of the Rome Statute of the International Criminal Court.²⁶ Ukraine has accepted the jurisdiction of the ICC for alleged crimes committed on its territory after 20 February 2014, which could potentially open the door for an investigation of the MH17 incident.²⁷ Yet the Office of the Prosecutor is conducting a preliminary examination of the conflict in eastern Ukraine as a whole and has expressed its intention to 'closely follow the progress and findings of the national and international investigations into the shooting down of the Malaysia Airlines MH17 aircraft in July 2014', suggesting that a full ICC investigation of this single incident is unlikely.²⁸ Therefore, what is needed is a form of international investigation that addresses all concerns raised by Russia when it vetoed the draft UNSC resolution and that is capable of uniting the Netherlands, Malaysia, Ukraine and Russia under one inquiry. The 1905 North Sea Incident Commission is a particularly promising precedent as it was deliberately designed to address the gulf of mistrust between the parties; Britain and Russia were on the brink of war when it was established.

Yet a successful MH17 tribunal not only needs to persuade all parties to assemble around the same table but also must disentangle complex technical issues and engage with far-reaching legal questions. The Dutch Safety Board's report concluded that the plane must have been downed by a specific type of Russian-made anti-aircraft missile, but, in line with its mandate, it did not make any statements as to who might have fired it.²⁹ Any criminal tribunal would have to establish from where the missile was fired and by whom. This would involve numerous groundbreaking decisions as to which of the mobile phone clips, social media posts and radar data currently presented in support of the theory that the plane was downed by pro-Russian rebels are actually authentic and permissible as forensic evidence.³⁰ Should the tribunal

²⁴ Presentation of preliminary results, 28 September 2016, available at <https://www.om.nl/onderwerpen/mh17-vliegramp/presentaties/presentation-joint/>, last accessed 11 October 2016. Ronald Oliphant/Senay Boztas, 'MH17 Investigation: Moscow denounces 'biased' investigation as prosecutors say missile came from Russia', <http://www.telegraph.co.uk/news/2016/09/28/mh17-investigation-prosecutors-to-reveal-where-missile-that-down/>, last accessed 11 October 2016.

²⁵ 'International investigators allowed Ukraine to fabricate MH17 evidence – Russia', <https://www.rt.com/news/360946-mh17-ukraine-fabricate-evidence/>, last accessed 11 October 2016.

²⁶ Rome Statute on the International Criminal Court 1998, 2187 UNTS 90.

²⁷ See International Criminal Court, press release, available at www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1146.aspx (last visited 11 October 2016).

²⁸ Report on Preliminary Examination Activities (2015), available at www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf (last visited 11 October 2016).

²⁹ Crash of Malaysia Airlines Flight MH17, 17 July 2014, available at www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf (last visited 11 October 2016).

³⁰ See 'The Evidence That May Prove Pro-Russian Separatists Shot Down MH17', available at www.washingtonpost.com/news/worldviews/wp/2014/07/20/the-evidence-that-may-prove-pro-russian-separatists-shot-down-mh17/ (last visited 11 October 2016).

find that the rocket was fired from a rebel-held area, complex legal questions of command responsibility would arise: (i) was rebel leader Igor Girkin, who is currently being sued in Chicago by some of the victim's relatives in a civil action under the US Torture Victim Protection Act of 1991, actually in charge of the unit operating the Buk missile system³¹ and (ii) has Russian support for the rebels crossed the threshold that would turn the fighting in Eastern Ukraine into an international armed conflict? Once the potential perpetrators are identified, the tribunal would also have to establish the *mens rea* element. If the attack on MH17 was a deliberate decision to shoot down a civilian plane, it would be a grave war crime. If the theory that the pro-Russian rebels thought they had shot down a Ukrainian AN-26 military transport plane (as they had only days previously) and only afterwards realized that it was a civilian plane was true, it would be manslaughter caused by negligence.³² Finally, since the Dutch report was highly critical of Ukraine's decision to continue allowing international air traffic over the conflict area, a tribunal would have to decide to what extent this implies criminal responsibility.³³

It could be argued that solving these questions is far beyond the remit of a commission of inquiry as envisaged in the 1907 Hague Convention, which was explicitly limited to fact-finding. But what is widely unknown is that the 1907 Convention was a conscious attempt by the drafters to restrain recent developments in international criminal law, precisely because the 1905 North Sea Incident Commission had just delved deeper into this field than anybody would have thought possible at the time of the First Hague Conference in 1899. This Commission not only broke new legal ground by establishing the rules of procedure of international inquiries, but it also settled questions of command responsibility and *mens rea* in a case involving what seemed to be a deliberate targeting of civilians. To achieve this, the tribunal resolved complex technical questions to establish a sequence of events agreed by all parties. This included the first time that wireless messages intercepted by naval intelligence were used as evidence in a courtroom. A detailed look at how this commission of inquiry resolved a dangerous international dispute will reveal that while it operated in a world of diplomacy that had yet to experience World War I, the solutions it found could well provide the key to a successful investigation of the MH17 tragedy.

2 The 1905 North Sea Incident Commission

The context of these extraordinary events was the Russo-Japanese War of 1904–1905, which put Anglo-Russian relations under enormous pressure due to Britain's

³¹ D. Millward, 'MH17: Russian Separatist Leader Sued for \$900 Million by Crash Victims', available at www.telegraph.co.uk/news/worldnews/europe/ukraine/11742865/MH-17-Russian-separatist-leader-sued-for-900-million-by-crash-victims.html (last visited 11 October 2016). Torture Victim Protection Act Pub L 102–256.

³² Nase and Kielsgard, 'A Call for Legal Accountability in the Wake of the MH17 Tragedy', 80 *Journal of Air Law and Commerce* (2015) 639, at 669.

³³ For a discussion of relevant precedents, see Abeyratne, 'Flight MH 17: The Legal and Regulatory Fallout', 39 *Air and Space Law* (2014) 329, at 334–339; Kaiser, 'Legal Considerations about the Loss of Malaysia Airlines Flight MH 17 in Eastern Ukraine', 40 *Air and Space Law* (2015) 107, at 114–118.

recent alliance with Japan.³⁴ For the Russian government, the war was not going well at all – the Japanese navy was superior to the Russian Pacific squadron and had blockaded it at its naval base in Port Arthur, which was also besieged by Japanese troops on land. In this desperate situation, the Russian leadership embraced a daring plan to relieve Port Arthur, sending the Baltic squadron on a journey around the world.³⁵ The problem was that shortly after crossing the Danish straits and entering the North Sea, the squadron brought Britain and Russia to the brink of war. On the night of 21 October 1904, the squadron encountered about 50 trawlers from the Hull fishing fleet in the popular fishing grounds of Dogger Bank, halfway between Denmark and the English east coast. For reasons that seemed unfathomable, members of the Russian squadron opened fire at the trawlers, sinking one and damaging several others. The incident lasted little more than ten minutes, but when the limping trawlers arrived at Hull with two dead and six injured sailors, the news stunned both the British public and the political elite.

The first reports on 24 October 1904 expressed disbelief, but when the event was confirmed, it dominated all news coverage for what would be a week of tense diplomatic activity. Reports that the Russian squadron had left the scene without making the slightest effort to assist the wounded or to help find survivors in the sea particularly outraged the public. The Russian ambassador, Alexander Benckendorff, was mobbed at the Victoria train station amid speculation that the attack might have been deliberate.³⁶ In his first diplomatic message, Foreign Secretary Lord Lansdowne echoed these beliefs by stating that the attack was ‘of the most deliberate character’ or at least caused by ‘the most culpable negligence’.³⁷ However, his telegram only demanded reparations and an apology but did not mention individual punishment. It was the British ambassador in St Petersburg, Charles Hardinge, who had already extracted a promise from the Russian Foreign Minister Vladimir Lamsdorff that, ‘as a means of maintaining the friendly relations between the two countries’, those found guilty of causing the incident would be punished.³⁸ What was envisaged at this point was a Russian investigation that would also consider evidence supplied by the British side.³⁹ To further assist the Russian investigation, Lansdowne warned Benckendorff that the Russian fleet must stop at the Spanish port of Vigo and remove the officers

³⁴ For the background of the Anglo-Japanese alliance treaty of 30 January 1902, see I. Nish, *The Anglo-Japanese Alliance: The Diplomacy of Two Island Empires 1894–1907* (1966); P. O’Brien, *The Anglo-Japanese Alliance, 1902–1922* (2004).

³⁵ See R. Hough, *The Fleet That Had to Die* (1958).

³⁶ *Manchester Guardian* (25 October 1904), at 6.

³⁷ Lord Lansdowne to C. Hardinge, 24 October 1904, reprinted in *Parliamentary Papers, Correspondence Relating to the North Sea Incident (Parliamentary Papers: North Sea Incident)* (1905), Cd 2350, vol. CIII, 369, no. 2, 1.

³⁸ C. Hardinge to Lord Lansdowne, 24 October 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 3, 2. This demand may have been inspired by the reported view within the diplomatic and foreign community in St Petersburg ‘that a pecuniary indemnity would be inadequate, and that Great Britain must insist on an exemplary punishment of those responsible’. *London Times* (25 October 1904), at 3.

³⁹ Lord Lansdowne to C. Hardinge, 25 October 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 10, 4.

responsible for the incident to face an inquiry, as 'otherwise we might find ourselves at war within the week'.⁴⁰

Meanwhile, the squadron's commander Admiral Zinovy Rozhdestvensky cabled a report claiming that his ships had come under attack by two or more torpedo boats presumed to be Japanese and that the fishing fleet had only been discovered during the shelling. Therefore, 'no warship could have acted otherwise, even in time of profound peace'. When the British ambassador in St Petersburg expressed some doubts about this account, Lamsdorff responded angrily that the word of a Russian admiral 'was of greater value than the testimony of panic-stricken fishermen'.⁴¹ This telegram from Moscow persuaded Lansdowne that a Russian tribunal would most likely accept the admiral's version, and he decided that an international enquiry with a mandate to determine individual responsibility was necessary. He spontaneously drafted a hybrid of a commission of inquiry as outlined in the 1899 Hague Convention on the Pacific Settlement of Disputes (1899 Hague Convention) and an internationalized court martial.⁴² In a brief telegram he demanded 'a full inquiry to be held at once as to the facts by an independent court with an international character. Procedure might be that laid down in articles IX to XIV of Hague convention, and [the] Commission might be formed of naval officers of high rank representing the two Powers concerned and, say, three others.'⁴³ Two of these others would be admirals from France and the United States, while the fifth was later determined as Admiral von Spaun from the Austrian Navy. As newspapers such as the *Guardian* and the *New York Times* pointed out, an international body trying individual officers of a great power was a welcome but unprecedented development.⁴⁴ However, rejecting the British request would in all probability have caused the dispute to escalate out of control. Therefore, the British government received an official proposal by Tsar Nicholas II on 28 October, suggesting to resolve the matter by establishing an international commission of inquiry.⁴⁵

When Prime Minister Arthur Balfour announced the international inquiry to loud cheers at the National Union of Conservative Associations, he made it unmistakably clear that this was neither a simple fact finding investigation nor a formal arbitration between Britain and Russia, but about the punishment of individuals. He announced 'an international commission of the kind provided for by the Hague Conventions – I should say that that has nothing to do with arbitration, that is, the constitution of an international commission to find out facts – and the persons found guilty by that

⁴⁰ Lord Lansdowne to C. Hardinge, 26 October 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 12, 6.

⁴¹ C. Hardinge to Lord Lansdowne, 27 October 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 14, 9.

⁴² Hague Convention on the Pacific Settlement of Disputes (1899 Hague Convention) 1899, 187 Consol TS 410.

⁴³ Lord Lansdowne to C. Hardinge, 27 October 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 17, 10.

⁴⁴ *Manchester Guardian* (28 October 1904), at 7; *New York Times* (28 October 1904), at 8; *Economist* (29 October 1904), at 1727.

⁴⁵ C. Hardinge to Lord Lansdowne, 28 October 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 22, 13.

tribunal will be tried and adequately punished'.⁴⁶ The *Economist* commented that Russia deserved great respect for agreeing to this extraordinary tribunal since 'it is never pleasant to throw your own officers over'.⁴⁷ However, even after that announcement the situation remained tense: the Russian squadron had now ordered four officers to remain at Vigo, but Lansdowne insisted that the Russian side must agree to precise terms regarding the powers of the international commission to apportion responsibility and blame before the fleet was allowed to leave the port.⁴⁸ In other words, the Royal Navy was effectively blockading the Russian squadron in a Spanish port until Britain was satisfied that this new tribunal would indeed have unprecedented powers. The idea was for the form of punishment to be determined by the Russian side, but the question of guilt to be decided by the international inquiry alone.⁴⁹

Under intense pressure, Russia accepted both this demand and the crucial procedural rule that all decisions of the tribunal would be made by majority vote, denying each side a veto in the proceedings.⁵⁰ After the squadron had left Vigo, the Russian government's lawyers made a final attempt to restrict the tribunal's punitive powers by arguing that the full inclusion of responsibility and blame within the commission's remit would be at odds with the terms for a commission of inquiry as set out by the 1899 Hague Convention for the Pacific Settlement of International Disputes, and their draft had now 'corrected' that mistake.⁵¹ This was a reference to Article 14 of the 1899 Hague Convention, stating that the report of a commission of inquiry 'is limited to a statement of facts'.⁵² Lansdowne coolly replied that while the planned commission built on the Hague Convention, the intention had always been to go much further.⁵³

The Russian government finally yielded, and their second draft now described the commission's task as 'looking particularly where the responsibility lies, and the degree of blame attaching to the subjects of the two High Contracting Parties, or any other persons involved'.⁵⁴ This extension was intended to allow for the Russian theory that the incident was caused by a Japanese torpedo boat attack taking advantage of the proximity of the fishing fleet, or even acting jointly with them, and Britain explicitly approved it.⁵⁵ Therefore, the commission could have demanded testimony from

⁴⁶ *London Times* (29 October 1904), at 11–12.

⁴⁷ *Economist* (5 November 1904), at 1766.

⁴⁸ Lord Lansdowne to C. Hardinge, 31 October 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 41, 25.

⁴⁹ Lord Lansdowne to C. Hardinge, 4 November 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 58, 35.

⁵⁰ A. Benckendorff to C. Hardinge, 5 November 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 60, 36; Lord Lansdowne to C. Hardinge, 5 November 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 62, 36; To see the Russian's acceptance, see C. Hardinge to Lord Lansdowne, 8 November 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 66, 38.

⁵¹ C. Hardinge to Lord Lansdowne, 14 November 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 76, 43.

⁵² 1899 Hague Convention, *supra* note 40.

⁵³ Lord Lansdowne to C. Hardinge, 15 November 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 77, 43.

⁵⁴ C. Hardinge to Lord Lansdowne, 18 November 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 82, 48.

⁵⁵ Lord Lansdowne to C. Hardinge, 18 November 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 84, 49.

anyone it deemed implicated, regardless of nationality.⁵⁶ Twenty years before the *Lotus* case provided a precedent for jurisdiction based on the passive personality principle (that is, the nationality of the victims), Russia and Britain simply took its existence for granted.⁵⁷ As Sir Edward Fry, the British legal advisor at the commission, wrote in his memoirs: 'It has, I confess, been a subject of surprise to me that none of the powers to whom this document was communicated have protested against an agreement between England and Russia to ascertain the degree of blame which might attach to the subjects of Powers who were not parties to the declaration.'⁵⁸

Perhaps this was because nobody thought the commission would lead to an agreed outcome that both parties could act upon – a book published before the proceedings were completed concluded this would be 'the most improbable result', especially since it was 'a little difficult to understand' how a commission of inquiry could establish criminal responsibility in the first place.⁵⁹ Yet the authority to effect the punishment of individuals was at the very heart of the inquiry and of how it was presented to the public. Therefore, the recent assessment by van den Herik that the commission 'went beyond the letter of the Hague convention while pretending not to' is missing the point.⁶⁰ Whereas the 1899 Hague Convention explicitly excluded matters of 'honour and essential national interests' from dispute settlement, the whole point of the tribunal was to pacify those members of the British public who wished to defend British honour by ordering the English Channel fleet to sink the Russian squadron.⁶¹

However, if the tribunal was to find those guilty and punish them, who would be the defendants? For Lansdowne, the point of the (involuntarily) prolonged stay of the Russian fleet at Vigo was for 'the express purpose of designating the officers who were responsible for the attack', but Benckendorff only ever spoke of 'witnesses'.⁶² After four officers had been designated, Lansdowne demanded an official confirmation of their status as defendants, but the Russian side would only go so far as to say that they were 'implicated' and that 'the selection of certain individuals as witnesses did not exclude the possibility of their having been responsible in the matter'.⁶³ Lansdowne

⁵⁶ In the final convention, Art. 2 reads: 'The commission shall inquire into and report on all the circumstances relative to the North Sea incident, and particularly on the question as to where the responsibility lies, and the degree of blame attaching to the subjects of the two High Contracting Parties or to the subjects of other countries in the event of their responsibility being established by the inquiry.' See *Parliamentary Papers, Declaration between the United Kingdom and Russia Relating to the Constitution of an International Commission of Inquiry on the Subject of the North Sea Incident*, 25 November 1904 (1905), Cd 2328, vol. CIII, 361.

⁵⁷ S.S. "Lotus" (*France v. Turkey*), 1927 PCIJ Series A, No. 10.

⁵⁸ E. Fry and A. Fry, *A Memoir of the Right Honourable Sir Edward Fry*, G.C.B. (1921), at 182.

⁵⁹ E.E. Smith and N.W. Sibley, *International Law as Interpreted during the Russo-Japanese War* (1905), at 277, 285.

⁶⁰ Van den Herik, *supra* note 9, at 514.

⁶¹ *London Times* (25 October 1904), at 8: '[T]he outrage was committed upon the British flag upon the high seas, and there is a strong feeling that it must be atoned for by satisfaction on the high seas by those responsible for its perpetration.' See also *New York Times* (25 October 1904), at 2.

⁶² Lord Lansdowne to C. Hardinge, 2 November 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 54, 34.

⁶³ Lord Lansdowne to C. Hardinge, 2 November 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 55, 34; C. Hardinge to Lord Lansdowne, 3 November 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 57, 35.

took this to mean that ‘the officers retained are not merely those qualified to act as witnesses, but the persons implicated’.⁶⁴ Lansdowne remained certain that if anyone of them or any other officers were found guilty, punishment would certainly follow, but he also admitted that the selection of who was sent to the tribunal was a sovereign decision by Russia and could not be challenged, ‘pending the result of the inquiry’.⁶⁵ The tribunal would consistently refer to them as ‘witnesses’, so Russia succeeded in avoiding them being formally treated as defendants. From a legal point of view, this turned out to be an advantage since it soon emerged that all relevant orders had been personally given by Admiral Rozhstvensky. Removing the commander from his squadron would have been an impossible demand for Russia to concede, but with four of his officers describing his decisions at the tribunal, he was effectively tried *in absentia*, which evaded any discussion of the ‘superior order’ defence that marred so many early war crime tribunals. There was also no issue whether the war crime in question was sufficiently defined, since unprovoked fire on the high seas directed at innocent civilians belonging to a friendly country was so obviously unlawful that the question of the crime’s precise legal foundation was not even raised.

When the tribunal met in Paris, it consisted not just of the five admirals but also two legal advisers (Sir Edward Fry from Britain and Baron Mikhail Taube from Russia, a pupil of Fyodor Martens⁶⁶) and two ‘agents’ (Hugh James O’Beirne and Mikhail Nekludov, who were secretaries at their respective embassies in Paris). Britain’s suggestion of the latter office had initially confused the Russian side, who wondered what the purpose of these officials might be.⁶⁷ As it turned out, O’Beirne would become the lead prosecutor in court, drafting the charges and formally presenting them at the final hearing, while Nekludov summarized the Russian defence.⁶⁸ This adversarial setup allowed for a robust cross-examination of all witnesses, including the technical experts. The commission spent most of January 1905 discussing procedure, and as British legal assessor Sir Edward Fry attested, the delegates found it difficult to agree, especially:

when you start, as we did, with a clean slate, and when each nation would like to write on its own ideas of what to do, the Russians hating publicity, the French wanting the judges to do all examining, and then besides, a body of five Admirals who know nothing on procedure, except in court martials and that kind of thing.⁶⁹

⁶⁴ Lord Lansdowne to C. Hardinge, 4 November 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 58, 35.

⁶⁵ Lord Lansdowne to C. Hardinge, 7 November 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 64, 38.

⁶⁶ Martens himself had refused to attend because he did not believe in the torpedo boat story and feared for his international reputation. See J.A. White, *Transition to Global Rivalry: Alliance Diplomacy and the Quadruple Entente* (2002), at 113.

⁶⁷ C. Hardinge to Lord Lansdowne, 8 November 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 66, 38–39. Russia was told they would ‘merely act as intermediaries between the Commission and the Governments concerned’ and should be taken from staff of the Russian and British embassies in Paris. Lord Lansdowne to C. Hardinge, 9 November 1904, reprinted in *Parliamentary Papers: North Sea Incident*, no. 68, 39.

⁶⁸ O’Beirne’s high profile in Paris was immediately claimed for the Catholic cause. See *The Tablet* (4 February 1904), at 24.

⁶⁹ Fry and Fry, *supra* note 56, at 186–187. The official British suggestions for procedure were extremely sparse. See ‘Procedure to Be Suggested to the International Commission’, file FO 881/8368X, The National Archives (TNA), Kew, United Kingdom.

Nonetheless, the rules of procedure they agreed on would, with minor changes, become the rule book for commissions of inquiry as set by the 1907 Hague Convention.⁷⁰

Here, the offices of agent and counsel were formally defined for the first time (Article 14), including giving both the right to ask questions of witnesses (Article 26). The Convention also adopted the concept of majority decisions (Article 30) and decided that the hearings would be secret, but the final report read out in public (Article 34). This was a direct response to the experience of the commission, where some witness statements such as that of the dashing and eloquent Captain Klado had turned into social, rather than legal, events, but it was also felt that the distinguished audience at the final sessions had added to the aura and importance of the report.⁷¹ Finally, Article 33 established the principle that 'if one of the members refuses to sign, the fact is mentioned; but the validity of the Report is not affected'. This was another lesson learned in Paris, where the possibility of invalidating the report by not adding one's signature had offered a potent threat to the Russian delegate. Tellingly, the two things that were not included in the 1907 Hague Convention were its adversarial character and the mandate to determine individual responsibility and guilt.

On 25 January 1905, the commission began its proceedings by hearing the evidence of the Hull fishermen, who had already testified at an earlier inquiry conducted in Hull.⁷² The hearings were public, and all leading newspapers sent their correspondents. The Russian officer's testimony revealed that the squadron had received numerous warnings about a Japanese plot to prepare an attack in European waters. Such warnings may have been the product of the creativity of Russia's spy network in Denmark, but the reports of a Japanese plot to obtain Swedish torpedo boats and then buy additional vessels at Hull had proven credible enough to persuade the Danish government to order its own navy to chaperone the Russian fleet through Danish waters.⁷³ Upon reaching the North Sea, Rozhstvensky gave an order for gunners to shoot on sight without asking the officers on their vessels for permission, and the first task of the tribunal was to determine whether this order was proportional and justified or whether it exposed innocent vessels to an unacceptable risk of being fired at by passing warships. The standard it applied was the *jus in bello* interpretation of proportionality that only seeks to constrain completely excessive use of force.⁷⁴ Despite the ridicule expressed when the idea of a Japanese plot had first been aired, it was soon decided that the admiral was in no position to completely dismiss the intelligence reports he was receiving. Commercial and maritime circles felt that the five admirals on the tribunal had set a dangerous precedent by elevating the safety concerns of naval commanders over those of all other shipping traffic.⁷⁵

⁷⁰ See A. Pearce Higgins, *The Hague Peace Conferences* (1909), at 168–169. 1907 Hague Convention, *supra* note 10.

⁷¹ Fry and Fry, *supra* note 56, at 185–190.

⁷² *Parliamentary Papers, North Sea Incident, 21–22 October 1904, Reports thereon by the Commissioners Appointed by the Board of Trade with Covering Memorandum by Sir Francis Hopwood, K.C.B., C.M.G. permanent secretary to the Board of Trade* (*Parliamentary Papers: Board of Trade*) (1905), Cd 2451, vol. LXIV, 327.

⁷³ *New York Times* (28 October 1904), at 1.

⁷⁴ See M. Newton and L. May, *Proportionality in International Law* (2014).

⁷⁵ *Economist* (4 March 1905), at 342.

However, the Russian contention went further. They not only claimed that the admiral had had to be prepared for an attack but that on the night in question an attack by Japanese torpedo boats had actually occurred. The British side presented formal declarations by all North Sea states and Japan that none of their torpedo boats were in the area as evidence to the court and also stated that all intelligence reports warning of Japanese activity in Hull and other British ports were false.⁷⁶ But the Russian officers believed a Japanese attack was imminent and was most likely to take place at the very moment when the squadron entered the North Sea. All of these fears were corroborated when the auxiliary vessel *Kamchatka*, which had fallen behind due to engine problems, reported an attack by several torpedo boats. In response, the cruisers *Aurora* and *Dimitrii Donskoi*, which were travelling with the *Kamchatka*, were ordered to slow down and wait for it. The Russian officers on the main battleships assumed that the torpedo boats attacking the *Kamchatka* might be trying to find their squadron, and if going at full speed would catch up with them between midnight and one o'clock in the morning. At five minutes before one o'clock, the 'admiral' of the Hull fishing fleet fired two green flares to signal that the fleet should move starboard, out of the way of the approaching battleships.⁷⁷ The Russian officers suspected a ruse, a distress signal to lure the Russian squadron to a specific place as part of a coordinated trap by the Japanese and the fishermen they had bribed. At precisely this moment, the lookouts saw two small vessels approaching the squadron from two different sides, and the battleships began firing.⁷⁸ As Captain Klado, a flag officer of Admiral Rozhdestvensky's flagship *Kniaz Suvorov* confirmed at the tribunal, the order had been given by the admiral himself.⁷⁹

Therefore, the decisive question at the tribunal was not whether the suspicion of the torpedo boats was justified but, rather, whether the Russian officers should have seen that they were firing at fishing trawlers. Against the vote of the Russian delegate, the tribunal decided that the squadron must have mistaken two of its own ships for Japanese attackers, namely the *Aurora* and the *Donskoi*. While Russia had sent no witnesses from the *Aurora* to the tribunal, British naval intelligence succeeded in locating a musician who had served on the vessel and been left at a stopover in Tangiers. His sworn testimony that the numerous shells that had hit the vessel bore marks stating they had been produced by a Russian factory impressed the judges and was not refuted by Russia.⁸⁰ The lookout's mistake was explained by a 'nocturnal

⁷⁶ See Annexes of the Statement of Facts Submitted on Behalf of His Britannic Majesty's Government, file FO 881/8350, TNA. A further file strongly suggests that after the incident Russian agents tried to persuade Hull fishermen to testify that such Japanese activity had indeed taken place. See file FO 881/8351, TNA.

⁷⁷ This was indeed a recognized signal among the fishermen. See W. Wood, *North Sea Fishers and Fighters* (1911), at 142. I am grateful to Robb Robinson, Hull Maritime Historical Studies Centre, for alerting me to this source.

⁷⁸ *London Times* (2 February 1905), at 3. See also the translation of a Russian eyewitness account dated 28 October 1904, published in the Russian newspaper *Novoe Vremya* and written by Captain Klado, 5 November 1905, reprinted in *Foreign Relations of the United States* (1904), at 796–799.

⁷⁹ *London Times* (3 February 1905), at 3.

⁸⁰ See the Declaration by Charles Lund, file FO 881/8361, TNA.

optical illusion', but how could a naval officer mistake a cruiser for a torpedo boat, given it was four or five times the size of the latter? Here, it is important to note that what the Russian witness described was actually a 'torpedo boat destroyer' – at the time, a new kind of vessel originally developed to hunt other torpedo boats. At the attack on Port Arthur in February, the Japanese navy had pioneered the idea to use these larger vessels as part of a torpedo boat squadron to attack battleships. They were about half the size of a cruiser, had a similar raised bowline, and two smoke stacks, just like the mystery vessels described by the Russian officers at the tribunal.

Therefore, the cross-examination of the Russian witnesses and the entire legal case suddenly hinged on to what extent it was possible to accurately identify a specific type of vessel in the North Sea during a cloudy, but not foggy, night. The tribunal's investigation now centred on the expert evidence given by Commander Keane, a torpedo boat specialist brought in from the Royal Navy to counter Captain Klado's confident assertions that he had positively identified two torpedo boat destroyers. Keane pointed out that searchlights had a limited range and confused the ordinary calculation of distance, up to the point that even the British battleship *Devastation* had been mistaken for a torpedo boat during naval exercises at night.⁸¹ Klado insisted that he had clearly identified a torpedo boat destroyer at a distance of two miles, but the admirals forming the tribunal told him to his face that his testimony was 'at variance with the accepted principles of naval science'.⁸² This was precisely what the British delegation had hoped for when it had made a conscious decision to offer a 'common sense' counter-case relying on naval evidence rather than a purely negative argument that there were no torpedo boats because it might 'appeal to the practical minds of five admirals'.⁸³

Having excluded an intentional attack on the trawlers and admitted the possibility of mistaking a cruiser for a torpedo boat destroyer, the tribunal then sought to answer the question why so many shells had hit the fishing vessels and why the fire on them was sustained for such a long period of time. The Russian witnesses told a sorry tale of panic about a continuing attack, complete confusion as two dozen searchlights investigated simultaneously where this attack might be coming from, and a breakdown of the chain of command between officers and gunners. For example, it remained unclear whether Admiral Rhozhstvensky's attempts to pick out individual trawlers with a searchlight and then raise it to signal 'stop firing on this vessel' were ever understood by the crews on the other battleships or simply marked these vessels for further punishment. The enormous number of shells fired (more than 500 in the case of the *Oryol*) and the parallel attempts of six major naval vessels to identify the ships they were firing at with searchlights suggest the second possibility. Having excluded

⁸¹ *London Times* (3 February 1905), at 3; *New York Times* (3 February 1905), at 2. The incident referred to had happened on 13 June 1901 in the Mediterranean. See file FO 881/8362, TNA.

⁸² *New York Times* (5 February 1905), 4. Justice Fournier from France took the lead in questioning Klado, having considerable expertise himself as the former inspector general of the French torpedo boat flotilla. See A. Rokhsund, *The Jeune École: The Strategy of the Weak* (2007), at 199. For the difficulties then involved in precise communication or firing in the North Sea, see J. Goldrick, *Before Jutland, The Naval War in Northern European Waters, August 1914–February 1915* (2015), ch. 5 'Operational Challenges'.

⁸³ See Remarks by Board of Admiralty, file FO 881/8362, TNA.

intent, the tribunal now confirmed a picture of panic, miscommunication, negligence, and naval incompetence.

The commissioners were even more scathing regarding the final indictment, the failure to provide any assistance to the stricken fishermen. Convinced that enemy torpedo boats were still in the area seeking to use the fishing fleet as a civilian human shield, the Russian squadron simply steamed south towards the English Channel. Accepting the Russian argument that there was ‘sufficient uncertainty’ about the dangers facing the squadron if it stayed, the commissioners nonetheless decided that any naval unit leaving an area after having fired upon civilian vessels had the duty to inform local authorities by wireless radio. This ruling was based on common sense rather than on established practice, given that the technology had only been introduced in leading navies around the turn of the century.

Finally, and despite accusing the Russian squadron of opening fire for no good reason, continuing that fire for far too long after it emerged that it was firing at fishing trawlers and then leaving the scene without informing local authorities that stricken vessels in need of assistance were still at sea, the commissioners’ report ended by claiming that its findings were not ‘of a nature to cast any discredit upon the military qualities or the humanity of Admiral Rozhstvensky, or the *personnel* of his squadron’.⁸⁴ This rather curious statement was included to prevent the Russian delegate from withholding his signature to the full report (and thus inspiring the rule in the Hague Convention mentioned earlier, which preserved the validity of a report even if one commissioner refused to sign), and it ensured that no punishment of the admiral or his officers would follow. Yet, at a time when intense national pride was vested in a great power’s naval forces and officers, it was no small thing to see the failings of a country’s proudest naval squadron and its most senior naval commander exposed in such humiliating detail. Despite a lack of formal punishment, Rozhstvensky’s international reputation was in tatters.

The tension between the findings and the declaration affirming the admiral’s honour was immediately picked up by the press. When the full report was published in the *London Times* the following day, it carried the headline ‘Russian admiral held responsible – the firing not justified’.⁸⁵ An editorial demanded that Rozhstvensky should now be punished by Russia and called the praise for his humanity ‘the most perplexing passage in the report’.⁸⁶ In its own comment on this final declaration, the *Economist* grimly noted that it ‘need not prevent the public from forming its own opinion’.⁸⁷ Like most newspapers outside of Russia, it was generally satisfied that the judgment had embraced the British case and reprinted the formula coined by a French observer that Rozhstvensky had been found ‘guilty, with extenuating circumstances’. The *Chicago Tribune* embraced a different version of the same quote, claiming that ‘whatever the extenuating circumstances, Rozhstvensky is condemned’.⁸⁸

⁸⁴ *Parliamentary Papers, North Sea Incident, International Commission of Inquiry, Despatch from the British Agent Forwarding the Report of the Commissioners* (1905), Cd 2382, vol. CIII, 437.

⁸⁵ *London Times* (27 February 1905), 3.

⁸⁶ *London Times* (27 February 1905), 7.

⁸⁷ *Economist* (4 March 1905), 342. It also claimed the judgment ‘has given general satisfaction, tempered by some serious misgivings’.

⁸⁸ *Chicago Tribune* (26 February 1905), reprinted in *London Times* (27 February 1905), at 3.

These are not the only clear references that the proceedings were understood in terms of criminal law. Responding to allegations of a whitewash by those confused that the firing was deemed unjustified but the admiral found free of blame, John Basset Moore, who would later become the first US judge on the Permanent Court of International Justice, argued that the criticism of the judgment was caused by the lack of training in legal terminology on the part of the five admirals:

Had they been lawyers, they probably would have brought out more clearly the distinction, which was clearly playing on their minds, between justification in fact and apparent justification. They found that the attack was not in fact justified, and from this finding there arose an obligation to make compensation. But when we pass from the domain of civil to that of penal law ... the element of intent becomes material, and apparent rather than actual justification or excuse becomes the test.⁸⁹

Keen to end the affair once and for all, Russia paid £65,000 in compensation on 9 March after the amount had been set by the Board of Trade, and the British government confirmed in Parliament that it regarded the matter as closed.⁹⁰ Rozhdestvensky's squadron finally reached East Asia, but the Japanese navy blocked its way and sank almost the entire fleet in the battle of Tsushima in late May 1905, which confirmed Russia's defeat in the war. Among the handful of Russian vessels that escaped was the *Aurora*, allowing her to eventually return to St Petersburg and famously give the starting signal for the October revolution in 1917. Rozhdestvensky's flagship *Kniaz Suvorov* was sunk by a Japanese torpedo boat. The admiral himself survived and was court martialled, but since he had been wounded and lost consciousness at the beginning of the battle, his attempt to take full responsibility for the defeat failed, and he was acquitted once more.⁹¹ By the time Rozhdestvensky died as a recluse in St Petersburg in January 1909, Russia had already entered an alliance with Britain and France, after the tribunal had helped to smooth the diplomatic path towards the triple entente of 1907. The North Sea Incident Commission had satisfied the British and international public outraged by the death of innocent fishermen and prevented a major dispute from escalating into war.

3 Why Did the Commission Not Leave a Legacy in International Criminal Law?

The immediate reaction within the legal profession was a very long article in the *Revue General du Droit International Public* written by André Mandelstam, who had been part

⁸⁹ Moore, 'The North Sea Incident', 67 *Advocate of Peace* (1905) 173, at 176.

⁹⁰ The sum was determined by a Board of Trade Report of 7 March, reprinted in *Parliamentary Papers: Board of Trade*, xv–xx. The fishing community in Hull was disappointed since the Board of Trade had reduced its original claims of about £110,000. See *London Times* (11 March 1905), at 8; House of Commons, 15 March 1905, reprinted in *Hansard*, vol. 143 col. 22–23. The North Sea Incident Commission did not directly order this award, but its report hinted that the 'deductions which are to be drawn ... with regard to the question of responsibility' should be 'sufficiently clear'.

⁹¹ His fellow defendants were sentenced to death, but the Tsar later commuted the punishment to prison terms. See C. Pleshakov, *The Tsar's Last Armada: The Epic Voyage to the Battle of Tsushima* (2002), at 332.

of the commission as one of the lawyers for the Russian side. Mandelstam did not withhold criticism of the blunt way in which the British government had forced Russia to accept a commission that went way beyond anything envisaged in the 1899 Hague Convention, but he also admitted that the use of the commission of inquiry as a ‘safety valve’ for public outrage was exactly what Martens had intended with his original proposition in 1899. From this perspective, the agreement setting up the North Sea Incident Commission corrected the mistakes of the First Hague Peace Conference, which had severely curtailed Marten’s vision.⁹² However, he did not wish for the commission to serve as a direct precedent, criticizing its hybrid structure and the way it had created a tribunal approaching an international court out of thin air. On the other hand, he believed that the commission had established the foundations for an extension of international arbitration into matters of criminal law and had established a mechanism for the punishment of violations of international law. Future conventions should build on this idea – in particular, the notion that an international body should act like a jury in a criminal trial and determine guilt and responsibility, with their decision being binding on the nation state of the convicted individual but with the state retaining the prerogative to determine the punishment.⁹³

Unsurprisingly, Martens made a second attempt to extend the functions of commissions of inquiry at the Second Hague Peace Conference in 1907. Citing the achievements of the North Sea Incident Commission in resolving questions of responsibility and blame, he suggested dropping the limitation on the simple investigation of facts. However, other delegates from Germany, Italy, the Ottoman Empire, and curiously also the British delegate Sir Edward Fry prevented this change to Article 9 of the 1899 Hague Convention, arguing it might lead to a situation where the use of such commissions in similar cases might be seen as compulsory rather than remaining the sovereign decision of states.⁹⁴ In other words, it might lead to a slippery slope towards an international criminal court. Martens then tried to at least remove the rule excluding commissions from reporting on matters of national honour and vital interests, arguing that, if nothing else, the Hull incident had shown that states were sovereign and could not be barred from setting up commissions in any shape they deemed necessary to preserve the peace. The drafters simply ignored him, left the article unchanged, and moved on, leaving Martens fuming that ‘the Conference seems to wish to ignore the most remarkable historical lesson of this celebrated case’.⁹⁵

International lawyers indeed disagreed about what that lesson might be. Sir Thomas Barclay felt that of all the institutions of the 1899 Hague Convention, only the commission of inquiry had shown itself capable of preventing a war, and he claimed that ‘this

⁹² Mandelstam, ‘La commission internationale d’enquete sur l’incident de la mer du nord’, 12 *Revue générale du droit international public* (1905) 161, at 177–178.

⁹³ Mandelstam, *supra* note 90, at 414–415. For his contribution to human rights law in the interwar period, see Aust, ‘From Diplomat to Academic Activist: André Mandelstam and the History of Human Rights’, 25 *European Journal of International Law* (2014) 1105.

⁹⁴ Hershey, ‘Convention for the Peaceful Adjustment of International Differences’, 2 *American Journal of International Law (AJIL)* (1908) 29, at 36; Pearce Higgins, *supra* note 68, at 168–169.

⁹⁵ D. Myers, *The Commission of Inquiry: The Wilson-Bryan Peace Plan, Its Origin and Development* (1913), at 13.

experience shows the utility of making all possible additions to the machinery of peace, however small may at the time appear their chance of being put into practice'.⁹⁶ Those lawyers that saw only arbitration as the future of international dispute settlement feared that promoting the use of commissions of inquiry, whose awards were technically non-binding, might undermine the binding nature of arbitration awards. Therefore, Britain's judge at the Permanent Court of International Arbitration in The Hague, John Westlake, included a warning in his volume on *International Law* that arbitration and politics should be best left separate, but he chose not to mention the North Sea Incident at all.⁹⁷ Lassa Oppenheim and Henry Erle Richards, the Chichele professor of international law in Oxford, both relegated it to a footnote.⁹⁸ US lawyer Jackson Ralston mentioned the case in his book on international arbitration but went so far as to claim that commissions of inquiry need not be discussed further since their conclusions were 'presenting nothing affecting any point of law'.⁹⁹

Other influential US lawyers led by James Brown Scott perceived even the Permanent Court of Arbitration in The Hague as corrupted by politics, with its lists of arbitrators mainly drawn from retired diplomats: 'The decision is thus likely to be a compromise instead of the cold and passionless application of a principle of law to the facts involved in the controversy'.¹⁰⁰ Scott founded the American Society for Judicial Settlement of International Disputes, which promoted a single international court, based on a flawed reading of US history that assumed that the Supreme Court of the United States had united the various states in common purpose.¹⁰¹ In this view of the future of international law, there was no room for multiple fora of international justice, and the Dogger Bank case was an irritant. In James Brown Scott's 1922 edition of his famous case textbook, it is simply described as a commission of inquiry 'as provided for' in the 1899 Hague Convention, with no special features.¹⁰²

In this book, Scott followed what proved to be the most successful and lasting response by enthusiasts of arbitration, claiming the success and high profile of the incident as a triumph of the movement, but treating the fact that it had the explicit mandate to determine individual guilt as unnecessary detail that was best omitted in the cause of advocating the general principle of arbitration.¹⁰³ The most extreme example

⁹⁶ T. Barclay, *New Methods of Adjusting International Disputes and the Future* (1917), at 93.

⁹⁷ J. Westlake, *International Law*, vol. 1: *Peace* (2nd edn, 1910), at 306.

⁹⁸ L. Oppenheim, *International Law: A Treatise* (1906), vol. 2, at 7–8; H. Erle Richards, *The Progress of International Law and Arbitration* (1911), at 20.

⁹⁹ J.H. Ralston, *International Arbitral Law and Procedure, Being a Resume of the Procedure and Practice of International Commissions* (1910), at 315–318.

¹⁰⁰ J. Brown Scott, *The American Society for Judicial Settlement of International Disputes: Its Scope and Work* (1910), at 4.

¹⁰¹ The society published a string of pamphlets such as A.H. Snow, *The Development of the American Doctrine of Jurisdiction of Courts over States* (1911); G. Wickersham, *The Supreme Court of the United States, a Prototype of a Court of Nations* (1913). See also Amorosa, 'James Brown Scott's International Adjudication between Tradition and Progress in the United States', 17 *Journal of the History of International Law* (2015) 15.

¹⁰² J. Brown Scott, *Cases on International Law* (1922), at 130.

¹⁰³ See, e.g., Hill, 'The Second Peace Conference at the Hague', 1 *AJIL* (1907) 671, at 681; Moore, 'International Arbitration', 7 *Michigan Law Review* (1909) 547, at 552; Tryon, 'The Hague Peace System in Operation', 21 *Yale Law Journal* (1911) 32, at 37–41. See also the editorial of the *New York Times* (27 February 1904), at 6.

of this approach was the Nobel peace prize acceptance speech by British arbitration activist Randal Cremer, who praised it in January 1905 as a breakthrough for arbitration because ‘notwithstanding the frantic efforts of some British journals to provoke a conflict, the two governments in a few days agreed to resort to the friendly offices of the Hague Tribunal’.¹⁰⁴ This must have confused those among his listeners who read the regular updates from the Paris commission in their newspapers that month, but Cremer still successfully misled an eminent historian more than a century later.¹⁰⁵

Yet Marten’s vision of commissions of inquiry as a force for peace was taken up by US President William Howard Taft, whose draft for a network of bilateral arbitration treaties in 1911 included ‘joint high commissions of inquiry’ that would establish the facts behind a dispute and even have the power to decide whether it should go to compulsory arbitration.¹⁰⁶ When the Senate rejected the latter clause, Theodore Roosevelt and Taft decided against trying to secure a watered down version without it. The new administration under President Woodrow Wilson and Secretary of State William Jennings Bryan went even further, again clearly inspired by the precedent of the North Sea Incident Commission.¹⁰⁷ Their draft treaty foresaw a permanent ‘international Commission (the composition to be agreed upon)’ that would report on important disputes. While the commission prepared its report, states were barred from declaring war and also banned from raising their naval or military levels of preparedness. A pamphlet published in November 1913 highlighted the significance of these suggestions: ‘The Wilson-Bryan treaty ... insures that no war will be fought until after the sober second thought of governments and people.’¹⁰⁸

The initial response by the vast majority of states presented with the suggestion was very positive as 31 nations, including all European great powers, responded favourably by December 1913,¹⁰⁹ but the timing could not have been more unfortunate. After the murder of Archduke Franz Ferdinand in Sarajevo on 28 June 1914, the only point in Vienna’s ultimatum that Serbia actually rejected was the demand for an Austrian inquiry to be given unprecedented legal privileges to operate within Serbia and identify the responsibility and blame for the assassination. As the diplomatic crisis evolved, the mobilization of the Russian military was the trigger that ended the diplomatic efforts to resolve the crisis and persuaded the German High Command to activate its war plan.¹¹⁰ In other words, had the Wilson-Bryan treaty proposal been adopted more

¹⁰⁴ ‘The Progress and Advantages of International Arbitration’, Nobel Lecture, 15 January 1905, available at www.nobelprize.org/nobel_prizes/peace/laureates/1903/cremer-lecture.html (last visited 11 October 2016).

¹⁰⁵ Mark Mazower took Cremer’s claim at face value. See M. Mazower, *Governing the World: The History of an Idea, 1815 to the Present* (2012), at 89.

¹⁰⁶ Campbell, ‘Taft, Roosevelt and the Arbitration Treaties of 1911’, 53 *Journal of American History* (1966) 279, at 280.

¹⁰⁷ See the ‘Peace Plan of the President’, circular, 24 April 1913, reprinted in United States Department of State, *Papers Relating to the Foreign Relations of the United States with the Address of the President to Congress, December 2, 1913* (FRUS) (1913), at 8.

¹⁰⁸ D. Myers, *The Commission of Inquiry: The Wilson-Bryan Peace Plan, Its Origin and Development* (1913), at 24.

¹⁰⁹ State of the Union Address, 2 December 1913, reprinted in FRUS, ix.

¹¹⁰ D. Stevenson, *1914–1918* (2004), at 27–28.

quickly by states in favour, such as Austria-Hungary, an international commission of inquiry looking at the background of the Sarajevo assassination and modelled on the North Sea Incident would almost certainly have prevented World War I. Instead, they were delegated to the fringes of international politics. After the end of the war, the Covenant of the League of Nations assigned the function of settling international disputes to the League Council (Article 12), although commissions of inquiry remained an option for disputes between member states and non-members (Article 17).¹¹¹ In practice, the Council primarily used them for fact-finding, most prominently in the Lytton report of October 1932, which established that the Japanese were not quite as welcomed by locals in Manchuria as they had claimed. However, in the case of Memel/Klaipeda, the commission of inquiry sent by the Council effectively decided a major territorial dispute between Lithuania, Poland and Germany.¹¹²

Their very flexibility as a tool in international relations ensured the survival of commissions of inquiry into the UN era, and although their fact-finding function has dominated in recent decades, there are further examples where adversarial commissions of inquiry have resolved disputed incidents and even attempted to establish criminal responsibility for the use of force against civilian vessels. A commission of inquiry set up in this way decided in 1922 that Germany's evidence in a dispute with the Netherlands was unreliable and that it should accept responsibility for sinking the Dutch merchant steamer *Tubantia* during World War I.¹¹³ On 15 November 1961, Britain and Denmark established an adversarial commission of inquiry to investigate the escape of the arrested British trawler *Red Crusader* and the subsequent firing on it by a Danish frigate. Like the North Sea Incident Commission, it allowed each side to present evidence in turn and also included the cross-examination and re-examinations of witnesses as well as the hearing of technical experts to determine the precise position of the trawler when it had allegedly entered the territorial waters of the Faroe Islands. Despite its strict mandate, the nature of its task led it to investigate questions of criminal law, as the report concluded that the Danish fire on the escaping trawler failed a proportionality test as it was not the least harmful means available and therefore 'exceeded legitimate use of armed force'.¹¹⁴

4 Conclusion: An Adversarial Commission of Inquiry Could Resolve the MH17 Dispute

In very different ages and political contexts, adversarial commissions of inquiry have proven to be capable of resolving the responsibility for disputed incidents, especially those involving the use of force against civilian vessels. In all cases, the incidents have

¹¹¹ Covenant of the League of Nations 1919, 225 Parry 195.

¹¹² Convention Concerning the Territory of Memel 1924, 29 LNTS 87. See also Z. Steiner, *The Lights That Failed: International History 1919–1933* (2005), at 356.

¹¹³ Grafton Wilson, 'Report of the International Commission of Inquiry in the Loss of the Dutch Steamer *Tubantia*', 16 *AJIL* (1922) 432.

¹¹⁴ Report of 'Red Crusader' Commission of Inquiry, 23 March 1962, available at http://legal.un.org/riaa/cases/vol_XXIX/521-539.pdf (last visited 11 October 2016). The standard of proportionality used here was different from that applied in the Dogger Bank case since none of the participants was at war.

sown mistrust between the countries involved, as each state had its own theory as to what happened and claimed to be in possession of evidence that proved their case. With each side eager to save face, all commissions have faced a very delicate task of producing authoritative statements about the complex technical questions involved, and they have succeeded in all cases. These precedents have also shown that commissions of inquiry are perfectly capable of deciding questions of international criminal law – indeed, if the drafters at the Second Hague Peace Conference had not decided otherwise, the North Sea Incident Commission might have become the foundation of a comprehensive system of international criminal law many decades before it was ultimately established. Crucially, the Dogger Bank case proves that, unlike a more strictly defined criminal tribunal, a commission of inquiry can investigate an incident and establish responsibility even though no defendant appears in the room. It identified Rozhestvensky as the key perpetrator and tried him *in absentia*, while allowing Russia to maintain that all of its officers appearing before the tribunal only ever spoke as witnesses. Shortly after it published its report, Russia paid compensation to the victims and began its path towards a diplomatic transition that saw it emerge as an alliance partner of Britain and France only a few years later.

An adversarial commission of inquiry modelled on the North Sea Incident offers the best and perhaps only viable forum to find justice for the victims of MH17 since it would allow the states involved to design a commission of inquiry specifically for the resolution of this single incident. The states could use the UN or set it up through a special treaty, establishing rules of procedure and a judges' bench that are agreeable to all parties. The states involved would each send their own judge, in addition to neutral ones, and every state's representatives and agents could freely cross-examine all witnesses and question all evidence presented. They could determine whether evidence would be heard in private or in public. The commission would also be free to hear as many technical experts as necessary to resolve the case. It might even allow for the rebels to address the commission and make their case, without implying diplomatic recognition.

Crucially, an adversarial commission of inquiry would address every issue that Russia raised in July 2015 when it vetoed the draft UNSC resolution. It would not be a large-scale war crime tribunal like the International Criminal Tribunal for the former Yugoslavia (ICTY), it would give every party involved access to all of the evidence presented and it would not invoke Chapter VII of the UN Charter. While Russia remains critical of the ICTY and similar war crime tribunals, it should find it much easier to embrace an international commission of inquiry – the format is after all one of Russia's gifts to international law.¹¹⁵ Russia has stated that it remains committed to an international investigation of the incident and would find it difficult and perhaps embarrassing to reject a forum designed to address all of its earlier concerns, and which is based on a precedent created by Russia itself. Therefore, this option offers the most promising road to justice for the victims of the tragedy that struck MH17 as well as closure and compensation for their families.

¹¹⁵ For Russia's complex relationship with international law in general, see L. Mälksoo, *Russian Approaches to International Law* (2015).