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International Commissions of Inquiry: What Difference Do They Make? Taking an Empirical Approach

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Abstract

Introducing a symposium on the question of what difference international commissions of inquiry (COIs) make, this article frames the debate methodologically and theoretically. COIs have become a common feature of responses to issues of international concern. While aspects of their work have received substantial scholarly attention, less is known about the concrete, case-specific effects of past COIs. This symposium therefore encourages empirical research into the consequences of COIs, absent or present, intended or not. After discussing some of the common challenges to the empirical research required, this framework article sets forth a non-exhaustive typology of ways in which COIs could end up making a difference, such as inspiring further action or substituting for such action; justifying decision-making, ex ante or ex post; fostering a shared narrative or hardening competing narratives; legitimizing some groups while delegitimizing others; enhancing political dialogue or intensifying division; spurring reform or encouraging more of the same; promoting (international) law or exposing its limitations. This typology is presented as a resource for hypotheses not only for this symposium but also for future empirical research into the differences made (or not) by COIs.

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1 Introduction

It has become a familiar phenomenon to see the latest international crisis or incident accompanied by calls for the establishment of an independent and impartial commission of inquiry (COI).[1] Many such calls are heeded; states and international organizations have established an extraordinary array of ad hoc 'inquiry bodies' in recent years, most of which combine fact-finding with legal analysis to arrive at a set of conclusions and recommendations.[2] Often enough, a commission will declare the need for further attention and additional investigation – indeed, for further inquiry.[3] It may be rare to find an international lawyer, diplomat or activist who views the establishment of a COI as the answer to any given problem, but it is growing more difficult to identify situations in which interested parties do not proffer inquiry as part of the solution or at least as a worthwhile place to start.

The recourse to inquiry suggests a widespread assumption or intuition that COIs are useful.[4] But once a COI has been established, does it make a difference? If so, what? Despite a surge of scholarly interest among international lawyers in the activities of COIs,[5] the legal literature has given relatively little attention to the impact of most COIs on the specific disputes, situations or problems that give rise to their establishment.[6]

1 For example, human rights organizations called repeatedly for an international commission of inquiry (COI) on the situation in Yemen (see, e.g., Joint NGO Letter: Urgent Need for Independent International Inquiry on Yemen, 29 August 2017, available at https://reliefweb.int/report/yemen/joint-ngo-letter-urgent-need-independent-international-inquiry-yemen-enar) before the UN Human Rights Council (UNHRC) took steps to establish such a body (formally labelled a 'group of eminent experts' rather than a COI) in 2017. See UNHRC Res 36/31, 29 September 2017.

2 As of mid-2019, there were active international COIs (sometimes referred to as 'fact-finding missions' or by other labels) established by the UNHRC for Burundi, the Democratic Republic of Congo (DRC), Myanmar, Syria and, as noted above, Yemen. See UNHRC Res. 33/24, 5 October 2016 (Burundi); UNHRC Res. 35/33, 23 June 2017 (DRC); UNHRC Res. 34/22, 3 April 2017 (Myanmar); UNHRC Res. S-17, 23 August 2011 (Syria) and UNHRC Res. 36/31, 29 September 2017 (Yemen).

3 See below in the typology under the heading 'spurring reform, or encouraging more of the same'.

4 For example, Rob Grace refers to the perception among fact-finding practitioners and human rights advocates of the 'inherent utility of fact-finding reports for serving various ends'. Grace, 'Lessons from Two Regional Missions: Fact-finding in Georgia and South Sudan', in C. Henderson (ed.), *Commissions of Inquiry: Problems and Prospects* (2017) 65, at 85. For an example of support for greater recourse to COIs, see 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 302–303. By contrast, Christine Chinkin describes the assumption that investigating and disseminating facts about human rights abuses will induce compliance as a premise in need of reconsideration. Chinkin, 'U.N. Human Rights Council Fact-Finding Missions: Lessons from Gaza', in M.H. Arsanjani *et al.* (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (2011) 475, at 493–498.

5 In addition to numerous articles, book chapters and blog posts, three substantial edited volumes on the topic have appeared within the past six years. M. Bergsmo (ed.), *Quality Control in Fact-Finding* (2013); P. Alston and S. Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (2016); Henderson, *supra* note 4.

6 Even where commentators address an inquiry body's impact, they often do so as an afterthought to the assessment of how the inquiry body operated or of the function of inquiry more generally. See, e.g., Lenk, 'Fact-Finding as a Peace Negotiation Tool: The Mitchell Report and the Israeli-Palestinian Peace Process', 24 *Loyola of Los Angeles International and Comparative Law Review* (2002) 289, at 319–325; Chinkin, *supra* note 4, at 493–498; Tagliavini, 'The August 2008 Conflict in Georgia', 105 *American Society of International Law Proceedings* (*ASILP*) (2011) 89, at 93–94; Kirby and Gopalan, '"Recalcitrant" States

Instead, the response of legal scholars has focused largely on the procedures and methodologies adopted by such bodies[7] and whether their final reports are credible and 'got the law right'.[8] This focus has extended to arguments about a shift in the function of inquiry over the past century – a transition from inquiry as an instrument of bilateral dispute settlement under the model of the 1899 and 1907 Hague Conventions to an exercise in accountability and justice that is imposed from above.[9] Other scholarship has considered the interplay between the work of inquiry bodies and proceedings before international courts and tribunals,[10] with particular attention to the link between

and International Law: The Role of the UN Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of Korea', 37 *University of Pennsylvania Journal of International Law* (2015) 229, at 263–266; G. Palmer, *Reform: A Memoir* (2013), at 1187–1218. It is notable that the five examples cited here were each authored (or co-authored) by individuals who led, or participated in, the inquiry bodies in question. There are some examples of commentators focusing more squarely on the impact of specific inquiry bodies. See, e.g., Van den Herik, 'Accountability through Fact-Finding: Appraising Inquiry in the Context of Srebrenica', 62 *Netherlands International Law Review* (2015) 295. For a broader assessment of the implementation of recommendations made by inquiry bodies, Grace, 'An Analysis of the Impact of Commissions of Inquiry', in R. Grace and C. Bruderlein (eds), *HPCR Practitioner's Handbook on Monitoring, Reporting, and Fact-Finding: Investigating International Law Violations* (2017) 279.

7 See, e.g., Bassiouni, 'Appraising UN Justice-Related Fact-Finding Missions', 5 *Washington University Journal of Law and Policy* (2001) 35; Boutruche, 'Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice', 16(1) *Journal of Conflict and Security Law* (2011) 105; R. Grace and C. Bruderlein, *Building Effective Monitoring, Reporting, and Fact-Finding Mechanisms* (2012), available at https://hhi.harvard.edu/publications/building-effective-monitoring-reporting-and-fact-finding-mechanisms; R. Grace, *The Design and Planning of Monitoring, Reporting, and Fact-Finding Missions* (2013), available at https://hhi.harvard.edu/publications/building-effective-monitoring-reporting-and-fact-finding-mechanisms; Orentlicher, 'International Norms in Human Rights Fact-Finding', in Alston and Knuckey, *supra* note 5, 501; Wilkinson, 'Finding the Facts: Standards of Proof and Information Handling in Monitoring, Reporting, and Fact-Finding Missions', in Grace and Bruderlein, *supra* note 6, 148.

8 See, e.g., Blank, 'Finding Facts But Missing the Law: The Goldstone Report, Gaza and Lawfare', 43 *Case Western Reserve Journal of International Law* (2010) 279; Buchan, 'The Palmer Report and the Legality of Israel's Naval Blockade of Gaza', 61 *International Comparative Law Quarterly* (2012) 264; K.J. Heller, *The International Commission of Inquiry on Libya: A Critical Analysis* (2012), available at https://ssrn.com/abstract=2123782.

9 Hague Convention for the Pacific Settlement of International Disputes (1899 Hague Convention) 1899, 1 AJIL 103 (1907); Hague Convention for the Pacific Settlement of International Disputes 1907, 2 AJIL Supp. (1908). See, e.g., 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; Henderson, 'Commissions of Inquiry: Flexible Temporariness or Permanent Predictability?', 45 *Netherlands Yearbook of International Law* (2014) 287; Hellestveit, 'International Fact-Finding Mechanisms: Lighting Candles or Cursing Darkness', in C.M. Bailliet and K. Mujezinovic Larsen (eds), *Promoting Peace through International Law* (2015) 368. For different perspectives on how the function of COIs has developed over time, see Lemnitzer, 'International Commissions of Inquiry and the North Sea Incident: A Model for a MH17 Tribunal?', 27 *European Journal of International Law* (2016) 923; Darcy, 'Laying the Foundations: Commissions of Inquiry and the Development of International Law', in Henderson, *supra* note 4, 231.

10 See, e.g., Del Mar, 'Weight of Evidence Generated by Intra-Institutional Fact-finding before the International Court of Justice', 2 *Journal of International Dispute Settlement* (2011) 393; see also A. Riddell and B. Plant, *Evidence before the International Court of Justice* (2009), at 237–240.

COIs and international criminal law.[11] However, the much broader universe of ways in which a COI might make a difference – that is, have some type of effect on the situation it is established to address – has barely been interrogated, let alone tested empirically.

This symposium provides a sampling of new analyses focused on the difference that specific COIs have made, or have not made, in their own contexts. The three case studies presented here address the same question – 'international commissions of inquiry: what difference do they make?' – with respect to inquiry bodies that were established to examine situations in Bahrain, Hungary and Israel and Palestine. Each contribution focuses on ways in which the COI under study made some type of impact, with attention as well to the possibility of the COI having made little to no discernible difference. These studies provide reason for pause when the next COI is proposed; a COI may make a difference but not necessarily in the ways that are expected or desired, at least in the literature or in policy circles.

The symposium's contributions challenge some of the assumptions that seem taken for granted by those involved in lobbying for, creating or participating in the work of COIs as well as the scholars studying them. Chief among those assumptions are that trying to resolve disputed facts is inherently a feasible and useful exercise, that the use of legal terminology (and a focus on alleged violations of international law) by inquiry bodies to frame disputes is productive and that inquiry is an impartial, logical and effective means to pursue broad (and, usually, contested) goals such as 'accountability', 'rule of law', 'reconciliation' or 'justice'.[12] The purpose of this symposium, however, is not to establish whether inquiry bodies are normatively desirable or 'effective' (whether in specific cases or as a general proposition). Assessments of that nature require a normative framework against which results or outcomes can be measured. The present goal is more modest: to take a preliminary step towards generating the type of data in relation to specific COIs that scholars and policy-makers might draw upon in addressing such questions in further research.

The role of this introduction to the symposium is to situate the three case studies that follow, while also providing an invitation for more empirical research along these lines. It does so, first, methodologically by highlighting some of the common challenges of the empirical work required. It then does so theoretically by contemplating a broader typology of ways in which COIs could make a difference. This non-exhaustive

[11] See, e.g., Frulli, 'Fact-Finding or Paving the Road to Criminal Justice? Some Reflections on United Nations Commissions of Inquiry', 10 *Journal of International Criminal Justice* (2012) 1323; Re, 'Fact-Finding in the Former Yugoslavia: What the Courts Did', in Bergsmo, *supra* note 5, 279; Mariniello, 'The Impact of International Commissions of Inquiry on the Proceedings before the International Criminal Court', in Henderson, *supra* note 4, 171; Jacobs and Harwood, 'International Criminal Law outside the Courtroom: The Impact of Focusing on International Crimes for the Quality of Fact-Finding by International Commissions of Inquiry', in Bergsmo, *supra* note 5, 325.

[12] For other scholarship that has begun to challenge these assumptions, see, e.g., Mégret, 'Do Facts Exist, Can They Be "Found", and Does It Matter?', in Alston and Knuckey, *supra* note 5, 27; Schwöbel-Patel, 'Commissions of Inquiry: Courting International Criminal Courts and Tribunals', in Henderson, *supra* note 4, 145; Krebs, 'The Legalization of Truth in International Fact-Finding', 18(1) *Chicago Journal of International Law* (2017) 83.

typology serves as a resource for hypotheses not only for the three pieces presented here but also for future empirical research into the differences made (or not made) by COIs.

But, first, three conceptual clarifications concerning the key terms in the research question are in order: 'international commissions of inquiry', 'difference' and 'what'. The term 'international commission of inquiry' defies easy definition. Some entities explicitly carry that name, while other entities that have similar or equivalent functions are described otherwise (for example, as 'expert panels', 'panels of inquiry' or 'fact-finding missions'). Although the label used may be significant in some cases, these different terms do not necessarily suggest distinct origins, functions, objectives or working methods.[13] We have taken a broad approach to the idea of the international commission of inquiry for the purposes of this project – that is to say, an inclusive approach to what the words 'international', 'commission' and 'inquiry' mean in this context. Thus, with respect to 'international', we have not limited the analysis to commissions established by interstate agreements, treaty provisions or organs of international organizations, such as the United Nations Security Council (UNSC) or the United Nations Human Rights Council (UNHRC).[14] COIs established under domestic law – with or without the participation of the 'international community' – but addressing issues of international concern or applying international law, also fall within the broad definition of 'international commissions of inquiry' for the purposes of this symposium. As for the word 'commission', we have not excluded what some might label as 'truth commissions', although differentiations could be made between 'truth commissions' and other inquiry bodies based on distinct objectives, political context, working methods or timing. Similarly, we do not take a formalistic approach to the meaning of 'inquiry' or seek to distinguish that term from the idea of 'fact-finding' and, yet again, between either of those terms and the notions of an 'expert' or 'advisory' panel or 'high-level' mission. Rather, for our purposes, the minimal unifying characteristics of an international commissions of inquiry are that: (i) they are ad hoc and temporary, designed and implemented with respect to particular situations (as opposed to general themes or problems); (ii) they engage with matters that raise questions of international law (although their engagement may extend beyond that domain or contemplate an effort to marginalize or 'downplay' the relevance of international law); (iii) they are established by a 'public' body, whether that means by one or more states or by an international organization; and (iv) their findings and

[13] Political considerations may play a role in the name assigned to an inquiry body, however. For example, the Panel of Experts on Sri Lanka established in 2010 by the UN Secretary-General was intentionally not described as a COI for political and strategic reasons. Ratner, 'The Political Dimensions of Human Rights Fact-Finding', 71 *ASILP* (2013) 70.

[14] The UN General Assembly has defined fact-finding in the peace and security context as '[a]ny activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent United Nations organs need in order to exercise effectively their functions in relation to the maintenance of international peace and security'. GA Res. 46/59, 9 December 1991. This is not the same as defining what constitutes an inquiry (or fact-finding) body.

conclusions are non-binding (thus, distinguishing COIs from most of the activity of international courts and tribunals).[15]

However, we have not invited consideration of other types of fact-finding mechanisms that may share much with COIs as defined above – for example, the work of United Nations (UN) special rapporteurs or other special procedure mandate holders; the routinized fact-finding work that various UN agencies undertake as a matter of course; claims commissions; inquiry bodies established by international courts; or fact-finding by peacekeeping operations. Nor does the symposium engage directly with the fact-finding work that non-governmental organizations (NGOs) and advocacy groups carry out – work that in many cases overlaps with, relates to or inspires the work of COIs. A broader study of inquiry and fact-finding could seek to consider what difference all or any of those mechanisms make. Adopting the open-ended definition outlined above, we have sought to focus on the ad hoc body created by an international organization or one or more states because we see these types of inquiry bodies as having become the most prominent and highly contested actors within the crowded fact-finding field.

Such a broad definition of COIs leads to a very large number of potential case studies. The three case studies included in this symposium have been selected on the basis of an open call for papers followed by an authors' workshop and, finally, a peer review process. A criterion in the selection process was the proposed article's potential to generate new empirical data on the differences made (or not made) by a specific COI in a specific context. The result is a set of case studies on COIs that differ in character and in the contexts in which they operated. This diversity found in a sampling of only three examples highlights the open-ended nature of COIs as a field of study.

We have also adopted an inclusive approach towards what we mean when we ask what 'difference' COIs make. As noted above, we intentionally pose that question in a value-neutral sense (to the extent possible) rather than examining whether (or why) COIs are effective or beneficial.[16] Effectiveness is typically a measure of contribution

[15] Another factor that might distinguish the type of bodies that fall within our definition of a COI from those that do not is their so-called 'quasi-judicial' character – a label that stems from the engagement by inquiry bodies with questions of international law, the court-like procedures that some COIs adopt, and their frequent characterization as bodies endowed with a degree of authority that approximates that of a court or tribunal, rendering them a 'new form of adjudication'. See D. Akande and H. Tonkin, 'International Commissions of Inquiry: A New Form of Adjudication?', EJIL: *Talk!*, 6 April 2012, available at www.ejiltalk.org/international-commissions-of-inquiry-a-new-form-of-adjudication/; see also Henderson, *supra* note 9. To wit, efforts to evaluate the activity of COIs against that of international courts and tribunals are manifold, but one does not often see the report of a special rapporteur or a non-governmental organization (NGO) analysed with respect to how closely it resembles a judicial decision or arbitral award.

[16] We note, however, that, outside the context of this symposium, even the formulation we have adopted – the question whether COIs 'make a difference' – may be perceived as having a normative slant. In other contexts, scholars have expressly used that language to consider the efficacy of a practice or regime in a normative sense. See, e.g., Hathaway, 'Do Human Rights Treaties Make a Difference?', 111 *Yale Law Journal* (2002) 1935. At a more colloquial level, when a law student who aspires to practice international law explains that her motivation is to have an opportunity 'to make a difference' in the world, the association between the formulation we have adopted and the idea of positive change or impact is explicit.

to, or progress towards, a predetermined objective or a question of meeting expectations.[17] This project seeks to identify the consequences that an inquiry body may have, whether or not intended and without necessarily ascribing any normative content to those outcomes. For the same reason, the project is not limited to assessing whether a COI achieved its assigned objectives (although this is often a logical place to start). A COI that is created to de-escalate a tense situation or to help broker a political settlement may fail to achieve those objectives, but the fact of its establishment, the attention it generated or how it carried out its work may nonetheless have made a difference (for example, by triggering a government response, empowering some actors or pacifying activist communities).

To spot such differences, we have not limited the focus of the symposium to specific activities, such as a commission's engagement with international law. The prevailing wisdom among international lawyers seems to assume that whether an inquiry body will have an impact (or 'succeed') rests with the quality or credibility of its factual findings, legal analysis and policy recommendations or other measures of normative authority or legitimacy.[18] This may be correct in some instances, but risks overlooking effects unrelated to, or not explained by, those features. Indeed, a COI's impact may have very little to do with its findings or recommendations, and the question of what difference the inquiry body has made goes beyond whether it has fulfilled its mandate in a formal sense or has seen its recommendations implemented (let alone whether it has resolved the underlying dispute or situation).

This conception of 'difference' may appear too flexible or indeterminate. After all, everything and everyone will make 'some' difference somewhere, somehow.[19] But precisely this open-ended approach could lead to findings that challenge what is commonly assumed about COIs or point to noteworthy effects that are seldom brought to light. An effect that is irrelevant to some may be highly relevant to others. We left it to the authors to identify what types of impact to explore in each case, suggesting only a focus on the situation for which the inquiry was established. They were also free to focus on the expectations attached to an inquiry body that went unfulfilled (without needing to evaluate whether that outcome was 'good' or 'bad'). That said, to maintain the methodological rigour required for establishing and arguing about what difference

[17] On the methodological challenges of making empirical claims about effectiveness in international law, see Y. Shany, *Assessing the Effectiveness of International Courts* (2014), at 4–8, 13–30; see also Helfer, 'The Effectiveness of International Adjudicators', in C.P.R. Romano, K.J. Alter and C. Avgerou (eds), *The Oxford Handbook of International Adjudication* (2013) 464; Diehl and Druckman, 'Peace Operation Success: The Evaluation Framework', 16 *Journal of International Peacekeeping* (2012) 209.

[18] See, e.g., Boutruche, 'Selecting and Applying Legal Lenses in Fact-Finding Work', in Grace and Bruderlein, *supra* note 6, 113. Franck and Fairley, 'Procedural Due Process in Human Rights Fact-Finding by International Agencies', 74 *American Journal of International Law* (*AJIL*) (1980) 308; Grace, *supra* note 4, at 66.

[19] As per Bram Vermeulen's poem (in Dutch): 'Ik heb een steen verlegd in de rivier' ('I have moved a stone in the river'): 'I have moved a stone in a river on earth. Now I know I will never be forgotten. I demonstrated evidence of my existence. Since due to the moving of that one stone, the stream will never travel the same course'). B. Vermeulen, 'De Steen Songtext', available at www.songtexte.com/songtext/bram-vermeulen/de-steen-6bc00ee2.html.

a given COI has or has not made – on which there is more below – the authors were encouraged to focus on a specific example (or a few examples) in which the commission under study has made (or not made) a difference, rather than to aspire to a comprehensive account.

Although the symposium seeks to expand our understanding of the wide range of differences a COI could make, it does not focus on the extremes of the spectrum. On the one hand, we have encouraged the authors to avoid treating the activities inherent to any given inquiry body as evidence of the COI under study making a difference. To do so would amount to stating the obvious. For example, it can be expected that any COI is in the business of generating information for its mandate provider(s) or third parties. It is also the case that a COI will serve a communicative function, signalling the concern or interest of the mandating body in the subject matter of the inquiry. In most instances, the commission will produce a public report. But the fact that a COI has done these things tells us very little about what difference a commission has made. When the analysis stops at identifying inherent activities as evidence of the difference a COI has made, the natural response is to ask: so what?

The other extreme encompasses the 'big-picture objectives' – objectives that speak to ongoing and indefinite processes such as 'accountability', 'justice', 'conflict prevention', 'peace building', 'dispute resolution' or 'closure for victims'. Precisely because these aims are works in perpetual progress and subject to a wide range of interpretations, it is problematic to use these terms to describe what difference a COI has made without identifying the intermediate steps that demonstrate the relationship of the COI to those goals. In short, it is not sufficient to treat the COI as an instantiation of the objective – for instance, the proposition that the creation of a commission meant that accountability was achieved or that victim participation in a commission's work was a form of 'closure for victims'. Equating the COI's existence, operations or work product with these broader objectives transforms the big-picture goals into purported inherent qualities. That approach would mean that a COI makes a difference by definition – that is, by the fact of its existence. This forecloses a more probing investigation into whether or how a commission has actually contributed to that broader objective.

Thus, one aim of the symposium is to shed light on the intermediate steps that link the establishment, conduct and output of COIs to the broad, multifaceted objectives that they are often asked to pursue. If an inquiry body seems to have contributed to some notion of 'peaceful settlement' or 'accountability' or 'justice', what are the concrete, identifiable ways in which it has done so? If an inquiry body has generated new information or evidence, endorsed a contested factual narrative or legal argument or opened a line of communication that otherwise did not exist, what difference did that make in the larger context? What responses did this trigger? What changed?

By way of final conceptual clarification, the focus of the symposium is on the conclusions or inferences that can be drawn, based on empirical evidence, about what difference a COI did or did not make, rather than predictions about what the possible impact or consequences of a COI – not yet realized – may be. Nor has the goal been to arrive at generalizable theories about how or why COIs do, or do not, make

a difference.[20] These are important questions, but the scholarly impulse to address them sometimes leaves the impression that the answer to the threshold question posed by this symposium has either been assumed or bypassed. Accordingly, focusing on the 'what difference' question, this symposium does not aim, for example, to draw causal links between design variations and outcomes – that is, to connect design or structural attributes of a given COI to demonstrable types of impact (or the absence thereof). Indeed, this is yet another prevalent assumption about COIs – namely, that the structure and working methods of a COI are the key (if not determinative) element in whether a commission succeeds (that is, leads to a desired outcome) or fails (that is, does not lead to a desired outcome).

However, the 'what difference' question, on the one hand, and the 'how did it make that difference' question, on the other, are not entirely separable. Methodologically, to make a reasonable claim about impact, it will often be necessary to trace the steps that led to that impact, which will usually address (at least in part) the 'how' question. But the 'how' question is here addressed in the form of a context-dependent causal narrative rather than by application of a general theory about the impact of COIs. Moreover, as just detailed above, the question of whether a 'big-picture' objective was achieved requires some analysis of the steps taken along the way; these steps may demonstrate both what difference a commission has made as well as how (or why) it can be said to have made a big-picture difference in some broader sense. The symposium's focus, however, is on providing empirical evidence about what happened rather than on providing theoretical or generalized explanations for the consequences of a COI's work or on theorizing why a commission 'failed' or 'succeeded'.

We now turn to some of the methodological considerations in answering the question posed by the symposium.

2 Knowing about Commissions of Inquiry: Some Insights from the Methodological Journey of this Symposium

Already when writing the call for papers for this symposium, we were much aware, concerned about and, more positively, interested in the methodological challenges accompanying the research question that we had posed.[21] When reviewing the abstracts submitted in response to the call, workshopping outlines of the selected abstracts[22]

[20] The relationship between a COI and its purported effects might be appropriately approached as one of 'singular causation' – a term that describes 'non-repetitive events that appear causal in nature but cannot be explained by regularities or laws' and reflect 'outcomes that are the result of local conditions and the sequence of events'. R.N. Lebow, *Constructing Cause in International Relations* (2014), at 54. As Lebow explains, the idea of singular causation 'poses a serious challenge to existing theories that insist on explaining an event by describing it as an instance of an event type and analyzing it in terms of general understandings of that event type'. *Ibid.*, at 143.

[21] 'Call for Papers for a Symposium', available at www.lcil.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.lcil.cam.ac.uk/docs/ejil_call_for_papers_commissions_of_inquiry_final.pdf.

[22] Workshop on International Commissions of Inquiry: What Difference Do They Make?, Pembroke College, 5–6 January 2017.

and commenting on various drafts of papers, we identified some common methodological challenges. We briefly mention them here not only because they influenced the research that went into this symposium but also because they may have general relevance to empirical socio-legal research in international law. First, the abstracts confirmed that the terms 'method' and 'methodology' mean different things to different people, even when these people share the discipline of international law. For some, 'method' or 'methodology' means 'theoretical approach'.[23] Others associate 'method' with 'data-gathering method'. For instance, some abstracts immediately listed 'interviews' or 'archives' under the heading 'methodology'. Most abstracts skipped the crucial step between theoretical approach and data-gathering methods – namely, a 'method' in the sense of a 'logic of inquiry':[24] a structured procedure that allows one to draw valid conclusions in response to a research question.

Data-gathering methods usually do not amount to a logic of inquiry. In the workshop, for instance, we discussed that interviews in themselves do not allow one to derive valid conclusions about the impact of a COI any more than other sources of data, such as newspapers or archives. If one asks 100 people in the street about the impact of a COI, and they all say 'it led to peace', all we can validly say is that in some people's perception the commission led to peace. Interviews in this way serve as opinion polls. But, as the debates on many subjects illustrate (climate change may come to mind), people's opinions may or may not have any relationship with fact. Elite interviews, in which one interviews people with specific knowledge about a topic, are also not sufficient in themselves. The chairperson of a COI, for instance, may have ideas about the commission's impact, but his or her views in themselves will not prove them. Rather, they may suggest a hypothesis to test or data that the author can use according to the method – in the sense of a logic of inquiry – that has been developed to establish, or suggest, an impact.

A second methodological challenge appeared to stem from various types of (natural) biases. For instance, the question posed by the symposium may spur confirmation bias. If one investigates COIs out of a belief that they make a difference of one sort or another, there is the risk of connecting developments that match those expectations too easily to the COI under study, as if it were the commission, rather than (or in addition to) other variables, that contributed to the change. In the workshop, we encouraged participants to be open to a finding that a COI has made no appreciable difference to the underlying subject of inquiry or the *status quo*. This is distinct, however, from a finding that the COI has in fact contributed to maintaining the *status quo* – a possible outcome that should not be overlooked or conflated with the idea of 'failure' to make a difference. There is also a risk of over-emphasizing the role of the COI compared to other factors and actors; the commission will always do its work in a

[23] See Ratner and Slaughter, 'Introduction: Symposium on Method in International Law: Appraising the Methods of International Law: A Prospectus for Readers', 93(2) *AJIL* (1999) 291; R. Cryer, T. Hervey and B. Sokhi-Bulley, with A. Bohm, *Research Methodologies in EU and International Law* (2011).

[24] 'Inquiry' in the sense of research; it is a coincidence that in this case the research is into mechanisms called 'commissions *of inquiry*'.

socio-political environment, and the way its work is received will be shaped heavily by those other factors and actors.

Related is the risk of professional bias – namely, the influence of the assumptions that are common in one's field on the identification of the question and the search for answers. Both the questions and methods, as well as the ensuing answers, may reinforce the practices, experiences and, indeed, assumptions of that field.[25] For instance, lawyers might focus on the impact of a commission's work in terms of law development or court decisions and be less concerned with whether the commission has had other political or social effects. Or lawyers might zoom in on the effects that result from the inherent qualities of COIs (for instance, generating and analysing information), assuming that these activities contribute to the above-mentioned big-picture objectives without exploring whether and in what ways they actually do so. To take an example from a related area of international law, in the peace-building practice of the UN and some NGOs, one of the logics of intervention is that making people aware of their human rights will promote compliance with human rights and the rule of law.[26] In other words, the assumption is that human rights awareness translates into human rights promotion. Socio-legal research has shown, however, that human rights training has potential benefits for various groups of people (for the trainers, who become part of an elite, and for the trainees, in that they have more diplomas to show at job interviews), but not necessarily in terms of compliance with human rights law.[27] Similarly untested assumptions about effects operate with respect to COIs. For instance, it is often assumed that a commission's 'findings' of human rights abuses are a form of accountability outright or otherwise contribute to accountability, without the notion of accountability being defined or the causal chain being revealed. Or it is assumed that participation in an inquiry 'empowers' victims or provides 'healing' or 'closure' – hugely complicated phenomena outside the realm of law that need unpacking and that may have a multifaceted relationship to the COI's work. Many of the assumptions contained in professional biases are precisely the assumptions that we wanted to see tested.

Finally, we reflected on how qualitative empirical research in situations affected by conflict or authoritarianism comes with a host of challenges, including data being unavailable, inaccessible, unreliable or politically sensitive, interviews being filled with socially desirable, pedagogical or seductive answers or answers that are given as part of a survival strategy and the justified fear for the personal consequences of the research, both for the researcher and for individuals participating in the research.[28] Apart from raising ethical questions, the challenges indicate the need for

[25] See, in a different context, Curtis, 'Introduction: The Contested Politics of Peacebuilding in Africa', in D. Curtis and G. Dzinesa (eds), *Peacebuilding, Power and Politics in Africa* (2012) 1, at 16.

[26] See, e.g., Aguettant, 'Towards a Culture of Human Rights in Darfur', 24 *Forced Migration Review* (2005) 43, available at www.fmreview.org/sites/fmr/files/FMRdownloads/en/sudan.pdf.

[27] See Massoud, 'Do Victims of War Need International Law? Human Rights Education Programs in Authoritarian Sudan', 45(1) *Law and Society Review* (2011) 1.

[28] See more elaborately Nouwen, '"As You Set out for Ithaka": Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict', 27(1) *Leiden Journal of International Law* (2014) 227.

triangulation: the application and combination of several sources of data in the study of the same phenomenon.

Given these and other challenges, it was tempting for the authors and editors to make a disclaimer that we cannot prove causality (asserting that a COI has made a difference is an assertion of causality), leaving this to the social scientists. Many social scientists, for their part, reject the idea that social science can demonstrate causality with anything like the certainty of the natural sciences.[29] However, neither to them nor to us does that mean that one should refrain from asking whether a plausible argument can be made that a COI has made some type of difference. Rather it shows the need for fine-grained contextual analysis. It means not seeing COIs as mechanical 'pushing-and-pulling' forces that automatically lead to certain effects but, rather, recognizing the role of ideas, rules and material conditions in causal pathways[30] and having an open eye for the phenomena of 'equifinality' (in which alternative paths can explain the same outcome)[31] and reverse causation (where the dependent variable explains the independent variable, instead of the other way around).

One methodology that can generate plausible arguments about causation is process tracing, in which a researcher examines a wide range of data (for instance, from archives, interviews, news reports) in one particular context to assess whether the sequence of events supports or undermines the explicit or implied hypothesis of a causal relation in a case or, in a grounded-theory approach,[32] to develop inductively new variables and hypotheses.[33] Process tracing allows one to identify intervening variables, observe equifinality and do (some) justice to complex causality, where multiple variables influence a phenomenon at the same time. Careful process tracing makes it possible, for instance, to correct logical fallacies and to identify reverse causation. An example of a logical fallacy is the *post-hoc-ergo-propter-hoc* assumption that a COI's report has led to a UNSC referral of a situation to the International Criminal Court (ICC), when process tracing reveals that, in fact, members of the UNSC had already contemplated referring the situation but viewed a favourable COI recommendation as a means to generate broader political support for the move. This does not mean that the inquiry did not 'make a difference' (but for the commission's recommendation, would the UNSC have acted?) but, rather, shows that the causal chain is more nuanced than *post hoc ergo propter hoc*. It challenges the popular narrative that independent investigation by a COI will have considerable influence and recasts the recourse to inquiry as a sophisticated political instrument. An example of reverse causation is a finding that it was not a COI's recommendations that led to particular reforms but, instead, that those reforms were already begun and in fact facilitated the creation of the COI.

[29] See Lebow, *supra* note 20, at 9.

[30] M. Kurki, *Causation in International Relations: Reclaiming Causal Analysis* (2008), at 12, 32.

[31] A.L. George and A. Bennett, *Case Studies and Theory Development in the Social Sciences* (2004), at 207.

[32] A.L. Strauss and J.M. Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (1998).

[33] George and Bennett, *supra* note 31.

Having done such careful analysis, lawyers can make as strong a causal claim as social scientists. After all, lawyers make causal claims all the time (albeit in varied contexts that require different types and degrees of causal certainty). Whether a causal claim is persuasive may depend substantially on how well the challenges above have been navigated.[34]

3 International Commissions of Inquiry: What Difference Do They Make? A Typology

This part contemplates a typology of difference – the types of impact that an inquiry body might have upon a situation. As a typology, it is an overview of expectations and empirical findings drawn from multiple commissions; it does not suggest that all COIs are expected to make a difference in all of these ways or, indeed, to make any of these differences. The aim is expressly not to generalize the effects that COIs have; we emphasize the need to view any given COI in its context when seeking to identify the ways in which it may or may not have made a difference. However, as alluded to above, the symposium gives reasons for pause when the next COI is proposed since it shows that effects of a COI may be totally different from those widely expected of it.

The typology is based on theoretical assumptions (that is, differences that scholars and policy-makers tend to assume COIs do or should make) and on empirical findings from the articles in this symposium and other work. The mandate assigned to an inquiry body provides a starting point for identifying theoretical assumptions. What does the parent body proclaim to be the purpose of the inquiry? One can also try to identify the 'hidden' motivations of the states, organizations and individuals involved in promoting and supporting the establishment of a COI. What do those disparate actors hope that the inquiry body will achieve? Setting aside the public or private expectations, the unintended consequences of an inquiry body also require attention. The contributors to this symposium have kept this in mind in their efforts to generate empirical data. Eliav Lieblich, for instance, shows how the UN Special Committee on the Problem of Hungary (Hungary Committee), a commission for which there never was 'real hope … of achieving direct, tangible behaviour-changing results', still had consequences.[35]

When thinking about a commission's impact we must consider more than just its output (for example, the final report) and the reactions to that output. The establishment of the commission, even before it becomes operational, or, indeed, the mere consideration of establishing an inquiry body or its activities – for example, holding public

[34] Then again, the persuasiveness of a researcher's causal claim may also turn on how neatly it adheres to a pre-determined narrative (among, say, international lawyers) or bolsters a policy preference (among, say, UN officials). In this way, the credibility or persuasiveness of research into what difference COIs make mirrors the challenges that confront the COIs themselves. The factors that we assume to be the most important drivers of influence may be eclipsed by other considerations.

[35] Lieblich, 'At Least Something: The UN Special Committee on the Problem of Hungary, 1957–1958', in this issue, 843.

hearings, consulting privately with officials, witnesses or NGOs or engaging a controversial expert – might also point to ways in which a commission has made a difference.

There is also a temporal element to answering the research question at hand. The immediate or short-term effect of a COI can be analysed separately from its impact over a longer time frame, although there may be essential links between short-term and long-term effects. Moreover, the challenges of demonstrating the impact of a COI over a longer time frame will typically be magnified by the fact that the passage of time allows for more intervening variables into an already rich socio-political environment.[36] How a researcher approaches the question of what difference an inquiry body has made may also turn on the timing of the inquiry itself; some inquiry bodies operate during armed conflict (Syria, Central African Republic) or periods of internal strife following some type of triggering incident (Burundi); others emerge only after a period of armed hostilities has ended, (Georgia, Sri Lanka); yet again others are created in response to a discrete incident or campaign that is part of a far broader ongoing conflict (the Gaza flotilla incident, Operation Cast Lead, the bombing of Flight MH17) and some exist without any armed conflict or specific incidental 'hook' (Eritrea, North Korea). These contexts not only shape a commission's work but also how its work is received and, ultimately, its consequences.

Equally relevant is the spatial perspective, as our co-symposium convener Doreen Lustig reminded us: what difference an inquiry body makes could be examined at local, regional and global levels. An inquiry body's factual findings, legal conclusions or policy recommendations may be analysed, incorporated or relied upon by a wide range of legal, judicial and political actors and institutions, including the UNSC and other UN organs and agencies, domestic and international courts, foreign ministries, domestic and transnational legislatures, militaries, advocacy groups and private lawyers. Thus, the commission may have an impact far outside the situation it is investigating. It may also influence discourses among institutions and relationships between groups (for instance, international community–state; state–state; state–non-state) in different ways.

With these points in mind, we propose the following non-exhaustive typology of the differences that a COI could make.

A *Doing Something or Not Doing Something Else*

A COI is inherently a response to a particular situation. International attention may begin a process of agenda setting and marshalling political will to take other action, or it may provide the impetus (or 'cover') for a government to undertake domestic reforms or engage in negotiations aimed at resolving the underlying problem. The fact that an inquiry body was set up to investigate a situation may in itself have (legal)

[36] This is distinct from the possibility that in some cases the passage of time, leading to the availability of new information sources (for example, as archives are made public), may contribute positively to being able to make a plausible case for the causal relationship between a commission of inquiry and later developments.

significance. For instance, a pre-trial chamber of the ICC found that the creation of several fact-finding missions into the *Mavi Marmara* incident was an indication of 'the international concern caused by the events at issue' – a factor it considered relevant in addressing whether crimes allegedly committed by Israeli soldiers on a flotilla heading to Gaza met the Rome Statute's admissibility threshold of 'sufficient gravity'.[37]

However, the creation of a COI may also accommodate inaction. It may forestall more destabilizing actions (such as states or non-state actors seeking recourse through the use of force) by giving parties a 'cooling-off' period that can help to prevent decisions being taken in a fog of disputed facts or in the heat of the moment.[38] But it may also (or instead) be a stand-in for other action – a means to signal 'concern without commitment'.[39] Establishing a COI may placate (at least temporarily) concerned parties or function as the best alternative to other potential responses that decision-makers cannot agree upon (for instance, military intervention, peacekeeping or sanctions). As the title of Lieblich's contribution on the Hungary Committee suggests, a COI may represent the only alternative to doing nothing: 'at least something.'[40] In that vein, Lori Allen has argued that the repeated recourse to COIs in relation to Palestine amounts to 'patterns of fake action'.[41] A COI may also be created to pre-empt or obstruct other forms of intervention (inquiry or otherwise) that are viewed as hostile or more intrusive. For example, in response to the outbreak of violence in South Sudan in December 2013, the African Union created a COI, almost overnight, to avoid a referral of the situation by the UNSC to the ICC.[42] And, as Mohamed Helal argues in this symposium, Bahrain's creation of its Bahrain Independent Commission of Inquiry (BICI) largely extinguished international support for a UN-led inquiry body.[43]

B *Justifying Decision-Making, Ex Ante or Ex Post*

COIs are almost always expected to make findings of fact, typically by sorting out the conflicting factual accounts of different parties or by generating new evidence themselves. A common expectation is that this information and analysis feed into and

[37] *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Decision on the Request of the Union of the Comoros to Review the Prosecutor's Decision Not to Initiate an Investigation* (ICC-01/13–34), Pre-Trial Chamber I, 16 July 2015, para. 48. Rome Statute of the International Criminal Court 1998, 2187 UNTS 90, Art. 17(1)(d).

[38] This was a key part of the original rationale for the formal institutionalization of inquiry in the 1899 Hague Convention, *supra* note 9. See Brownlie, 'The Peaceful Settlement of International Disputes', 8 *Chinese Journal of International Law* (2009) 267, at 272.

[39] Hellestveit, *supra* note 9, at 369, 392–393.

[40] Lieblich, *supra* note 35.

[41] L. Allen, *Inquiring into International Commissions of Inquiry* (2013), available at www.merip.org/inquiring-international-commissions-inquiry.

[42] See also UN Development Programme, Search for a New Beginning: Perceptions of Truth, Justice, Reconciliation and Healing in South Sudan (2015), at 8, available at www.ss.undp.org/content/dam/southsudan/library/Rule%20of%20Law/Perception%20Survey%20Report%20Transitional%20Justice%20Reconciliation%20and%20Healing%20-.pdf.

[43] Helal, 'Two Seas Apart: An Empirical Study of the Difference Made by the Bahrain Independent Commission of Inquiry', in this issue, 903.

are used to justify subsequent decision-making by other institutions (for example, the UNSC, regional organizations, peacekeeping operations, national governments and international courts). For instance, the Commission of Experts on the Former Yugoslavia is widely credited with having helped (or motivated) the USA and other proponents to push for the creation of the International Criminal Tribunal for the Former Yugoslavia.[44]

Whether international courts have relied upon the findings of COIs to reach judgments they would not otherwise have reached is difficult to say, and the record of international courts relying on, or engaging with, the work of COIs is more limited than may be assumed.[45] COI reports have been consulted, for example, as a relevant source of information by regional judicial bodies and domestic courts that have needed to determine whether a country is safe or respects fair trial rights.[46] Moreover, while COIs may provide a basis for decision-making by other actors, they can also serve to justify predetermined policy choices. As Helal argues in his study of the BICI, this mechanism had the effect of legitimizing the decision by the government to undertake certain reforms that factions within the ruling elite already favoured.[47] Whether a commission provides persuasive justification or not may vary from audience to audience.

C Fostering a Shared Narrative or Hardening Competing Narratives

A related expectation is that a COI's analysis will shape how a situation is understood, fostering greater consensus at the local, national, regional or international levels. For instance, the African Union's High-Level Panel in Darfur produced a conflict analysis that was adopted by diverse stakeholders,[48] including even the government of Sudan (which is not to say that it accepted all of the panel's recommendations). However, COIs may also entrench opposing narratives – a result that seems sharply at odds with the conventional view of inquiry as a means of dispute settlement.[49] For instance,

[44] Stahn and Jacobs, 'The Interaction between Human Rights Fact-Finding and International Criminal Proceedings: Toward a (New) Typology', in Alston and Knuckey, *supra* note 5, 255, at 259.

[45] See, e.g., the sources listed in notes 10–11 above.

[46] See, e.g., the reliance of the European Court of Human Rights on the Report of the Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan in June 2010, in ECtHR, *Makhmudzhan Ergashev v. Russia*, Appl. no. 49747/11, Judgment of 16 October 2012. For a domestic example, see the discussion of the Report of the Commission of Inquiry for Eritrea by a United Kingdom immigration tribunal in MST and Others, Doc. CG [2016] UKUT 00443 (2016). We thank Larissa van den Herik and Mirjam van Reisen for alerting us to this case. See further, Van den Herik and Van Reisen, "Commissions of Inquiry in a Networked World: Unveiling the Roles of Diasporas", *International Journal of Transitional Justice*, forthcoming.

[47] Helal, *supra* note 43.

[48] See Rosalind Marsden, former Special Representative of the European Union to Sudan: 'An important analytical turning point in understanding how to achieve "peace" in Darfur was a report published in October 2008 by the AU High Level Panel on Darfur (AUPD), chaired by President Mbeki, which located the Darfur conflict for the first time in a national context.' Marsden, 'Peacemaking in the Sudans: The Role of Foreign Actors', in S. Nouwen, L. James and S. Srinivasan (eds), *Making and Breaking Peace in Sudan and South Sudan: The 'Comprehensive' Peace Agreement and Beyond* (forthcoming); see also S. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (2013), at 277–278.

[49] For example, Shiri Krebs argues that an emphasis on 'rigid legal categories' in fact-finding 'may strengthen social biases and trigger denial and rejection', thus preventing the development of a shared narrative. Krebs, 'Designing International Fact-Finding: Facts, Alternative Facts, and National Identities', 41 *Fordham International Law Journal* (2018) 337, at 370, 342–343.

rather than fostering a shared narrative, the Palmer Commission, one of several COIs established to investigate the 2010 *Mavi Marmara* incident, produced a report that was contested even by some of its members, with separate 'dissents' from the panel members from Israel and Turkey on points that conflicted with the positions taken by their respective states.[50]

A COI's work may also harden competing narratives among the general public. Hala Khoury-Bisharat argues in her contribution to this symposium that the report of the 2009 Goldstone Commission, tasked by the UNHRC with investigating alleged violations of international law during the 2008 Gaza war, itself became part of the conflict, leading to greater polarization as demonstrated by the Israeli government's response to civil society actors that co-operated with the investigation.[51] For his part, Lieblich contends that the report of the Hungary Committee became a new point of contention in the Cold War, hardening pre-existing narratives.[52]

D *Legitimizing Some Groups and Delegitimizing Others*

A COI could also legitimize or delegitimize states or other actors (militaries, individual politicians, civil society groups, populations or communities). The inquiry body may paint some groups in a much better (international) light than others, by its engagement with them or in its report. This may bestow some with more (international) legitimacy and others with less. This legitimization and delegitimization is in the eye of the beholder; those who support or champion the inquiry body will respect those who cooperate with it and its outcomes; those who do not, the opposite. As Khoury-Bisharat demonstrates in her contribution, the participation of Israeli human rights groups in the work of the Goldstone Commission delegitimized these organizations in the eyes of the Israeli public but enhanced their international legitimacy.[53] Lieblich argues that the report of the Hungary Committee played a role in the discourse that led to the weakening of Western communist parties.[54] As noted above, Helal explains how reform-minded elements within Bahrain's ruling elite believed a COI would create the political opening to implement new policies.[55]

E Enhancing Political Dialogue or Intensifying Division

A COI could open up lines of communication that did not exist before. Rather than only finding facts and assessing them within a legal framework, a commission might fulfil a diplomatic role, for instance, trying to persuade the involved parties to comply with

[50] Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (Flotilla Incident report), July 2011, at 104–105, available at www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf; see also Hellestveit, *supra* note 9, at 3.

[51] Khoury-Bisharat, 'The Unintended Consequences of the Goldstone Commission of Inquiry on Human Rights Organizations in Israel' in this issue, 877; see also Krebs, *supra* note 12, at 83.

[52] Lieblich, *supra* note 35.

[53] Khoury-Bisharat, *supra* note 51.

[54] Lieblich, *supra* note 35.

[55] Helal, *supra* note 43.

certain international norms, attempting to facilitate agreement among disputing parties or assisting in the implementation of a political agreement. Helal demonstrates in this symposium how the BICI intervened in several tense situations during its period of operation, persuading the government to protect and release detainees, reverse controversial decisions and change policies.[56] Lieblich argues, however, that COIs may also complicate parallel attempts to negotiate diplomatic solutions to the specific conflict or negotiations on other matters. He shows how the Hungary Committee may have created difficulties for later efforts by UN officials to engage the parties diplomatically and was used as a pretext to derail disarmament talks.[57]

Indeed, by legitimating some and delegitimating others, a COI may intensify division by being seen as branding some actors as enemies of humankind (those who violate the norms of the international community) and others as friends of the international community because they fight the enemies. It need not be the COI itself that makes the distinction between friends and enemies. Rather, in a situation in which international institutions promoting international law (or particular interpretations of international law) are themselves perceived as enemies, those who cooperate with an international COI are also branded as such. Khoury-Bisharat shows in this symposium how the Israeli government depicted the Goldstone Commission as an enemy of Israel and similarly classified the domestic NGOs that provided information to the commission.[58]

F *Mobilizing or Demobilizing Certain Constituencies or Causing a Backlash against Constituencies*

A COI may also mobilize certain groups or promote social activism. Lieblich argues that the Hungary report mobilized some NGOs in Hungary,[59] and Khoury-Bisharat's focus is on the backlash against NGOs that engaged with the opportunities presented by the Goldstone Commission.[60] However, the assertion that a COI has mobilized groups of people – whether one speaks of particular communities or organized groups – raises further questions about the significance of this effect. Has the mobilization in turn had some further impact? Such effects could manifest themselves in collective protest and responses to that protest.

At the same time, the normalization of inquiry as a response to violations of international law and other perceived injustices may also have the effect of diverting attention from other forms of political action and, in that sense, demobilize constituencies. For example, Allen argues on the basis of archival and ethnographic research that the recourse to COIs by international and foreign actors to address the situation in Palestine, from the King-Crane Commission in 1919 to the Mitchell Commission in

[56] *Ibid.*
[57] Lieblich, *supra* note 35.
[58] Khoury-Bisharat, *supra* note 51.
[59] Lieblich, *supra* note 35.
[60] Khoury-Bisharat, *supra* note 51.

2001, has 'given Palestinians false hope that discourse and reason were the appropriate and effective mode of politics'.[61]

Furthermore, whether or not constituencies mobilize, the activities of a COI may generate a backlash against certain groups. Khoury-Bisharat's contribution provides a closer look at how the 2009 Goldstone Commission had a chilling effect on social activism in Israel and caused a backlash against NGOs.[62] This has played out in other contexts as well, whether directly or indirectly as a result of a COI. In Sudan, for example, the International Commission of Inquiry on Darfur urged the UNSC to refer the situation to the ICC, which it did shortly after the commission issued its report (a decision that it might have taken even in the absence of a recommendation from the COI). Over time, the activity of the ICC in relation to Sudan provoked a crackdown on civil society groups and starkly reduced 'the space for dissenting voices' – NGOs were shut down, forced to leave the country or found themselves adjusting their own agendas in order to continue operating.[63] Indeed, COIs may sometimes make recommendations without taking into account the possible downsides of their implementation.

G *Spurring Reform or Encouraging More of the Same*

Most COIs make recommendations – a practice that has become commonplace but is not without its critics[64] – and such recommendations may cover areas such as setting up accountability measures (trials, truth commissions), reparations, domestic reform, action necessary to comply with existing legal obligations or coercive measures such as sanctions. The fact that a recommendation is made does not demonstrate that a COI has made a difference unless there are follow-up efforts at implementation – or, potentially, a backlash in response to the threats that certain recommendations may pose. Sometimes the mere existence of a commission will spur domestic reform – for instance, if domestic actors fear that otherwise the commission may encourage international action. In his article on the BICI, Helal argues that its direct interaction with the authorities prompted improvements in the treatment of detainees (at least in the short term) and spurred domestic investigations into abuses in detention centres.[65]

However, a COI may also lead to more of the same or be used to forestall reform. COIs frequently recommend that further investigation take place. Whether recommended or not, it is not infrequent that a subsequent COI is established not long after the first commission has submitted its report. For example, the Goldstone Commission was followed by the Turkel Commission and a separate UNHRC expert panel; the African Union Commission of Inquiry for South Sudan preceded the UN Commission

[61] Allen, 'Determining Emotions and the Burden of Proof in Investigative Commissions in Palestine', 59(2) *Comparative Studies in Society and History* (2017) 385, at 414.

[62] Khoury-Bisharat, *supra* note 51.

[63] S. Nouwen, 'International Justice and the Prevention of Atrocities – Case Study: Darfur', ECFR Background Paper (2013), available at www.ecfr.eu/page/-/IJP_Sudan.pdf.

[64] See, e.g., Saxon, 'Purpose and Legitimacy in International Fact-Finding Bodies', in Bergsmo, *supra* note 5, 211, at 222.

[65] Helal, *supra* note 43.

on Human Rights in South Sudan and the UNHRC commissioned an investigation by the Office of the High Commissioner for Human Rights as a follow-up to the report of the UN Secretary-General's Panel of Experts on Accountability in Sri Lanka. There are many more examples. But whether such follow-up investigation is of much significance largely depends on whether the follow-up commission makes any difference. Moreover, the impact of successive rounds of inquiry may be deleterious – that is, it may produce a situation of disenchantment and 'inquiry fatigue' in which human rights remain unprotected and accused perpetrators are not prosecuted and where communities or activists see their expectations for decisive action or change repeatedly let down.[66]

A commission may also have an impact on the undertaking of some reforms but not others. The lists of recommendations made by COIs are often extensive. States and international actors, such as the UNSC, are often selective about which recommendations they pursue and which ones they disregard, depending, among other factors, on the financial and political costs of implementation. For instance, Helal shows how in Bahrain some recommendations were given effect (for instance, the creation of new institutions), but others (ensuring accountability for those responsible for human rights abuses) were not and that even those that were implemented may not have had lasting influence.[67] The UNSC also has proven selective in its implementation of recommendations. Consistent with a recommendation made by the International Commission of Inquiry on Darfur, it referred the situation in Darfur to the ICC, as noted above. However, it did not take action on the detailed proposal in the same report for an international compensation commission.[68]

H *Promoting (International) Law or Exposing Its Limits*

There are at least two types of expectations about how a COI could promote (international) law. First, it could enhance compliance with the norms it is mandated to investigate, as in the case of alleged violations of international human rights law or international humanitarian law. Some suggest that the turn to inquiry reflects a gap between the contemporary emphasis on pursuing accountability for violations of international law (including the fight against impunity) and the lack of accessible judicial forums within which such claims may be pursued.[69] Second, an inquiry body

[66] For one such account, see Allen, *supra* note 41.

[67] Helal, *supra* note 43.

[68] See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council Resolution 1564 of 18 September 2004, UN Doc. S/2005/60, 1 February 2005, paras 571–603; Report of the Secretary-General on the Sudan, UN Doc. S/RES/1593, 31 March 2005.

[69] See Akande and Tonkin, *supra* note 15; Butchard and Henderson, 'A Functional Typology of Commissions of Inquiry', in Henderson, *supra* note 4, 11, at 21; Orakhelashvili, 'Commissions of Inquiry and Traditional Mechanisms of Dispute Settlement', in Henderson, *supra* note 4, 119, at 121; Buchan, 'The *Mavi Marmara* Incident and the Application of International Humanitarian law by Quasi-Judicial Bodies', in Derek Jinks *et al.* (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects* (2014) 479, at 497.

might, in theory, push international law in a new direction, particularly to validate certain legal positions or arguments that have not been accepted or codified through traditional law-making forums.[70] Some commentators have expressed alarm at the possibility of inquiry bodies generating faulty legal conclusions that are picked up by state actors or international courts and the prospect of their unconventional (or ill-conceived) legal analysis contributing to a perceived fragmentation of international law.[71] There has been little empirical work done to date, however, to substantiate the proposition that the sometimes novel (or, perhaps, flawed) legal interpretations adopted by some COIs have in fact changed the direction of international law (for example, by influencing state practice and *opinio juris* or leading to domestic or international courts adopting the same legal conclusions).[72] However, COIs may also reveal or even explicitly discuss the limits of international law. For instance, a COI established by Sri Lanka following the end of its civil war considered international humanitarian law, as it stands, ill-suited to its task,[73] while the above-mentioned Palmer Commission asserted that too much focus on international law could be counter-productive to the pursuit of diplomatic rapprochement and interstate cooperation.[74]

4 Conclusion

The term 'international commission of inquiry' encompasses a wide range of bodies whose idiosyncrasies (in terms of contexts, mandates, procedures and outputs) may defy efforts at standardization and systemization. That also applies to their impact; their effects have been wide-ranging and inconsistent. As we argue in the methodology section above, it is not easy to establish what difference COIs make. However, in light of these wide-ranging and sometimes unintended effects and the methodological challenges to ascertaining what difference a COI has made, the almost 'reflexive' resort to COIs is all the more remarkable.[75]

[70] On how COIs may have pushed international law in particular directions within distinct sub-topics, see, e.g., Koutroulis, 'The Prohibition of Use of Force in Arbitrations and Fact-Finding Reports', in Romano, Alter and Avgerou, *supra* note 17, at 605; P.I. Labuda, 'What Lies beneath the "G" Word? Genocide-Labelling and Fact-Finding at the UN', EJIL: *Talk!*, 28 May 2015, available at www.ejiltalk.org/what-lies-beneath-the-g-word-genocide-labelling-and-fact-finding-at-the-un/. Shane Darcy not only argues that 'the contribution of commissions of inquiry to the future development of international law is more likely to be inconspicuous and inadvertent' but also highlights links between the Commission on the Responsibility for the War that was established after World War I and (much) later developments in international criminal law following World War II. Darcy, *supra* note 9, 231, at 240–245, 256.

[71] See, e.g., Buchan, *supra* note 69, at 501–502.

[72] Even if states or international courts have adopted the approach previously taken by a COI on a particular issue, it may not be the case that the latter caused or contributed to the former.

[73] Report of the Commission of Inquiry on Lessons Learnt and Reconciliation, 11 November 2011, paras 9.27–9.32, available at https://reliefweb.int/report/sri-lanka/report-commission-inquiry-lessons-learnt-and-reconciliation.

[74] Flotilla Incident report, *supra* note 50, para. 15.

[75] In a domestic context, see Allen, *supra* note 41: 'Commissions of inquiry seem to be a reflexive reaction when it comes to problems in Palestine.'

Part of the explanation may lie in one of the inherent characteristics of COIs. They are always 'at least something'. In some instances, they may have some of the expected effects. In others, they may be hardly anything more than just 'something'. A COI being 'at least something' is meaningful for those who lobby for them, who establish them and who work on them. It is a 'something' that can absorb or channel a very human desire to take action, to seek justice, to hold others to account – or to be seen as doing so. The power of these dynamics must not be under-estimated. Samuel Moyn has observed in the related field of human rights activism how Amnesty International's founder, Peter Benenson, viewed the effect of the organization's campaigns on political prisoners or state conduct as 'unimportant' or at least less important than the fact of Amnesty providing an outlet to those 'searching for an ideal'; it mattered more 'to harness the enthusiasm of the helpers'.[76] Similar observations have been made with respect to the drivers of international criminal justice and humanitarianism.[77] But this suggests that whatever form of intervention one speaks of (a COI, an international criminal tribunal, humanitarian aid), 'the activist's personal understanding of this activism, not simply the victim who captured his gaze, is what matters'.[78]

We might posit that the more likely it is that an intervention will meaningfully address an underlying conflict or the needs of victims (or the extent to which it will do either of those things), the more meaningful (and, indeed, essential) that form of intervention becomes for the activist. Yet, in the absence of empirical evidence that can inform a realistic assessment of the likely consequences, the activist fills the gap between not knowing and wishful thinking with faith – a faith that the intervention (the COI, the international criminal tribunal, the humanitarian aid) will do some good.[79] As David Koller has argued in the context of international criminal justice, such faith may be necessary: 'In the absence of empirical answers … one can either act on the basis of faith or refuse to act until [the] questions can be answered.'[80] But faith can also be problematic; it may become an objective in itself, as a result of which proselytizing the faith (for instance, promoting the use of COIs) becomes more important than realizing underlying aims (conflict resolution, accountability and so on).[81] Moreover, once a faith – or, perhaps, a normative belief grounded in faith – has become strong enough, it no longer fills the gap between ignorance and the empirical; the article of faith can no longer tolerate contrary empirical evidence that pushes in another direction.[82]

76 S. Moyn, *The Last Utopia: Human Rights in History* (2010), at 131.

77 For international criminal justice, see Nouwen, 'Justifying Justice', in J. Crawford and M. Koskenniemi, *The Cambridge Companion to International Law* (2012) 327; for humanitarianism, see L.H. Malkki, *The Need to Help: The Domestic Arts of International Humanitarianism* (2015).

78 Moyn, *supra* note 76, at 131.

79 Koller, 'The Faith of the International Criminal Lawyer', 40(4) *New York University Journal of International Law and Politics* (2008) 1019.

80 *Ibid.*

81 D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004), at 23, 116.

82 Nouwen, *supra* note 77.

Those who see COIs as the best way, or the best available way, to advance particular objectives – post-conflict justice, accountability, victims' rights, global governance – may be more pragmatic than the above critique suggests. And we have little doubt that some of the proponents of a COI in any given case are not driven by a quixotic hunch or intuition about the potential of a COI to make a (positive) difference but have other reasons that are grounded in *realpolitik* and, indeed, a keen understanding of the limitations or even toothlessness of such bodies. But assessing these dynamics is made harder by the dearth of information about what the concrete, case-specific effects of past COIs have been. This symposium has aimed to respond to that absence of knowledge (or, conversely, the sheer reliance on faith) by encouraging empirical research into the consequences of COIs, absent or present, intended or unintended.