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The Evolving Role of the Investigative Bodies of the United Nations Human Rights Council:

More or Less Accountability for Violations of International Law?

Master's thesis

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ACRONYMS

CAR – Central African Republic

CoI – commission of inquiry

DPRK - Democratic People's Republic of Korea

ECtHR – European Court of Human Rights

EU – European Union

FFM – fact-finding mission

HCHR – High Commissioner for Human Rights

HRC – Human Rights Council

ICC – International Criminal Court

ICTR - International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the Former Yugoslavia

IDF – Israeli Defence Forces

IGO – intergovernmental organisation

NGO - non-governmental organisation

OHCHR - Office of the High Commissioner for Human Rights

OP – operational paragraph

OPT – Occupied Palestinian Territory

OTP – Office of the Prosecutor of the ICC

PLO – Palestine Liberation Organisation

PP – preambular paragraph

R2P – responsibility to protect

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNGA – United Nations General Assembly

UNOG – United Nations Office at Geneva

UNRWA - United Nations Relief and Works Agency for Palestine Refugees

INTRODUCTION

Fact-finding has become a widely used means in international law to collect reliable information about violations, including in cases of alleged abuses and violations of human rights.

As governments responsible for violations do a great deal to hide the signs of violations from international scrutiny, and even, or especially, in an era where human suffering in conflicts is regularly reported in the mass media, fact-finding has become an essential means to obtain first-hand information of violations on the ground.

This more recent investigations trend by international organisations has long been practiced by the human rights NGOs. Even more so, the modern history of fact-finding pre-dates NGO monitoring, emerging as a means of dispute settlement by mutual agreement of states, emerging in writing in the outcomes of the Hague Peace Conferences of 1899 and 1907.

The beginning of a significant contribution by fact-finding towards accountability for grave crimes was witnessed in the creation of the International Criminal Tribunal for the Former Yugoslavia - the first war crimes court created by the United Nations, and the first international war crimes tribunal since the Nuremberg and Tokyo tribunals. It is rarely reminded that the establishment of both, the tribunals for former Yugoslavia in 1993 and, one year later, for Rwanda, tasked with trying individuals responsible for international crimes specified in their respective statutes, were preceded notably by fact-finding commissions set up by the Secretary-General of the United Nations at the request of the Security Council. The Security Council later went on to establish an international tribunal in East Timor. Hybrid tribunals have been established by agreement with the UN to carry out prosecutions in Sierra Leone and Cambodia.

Today fact-finding is used in international courts and tribunals, regional organisations and at the domestic level. In the United Nations, human rights related fact-finding may be mandated by its main or subsidiary organs: the Security Council, the General Assembly, the Human Rights Council and the Office of the High Commissioner for Human Rights. There are a rising number of investigations prompted by the Human Rights Council to respond to situations of alleged human rights violations.

As of late, the UN in general and the Human Rights Council in particular have been preoccupied with mandating *ad hoc* commissions of inquiry or fact-finding missions to deal with accountability issues, including determining the accountability of specific actors - individuals

or groups, for human rights violations¹. As a result, there have been increasing calls for accountability by investigative bodies in their reports, including for the case to be referred to the International Criminal Court. At the same time, there also seems to be more appetite by the international tribunals and courts and also by national courts to use the findings of human rights investigations. Yet it is still unclear to which extent this is feasible or desirable.

The above developments have led to increased controversies over the nature and uses of fact-finding in a situation where there is no common agreement on the commission or conduct of such investigations. Furthermore, although, as the UN Secretary-General Ban Ki-moon already stated in the early days of the Human Rights Council that “All victims of human rights abuses should be able to look to the Human Rights Council as a forum and a springboard for action”², this action has been seemingly lacking in relation to the outcomes of the HRC investigations.

Although fact-finding has existed as a part of the international legal framework at least since the beginning of last century, may ultimately have implications on individual criminal responsibility, and is rapidly increasing in numbers, there has not been a comparable increase in the attention paid to these investigative bodies in academic literature. Most of what has been written on the HRC investigations concerns the so-called special procedures – independent experts and special rapporteurs mandated by the HRC. Accountability and justice in the international sphere is almost exclusively treated with a focus on international tribunals and courts, particularly the ICC. Fact-finding further arises in connection with international or domestic truth and reconciliation efforts. However, this connection remains marginal in literature and is often confined to the sphere of the domestic. However, lately members of the academia have started to pay more attention to the impact of investigations in relation to international law, including criminal law, and have become more responsive to discussions.

The thesis, thus, sets out to make a contribution to the still emerging academic discourse on fact-finding mechanisms in the field of human rights by focusing specifically on accountability-related justice fact-work mandated by the HRC, by exposing the seeming promises and possible misgivings in the HRC’s expanding practice on investigations.

The aim of this thesis is to inspect the evolving role of the HRC’s investigative bodies in the international law and criminal justice framework, including, to what extent the HRC’s

¹ See generally Ramcharan, Bertrand G. (ed.). *International Law and Fact-Finding in the Field of Human Rights*. Revised and Edited Reprint. Brill | Nijhoff: 2014.

² Ban Ki-moon, UN Secretary-General, 12 March 2007, Opening of the 4th Human Rights Council Session.

investigative bodies help deliver justice to victims of human rights violations. In view of the rare cases of real follow-up to the investigations it may well be that the endeavours of the Human Rights Council in establishing investigative bodies act as yet another fig leaf for UN inaction, remaining largely devoid of purpose. In the thesis I explore whether and, if so, then to which extent such criticisms are justified.

Throughout the thesis I use empirical, systematic, analytical and occasionally historical-comparative methods.

In the first chapter I give an overview of the relevant legal framework and the basis for the methodology applied by the investigative bodies of the HRC. Chapter two contains an empirical analysis of the investigative bodies' case-law of the HRC relating to accountability. I will trace the creation of mandates and the reports of the investigations. Among other aspects this chapter addresses the issue where most academic work and practical guides to investigations end their discussion, i.e the question of follow-up to the reports of investigative bodies. I hope to reveal some cases where significant contribution to accountability may be witnessed. The chapter will also discuss possible obstacles to the activities of the investigative bodies. The third chapter attempts to offer some perspective to the activities of the HRC in relation to international law and international criminal justice. Implications of the seeming convergence of human rights investigations and international criminal law will also be dealt with in this chapter. For an overview and ease of reference the thesis is annexed with a table of investigation cases so far mandated by the HRC.

In order to clarify, the notions of „commission of inquiry“ and „fact-finding mission“ used in the thesis usually refer to the name of the investigative body. As a generic name, in literature and practice they do not seem to hold substantive differences as to their meaning, although the latter, an FFM, may imply a more narrow scope of action. „Investigative bodies“ is used as a common denominator for such entities.

Further, when reference is made to international human rights law it is without prejudice to applicable humanitarian law, as the mandates of the HRC investigative bodies are often tasked to investigate abuses and violations of both human rights and international humanitarian law, including international crimes, and in light of the view that international humanitarian law and human rights law are widely considered to be mutually interrelated³.

³ In the basic document of the HRC inclusion of international humanitarian law is plausibly by the complementary and mutually interrelated nature of international human rights law and international humanitarian law. Annex to

In terms of scope, the thesis does not directly concern the work of the so-called special procedures of the HRC - mandates comprising of independent experts, special rapporteurs and representatives, working groups and similar posts, created with a country-specific or a thematic mandate. Whilst these wide mandate holders conduct a variety of tasks, including on-site visits and communications to governments they are independent in setting their agenda in correlation with their general mandate. The HRC has no direct power to order investigations by the mandate-holder in specific cases. The activities and the regulatory framework of special procedures will be considered where necessary.

The thesis covers investigations mandated by the HRC as a specific UNGA subsidiary organ tasked with addressing situations of human rights violations. Its predecessor, the Commission of Human Rights and its five investigations mandated between 1975 and 2000 will be addressed where relevant.

the so-called Human Rights Council Institution-building package, adopted by the HRC in its resolution 5/1 of 18 June 2007, Article 2.

1 Aiming at accountability through international investigations. The origins of human rights fact-finding

1.1. Basis for fact-finding by the United Nations

The implied powers of the UN organs to establish fact-finding investigations derive from the UN Charter, whereby the purposes of the UN are „to maintain international peace and security“, „to achieve international co-operation /.../ in promoting and encouraging respect for human rights and for fundamental freedoms for all“⁴.

The Charter further foresees the right to investigate disputes or situations „possibly leading to international frictions“ or disputes in connection with the possible endangerment of international peace and security.⁵ Similarly, the UNGA Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security refers to the context of disputes and situations „which might threaten the maintenance of international peace and security“⁶, thus providing an overarching „umbrella“ for action in a variety of cases. The tasks of the main UN bodies may also be transmitted, as both the Security Council and UNGA may establish subsidiary organs to perform these functions.⁷ The UNGA declaration places the main privilege and burden of information-gathering to the Secretary-General, the next in line being any other „competent organ“ of the UN⁸. In reality, with some exceptions the Secretary-General has only initiated investigations upon requests by the state in question. In the 1980s and 1990s, the Security Council was the most active UN body establishing investigations⁹. In 1991, a few of years before the creation of the High Commissioner for Human Rights and her Office the main actor deemed responsible for organising fact-finding in the UN was, perhaps understandably, the Secretary-General who was encouraged to step up the capabilities of its Secretariat to perform the information gathering tasks¹⁰. However, by now, the HRC has

⁴ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS xvi, Article 1, para. 1 and para. 3.

⁵ *Id.*, Article 34.

⁶ United Nations General Assembly Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security, General Assembly resolution A/RES/46/59 of 9 December 1991, preambular paragraph 2.

⁷ UN Charter. *Op. cit.* note 4, Articles 29 and 22.

⁸ UN declaration on fact-finding. *Op. cit.* note 6, Articles 4 and 15.

⁹ See full list of investigations mandated by UN organs: UN Office at Geneva. Library Resources. Available at: <<http://libraryresources.unog.ch/coi>> (as of 15.04.2015).

¹⁰ UN declaration on fact-finding. *Op. cit.* note 6, Articles 4, 15, 28-29.

become one of the busiest organs in the UN to mandate fact-finding investigations, and the OHCHR offers UN-wide support to missions¹¹.

The rather wide basis for UN action on human rights derives from article 55 of the UN Charter stipulating that in order to have „peaceful and friendly relations among nations“, the UN promotes, among others „universal respect for, and observance of, human rights and fundamental freedoms for all¹². In search for a more precise legal basis for HRC action when creating the investigative bodies than the UN Charter, no explicit reference to mandating of investigative bodies, other than the special procedures dealing with on-site fact-finding can be found in the basic documents on the creation and functioning of the HRC¹³.

The resolution creating the HRC mentions HRC’s tasks very broadly: to be „responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all“¹⁴, needing to „address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon“¹⁵, having to „respond promptly to human rights emergencies“¹⁶ and „make recommendations with regard to the promotion and protection of human rights“¹⁷. The aforementioned references to addressing violations and responding to emergencies were also cited in the HRC’s first investigation mandate¹⁸. A further resolution on HRC activities only extensively regulates the special procedures framework. Due to the differences between the special procedures and *ad hoc* investigative bodies it is not possible to apply the regulation directly to the latter. Nevertheless, due to the fact that both entities conduct on-site visits, analogies remain necessary.

1.2 The „idea“ of fact-finding

Fact-finding as investigations initiated by the HRC differ greatly from the „idea“ of international fact-finding, first agreed by states in writing in the Hague Conventions of 1899

¹¹ UN Office at Geneva. Library Resources. *Op. cit.* note 9.

¹² UN Charter. *Op. cit.* note 6, Article 55.

¹³ UN General Assembly resolution A/RES/60/251. Human Rights Council. 15 March 2006; UN Human Rights Council resolution 5/1. Institution-building of the United Nations Human Rights Council. 18 June 2007.

¹⁴ UNGA resolution A/RES/60/251. *Op. cit.* note 13, OP 2

¹⁵ *Id.*, OP 3

¹⁶ *Id.*, OP 5 (f)

¹⁷ *Id.*, OP 5 (i)

¹⁸ UN Human Rights Council Special session resolution S-2/1. The grave situation of human rights in Lebanon caused by Israeli military operations. 11 August 2006, PP 4.

and 1907¹⁹. With 177 ratifications of one or both of the instruments, the framework of these specific conventions remains theoretically relevant today²⁰. According to these conventions, fact-finding by commissions of inquiry is applied to cases of dispute between states arising from a difference of opinion on points of fact²¹. This rather old mechanism is very much constrained by the will of the parties who, in the first place, have to agree to establish such a body²². The HRC, for its part, is not constrained by the will of the state in question. Moreover, fact-finding may take place when the state denies human rights violations. Any country may initiate a resolution at the HRC, including one mandating an investigation.²³ There are further cases when a state is proactive for the UN to conduct investigations, for example in the case of investigations on ISIL activities in Iraq²⁴. The HRC operates in a subsidiary capacity in situations where the state seems not to be able or willing to handle its obligations to efficiently investigate alleged crimes. In several cases discussed below, the investigations have taken place without the consent or cooperation of the state concerned.

The mechanism of the Hague Conventions foresees proceedings whereby the „statements of facts“, and the witnesses and experts whose evidence states wish to hear are presented to the commission by the states themselves²⁵. This is not the case with the HRC, where investigations include international open calls for submission of information²⁶. The Hague Conventions curiously even foresee that the states should supply the commission with the means necessary, among others, „to accurately understand the facts in question“.²⁷

¹⁹ For information on fact-finding before United Nations era, see Thomas M. Franck and Laurence D. Cherkis. The problem of fact-finding in international disputes. 18 W.Res.L.Rev. 1483, 1483-542 (1966-67); for another comprehensive overview of the history of fact-finding, see: Edwin Brown Firmage. Fact-finding in the Resolution of International Disputes – From the Hague Peace Conference to the United Nations. Utah Law Review, 421, 1971, pp 421-473.

²⁰ The Treaty Database of the Kingdom of the Netherlands. Ratifications of and accessions to the 1899 Convention available at: <https://verdragenbank.overheid.nl/en/Verdrag/Details/002330>, of the 1907 Convention: <https://verdragenbank.overheid.nl/en/Verdrag/Details/003316>.

²¹ Pacific Settlement of International Disputes (Hague I), 29 July 1899 and Pacific Settlement of International Disputes (Hague I), October 18, 1907, Article 9 in both.

²² *Id.*, Article 10 in both.

²³ To take action on a resolution, it should seek to secure the broadest possible support for the resolution, preferably at least 15 UN members. See: UN Human Rights Council resolution 5/2. Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council. 18 June 2007, Article 117 (d).

²⁴ UN Web TV. Adoption of Resolution A/HRC/S-22/L.1 - 22nd Special Session of Human Rights Council. 3. Iraq, Mr. Mohammed Shyaa Al-Sudani (Concerned Country), at 00:12:40. ... available at: <<http://webtv.un.org/meetings-events/human-rights-council/special-sessions/22nd-session/watch/adoption-of-resolution-ahrcs-22l.1-22nd-special-session-of-human-rights-council/3762444519001>> (as of 13.04.2015).

²⁵ 1907 Hague I Convention. *Op.cit.* note 21, Article 19.

²⁶ Available on the respective web-page of the investigation. E.g:

<<http://www.ohchr.org/EN/HRBodies/HRC/CoIEritrea/Pages/commissioninquiryonhrinEritrea.aspx>> (as of 15.04.2015).

²⁷ 1899 Hague I Convention, Article 12; 1907 Hague I Convention, Article 23. *Op. cit.* note 21.

The operation of the HRC investigative bodies is discussed further in the thesis. What has, indeed, remained relevant of the conventions' mechanism to this day is the fact that physical presence in a country takes place at the permission of the respective state²⁸.

1.3 The definition of fact-finding

Fact-finding has been defined as “a recognized form of international dispute settlement through the process of elucidating facts²⁹“, being, thus, related to disputes and used alongside other diplomatic solution-seeking mechanisms such as negotiation, mediation, good offices and arbitration. An impartial investigation should facilitate the parties in identifying a solution to the dispute³⁰. This does not seem to be entirely commensurate with the mechanism of the HRC, as there usually is no formal dispute between the HRC and the state in question, or a dispute between two states.

The UN declaration on fact-finding of 1991 gives a broader definition of fact-finding as being „any activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent United Nations organs need in order to exercise effectively their functions in relation to the maintenance of international peace and security.³¹“ This confines the substance of the resulting report to „a presentation of findings of a factual nature“.³² The UN declaration on fact-finding does not mention the need for consent of the state under question for the creation of the mandate. It is, of course, necessary to obtain consent to perform investigations on the territory of that state³³. As fact-finding has been pursued regardless of consent of the state, it is wider than on-site visits, also performed by the special procedures. The UN declaration nevertheless foresees that the states „cooperate with United Nations fact-finding missions and give them, within the limits of their capabilities, the full and prompt assistance necessary for the exercise of their functions and the fulfilment of their mandate“³⁴.

From the point of view and for the purposes of OHCHR, officially the secretariat of the HRC and also the organ supporting most of the HRC-mandated investigations, fact-finding is

²⁸ 1907 Hague I Convention. *Op.cit.* note 21, Article 23. Similarly in the UN declaration on fact-finding. *Op. cit.* note 6, Article 6.

²⁹ Agnieszka Jachec-Neale, Fact-finding, Max Planck Encyclopedia of Public International Law, Oxford Public International Law (last updated March, 2011), at 1.

³⁰ *Ibid.*

³¹ UN declaration on fact-finding. *Op. cit.* note 6, Article 2.

³² *Id.*, Article 17.

³³ *Id.*, Articles 18-21.

³⁴ *Id.*, Article 22.

described as „a process of drawing conclusions of fact from monitoring activities“. Although resembling NGO monitoring activities, "fact-finding" remains a more narrow term. The OHCHR specifies fact-finding as entailing „information gathering in order to establish and verify the facts surrounding an alleged human rights violation“³⁵.

With regard to its purposes, Ramcharan adds emphasis on victims as fact-finding should „help shed light on situations of concern with a view to facilitating the protection of those whose rights have been violated or are at risk, and to help bring about justice for victims“³⁶. The OHCHR accepts investigations to be „a key tool in the UN response to situations of violations /.../, including international crimes“³⁷.

1.4 Fact-finding methodology

Regarding methodology, the OHCHR deems fact-finding to pursue reliability, among others, „through the use of generally accepted procedures“³⁸. While differing in time frames, tasks, scope and composition, all UN organs conducting fact-finding should apply the same monitoring principles and methodology³⁹.

As fact-finding is an *ad hoc* endeavour, its methodology has developed over time. At first, published guidelines on fact-finding were primarily intended for the use of NGOs, including the so-called Lund-London guidelines of 2009.⁴⁰ In 1980 the International Law Association adopted the so-called Belgrade rules, i.e the minimum draft rules of procedure for NGO human rights fact-finding⁴¹. The Commission on Human Rights working group also drafted model rules of procedure for UN bodies dealing with violations of human rights which never received

³⁵ UN Office of the High Commissioner for Human Rights, Training Manual for Human Rights Monitoring, New York and Geneva 2011/2015, No. 7/ Rev.1, 2015 version available at:

<<http://www.ohchr.org/EN/PublicationsResources/Pages/MethodologicalMaterials.aspx>> (as of 16.04.2015).

³⁶ Bertrand G. Ramcharan. The UN Human Rights Council. Routledge, 2011, at 88.

³⁷ OHCHR. Commissions of Inquiry and Fact-finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice. New York and Geneva, 2015. ... available at: <http://www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf> (as of 20.04.2015), at V.

³⁸ UN manual on monitoring. *Op. cit.* note 35.

³⁹ *Id.*, at 3.

⁴⁰ International Bar Association, Human Rights Institute and Raoul Wallenberg Institute, Lund University. Guidelines on International Human Rights Fact-Finding Visits and Reports ("Lund-London Guidelines"). 2009, at 1.

⁴¹ The so-called Belgrade guidelines: International Law Association. Minimal procedures to protect the integrity of human rights fact-finding by nongovernmental organizations. 59th Conference of the International Law Association. Belgrade, August 18 to 23, 1980. ... available at: <http://www3.nd.edu/~sobrien2/the_belgrade_minimum_rules_o.pdf> (as of 13.03.2015).

consensus support or official status⁴². A training manual for UN fact-finding was published by the OHCHR only a decade after the surge of UN investigations, in 2011, and is currently in the process of being revised⁴³. Furthermore, as the main provider of operational, legal, analytical and methodological support to UN fact-finding missions, the OHCHR has gathered vast knowledge on the issue that has been compiled in a 2013 publication on the UN principles, policies, practices and methodologies guiding the work of the UN investigative bodies⁴⁴.

UN investigations have been a target for criticism, among others, for issues relating to methodology. Although today there is UN guidance on methodology emerging from *ad hoc* practice, this guidance remains at a high level of generalisation and is in no way binding. The OHCHR guides do not form any expectations to the investigative bodies relating to issues on accountability. It has been suggested that regardless of the UN and NGO manuals on fact-finding methodology, the problem may be that the fact-finding „community has not accepted any methodological standards as authoritative“⁴⁵. While the OHCHR agrees that there is no single format for the constitution and functioning of all investigative bodies, it believes that the methodological beliefs guiding investigations on human rights and international humanitarian law, developed „based on relevant norms, standards and principles“⁴⁶, provide „a common thread across the various models“⁴⁷. The difficulty lies with the fact that it is hard to trace these norms, standards and principles, which should „ensure the production of sound analysis, reports and recommendations“⁴⁸. In the case of HRC information on fact-finding remains accompanied by somewhat differing descriptions of methodology used in each case⁴⁹.

In a situation where there is no single format for the creation and functioning of HRC, I proceed with an examination of the HRC practice in this regard. In order to reveal the aims that the HRC has pursued through its mandated bodies I start with looking into the terms of reference of the latter.

⁴² Contained in the Report of Working Group established under resolutions 14 (XXVII) and 15 (XXIX) of the Commission on Human Rights: UN doc. E/CN.4/1134 of 1 February 1974.

⁴³ UN manual on monitoring. *Op. cit.* note 35.

⁴⁴ OHCHR. Commissions of Inquiry and Fact-finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice. New York and Geneva, 2015. ... available at: <http://www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf> (as of 15.04.2015).

⁴⁵ Rob Grace and Claude Bruderlein. Building Effective Monitoring, Reporting, and Fact-finding Mechanisms. Working Paper, Program on Humanitarian Policy and Conflict Research at Harvard University, 2012, at 8.

⁴⁶ On applicable international human rights standards, see also: Ramcharan 2014. *Op. cit.* note 1, at 7-15.

⁴⁷ OHCHR guide. *Op. cit.* note 37, at V.

⁴⁸ *Ibid.*

⁴⁹ Information on HRC investigations available at:

<<http://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCIndex.aspx>> (as of 18.04.2015).

2 Accountability according to the Human Rights Council. Mapping the practice

2.1 Human Rights Council's expectations of the investigations

In this subsection I follow the HRC action in laying out its expectations to the investigations by way of examining the mandates in the respective HRC resolutions.

According to the UN fact-finding declaration „the decision by the competent United Nations organ to undertake fact-finding should always contain a clear mandate for the fact-finding mission and precise requirements to be met by its report“, and „the report should be limited to a presentation of findings of a factual nature“. ⁵⁰ From the latter it may be deduced that in order for the report of the investigations to correspond to its tasks the mandate should also request only findings of a factual nature. Furthermore, according to the Belgrade rules, albeit for NGOs, the resolution authorizing the mission should not prejudge the mission's work and findings⁵¹.

The total amount of investigative bodies created in the UN system has reached almost 60 according to the OHCHR⁵². The total count of investigative bodies initiated by the HRC since its creation in 2006 is close to 20, i.e around one third of UN investigations. At the moment there are four ongoing investigations mandated by the HRC in cases of Syria, Gaza, Eritrea and Sri Lanka. The investigation on Boko Haram by the OHCHR should be effectuated in the near future.

The mandates of the HRC investigative bodies and the contexts in which these mechanisms have been created differ widely. Few common elements emerge from the HRC's practice.

2.1.1 In search of a clear mandate

While it would be beneficial to have an investigation mandate that would most likely provide information which can be further used to remedy the situation, it is somewhat surprising that in many cases the HRC mandates have been vague. For example, when establishing an investigative mission to Darfur, Sudan, in 2006, the HRC tasked it to „assess the human rights situation in Darfur and the needs of the Sudan in this regard“⁵³. At the adoption of the decision

⁵⁰ UN declaration on fact-finding. *Op. cit.* note 6, Article 17.

⁵¹ Belgrade rules. *Op. cit.* note 41, para. 2.

⁵² A complete database can be accessed at the OHCHR website: <<http://libraryresources.unog.ch/coi>> (last accessed 10.04.2015).

⁵³ UN Human Rights Council Special session decision S-4/101. Situation of human rights in Darfur. 13 December 2006, OP 4.

a positive statement among many similar expressed contentment over the „balanced text“ that had tried to take on board the „concerns of all parties“ involved and would hopefully allow benefit from an „efficient follow-up that eventually would be able to bring about a difference to the people of the Darfur“⁵⁴. In reality such a mandate fails to provide concrete guidance to the members of the mission about the actual substance and focus of its mandate. In case being a compromise wording, it would seem to compromise the efficiency of the mission or at least leave the focus of the mission unduly up to members of the mission to decide. Differences in understanding of the mandate by the HRC and by the missions are discussed in the next subsections.

2.1.2 Identifying perpetrators

In the most general terms and according to the traditional sense of the activity, human rights fact-finding involves gathering information to determine the occurrence of human rights violations. However, the HRC has expanded and, at the same time, specified the mandates in tasking the investigators to identify perpetrators and to make recommendations for further action. Such a shift may be seen as offering a more concrete possibility of linking the results to further accountability endeavours. As with the ongoing Gaza investigation, mandated in 2014, which is to establish the „facts and circumstances of such violations and of the crimes perpetrated and to identify those responsible, to make recommendations, in particular on accountability measures, all with a view to avoiding and ending impunity and ensuring that those responsible are held accountable, /.../“⁵⁵. Similar calls to identify perpetrators have been made in cases on Darfur⁵⁶, Côte d’Ivoire⁵⁷, Syria⁵⁸ and Libya⁵⁹. In the case of Syria, the initial mandate for the investigation in 2011 was to „investigate all alleged violations of international human rights law and to establish the facts and circumstances of such violations and of the crimes perpetrated, with a view to avoiding impunity and ensuring full accountability“. The

⁵⁴ Explanation by Azerbaijan on decision on Darfur. 13 December 2006. Available at: <<http://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/4SpecialSession/DraftDecision.html>> (as of 15.04.2015).

⁵⁵ UN Human Rights Council resolution S-21/1. Ensuring respect for international law in the Occupied Palestinian Territory, including East Jerusalem. 24 July 2014, OP 13.

⁵⁶ This was, in fact, an investigation mandated by the Security Council. UN Security Council Resolution 1564 (2004) of 18 September 2004.

⁵⁷ UN Human Rights Council 16/25. Situation of human rights in Côte d’Ivoire. 13 April 2011, OP 10.

⁵⁸ UN Human Rights Council resolution S-17/1. Situation of human rights in the Syrian Arab Republic. 23 August 2011, OP 13.

⁵⁹ UN Human Rights Council resolution S-15/1. Situation of human rights in the Libyan Arab Jamahiriya. 3 March 2011, OP 11.

commission of inquiry ended up compiling a list of 50 alleged perpetrators at various levels of government and its agencies in connection with the information obtained. The list is confidential but direct link with accountability may arise as the list may be presented by OHCHR in the context of future investigations and possible indictments by a competent prosecutor.⁶⁰ Views have been expressed that it is important to keep the confidentiality of the lists which could otherwise end up being „naming and shaming“ of individuals, having severe implications to their rights. Criticism has focused towards the possible lack of procedural due process with regard to fact-finding results identifying perpetrators, which may have adverse impact on the person's rights⁶¹. So far the lists of perpetrators of the HRC investigations have been kept confidential⁶².

Thus, the HRC mandates have come to contain various international criminal law implications: identifying perpetrated crimes and perpetrators - states, individuals, groups. The investigations are increasingly tasked to gather evidence with a view to criminal prosecutions⁶³. This raises further questions, including on the standard of proof applied by the investigators⁶⁴.

2.1.3 Investigations on Israel

A separate body of HRC investigations exists concerning Israel and its activities in Gaza and, in one case, in Lebanon. These mandates vary in terms of precision, but in many cases include a humanitarian law component, and have been widely commented for mandating investigations focusing on actions of one side to a conflict⁶⁵. Already in the first HRC resolution establishing an investigative body in an HRC special session in 2006 the commission of inquiry on Lebanon was tasked to investigate human rights violations caused by Israeli military operations in Lebanon following Hezbollah attacks. Resolutions on Israel prevalently refer to international

⁶⁰ UN High Commissioner for Human Rights report A/HRC/18/53 on the situation of human rights in the Syrian Arab Republic. 15 September 2011, at 5, para. 13.

⁶¹ Luciana T Ricart. *Due Process of Law in the Fact-Finding work of the Security Council's Panels of Experts: An Analysis in terms of Global Administrative Law*, New York University School of Law, 2008. Available at: <<http://www.iilj.org/publications/documents/Ricart.ESP8-08.pdf>> (as of 17.04.2015). See also: Antonio Cassese. *International Criminal Law*. Second Edition. Oxford University Press: 2008, at 416-17.

⁶² The CoI on Guinea and Independent special CoI for Timor-Leste, established by the Secretary-General in 2009 and 2006 respectively, did mention names of perpetrators in their reports.

⁶³ See also: Lara Talsma. *U.N. Human Rights Fact-Finding: Establishing Individual Criminal Responsibility*. Florida Journal of International Law, Vol. 24, Issue 2 (August 2012), at 421.

⁶⁴ In terms of international criminal law, this standard is for the judges to be convinced „beyond a reasonable doubt of the guilt of the accused. See, e.g: Cassese. *Op. cit.* note 61, at 414.

⁶⁵ Criticism mostly originates from Israel itself and its proponents. See, e.g: PM Netanyahu and FM Liberman meet with UN Secretary General Ban Ki-moon. 30 Sep 2014. ... available at: <<http://mfa.gov.il/MFA/PressRoom/2014/Pages/PM-Netanyahu-and-FM-Liberman-meet-with-UN-Secretary-General-Ban-Ki-moon-30-Sep-2014.aspx>> (as of 10.04.2015).

humanitarian law obligations. The CoI on Lebanon was tasked to „investigate the systematic targeting and killings of civilians by Israel in Lebanon“, „examine the types of weapons used by Israel and their conformity with international law“, and „assess the extent and deadly impact of Israeli attacks on human life, property, critical infrastructure and the environment.“⁶⁶ The EU member states and some others voting against the resolution did not express any opposition to references on international humanitarian law, sometimes considered to be out of the scope of the HRC’s mandate⁶⁷, but rather referring to procedural misconduct - lack of requisite genuine discussions, and the fact that the resolution addressed the concerns of one party to the conflict⁶⁸.

The issue of mandating the investigative body to look into the activities and alleged violations of one party to the conflict has been the common thread for all investigations mandated in connection with the situation in Gaza. The second investigation by HRC about three months after the first, in 2006, also concerned Israel and its attacks on the OPT in the Gaza town of Beit Hanoun. The mandate for the investigation was extremely wide, starting the enumeration with „inter alia“, mandating the high-level fact-finding mission to „assess the situation of victims“, „address the needs of survivors“, and „make recommendations on ways and means to protect Palestinian civilians against any further Israeli assaults“⁶⁹. Again, EU and some other countries were against the resolution, referring at politisation of HRC, remarking that the HRC should address all human rights violations in an objective and non-selective manner, and that the resolution remained one-sided.⁷⁰ The HRC continued to address Israel’s actions in the 2009 FFM with a very wide mandate to investigate violations of international human rights law and international humanitarian law by Israel particularly in Gaza⁷¹, producing the well-known

⁶⁶ UN Human Rights Council Special session resolution S-2/1 on Lebanon. *Op. cit.* note 18, OP 7 (a), (b), (c).

⁶⁷ E.g. in the discussion on drones. UNOG. Human Rights Council holds panel on remotely piloted aircraft or armed drones in counterterrorism and military operations. 22 September 2014. ... available at: <[http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear_en\)/BCE56ED914A46D40C1257D5B0038393F?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/BCE56ED914A46D40C1257D5B0038393F?OpenDocument)> (as of 22.04.2015).

⁶⁸ EU explanation of vote on Human Rights Council resolution S-2/1. ... available at: <<http://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/2SpecialSession/Tab%2cTab6.html>> (as of 15.04.2015).

⁶⁹ UN Human Rights Council Special session resolution S-3/1. Human rights violations emanating from Israeli military incursions in the Occupied Palestinian Territory, including the recent one in northern Gaza and the assault on Beit Hanoun. 15 November 2006, OP 7.

⁷⁰ EU explanation of vote on Human Rights Council resolution S-3/1. Available at: <<http://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/3SpecialSession/Tab6.html>> (as of 15.04.2015). One-sidedness has been criticised to be replaced by even-handedness, e.g. by Geoffrey Robertson. Human Rights Fact-Finding: Some Legal and Ethical Dilemmas. 3 UCL Hum. Rts. Rev. 15 (2010), at 23-24.

⁷¹ UN Human Rights Council Special session resolution S-9/1. The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip. 12 January 2009, OP 14.

„Goldstone report“⁷². This FFM has been followed by several others⁷³, including an investigation of the so called Gaza flotilla raid⁷⁴. While being concerned at the lack of implementation of the recommendations contained in the report of the FFM of 2009, latest in 2014 the HRC dispatched a CoI⁷⁵ to investigate violations of international humanitarian law and international human rights law in Gaza in the context of the military operations conducted since 13 June 2014.

2.1.4 Issues of categorisation

Regarding the possible responsible actors in the context of human rights violations, from some of the mandates it is apparent that the activities of non-state actors have been included in the investigation, either addressing them directly – such as the case of resolutions on activities of ISIL and associated groups⁷⁶, and Boko Haram⁷⁷, or indirectly, such as the cases of investigations focusing on Israel, implying activities of Hamas and Hezbollah⁷⁸. Although fulfilment of human rights law obligations are primarily the responsibility of states, humanitarian law clearly incur obligations on non-state groups exercising *de facto* control over a territory⁷⁹. Thus, the HRC has recently begun to turn its attention farther from states as entities with primary responsibility for protecting human rights to other organised entities.

At times the HRC has created confusion of categorising investigations by not explicitly calling for a commission of inquiry or a fact-finding mission to be established. For example, the latest investigation mandated by the HRC in a special session in April 2015 is for OHCHR to collect

⁷²UN Human Rights Council. Report A/HRC/12/48 of the United Nations Fact-Finding Mission on the Gaza Conflict. 25 September 2009.

⁷³ UN Human Rights Council resolution 13/9. Follow-up to the report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict. 14 April 2010, OP 9; UN Human Rights Council resolution 15/6. Follow-up to the report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9. 6 October 2010, OP 8; UN Human Rights Council resolution. 19/17 Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan. 10 April 2012, OP 9.

⁷⁴ UN Human Rights Council resolution 14/1. The grave attacks by Israeli forces against the humanitarian boat convoy. 23 June 2010, OP 8.

⁷⁵ HRC session resolution S-21/1 on the OPT. *Op. cit.* note 55.

⁷⁶ UN Human Rights Council Special session resolution S-22/1. The human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups. 3 September 2014.

⁷⁷ UN Human Rights Council Special session resolution S-23/L.1 (unedited version). Atrocities committed by the terrorist group Boko Haram and its effects on human rights in the affected countries. 1 April 2015. ... available at: <https://extranet.ohchr.org/sites/hrc/HRCSessions/SpecialSessions/23rdSession/Documents/A_HRC_S-23L1revised1apr15at_1430adoptedextranet.pdf> (as of 15.04.2015).

⁷⁸ See previous subsection.

⁷⁹ According to the OHCHR the element of control over territory applies also for human rights law, see e.g the Sri Lanka investigation terms of reference: <<http://www.ohchr.org/EN/HRBodies/HRC/Pages/OISL.aspx>> (as of 15.04.2015).

information from countries affected by the activities of Boko Haram, and to prepare a report on violations and abuses of human rights and atrocities committed by the latter. As per HRC trend in general, the HRC tasked the OHCHR to investigate the issue „with view towards accountability“⁸⁰. However, as opposed to other types of investigations, this investigation does not call for separate, non-OHCHR members to be used in the investigation, thus arguing against a „fully fledged HRC-mandated“ investigation. While the intention of the drafters of the mandate remains unknown, there are implications of a hierarchy between investigations fulfilled by OHCHR itself and those fulfilled with its assistance. It would appear to be based on an assumption that some cases are more in need of a fully-fledged HRC-mandated investigation than others.

This is further supported by the case of the recent investigation on Sri Lanka where the OHCHR, in a way, „elevated“ its investigation by appointing three eminent experts, including former President of Finland Mr. Martti Ahtisaari „to play a supportive and advisory role, as well as independent verification throughout the investigation“⁸¹, without the specific authorisation for this by the HRC. Confusion also arose regarding investigation on the Sri Lanka which was initiated by the OHCHR⁸² and was later said to be mandated by the HRC⁸³.

Examination of the above HRC practice reveals that most investigation mandates have been worded in a manner providing a lot of „manoeuvring room“ for the mandate-holders. Thus, I will next to look into the interpretation by and application of the investigative bodies of their terms of reference, in order to see how the investigative bodies have operated within their mandates.

2.2 Interpretation of the mandate – what the investigation delivers

A convergence between the formulation of the mandate and its effectuation by the members of the investigation should be desirable, at the least for transparency reasons. In this subsection I will try to find out to what extent the tasks set by the HRC have been met by the investigative bodies in their reports.

⁸⁰ UN Human Rights Council resolution 23/18. Technical assistance to the Central African Republic in the field of human rights. 27 June 2013, OP 9

⁸¹ See OHCHR investigation on Sri Lanka. ... available at:
<<http://www.ohchr.org/EN/HRBodies/HRC/Pages/OISL.aspx>> (as of 15.04.2015).

⁸² HRC resolution S-23/L.1 on Boko Haram. *Op. cit.* note 80, OP 2.

⁸³ Report A/HRC/24/59 of the United Nations High Commissioner for Human Rights. Situation of human rights in the Central African Republic. 12 September 2013.

2.2.1 Strict observance of mandate?

The UN declaration on fact-finding foresees that the report to be „limited to presentation of findings of a factual nature“⁸⁴. Further, „fact-finding missions have an obligation to act in strict conformity with their mandate and perform their task in an impartial way.“⁸⁵ In addition, the code of conduct of HRC special procedures that may be applied to other HRC investigations reminds us that mandate-holders must exercise their functions „in strict observance of their mandate and in particular to ensure that their recommendations do not exceed their mandate or the mandate of the Council itself“.⁸⁶

The latter guidance seems to leave no room to widening or narrowing interpretations of the mandate.

The reports of the investigative bodies submitted to the mandating HRC are usually made public, and include information on their mandates, methods of work, factual and legal analysis of collected information, conclusions and recommendations.

Already in the case first investigation mandated by the HRC, the CoI widened the scope of the investigation in line with criticism from the EU countries that the mandate was one-sided. Namely, the Commission of Inquiry on Lebanon concluded in its report that while its first task to investigate the systematic targeting and killings of civilians referred explicitly to the actions “by Israel in Lebanon”, the responsibility of the CoI to investigate nonetheless „requires a consideration of all factors relevant to the actions of Israel in relation to the conflict in Lebanon.“⁸⁷ Thus, the CoI itself „remedied“ or „compensated“ the „biased“ mandate.

The CoI on Lebanon further confessed in the beginning of its report that it „cannot constitute a full and final accounting of all alleged violations“ due to several reasons, including the time constraint – i.e HRC’s call to receive information promptly – later agreed by the end of two months; the geographical reach of hostilities, and the displacement of civilians. The CoI thus oriented its inquiry on what „within the terms of its mandate representatively stand out and emerge as serious international humanitarian law and human rights violations.“⁸⁸ Many following investigations have put forward a similar caveat⁸⁹.

⁸⁴ UN declaration on fact-finding. *Op. cit.* note 6, Article 17.

⁸⁵ *Id.*, OP 25. See, also: Ramcharan 2014. *Op. cit.* note 1, at 3.

⁸⁶ Code of Conduct for the Special Procedures. *Op. cit.* note 2, Article 7.

⁸⁷ UN Human Rights Council. Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1. A/HRC/3/2. 23 November 2006, at 15, para. 11.

⁸⁸ CoI on Lebanon report A/HRC/3/2. *Op. cit.* note 87, at 17, para. 20.

⁸⁹ E.g HCHR report A/HRC/18/53 on Syria. *Op. cit.* note 60, at 4, para. 9.

2.2.2 Qualifying crimes and perpetrators

Although the HRC had mandated the CoI on Lebanon to „investigate the systematic targeting and killings of civilians by Israel“⁹⁰ and „the extent and deadly impact of Israeli attacks on human life“⁹¹, and did not expressly call on the CoI to assign responsibility or find out perpetrators of the possible crimes, the CoI, nevertheless, considered that the conflict gave rise to issues of international responsibility of Israel under international, humanitarian law and human rights, and the accountability of individuals for serious violations of international humanitarian law and human rights⁹². The CoI concluded that „the violations committed by IDF [Israeli Defence Forces] could qualify as serious violations of the laws and customs of war and war crimes“⁹³ and that the report contains indications of conduct that „constitute serious international humanitarian law and human rights violations for which individual responsibility can be imputed“⁹⁴.

The CoI went further beyond strictly assigning responsibility by concluding that the deliberate strikes against civilians amounting to summary and extra-judicial executions of persons not only violated the fundamental rights of these persons but also constituted „a very negative State practice, extremely disturbing for contemporary legal culture“⁹⁵.

As opposed to the Lebanon case, in the case of Beit Hanoun, in addition to Israel the report also expressly discusses the accountability of the other party to the conflict by remarking that, „as the mission has repeatedly stressed (including to representatives of Hamas), those firing rockets on Israeli civilians are no less accountable than the Israeli military for their actions“⁹⁶. The conclusions also make assumptions on the proportions of guilt, as the commission finds that „Israel, Hamas and the Palestinian Authority have human rights obligations towards the victims. Most of the ongoing violations, however, are caused by Israeli action or inaction.“⁹⁷

In its second report in the same question, the commission found that in addition to independent, impartial investigations to be conducted into the bombing of Beit Hanoun, also „a mechanism

⁹⁰ HRC Special session resolution S-2/1 on Lebanon. *Op. cit.* note 18, OP 7 (a).

⁹¹ *Id.*, OP 7 (c).

⁹² CoI on Lebanon report A/HRC/3/2. *Op. cit.* note 87, at 74, para. 341.

⁹³ *Id.*, at 74, para. 342.

⁹⁴ *Id.*, at 75, para. 347.

⁹⁵ *Id.*, at 74, para. 340 (a).

⁹⁶ Report A/HRC/9/26 of the high-level fact-finding mission to Beit Hanoun established under Council resolution S-3/1. Human Rights Situation in Palestine and Other Occupied Arab Territories. 1 September 2008, at 22, para. 77.

⁹⁷ *Id.*, at 22, para. 79.

must be established to bring to account those responsible for the launching of rockets towards Israeli towns.⁹⁸

Investigation reports have further considered what law was applicable to the factual situations of the case, i.e. have applied legal classification of the situation, and determined whether the situation is international or non-international, and which part of international humanitarian law applies⁹⁹. After referral to the ICC, a day after establishing the CoI on Libya, the Commission further „considered events in the light of international criminal law“¹⁰⁰.

Furthermore, the question of mandates tasking to identify perpetrators may puzzle the investigators, as outlined in the previous subsection. Such case presents possibly opposing considerations of the demand of the mandate and the procedural rights of the alleged perpetrators. Again, a confidential list allows the mission to fulfil the mandate while still addressing concerns of due process for the accused, possibility of prejudicing future trials or posing a threat to witnesses.¹⁰¹

2.2.3 Extensive interpretations

From viewing the interpretations of the mandate-holders, while many of the commissions have a mandate by the HRC to engage in fact-finding, they actually do more than this and, as seen from above, often make detailed determinations on points of international law¹⁰², assuming a more legal character in their assessments¹⁰³. In literature this has been explained by a struggle of deciding amongst the legal limitations of a mandate, professional norms of practice on the conduct of credible investigations and the humanitarian impulse to meet the needs of victims¹⁰⁴.

⁹⁸ Report A/HRC/5/20 of the High-Level Fact-Finding Mission to Beit Hanoun established under resolution S-3/1. 18 June 2007, at 7, para. 19.

⁹⁹ Report A/HRC/17/44 of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, pursuant to Human Rights Council resolution S-15/1. 12 January 2012, at 17-19, paras 50-56.

¹⁰⁰ *Id.*, at 22, paras 68-70.

¹⁰¹ Rob Grace and Jill Coster van Voorhout. Working Paper 4: From Isolation to Interoperability: The Interaction of MRF Missions and ICCTs. The Hague Institute for Global Justice. December 2014, at 5-6. Available at: <<http://www.thehagueinstituteforglobaljustice.org/index.php?page=Publications&pid=179>> (as of 17.04.2015).

¹⁰² See also Dapo Akande and Hannah Tonkin. International Commissions of Inquiry: A New Form of Adjudication? April 6, 2012. European Journal of International Law blog. ... available at: <<http://www.ejiltalk.org/international-commissions-of-inquiry-a-new-form-of-adjudication/>> (as of 15.04.2015).

¹⁰³ E.g. see also: Robert Miller. United Nations Fact-finding Missions in the Field of Human Rights. Aust. YBIL 40, 1970-1973, at 47.

¹⁰⁴ Rob Grace. From Design to Implementation: The Interpretation of Fact-finding Mandates. Journal of Conflict and Security Law. Oxford University Press, 2014, at 3.

The conduct of investigative bodies in overriding their mandates has prompted mixed views. The word fact-finding itself implies that the method should be descriptive. The question is, should it be only descriptive or can it add value in the form of a certain deduction, a judgment?

Philip Alston sees extensive interpretation in a positive manner, noting that fact-finding mechanisms have experienced „a dramatic evolution, changing the previously fairly elementary documenting and reporting mechanisms into deeper analysis and more far reaching recommendations“¹⁰⁵. Sometimes too far reaching recommendations may be witnessed, as above, when members of investigative bodies have interpreted their tasks to various degrees of liberty.

At the same time, practitioners have called on the commissions of inquiry to refrain from voicing legal judgments on criminal responsibility and focus on establishing facts without evaluating them,¹⁰⁶ that is, in general, to avoid legal determinations of complex situations and divergent legal determinations between different commissions of inquiry.¹⁰⁷

Ramcharan, once acting High Commissioner for Human Rights and a member of a many international investigations holds a very flexible view, without stating anything new regarding the role of the fact-finders, noting that the investigators „should act in a quasi-judicial spirit, and they should fairly present evidence that they have collected and analyzed and should not shy away from reporting facts and offering conclusions“. The latter might be the reason that the investigations always seems to deliver more than was asked.

Next, I will explore the possible obstacles to fulfilling the mandate by the investigative bodies.

2.3 Possible obstacles to the functioning of investigative bodies

2.3.1 Non-Cooperation with the state

According to the UN declaration on fact-finding, although voluntary, states should endeavour to follow the policy of admitting UN fact-finding missions to their territory, to cooperate with

¹⁰⁵ Philip Alston. Keynote introduction. Fact-finding on gross violations of human rights during and after conflicts. University of Oslo. 17.11.2011. ... available at: <<http://www.jus.uio.no/smr/english/research/areas/conflict/events/conferences/fact-finding/alston.html>> (as of 17.04.2015).

¹⁰⁶ Geert-Jan Knoops, *Blufpoker: De duistere wereld van den internationaal recht* 94-95 (2011). Cited in: Talsma. *Op. cit.* note 63, at 386-387.

¹⁰⁷ James G. Devaney. Morten Bergsmo (ed.). *Quality Control in Fact-Finding*. *Eur J Int Law* (2014) 25 (1).

the missions, and „give them, /.../, the full and prompt assistance necessary for the exercise of their functions and the fulfilment of their mandate“¹⁰⁸.

Some states have said, especially in debates which preceded the setting up of the first expert group by the Commission on Human Rights¹⁰⁹, that the human rights issues fall within their sovereign sphere and that article 2(7) of the UN Charter prevents the UN from intervening in the domestic sphere on these issues.¹¹⁰ Yet it has been argued that with the adoption of the UN Charter human rights have become an international concern and are no longer a domestic matter, and that most states have accepted intervention by fact-finding¹¹¹, including by way of accepting the UN Charter and the implied powers of the UN main and subsidiary bodies.

Nevertheless, some states refuse investigations access to their territory. The cooperation of the state concerned is usually dependent on its acceptance of the investigation¹¹². As a prominent example, Israel has refused to cooperate with any of the investigations or the OPT special procedures mandate-holder for reasons of alleged politisation and bias against Israel.¹¹³

Regarding on-site visits Alston has noted that a major weakness of the special procedures system derives from its „inability to compel any particular state to cooperate either with a given mandate-holder or with the system as a whole.“¹¹⁴ Unlike special procedures, most HRC investigations in question have so far also operated without explicit state consent¹¹⁵.

In the first year of the HRC, in the case of investigation of Israel’s actions in Gaza, specifically the town of Beit Hanoun, the high-level FFM, comprising of an odd number of members: Archbishop Desmond Tutu and Professor Christine Chinkin did not manage to get visas from Israel to travel to Gaza, which they regretted¹¹⁶. The mandate was clear on the on-site investigation, referring that the mission „travel to Beit Hanoun“¹¹⁷. The mission felt that without travelling to Beit Hanoun and meeting the victims and survivors, it would not be in a position

¹⁰⁸ UN fact-finding declaration. *Op. cit.*, note 6, OPs 22 and 23.

¹⁰⁹ Miller. *Op. cit.* note 103, at 43.

¹¹⁰ Talsma. *Op. cit.* note 63, at 388.

¹¹¹ *Id.*, at 389; Miller. *Op. cit.* note 103, at 48.

¹¹² Ramcharan 2014. *Op. cit.* note 1, at 39-40.

¹¹³ See: Israel Ministry of Foreign Affairs. Israel will not cooperate with UNHRC investigative committee. 13 Nov 2014. ... available at: <<http://mfa.gov.il/MFA/PressRoom/2014/Pages/Israel-will-not-cooperate-with-UNHRC-investigative-committee-13-Nov-2014.aspx>> (as of 16.04.2015).

¹¹⁴ Philip Alston. Hobbling the Monitors: Should UN Human Rights Monitors Be Accountable? Harvard International Law Journal, Vol. 52, 2011, at 573.

¹¹⁵ Unlike the early UN investigations which have said to take place with the consent of the government concerned. Ramcharan 2014. *Op. cit.* note 1, at 161.

¹¹⁶ Report A/HRC/5/20 of the HL-FFM to Beit Hanoun. *Op. cit.* note 98, at 3, para. 4.

¹¹⁷ HRC Special session resolution S-3/1 on Israel. *Op. cit.* note 69, OP 7.

to independently assess their situation nor to formulate recommendations for protection in the future. The option of interviewing victims in third countries was not feasible at the time¹¹⁸. During another attempt, in 2008, the mission decided to travel to Beit Hanoun via Egypt¹¹⁹. In the case of another investigation in 2014 the commission also regretted the failure to obtain access to Gaza by Israel after numerous fruitless attempts, but obtained indication from Egypt to facilitate travel to Gaza as soon as the security situation permits travel through its territory. Witnesses and officials have been met in neighbouring countries, information technology is used to interview witnesses and victims, both in Israel and the OPT.¹²⁰ It is also important to note that while the situation of Gaza is not usual state-controlled territory, it is in similar position to other territories in conflict.

Access to a state does not seem to be deemed highly important for a credible report any more¹²¹. Due to frustrating circumstances, the investigations are not finding access imperative, thus circumnavigating the hurdle of non-cooperation by states.

Views differ to which extent the failure to have access to a country disturbed the investigators.

In the case of Syria, the High Commissioner for Human Rights has seen the failure to have access to the territory of Syria hamper the investigation so as to limit its geographical and substantive scope¹²². In another case, the HRCH dismissed claims that the failure of a country to grant access to investigators would undermine the integrity of the investigation, rather „it raises concerns about the integrity of the government in question.“ He went on to raise the question of „why would governments with nothing to hide go to such extraordinary lengths to sabotage an impartial international investigation?“¹²³

Usually, whether or not a country cooperates with the international investigation, the investigative bodies proceed as mandated and present their report to the HRC. However, access

¹¹⁸ Report A/HRC/9/26 of the HL-FFM to Beit Hanoun. *Op. cit.* note 96, at 16, para. 10.

¹¹⁹ Report A/HRC/9/26 of the HL-FFM to Beit Hanoun. *Op. cit.* note 96, at 3, para. 3.

¹²⁰ Oral Update by the Chairperson of the Independent Commission of Inquiry on the 2014 Gaza Conflict. 23 March 2015. ... available at: <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15741&LangID=E#sthash.ckM1Q24I.dpuf>> (as of 15.04.2015).

¹²¹ This view was shared by the HCHR. See: Navanethem Pillay. Human Rights Investigations and their Methodology: Lecture by Ms. Navanethem Pillay United Nations High Commissioner for Human Rights. Graduate Institute of International and Development Studies. 24 February 2010. ... available at: <<http://unispal.un.org/UNISPAL.NSF/0/C9222F058467E6F6852576D500574710>> (as of 13.03.2015).

¹²² HCHR report A/HRC/18/53 on Syria. *Op. cit.* note 60, at 4, para. 9.

¹²³ Zeid condemns persistent disinformation designed to discredit UN investigation on Sri Lanka. ... available at: <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15263&LangID=E#sthash.S9RYpj5K.dpuf>> (as of 15.04.2015).

to the country remains the desired case and it is reiterated in multiple fora by the HRC, the OHCHR and the civil society¹²⁴.

Also, reasons behind state action may be difficult to trace, as in some cases states seem to mind the appearance rather than the substance of investigations. For example, the government of Sri Lanka did not cooperate with the ongoing investigation mandated by the HRC. At the same time, it voluntarily hosted the visit of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, mandated to deal with topics similar to the HRC investigation, giving rise to possibly similar observations¹²⁵.

With reference to the cooperative nature of the HRC pursuant to its mandate to work on principles of constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights¹²⁶, fact-finding against the will of a country could be called counterproductive, e.g if there are recommendations which the state does not accept. This would cause further discreditation of the CoI and lead to ineffectiveness. On the other hand, a CoI with full consent of every state would prove flawed thinking, as it would neutralise the activities of the HRC.

2.3.2 Linkages with simultaneous accountability efforts

In relation to its fact-finding work the HRC should to bear in mind other relevant fact-finding efforts, including those undertaken by the States concerned, and in the framework of regional arrangements or agencies¹²⁷.

There are many instances where the HRC mandates investigations while other UN or non-UN efforts are underway. Not to be considered an obstacle *per se* in every situation, linkages with other accountability efforts may render the work of the investigations less meaningful.

¹²⁴ E.g in the case of Syria, the High Commissioner for Human Rights called in her first report on Syria to allow OHCHR immediate access to conduct investigations into all human rights abuses. It also recommended the HRC to urge Syria to do allow access. HCHR report A/HRC/18/53 on Syria. *Op. cit.* note 60, at 25, paras 93 (g), 94 (b).

¹²⁵ See: Observations by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Mr. Pablo de Greiff, on the conclusion of his recent visit to Sri Lanka. Geneva/Colombo, 11 April 2015. ... available at:

<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15820&LangID=E#sthash.He9qOCRs.dpuf>> (as of 17.04.2015).

¹²⁶ UNGA resolution 60/251 establishing the HRC. *Op. cit.* note 13, OP 4.

¹²⁷ UN fact-finding declaration. *Op. cit.* note 6, OP 16. On co-existence of fact-finding procedures, see: Ramcharan 2014. *Op. cit.* note 1, at 31-4.

As observed already above, the HRC has ordered investigations in relation to the activities of Israel several times. In 2009 it dispatched an FFM with a very wide mandate to investigate violations of international human rights law and international humanitarian law by Israel throughout the OPT, and particularly in Gaza¹²⁸. In April 2010 it established a follow-up committee of independent experts to the above-mentioned FFM report¹²⁹, and in October 2010 renewed the committee of experts¹³⁰. The first time around the independent experts were mandated, in light of an UNGA resolution, to monitor and assess domestic proceedings of both Israel and Palestine to investigate violations of international humanitarian and international human rights law reported by the FFM.¹³¹ There was opposition to the mandate indicating that it duplicated efforts, as the UNGA resolution had already requested the Secretary-General to report on the implementation of the resolution calling for investigations from both sides. As that report was pending, it would have been contradictory to take further monitoring action on domestic investigations.¹³² More rigidly put, international oversight of domestic legal processes cannot be supported when there is no indication that they would not deal with alleged abuses¹³³.

In the case of Darfur, the Secretary-General set up a CoI on Darfur in 2004 to „investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties“, to determine „whether or not acts of genocide have occurred“, and to „identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable“¹³⁴. In its report in January 2005 the five-member CoI, headed by Antonio Cassese, recommended that the Security Council refer the situation in Darfur to the ICC¹³⁵, and also recommended the then Commission on Human Rights to re-establish the special procedures mandate-holder on human rights in Sudan¹³⁶. However, the HRC decided to dispatch a High-Level Mission to assess the human rights situation in Darfur in December 2006, while the case

¹²⁸ HRC Special session resolution S-9/1 on OPT. *Op. cit.* note 71, OP 14.

¹²⁹ HRC resolution 13/9 on Gaza. *Op. cit.* note 73, OP 9.

¹³⁰ HRC resolution 15/6 on Gaza. *Op. cit.* note 73, OP 8.

¹³¹ HRC resolution 13/9 on Gaza. *Op. cit.* note 73, OP 9.

¹³² Norway's explanation of vote on Human Rights Council resolution 13/9. Available at:

<<http://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/13thSession/DraftResolutions/AHRC13L.30/L30%20Norway.pdf>> (as of 11.04.2015).

¹³³ US explanation of vote on Human Rights Council resolution 13/9. Available at:

<<http://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/13thSession/DraftResolutions/AHRC13L.30/L30%20USA.pdf>> (as of 11.04.2015).

¹³⁴ United Nations Security Council Resolution 1564 (2004), adopted on 18 September 2004, OP 12.

¹³⁵ 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. Geneva, 25 January 2005, at 174, para. 647.

¹³⁶ *Id.*, at 176, para. 652. There is a HRC mandated Independent Expert on Sudan, established in 1993. See: <<http://www.ohchr.org/EN/HRBodies/SP/CountriesMandates/SD/Pages/IESudan.aspx>> (as of 13.04.2015).

had already been referred to the ICC by the Security Council in March 2005¹³⁷. Furthermore, while the commission focused on incidents that had occurred from February 2003 and mid-January 2005¹³⁸, the ICC has more extensive jurisdiction over situation in Darfur, i.e. as of 1 June 2002¹³⁹.

In the light of the above, it may be noted that communication and coordination with tribunals or accountability mechanisms of other states are rarely explicitly present in mandates. As a positive exception, in 2012 the HRC requested the CoI on Syria to gather information about an incident in May 2012, and „preserve the evidence of crimes for possible future criminal prosecutions or a future justice process“¹⁴⁰.

It is still apparent that the HRC investigations „compete“ with other, mainly UN, endeavours with regard to human rights, humanitarian and criminal law. For example, the most recent investigation initiated by the HRC, on Boko Haram¹⁴¹ might duplicate the investigation already underway in the ICC, where the Office has already determined that there is a reasonable basis to believe that crimes against humanity have been committed in Nigeria, namely acts of murder and persecution attributed to Boko Haram. The Office currently looks into the admissibility of the case by assessing whether the national authorities have been conducting genuine proceedings in relation to those bearing the greatest responsibility for the crimes¹⁴². Although the scope of the HRC-mandated investigation covers countries affected by Boko Haram’s acts, i.e. also Chad, Cameroon, Niger and Chad, Nigeria remains the most affected. In case no value is added by the HRC investigation to the comprehensive investigation by the ICC underway, this could sign opposing the ICC investigation. Moreover, as opposed to resolutions where the HRC has called upon ICC referral, and action the resolution on Boko Haram dismisses the ICC phase and instead calls upon the affected states to try the perpetrators of the crimes committed by Boko Haram in their competent courts to ensure accountability¹⁴³, i.e. the very fact that the subsidiary ICC mechanism is already looking into.

¹³⁷ Security Council resolution 1593 (2005) of 31 March 2005, OP 1.

¹³⁸ Report of the International CoI on Darfur. *Op. cit.* note 135, at 2.

¹³⁹ Security Council resolution 1593 (2005) of 31 March 2005. *Op. cit.* note 137, OP 1.

¹⁴⁰ UN Human Rights Council Special session resolution S-19/1. The deteriorating situation of human rights in the Syrian Arab Republic, and the recent killings in El-Houleh. 1 June 2012, OP 8.

¹⁴¹ HRC Special session draft resolution S-23/L.1 on Boko Haram. *Op. cit.* note 80.

¹⁴² Information on the investigation of Nigeria available at: <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/nigeria/Pages/nigeria.aspx> (as of 15.04.2015).

¹⁴³ HRC Special session draft resolution S-23/L.1 on Boko Haram. *Op. cit.* note 80, OP 7.

The possible substantial overlap of mandates of the investigative body and special procedures needs closer attention as the entities usually perform different tasks. Although the special procedures are able to perform on-site visits, their code of conduct foresees consent or invitation applied to the conduct of a field visit and is, in general, more cooperation-oriented¹⁴⁴. The same applies to OHCHR field offices. Overlap with the work of the special procedures of the HRC may still happen, as they are in place for many of the situations where HRC has mandated *ad hoc* investigations such as Eritrea, the DPRK, Sudan and the OPT. However, in the cases of Central African Republic, Cote d'Ivoire and Syria, the special procedures mandate-holder has not preceded, but followed the investigation¹⁴⁵. Regarding thematic rapporteurs, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence is also active on countries that have been subjected to the scrutiny of HRC investigations.

In the next section I will go beyond the investigations phase and examine what the HRC has done to try to enhance implementation of the investigation reports concerning promotion of accountability.

2.4 Follow-up to the investigative reports

In the 16th century, father Bartolomé de Las Casas conducted field research on crimes committed by Spanish conquerors against the American population. His call, at the end of his reports, to the congregation of the faithful to stop the crimes may be considered a precedent for the appeals to the international community that are the implication of the human rights reports today.¹⁴⁶

2.4.1 Attributes of follow-up

According to a positive description by the OHCHR, investigative bodies have proven to be valuable in countering impunity by promoting accountability for violations. They gather and verify information, create an historical record of events, and provide a basis for further investigations. They also recommend measures to redress violations, provide justice and

¹⁴⁴ Code of Code of Conduct for the Special Procedures. *Op. cit.* note 23, Article 11.

¹⁴⁵ The list of current country mandate-holders is available at:
<<http://www.ohchr.org/EN/HRBodies/SP/Pages/Countries.aspx>> (as of: 16.04.2015).

¹⁴⁶ Bartolome de las Casas, *Brevissima Relacion de la Destruycion de las Indias*. Seville: 1552. Cited in: Aranburu, Xabier Agirre. *Methodology for the criminal investigation of international crimes*. In: A. Smeulers, ed., *Collective Violence and International Criminal Justice. An Interdisciplinary Approach*. Antwerpen: Intersentia, 2010, at 354.

reparation to victims, and hold perpetrators to account¹⁴⁷.

According to both of the final documents of the Hague Conferences on dispute settlement, the report of the commission in no way had the character of an award, leaving to the parties entire freedom as to the effect to be given to the statement¹⁴⁸. While the 1899 convention foresees the report of the commission to be submitted to the conflicting parties, leaving its fate to the parties involved¹⁴⁹, the 1907 convention has ventured to have the report read at a public sitting, at the attendance of the agents and counsel of the parties¹⁵⁰. Regardless of this, nothing reminiscent of a follow-up or an appeal is envisaged in these instruments. The report has no legally binding nature on the parties.

In case of alleged violations, post-investigation and pre-accountability is the space that should be invaded by all possible follow-up. In a similar context, the term „utilisation of reports“ can be used.

According to the manual of operations of the HRC special procedures, follow-up to country visits may take the form of either: 1) formulating their recommendations in ways that facilitate implementation and monitoring; 2) undertaking follow-up initiatives through communications and further visits; and 3) cooperating with relevant partners¹⁵¹. It is, however, argued that instead of facilitation of implementation, for HRC investigations formulation of recommendations should first be guided by the necessity to make them. Further visits by the investigative body depend on the HRC. The missions are usually dispatched once. Certain missions, such as on Syria and the OPT, are often basically renewed. Cooperation with relevant partners could mean inter-UN cooperation and referral, which is the main fate of the HRC investigation reports.

As a possibility, the OHCHR could perform follow-up, to see over the implementation of recommendations. The OHCHR is independent from the HRC and states and could be especially useful when it has a country office in the particular country.

With regard to recommendations, according to the OHCHR, they should be specific, measurable, attainable, realistic, and time-bound (=S.M.A.R.T.)¹⁵². This approach implies that recommendations hold different degrees as to the possibility of their implementation.

¹⁴⁷ OHCHR guide. *Op. cit.* note 37, at V.

¹⁴⁸ 1899 Hague I Convention, Article 14; 1907 Hague I Convention, Article 35. *Op. cit.* note 21.

¹⁴⁹ 1899 Hague I Convention. *Op. cit.* note 21, Article 13.

¹⁵⁰ 1907 Hague I Convention. *Op. cit.* note 21, Article 34.

¹⁵¹ OHCHR. Manual of Operations of the Special Procedures of the Human Rights Council. August 2008. ... available at: <http://www.ohchr.org/Documents/HRBodies/SP/Manual_Operations2008.pdf> (as of 15.04.2015), at 25, para. 97.

¹⁵² *Id.*, at 26.

Alston has further noted a „major broadening of remedial and institutional options in terms of the outcomes of human rights fact-finding – the whole spectrum, from avoidance of criminal responsibility issues all the way to the detailed naming and strong recommendations for criminal prosecutions with the crimes being specified“¹⁵³.

I will next seek to find out how the HRC has given use to the recommendations.

2.4.2 Follow-up by the HRC

It is possible to examine that, so far, no actual follow-up has been conducted in the case of Libya. In the last resolution on Libya’s CoI, established in 2011, the HRC takes note of the second and final report of the CoI, and encourages the transitional Government of Libya to implement the recommendations addressed to it¹⁵⁴. At the same time, in its final report, the CoI on Libya has presented many recommendations to the Government of Libya¹⁵⁵, which were not addressed in the follow-up resolution. Starting another round in the investigations circle, during the HRC March session of 2015, the HRC dispatched a new mission on Libya to investigate violations and abuses of international human rights law that have been committed in Libya since the beginning of 2014, and to establish their facts and circumstances with a view to ensuring full accountability¹⁵⁶.

In the report of the CoI on Israel’s attacks in Lebanon the CoI made a very general recommendation that „the HRC should establish a follow-up procedure to monitor the human rights situation in Lebanon, taking into account the conclusions and recommendations of the report“¹⁵⁷. Actual follow-up was requested by the HRC from the OHCHR who was to coordinate the implementation of the recommendations of the respective CoI. After an initial report to the HRC at a further session the OHCHR presented a rather comprehensive report on the follow-up activities as per recommended by the CoI¹⁵⁸. The activities ranging from humanitarian aid and reconstruction to weapons and vulnerable groups were sought to integrate

¹⁵³ Alston. University of Oslo. *Op. cit.* note 105.

¹⁵⁴ UN Human Rights Council resolution 19/39. Assistance for Libya in the field of human rights. 19 April 2012.

¹⁵⁵ Report of the International Commission of Inquiry on Libya, pursuant to HRC resolution S-15/1. 28 January 2014.

¹⁵⁶ UN Human Rights Council resolution 28/L.7/Rev.1. Technical assistance and capacity-building to improve human rights in Libya. 25 March 2015, OP 18.

¹⁵⁷ CoI on Lebanon report A/HRC/3/2. *Op. cit.* note 87, at 77, para. 349 (i).

¹⁵⁸ Report A/HRC/5/9 of the United Nations High Commissioner for Human Rights on the follow-up to the report of the Commission of Inquiry on Lebanon. 4 June 2007.

human rights in the recovery process. Thus, for Lebanon, there was HRC follow-up and seeming relief from the investigation.

However, attempts to follow-up on investigations on Gaza have yielded no significant results. The HRC continued to address Israel's actions in the 2009 FFM with a very wide mandate to investigate violations of international human rights law and international humanitarian law by Israel particularly in Gaza¹⁵⁹, producing the „Goldstone report“¹⁶⁰. The resolution 13/9 holds many follow-up paragraphs, including requesting the Secretary-General present a comprehensive report on the progress made in the implementation of the recommendations of the Goldstone Fact-Finding Mission by all concerned parties, including United Nations bodies¹⁶¹. The report of the Secretary-General was indeed comprehensive, including revealing the fact that the HRC had transmitted the report of the mission to the Prosecutor of the ICC, but had failed to forward the report to the Security Council under Article 99 of the Charter¹⁶². The Security Council had failed to require Israel to take steps to launch appropriate investigations into violations. There were no significant effects of the follow-up.

Among other endeavours, the HRC has establishing a follow-up committee of independent experts to the Goldstone report¹⁶³ in April 2010, and in October 2010 renewing the committee of experts¹⁶⁴. After further investigations on the Israeli attacks on the flotilla of ships carrying humanitarian assistance to Gaza¹⁶⁵ in 2010 and in the OPT in 2012¹⁶⁶, yet again in July 2014, including while being concerned at the lack of implementation of the recommendations contained in the report of the FFM of 2009, the HRC dispatched a CoI to investigate violations of international humanitarian law and international human rights law in Gaza in the context of the military operations conducted since 13 June 2014.

The investigations of Israel's activities are not accompanied by effectuation of the former's recommendations, and build up on overlapping recommendations addressing violations. Descriptive of the situation, in the second report of the Beit Hanoun investigation it was noted

¹⁵⁹ HRC Special session resolution S-9/1 on the OPT. *Op. cit.* note 71, OP 14.

¹⁶⁰ HRC report A/HRC/12/48 on Gaza. *Op. cit.* note 72.

¹⁶¹ HRC resolution 13/9 on Gaza. *Op. cit.* note 73, OP 14.

¹⁶² UN Charter. *Op. cit.* note 4, Article 99: The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

¹⁶³ HRC resolution 13/9 on Gaza. *Op. cit.* note 73, OP 9.

¹⁶⁴ HRC resolution 15/6 on Gaza. *Op. cit.* note 73, OP 8.

¹⁶⁵ HRC resolution 14/1 on Israel. *Op. cit.* note 74, OP 8.

¹⁶⁶ HRC resolution 19/17 on Israeli settlements in the OPT. *Op. cit.* note 73, OP 9.

that „one victim of the Beit Hanoun shelling was the rule of law. There has been no accountability for an act that killed 19 people and injured many more“.¹⁶⁷

In another case, the investigation of alleged violations and abuses of international human rights law committed by ISIL and associated terrorist groups in Iraq, mandated by the HRC at a special session in September 2014 saw basically no follow-up. The OHCHR presented its report in March 2015 session and the HRC adopted a brief resolution taking note of the report and asking the HCHR to provide technical assistance to Iraq and report on it¹⁶⁸. At the same time the OHCHR had expanded the scope of the mandate given by the HRC and foreseen possible violation of international law in addition to individual responsibility also the state responsibility to be borne by Iraq as the main guarantor of protection of human rights on its territory.¹⁶⁹ The OHCHR made many specific recommendations to Iraq, including acceding to the Rome Statute etc. Possibly the issue was with the unfortunate late submission of the report and some additional follow-up will follow in the future. Thus far accountability has not been reached through effectuation of the OHCHR report.

Latest, as the recommendations over the years of the CoI on Syria for the situation to be referred to the ICC by the Security Council, and not seeing any movement in the realisation of this recommendation, the CoI has now turned to other possibilities in search for justice, specifically third country criminal proceedings¹⁷⁰.

The most extensive and comprehensive set of recommendations for achieving accountability may be found in the report of the CoI on DPRK¹⁷¹. In addition to recommendations to DPRK, its neighbouring states and the UN organs, it specified a recommendation to the HCHR with support from HRC and UNGA to establish a structure to help ensure accountability for human rights violations in the DPRK, which „should build on the collection of evidence and documentation work of the commission, and further expand its database“¹⁷². Furthermore, the work of such a structure should „facilitate United Nations efforts to prosecute, or otherwise

¹⁶⁷ Report A/HRC/9/26 of the HL-FFM to Beit Hanoun. *Op. cit.* note 96, at 22, para. 76.

¹⁶⁸ UN Human Rights Council resolution 28/32. Technical assistance and capacity-building in strengthening human rights in Iraq in the light of the abuses committed by Daesh and associated terrorist groups. 24 March 2015, PP 4, OP 4.

¹⁶⁹ Report A/HRC/28/18 of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups. 27 March 2015, paras. 72-75.

¹⁷⁰ Report A/HRC/28/69 of the Independent International Commission of Inquiry on the Syrian Arab Republic. 5 February 2015, paras 102-108.

¹⁷¹ Report A/HRC/25/63 of the commission of inquiry on human rights in the Democratic People's Republic of Korea. 7 February 2014.

¹⁷² *Id.*, para. 94(c) at 20.

render accountable, those most responsible for crimes against humanity¹⁷³. The recommendation on the field-based structure was effectuated by the HRC in its respective resolution¹⁷⁴ and such an office is yet to be established, possibly to be hosted by the Republic of Korea¹⁷⁵. The CoI report was lately discussed at the Security Council, albeit without concrete commitments¹⁷⁶. While the HRC showed some fatigue and avoided pressing explicitly on ICC issues during its past session, it agreed to hold a panel discussion on the DPRK in September 2015¹⁷⁷.

The usual practice of the HRC in follow-up that can be deduced upon examination of the cases is to for it to task the follow-up activity with the HCHR or the Secretary-General, expect a report on follow-up activities, possibly discuss it in the HRC session and include in another resolution. As an alternative, no follow-up is mentioned in the respective resolution after receiving a report, or some paragraphs are picked out from the report and inserted to the resolution.

Although UNGA „may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations“¹⁷⁸, it rarely follows up on HRC resolutions.

A 2011 review concluded that the HRC’s political response to possible forms of justice in situations of gross, systematic human rights violations has been „selective and lacks follow-through“. Further, implementation of recommendations by human rights mechanisms on accountability for violations is rarely monitored, negatively impacting HRC’s credibility¹⁷⁹. This lack of action has been attributed to lack of political will¹⁸⁰.

Taking no action defies the purpose of investigations in most cases. Indeed, a connection exists between the HRC mandate, its interpretation and the actual work of the investigators. One might

¹⁷³ *Ibid.*

¹⁷⁴ UN Human Rights Council resolution 25/25. Situation of human rights in the Democratic People’s Republic of Korea. 9 April 2014, OP 10.

¹⁷⁵ OHCHR. Press briefing notes on DPRK and US Supreme Court ruling on death penalty. 30 May 2014. ... available at:

<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14653&>> (as of 10.04.2015).

¹⁷⁶ UN Security Council Meeting Record S/PV.7353. 7353rd meeting on 22 December 2014, 3 p.m. New York. Agenda: The situation in the Democratic People’s Republic of Korea.

¹⁷⁷ UN Human Rights Council resolution 28/22. Situation of human rights in the Democratic People’s Republic of Korea. 25 March 2015, OP 11.

¹⁷⁸ UN Charter. *Op. cit* note 4, Article 14.

¹⁷⁹ International Center for Transitional Justice. Transitional Justice in the Human Rights Council. International Policy Relations. June 2011. ... available at: <<https://www.ictj.org/sites/default/files/ICTJ-Global-TJ-In-HRC-2011-English.pdf>> (as of 15.04.2015), at 1.

¹⁸⁰ *Id.*, at 4.

hope that the quality of the work of the investigators would facilitate its follow-up by the HRC. However, so far, no noticeable pattern for follow-up by the HRC has emerged.

In connection with HRC special procedures fact-finding, Philip Alston has noted one of the evident purposes of the reports, which is oftentimes „designed to mobilize pressure from peers or other stakeholders, with a view to inducing compliance by the state concerned“¹⁸¹.

2.4.3 Follow-up by the ICC

Prior to the 1990s, the UN responses to fact-finding had been mostly political - urging governments to take positive action. However, since then, the reports of investigations have increasingly led to responses of a more criminal nature.¹⁸²

The UN Security Council has been authorised under Chapter VII of the UN Charter to refer cases to the Office of the Prosecutor of the ICC upon the creation of the Court.¹⁸³ At present, there are no obstructions to use the results of fact-finding for such referrals.

Nevertheless, so far, follow-up to an HRC investigation by way of a referral to the ICC has remained a recommendation „on paper“. In the case of fact-finding on violations in Gaza, the HRC did forward the report of the mission to the Office of the Prosecutor of the ICC, although without results¹⁸⁴, even though referrals to the ICC have been recommended by investigations several times¹⁸⁵.

Lately, most notably Judge Michael Kirby who served as Head of the CoI on DPRK has become an outspoken advocate for using the findings of the investigation in future accountability efforts.¹⁸⁶ While the DPRK CoI report has circulated in the UN system since its publication in March 2014, in late 2014 there was an exceptional case where, for the first time, the UNGA submitted a HRC CoI report on DPRK to the Security Council, and among other measures, encouraged the latter to take appropriate action to ensure accountability, including considering

¹⁸¹ Alston. *Hobbling the Monitors*. *Op. cit.* note 114, at 573.

¹⁸² Talsma. *Op. cit.* note 63, at 385.

¹⁸³ Rome Statute of the International Criminal Court, July 17, 1998. 2187 U.N.T.S. 90, Article 13(b).

¹⁸⁴ The Office of the Prosecutor of the ICC has, since then, on 16 January 2015, opened a preliminary examination into the situation in Palestine. See: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx (as of 13.05.2015).

¹⁸⁵ Most prominently in the cases of Syria and DPRK.

¹⁸⁶ For his account on these efforts, see: Michael Kirby. *Human Rights and media: the experience of the Commission of Inquiry on North Korea*. *Denning Law Journal*. 2014, Vol. 26, p1-18.

the referral of the situation in the DPRK to the ICC¹⁸⁷. Although in reality the CoI report had already been communicated to the Security Council by some member states in spring 2014¹⁸⁸, the UNGA submission needs an official Security Council consideration, yet to take place.

While the CoI on Syria, perhaps as a sign of fatigue, called for referral of the case by the Security Council „to justice“, mentioning an ad hoc criminal tribunal as an alternative to the ICC¹⁸⁹, the HRC opted to still emphasise the important role of the ICC, but left the appropriate action open to the Security Council¹⁹⁰.

In several further cases the HRC investigation reports have made allegations of violations of the Rome Statute, either in stronger or weaker language. For example, in conditions where it seems that definite proof was lacking the second report on Beit Hanoun concluded that „in the absence of a well-founded explanation from the Israeli military (who is in sole possession of the relevant facts), the mission must conclude that there is a possibility that the shelling of Beit Hanoun constituted a war crime as defined in the Rome Statute of the International Criminal Court“¹⁹¹.

In terms of follow-up on accountability, notwithstanding not addressing it at all, the HRC has sometimes failed to directly tackle the investigation’s call for accountability. For example, in the interim report on the CAR, the sole recommendation of the HCHR to the HRC was to appoint a special procedure on the situation of CAR „to ensure accountability for serious crimes, by means of referral to justice, possibly to the International Criminal Court“¹⁹². The HRC did respond by appointing an independent expert on CAR¹⁹³, however, with a mandate differing from the one envisaged by the HRCR. Namely, while the HRC „took note with appreciation“ of the interim report of the HCHR¹⁹⁴ - the latter two words implying less contradictions between states as to the substance of the report, and also called on authorities to take steps to ensure there be no impunity for perpetrators of crimes¹⁹⁵, it appointed the

¹⁸⁷ UN General Assembly resolution 69/188. Situation of human rights in the Democratic People’s Republic of Korea. 21 January 2015, OP 8.

¹⁸⁸ See: UN Security Council. Letter S/2014/276 dated 14 April 2014 from the Permanent Representatives of Australia, France and the United States of America to the United Nations addressed to the President of the Security Council. 14 April 2014.

¹⁸⁹ Report A/HRC/28/69 of the CoI on Syria. *Op. cit.* note 170, para 145 (b).

¹⁹⁰ UN Human Rights Council resolution 28/20. The continuing grave deterioration in the human rights and humanitarian situation in the Syrian Arab Republic. 23 March 2015, OPs 18 and 25.

¹⁹¹ Report A/HRC/9/26 of the HL-FFM to Beit Hanoun. *Op. cit.* note 96, at 21, para. 75.

¹⁹² HCHR report A/HRC/24/59 on CAR. *Op. cit.* note 83, at 19, para. 96.

¹⁹³ UN Human Rights Council resolution 24/34. Technical assistance to the Central African Republic in the field of human rights. 9 October 2013.

¹⁹⁴ *Id.*, PP 2.

¹⁹⁵ *Id.*, OP 11.

independent expert to monitor the human rights situation in CAR, and to make recommendations merely concerning technical assistance and capacity-building in the field of human rights¹⁹⁶.

While also mentioning obligations deriving from the Rome Statute and the actions of the ICC with regard to the case of CAR, in its resolution the Security Council expressed support to the work of the independent expert in the context of the need to bolster national, not international accountability mechanisms.¹⁹⁷ At the same time, in her statement on the deteriorating situation in the CAR, the prosecutor of the ICC referred to the findings of the OHCHR mission to the CAR, which seemed „to confirm that crimes that may fall under the jurisdiction of the International Criminal Court continue to be committed in CAR, /.../“¹⁹⁸. In further action to investigate the situation in CAR, besides an OHCHR investigation, initiated by the HRC in June 2013, reporting back to the HRC in September 2013 and March 2014, the Security Council requested the Secretary-General to launch its own commission of inquiry on CAR in December 2013¹⁹⁹. Without explicitly referring to either investigation, in February 2014, the prosecutor of the ICC decided to open a preliminary examination on the situation in the CAR since September 2012²⁰⁰.

It is, thus, possible that the factual information gathered by the investigation serves as the basis for subsequent proceedings, including criminal prosecutions of individuals. However, notwithstanding the role of the HRC to follow up on cases where it has ordered an investigation, it is not always possible to establish whether any future investigation or tribunal has been effectuated due to or with the influence of an HRC investigation and HRC action on it.

¹⁹⁶ *Id.*, OP 13.

¹⁹⁷ UN Security Council Resolution Resolution 2149 (2014) of 10 April 2014, PP 11.

¹⁹⁸ ICC. Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, in relation to situation in Central African Republic. 07.08.2013. ... available at: <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-07-08-2013.aspx> (as of 18.04.2015).

¹⁹⁹ UN Security Council Resolution 2127 (2013) of 5 December 2013, OP 24.

²⁰⁰ ICC. Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a new Preliminary Examination in Central African Republic. 07.02.2014. ... available at: <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-07-02-2014.aspx> (as of 17.04.2015). Further, in May 2014 the transitional government of the CAR itself referred the situation on the territory of the CAR since August 2012 to the Prosecutor of the ICC. In September 2014, the prosecutor indicated that she would proceed with the investigation: ICC. Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic. 24.09.2014. ... available at: <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/Statement-open-CARII.aspx> (as of 18.04.2015).

2.4.4 Follow-up by states

There is little expectation to see action by states on recommendations by HRC investigations, least in cases where these had not been supported by the state under investigation. Further, as Alston has marked, it is not possible to establish a causal link between the actions of the state and the work of investigators „even when human rights improvements on the ground can be shown“²⁰¹. In instances, governments would acknowledge such a link, but mostly convey that changes were „internally driven and unrelated to external pressures.“²⁰²

In the 2010 HCHR report on Honduras, commissioned by the HRC in 2009 following a coup d'état, more general recommendations were issued to the authorities on the improvement of the human rights situation and addressing structural problems²⁰³. The same year the government requested closer engagement with the OHCHR and in 2010 a senior Human Rights Adviser was deployed to Honduras, assisting the government with issues covered in the recommendations²⁰⁴. Although this development is not directly attributable to the investigation, its positive influence may not be ruled out.

In some further cases special domestic accountability mechanisms have been established to address violations that have been investigated by international missions. According to the UN declaration, the sending of a UN fact-finding mission is without prejudice to the use by the states of inquiry or any similar procedure or of any means of peaceful settlement of disputes agreed by them²⁰⁵. Today, this would apply also to non-international conflicts where simultaneous international and domestic investigations are commonplace.

For example, at the initial request by Cambodian authorities a Group of Experts was appointed by the Secretary-General of the United Nations to investigate how to best respond to past serious violations in Cambodia. The experts recommended to the UN to establish an ad hoc international tribunal to try Khmer Rouge officials for crimes²⁰⁶. However, after five years of negotiations, the UN reached an agreement with the Cambodian government to establish a hybrid tribunal, the Extraordinary Chambers in the Courts of Cambodia, consisting of both

²⁰¹ Alston. *Hobbling the Monitors*. *Op. cit.* note 114, at 574.

²⁰² *Ibid.*

²⁰³ Report A/HRC/13/66 of the United Nations High Commissioner for Human Rights on the violations of human rights in Honduras since the coup d'état on 28 June 2009. 3 March 2010, at 18, paras 84-85.

²⁰⁴ Human Rights Adviser in Honduras. See:

<<http://www.ohchr.org/EN/Countries/LACRegion/Pages/HNHRAdviser.aspx>> (as of 13.04.2015).

²⁰⁵ UN fact-finding declaration. *Op. cit.* note 6, Article 30.

²⁰⁶ Annex. Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, at 57, para. 219. In: Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council. A/53/850. S/1999/231. 16 March 1999.

Cambodian and international judges²⁰⁷. However, no such investigations have directly followed from HRC investigations.

In the case of the DPRK, no action by the country in terms of recommendations by the CoI on the DPRK has been noticed, as the country has rejected all allegations in the report of the investigation²⁰⁸. Nevertheless, in October 2014 the DPRK had its very first meeting with the Special Rapporteur on the situation of human rights in the DPRK, a special procedure established in 2004. The current mandate-holder was also one of the three members of the DPRK CoI. The DPRK also invited the special rapporteur to undertake a visit to the DPRK on „condition that two operative paragraphs -on accountability of the Supreme Leader and possible referral to the International Criminal Court- contained in the draft EU-led resolution on the situation of human rights situation in DPRK be removed“²⁰⁹. Thus, as of yet no shift in opinion on issues of accountability may be traced.

2.4.5 Prosecutions by third states

With regard to reports being used in domestic investigations, according to an investigative practitioner police, prosecutors and judges rarely use fact-finding reports as key evidence in international criminal proceedings. Nevertheless, they may be useful sources, and often a starting point, in international criminal investigation²¹⁰.

Furthermore, although recommendations are made to states to investigate violations and abuses through their respective adjudication mechanisms, recommendations have also been made now by the HRC investigations to third states to prosecute the perpetrators of crimes.

This mechanism is different from the situation of foreign fighters, where domestic investigations of states have been triggered vis-à-vis their citizens. In such a case the CoI on

²⁰⁷ See more on the Extraordinary Chambers in the Courts of Cambodia at: <<http://www.eccc.gov.kh/en>> (as of 15.04.2015).

²⁰⁸For example, see: UN Radio. North Korea rejects report on human rights violations. 17 March 2014. ... available at: <<http://www.unmultimedia.org/radio/english/2014/03/north-korea-rejects-report-on-human-rights-violations-in-the-country>> (as of 9.04.2015).

²⁰⁹ Statement by the United Nations Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea at the end of his visit to the Republic of Korea from 10 to 14 November 2014. 14 November 2014. ... available at:

<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15293&LangID=E>> (as of 9.04.2015).

²¹⁰ Zimmer, Per J. Fact-finding on gross violations of human rights during and after conflicts. University of Oslo. The Use of Information Collected by Fact-Finders in National Criminal Proceedings. 17.11.2011 ... available at: <<http://www.jus.uio.no/smr/english/research/areas/conflict/events/conferences/fact-finding/zimmer.html>> (as of 17.04.2015).

Syria confessed to have shared information, upon consent of the source, with justice systems of states that were willing to exercise their national jurisdiction over crimes committed in Syria²¹¹.

In this case, as discussed above under subsection 3.4.2, in its latest report the CoI on Syria turned to possibilities to achieve justice other than through referral to the ICC which is in an unyielding position in the Security Council. In its report the CoI on Syria recommended to the international community to investigate and prosecute persons and groups implicated in violations under their national law according to the principle of universal jurisdiction²¹². It further noted that some states had already indicated willingness to apply universal jurisdiction in order to pursue criminal investigations against alleged perpetrators. The CoI asserted that in case a state was to gain custody over such a person, and their courts met international fair trial standards, the CoI would „be willing to share its information upon request²¹³. A previous similar recommendation concerning enforcing universal jurisdiction has been made by the Secretary-General’s CoI on Darfur²¹⁴.

²¹¹ Report A/HRC/28/69 of the CoI on Syria. *Op. cit.* note 170, at 18, para. 106.

²¹² *Id.*, para 145 (a).

²¹³ *Id.*, at 18, para. 107.

²¹⁴ Report of the International CoI on Darfur. *Op. cit.* note 135, at 176, para. 651.

3 The role of the Human Rights Council investigations

While the previous chapter revealed many important insights into the expectations of the HRC in assigning investigations, the activities of the mandate-holders during and the activities of the HRC after the investigations, it also raised further questions as to the role of the investigations. This chapter seeks to analyse the aspects affecting the possible role of the investigations in international law at the backdrop of the evolving legal framework on accountability.

3.1 Constraints of the United Nations

The lack of legal framework for the fact-finding investigations discovered in the first chapter proved to significantly affect the work of the investigations, as analysed in the second chapter. It also became clear that the follow-up to the work of the investigations was affected not only by the immediate actions taken by the HRC as the mandating body, but also by the other UN organs. A further analysis is warranted on the aspects that impact the way that the investigations are able to promote accountability. First, I look into the criticism that the investigations are facing when conducting their daily activities under the HRC mandates.

3.1.1 Vulnerabilities of the Human Rights Council investigative bodies

In principle, country investigations should „strive for independence, show restraint, moderation and discretion so as not to undermine the recognition of the independent nature of their mandate or the environment necessary to properly discharge the said mandate“²¹⁵. These are conditions not only of internal credibility but also of the externalisation of trust that has not always been present in the HRC investigations, and that has been scrutinised by the unassured international audiences.

It is possible to notice that the attacks on investigation reports on accountability, including by states under review, become more robust as the former may now lead to the prosecution of the states' political and military leadership²¹⁶. The existence of the will of the states to engage with the investigations may be further connected to the more judicial character of the investigations that has emerged as witnessed in subsection 2.2.2 of the thesis.

²¹⁵ Code of Conduct for the Special Procedures. *Op. cit.* note 23, Article 12 (b).

²¹⁶ Robertson. *Op. cit.* note 70, at 15.

Criticism of the investigative bodies has been made regarding both, issues of staffing and the conduct of investigations. The principle of ensuring of the impartiality and objectivity of fact-finders applies also on the selection procedure²¹⁷.

As to the composition of the staff, in practice it is the President of the HRC who appoints its members²¹⁸. Although rarely mentioned in the HRC resolution mandating the creation of the investigative body, according to practice the CoI or FFM usually comprises three persons, in reality accompanied by additional OHCHR staff.

Since the beginning of the investigations there have been issues raised as to the process of appointment of members of investigations. Much of the criticism on the composition of investigative bodies includes „ad hominem“ arguments. Perhaps not surprisingly, many of the accusations regarding the bias of HRC investigations originate from Israel who holds distinct status in the HRC as the only country being treated as a separate HRC agenda item. Most recently, the international criminal law specialist, Professor William Schabas resigned from the latest CoI addressing Israel’s actions during its Operation Protective Edge in the summer of 2014. Israel had complained regarding Schabas having delivered a legal opinion to the PLO on international law questions associated with a possible Palestinian application for membership in the ICC two years prior to his appointment. Schabas resigned as the complaint was being sent to the UN Office of Legal Affairs for assessment²¹⁹. Similar allegations of bias had also followed Richard Falk as the Special Rapporteur for the OPT during 2008-2014, in his own words, „defamatory attacks /.../ that avoids the message while mounting a furious attack on the messenger“²²⁰.

As a means to avoid situations of „biased“ members in the investigations, Schabas has proposed to adopt UN guidelines on the criteria for disqualification of members of investigations²²¹. However, the feasibility of compiling an exhaustive list of criteria remains questionable. Nevertheless, it is clear that the fact-finders should have the necessary expertise to fulfil the

²¹⁷ See generally: Ramcharan 2014. *Op. cit.* note 1, 17-25.

²¹⁸ See, e.g HRC Special session resolution S-15/1 on Libya. *Op. cit.* note 59, OP 11.

²¹⁹ See: OHCHR. Press Statement on the resignation of the Chairperson of the Commission of Inquiry on the 2014 Gaza Conflict. Geneva, 3 February 2015. ... available at: <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15535&LangID=E>> (as of 5.04.2015).

²²⁰ Richard A. Falk. Interview with William Schabas, former Chair, UN Commission of Inquiry for 2014 Israeli Attack on Gaza. 16 February 2015. ... available at: <<https://richardfalk.wordpress.com/2015/02/16/interview-with-william-schabas-former-chair-un-commission-of-inquiry-for-2014-israeli-attack-on-gaza/>> (as of 5.04.2015).

²²¹ *Ibid.*

investigation's mandate²²², and that persons conducting investigations should be, and be perceived as, „free of commitment to a preconceived outcome“²²³.

The HRC has also been targeted regarding the credibility of the reports. In an exceptional case discrediting feedback came from a member of an inquiry himself who withdrew his sponsorship of some of the findings of the investigation, while other members stood by the initial report. Namely, two years past the publication of the initial report Richard Goldstone claimed that the report of the CoI on Israel/Gaza that he had chaired would have possibly been different had he known some information previously²²⁴. He went on to assert that the „allegations of intentionality by Israel were based on the deaths of and injuries to civilians in situations where our fact-finding mission had no evidence on which to draw any other reasonable conclusion.“ Relying on investigations published by Israeli military, which indicated that civilians were not intentionally targeted as a matter of policy, he basically retracted from the findings of the CoI which noted that there had been „a deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population“ by Israel²²⁵.

Criticism of selectivity is often used with regard to activities of the HRC, which may also be called as the „sins of omission“ or „sins of commission“, as described by Chomsky ²²⁶. Regarding the integrity of the conduct of investigations, as with issues on persons, the criticism mostly originates from the countries under investigation. In the case of Sri Lanka, the government accused the conduct of the investigation as being unprofessional and the approach of the investigation selective and biased. The HCHR defended the investigation by reassuring that the UN investigators were trained to spot fraudulent submissions, and that the methodology of the investigation is made public through its terms of reference, being „based on standard methodology /.../ aimed at ensuring the integrity of the process through the application of the principles of independence, impartiality, objectivity and protection of witnesses. ²²⁷” The

²²² Kevin Jon Heller. The International Commission of Inquiry on Libya: A Critical Analysis. In: Jens Meierhenrich (ed.), *International Commissions: The Role of Commissions of Inquiry in the Investigation of International Crimes*, Oxford University Press (2014), at 6.

²²³ Thomas M. Franck, Scott H. Fairley. Procedural Due Process in Human Rights Fact-Finding by International Agencies, 74 *American Journal of International Law*, 308, 1980, at 313.

²²⁴ Goldstone, Richard. Reconsidering the Goldstone Report on Israel and war crimes. *The Washington Post*. 1 April 2011. ... available at: <http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html> (as of 4.04.2015).

²²⁵ HRC report A/HRC/12/48 on Gaza. *Op. cit.* note 72, para. 1893.

²²⁶ Cited in: Alex J. Bellamy. *The Responsibility to Protect*. A Defense. Oxford University Press. 2015, at 134.

²²⁷ OHCHR. Zeid condemns persistent disinformation designed to discredit UN investigation on Sri Lanka. Geneva, 7 November 2014. ... available at: <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15263&LangID=E#sthash.S9RYpj5K.SHSwYTpk.dpuf>> (as of 6.04.2015).

considerations for substantive and methodological integrity have been seen as crucial for fact-finding, at least in literature generally sympathetic to the role of the investigations²²⁸. At the same time, the methodology remains vulnerable to criticism. As seen in the thesis previously, the content of the methodology varies from investigation to investigation. Some voices have been calling for more flexibility on evidentiary criteria for the human rights fact-finders than applicable to international judicial bodies, due to the „different context“ from the former²²⁹. Furthermore, the rather *ad hoc* methodology has been seen as a necessary precondition or „evil“ of flexibility conducive to effective fact-finding²³⁰.

While the discourse of foul conduct by investigations is pervasively used by countries that do not cooperate with the HRC investigations, similar observations also extend to legal scholarship²³¹. Notwithstanding clear cases of misconduct, the bias argument remains a convenient and oft-used stick with which to beat the HRC investigations, a method of defence for states to attack the report rather than accept responsibility²³². To overcome criticism, a „more judicial approach“ for fact-finding has been put forward. A need has been voiced for the „gradual professionalization of fact-finding“, relating to training, methodology and standards²³³. Ramcharan has further suggested that the HRC should have rules on how the investigative bodies are created and how the reports are being handled²³⁴.

Although it is important to separate the credibility of the investigation in a narrow sense from the credibility of the actions of the HRC, the latter inevitably casts a shadow on the former.

Many authors deem the HRC to be a „highly political“ body basically continuing the legacy of the Commission on Human Rights²³⁵. However, this view may be considered over simplistic and not contributing much to the discussion. While the HRC is seen as divided on politically sensitive issues, ongoing tensions have affected the actions of the HRC on certain human rights issues, which Freedman has attributed to the North-South divide, illustrated by regionalism and group tactics²³⁶. She has criticised the HRC Special sessions, during which also many of the

²²⁸ E.g. see: Ramcharan 2014. *Op. cit.* note 1.

²²⁹ *Id.*, at IX.

²³⁰ *Ibid.*

²³¹ See, e.g: Heller. *Op. cit.* note 222; Piergiuseppe Parisi. Finding the crime: The fact-finding mission on the Gaza conflict through the lenses of international criminal justice. Master's thesis. Università Degli Studi di Trento. Anno Accademico 2011/2012.

²³² Ramcharan 2014. *Op. cit.* note 1, at VII.

²³³ Alston, University of Oslo. *Op. cit.* note 105.

²³⁴ Ramcharan, 2011. *Op. cit.* note 36, at 95.

²³⁵ E.g see Posner, Eric. The Twilight of Human Rights Law. Oxford University Press: 2014, at 46.

²³⁶ Rosa Freedman. The United Nations Human Rights Council: A critique and early assessment. Routledge: 2014, at 294.

investigations have been created of the familiar notions of bias and selectivity, concentrating on Israel resulting in less attention being paid to other regional human rights violations and crisis²³⁷.

Freedman, however, found that the HRC has fulfilled its role in relation to fact-finding²³⁸. She saw an obstacle in the possibility of states to block the HRC in fulfilling this function by refusing to cooperate with mandate-holders. This, however, should not be considered an actual hindrance, as was shown in subsection 2.3.1, whereby the investigations are carried on regardless of non-cooperation.

A further point was made, also apparent from the subsections on follow-up above, that without binding powers from the resolution creating the HRC, there is not much more that the HRC may do to implement recommendations other than follow-up and referral of situations to the UNGA or the Security Council, and the use by the HRC of diplomatic pressure, among other means, to discharge its mandate.²³⁹

With this in mind, I will proceed to consider the important aspects related to the effectuation of the investigations throughout the UN system.

3.1.2 An omnipresence at the United Nations

It is clear that the Security Council is the body of the UN able to ensure compliance with human rights obligations. As such, it is the link between HRC and the Security Council which should ensure the adequate use of the recommendations of the investigations. As witnessed in the second chapter of the thesis, practice for such an effective outcome is lacking.

Due to issues connected to the political body of the Security Council with veto powers, it may seem even inevitable that the UN system of follow-up does not produce meaningful outcome to the investigations, at least most of the time.

The Security Council has been shown, at least rhetorically, to consider issues of individual accountability integrally linked with international peace and security. It has also taken increasing steps to uphold individual accountability through the establishment of *ad hoc*

²³⁷ *Id.* at 295.

²³⁸ *Id.* at 298. See also: Rosa Freedman. *New Mechanisms of the UN Human Rights Council*. 29 *Neth. Q. Hum. Rts.* 289 2011, pp 289-322.

²³⁹ Rosa Freedman 2014. *Op. cit.* note 236, at 295.

criminal tribunals, referrals to the ICC, and imposing individual sanctions on perpetrators of human rights violations²⁴⁰. UN investigations have been used by the Security Council since 1993. However, its practice has been found to be ambiguous, as also examined in the previous chapter of the thesis regarding the action of the Security Council in cases referred to it which had been investigated by the HRC mandate, and further found to be even contradictory²⁴¹. Inconsistencies include with regard to referrals to the ICC²⁴², following up on its previous decisions regarding individual accountability, and having a short attention span in such cases in general. As a political body the Security Council has been seen to „opt for ignoring accountability in favour of short-term political conciliation, short-term cessation of violence or cutting back on expenses. Or, it may simply take no action at all /.../.“²⁴³ As such, the Security Council may be considered to approach accountability from the perspective of political interest rather than any principled views²⁴⁴.

3.1.3 The „political“ of human rights

In the light of the above, the question remains, why the HRC is used for investigations purposes, if it seems not to produce desirable results? This topic is linked to larger issues of the capabilities and innate obstacles to the activities of the international organisations, whereby states are generally reluctant to grant autonomy to international organisations with legally binding abilities.

This conundrum has been described with regard to the HRC treaty body reform as a tension between „a superficial commitment by many state-parties to the goal of human rights promotion and a *realpolitik* aversion to actual treaty implementation“²⁴⁵.

The rejection of either the process or the outcome of the investigations attests to issues of state sovereignty and consent to adjudication that is lacking in the HRC process, discussed in

²⁴⁰ For example, on 9 May 2014, the UN Security Council imposed sanctions against three CAR leaders. See: UN Security Council resolution 2134 of 28 January 2014; and targeted sanctions on perpetrators of violations in South Sudan. See: UN Security Council resolution 2206 (2015) of 3 March 2015.

²⁴¹ Security Council Report. The Rule of Law: The Security Council and Accountability. 2013, No. 1. 18 January 2013. ... available at: <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/cross_cutting_report_1_rule_of_law_2013.pdf> (as of 13.04.2015), at 37-38.

²⁴² For example, see: Human Rights Watch. UN Security Council: Address Inconsistency in ICC Referrals. 16 October 2012. ... available at: <<http://www.hrw.org/news/2012/10/16/un-security-council-address-inconsistency-icc-referrals-0>> (as of 14.04.2015).

²⁴³ *Id.* at 38.

²⁴⁴ *Idem.*

²⁴⁵ Yuval Shany. The effectiveness of the Human Rights Committee and the Treaty Body Reform. Hebrew Univ. Fac. Of Law, Int'l Law F., Research Paper No. 02-13, 2013. 20-21. Cited in: Posner. *Op. cit.* note 235, at 43.

subsection 2.3.1, to which some states are having a difficulties adjusting. The discourse of the possible role of the international human rights fact-finding investigations is, thus, connected to a wider discussion of the application of international human rights law.

Indeed, one of the possibilities to look at the seeming hardship to reach decisions on the effectuation of the recommendations of the investigations is illustrated by the discourse of the innate obstructions in the applicability of international human rights law.

In this regard, for example, Posner is pessimistic, arguing that there is little evidence that human rights treaties have improved the well-being of people or resulted in the adherence to the rights enshrined in the UN treaty system and beyond. After examining the compliance of states with human rights law and its influences, he concluded that it does not have much actual impact²⁴⁶.

With this Posner noted one of the very issues that the HRC investigations are struggling with. Namely, the setting up of committees monitoring compliance with human rights which lack an enforcement mechanism, an authority to order states to comply²⁴⁷. One may further argue that similarly to the HRC treaty body reports the investigation reports may be considered a form of soft coercion. According to one view the „so-called „CNN effect“ has never pushed a democratic government to do something it did not want to do"²⁴⁸. Such arguments are not easily dismissed. Even though the examination of the cases of HRC investigations showed some progress in the activities of the ground, the linkage remained inconclusive.

Posner further argues that while states have agreed to enter into human rights treaties, they have been reluctant to submit themselves under the jurisdiction of courts or other legal entities, inevitably leaving the legal institutions of the international fora weaker than in the domestic sphere²⁴⁹. The original task of the human rights treaties having a judicial oversight never realised. As seen in the second chapter of the thesis, the results of the investigations rather tend to be pushed in the direction and towards the discretion of the Security Council.

Thus, Posner sees one of the failures of international human rights law in the lacking of a binding international adjudication mechanism, and the lack of possibilities to bring about change on the domestic level. Again, he argues that the UN human rights bodies, the HRC, OHCHR and treaty bodies interpret human rights but do not possess the power to force implementation. States are further aware of the possibility of these bodies advancing

²⁴⁶ *Id.*, at 7-8.

²⁴⁷ *Id.* at 28.

²⁴⁸ Bellamy. *Op. cit.* note 226, at 53.

²⁴⁹ *Id.* at 40.

interpretations of law that countries do not accept²⁵⁰. The aforementioned would support a somewhat cynical view, according to which the HRC investigations are tolerated as no operational results are expected from them. States remain in control of the mechanism and no „costs“ arise from establishing fact-finding investigations.

Nevertheless, by claiming that the human rights bodies cannot compel states to adopt their interpretations or adhere to them, Posner dismisses the ultimate possibilities of the UN system when it comes to grave violations of human rights, notably by the Security Council. In a way, the mechanism of the HRC investigations has been used, knowingly or unknowingly, to circumvent the „regular“ or „traditional“ unenforceability of human rights, by trying to prove violations, admittedly mostly of the grave kind, and enforce the opinion of the need for accountability via the UN system, notably the Security Council.

In the light of the scepticism of the investigations and the possible inherent impotence of the United Nations system to put into effect the recommendations of the investigations revealed above, the question then arises whether indeed too much is expected from the HRC fact-finding. In the final subsections of the thesis I will look into the possible roles of the investigations to be used to promote accountability, not necessarily only relying on its effectuation by the HRC.

In order to proceed to this an exploration of the evolving framework of international law relating to accountability is needed.

3.2 The evolving framework of international law on accountability

3.2.1 The indispensable sovereign will

According to one possible view the system of state sovereignty has been considerably eroded since the adoption of the Universal Declaration of Human Rights, whereby individuals were confirmed to possess rights under international law and, thus, entitled to legal protection from violations by their governments. Whilst the idea of individual rights did not become a reality until a few decades after the UDHR, this has been referred to as the beginning of the modern era of human rights²⁵¹. However, only much later the ICTY and the ICTR tribunals have revived

²⁵⁰ *Id.* at 46-7.

²⁵¹ Posner. *Op. cit.* note 235, at 16.

the idea of Nuremberg trials of individuals committing international crimes by engaging in human rights violations amounting to the level of atrocity²⁵².

The international community is generally seen as not having had very a good track record of protecting people from mass atrocities, mainly due to the privileging of the rights of states over the rights of people and issues associated with political will²⁵³. Even more so, „none of these obstacles can be wished away“²⁵⁴. Utopian proposals have been made, for example, for an institutional structure to deal with mass atrocities in a context of an intra-state humanitarian crisis in the form of a body of twelve judges elected by the whole of the UN with the capacity to dispatch independent fact-finding missions. Such a body’s findings and the appropriate response, if containing coercive measures, would be envisioned as grounds for individual countries to act, even if the Security Council refused to act²⁵⁵. If not for the certainty that states would never create a body with such powers, the system would still entail political decisions by states to act or refrain from acting in any concrete case.

3.2.2 The principle of responsibility to protect

The principle of the responsibility to protect, the third pillar of which lately emerged in the case of Libya, is linked to the effort to fight impunity and protect populations, including from the actions or omissions by their governments.

As is often the case with the reports by the HRC investigations which show blatant violations of international law, including human rights law, it is rarely felt by states, at least in rhetoric, that there should be no action and no accountability. The principle of R2P may be seen as promoting the legitimisation of the states’ commitment, or desire, to take action in case of violations. Nevertheless, as its third pillar operates through the Security Council, the R2P mechanism in end is still confronted with the previously discussed inconsistency of political will.

Furthermore, although states have been reluctant to enforce the principle of responsibility to protect, Bellamy has argued that the inclusion of the element of the sovereign or political will

²⁵² *Id.* at 23.

²⁵³ Bellamy. *Op. cit.* note 226, at 55.

²⁵⁴ *Id.* at 56.

²⁵⁵ Aidan Hehir. *The Responsibility to Protect: Rhetoric, Reality and the Future of Humanitarian Intervention*. Lodan: Palgrave, 2012, pp. 232-6. Cited in: Bellamy. *Op. cit.* note 226, at 78-79.

is both indispensable for the existence and the possible application of the R2P principle²⁵⁶. In terms of fighting against impunity, traditionally the governments have been called upon to ensure access to justice for all and to refrain from using national security, immunities or any other measures to “cloak criminal behaviour.”²⁵⁷ Under the R2P principle the same could be said to apply to the UN who has been called to take a more decisive role in combating impunity and to „focus on all dimensions of the problem“, including the erosion of the rule of law and the violation of general principles of justice.”²⁵⁸

3.2.3 The justice cascade

Sikkink has provided a wider perspective to the emergence of the norm (although the aspect of the legal implications are still a topic of debate for states) of individual criminal responsibility in the international legal arena through an expression from the sociological phenomenon of a cascade, or, in this case - a justice cascade; the gradual emergence of a norm through efforts of various actors²⁵⁹. In her work she describes and gives credit to the movement that brought forward, embedded in law, and put into practice the ideas of individual criminal responsibility. In her narrative Sikkink largely bases the origins of this cascade, its „first streams“ on the fight against immunity perceived to belong to powerful leaders who abused their status and wrongfully treated the citizens of the country. In this sense, the HRC investigations may be viewed as providing yet another stream into the general framework of pursuing individual accountability that started with the indictments of heads of states, which remains topical to this day.

Sikkink went on to claim that although the ICC plays a role, it is not the main institution through which the new model of individual accountability is enforced, due to its complementary role, and rather gives the credit for the enforcement to the domestic courts²⁶⁰. Similarly, the field of international criminal justice has been further altered by the emergence of third party prosecutions under the aegis of universal jurisdiction. Rare until the mid-1990s, the practice has

²⁵⁶ Bellamy. *Op. cit.* note 226, e.g at 82-91.

²⁵⁷ UN experts. Breaking the silence: Time to strengthen UN role in ending impunity for human rights violations – UN experts. 22 November 2013 ... available at:

< <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14018&>> (as of 14.04.2015).

²⁵⁸ *Ibid.*

²⁵⁹ Sikkink, Kathryn. *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*. New York City: W.W. Norton, 2011, at 11-2.

²⁶⁰ *Id.* at 18-9.

increased, although not always having reached the verdict stage²⁶¹. The same was also observed previously under subsection 2.4.5 of the thesis.

Bosco has also granted viability to the constructivist „norm cascade“ in international justice. In relation to the ICC he feels that the free flow of impartial international justice still suffers from obstacles, citing major-power control mechanisms²⁶². As also marked in the previous section of the thesis, for Bosco, the central element here remains the interaction between the Security Council and the Court²⁶³.

Some authors have proposed an obvious gap in the process of pursuing justice, namely that establishing individual responsibility must be accompanied by state responsibility in the colloquial sense of the term, or the collective will to pursue justice. Such state responsibility flows from various, including moral, political and legal considerations²⁶⁴.

Further, the individual accountability framework has been labelled more reminiscent of patchwork than a coherent regime, international law having just partially recognised individual responsibility, including by states holding persons accountable „sporadically and often with reluctance“²⁶⁵. The issue of selectivity means that there are differences in the feasibility of prosecuting the only few alleged perpetrators of crimes, and prosecuting a larger number of persons, meaning that in the latter case the „full accountability“ becomes more complex, and may not always even be desirable²⁶⁶. This means more nuanced accountability for large-scale violations.

As for the HRC, there is an obvious link between the investigations mandated by it and the principle of the responsibility to protect. The HRC fact-finding investigations are also important from the perspective of the evolving framework of the UN’s approach to both the rule of law²⁶⁷ and the principle of R2P as the entity providing first-hand information of ongoing violations. At the same time, the unlimited powers of the Security Council to address individuals’ criminal responsibility, including by setting up *ad hoc* tribunals and referring cases to ICC may have a detrimental effect on international criminal law due to possible attainment of different goals,

²⁶¹ Steven R. Ratner, Jason S. Abrams, James L. Bischoff. *Accountability for Human Rights Atrocities in International Law. Beyond the Nuremberg Legacy*. Third Edition. Oxford University Press: 2009, at 198.

²⁶² David Bosco. *Rough Justice: The International Criminal Court in a World of Power Politics*. Oxford University Press: 2014, at 187-8.

²⁶³ *Idem*.

²⁶⁴ *Id.* at 369-70.

²⁶⁵ Ratner *et al.* *Op. cit.* note 261, at 365.

²⁶⁶ *Id.* at 371.

²⁶⁷ UN initiatives on rule of law are available at: <<http://www.unrol.org/>> (as of 9.04.2015).

i.e. politisation²⁶⁸. Concerning the impact of fact-finding converging with international criminal law on states, Alston has predicted that there will be even further rejection by governments of reports with implications on criminal behaviour which is considered as „something that needs to be discredited at all costs“²⁶⁹. However, he also finds that the infusion of criminal prosecution into fact-finding processes is important as it adds new perspective and gives teeth to fact-finding practices²⁷⁰.

According to another positive outlook, the R2P principle may become a self-fulfilling prophecy or a further addition to the justice cascade. Namely, on the premises that as the UN and especially the Security Council become more proactive, the demands for accountability become more persistent²⁷¹. The same may be said to be happening in the case of the HRC, whereby it has taken investigative action, whereas in similar cases it previously had not done so. This may well be because of the perceived role that the HRC, or, more accurately, the states comprising the HRC, have taken upon themselves to address violations by sending stronger signals, least in rhetoric, on accountability.

3.2.4 Universal jurisdiction

It has been proposed that responsibility in conflicts is not a question of choice, but, in every sense, a more positive question of the existence of an obligation to prosecute under international law²⁷². Universal jurisdiction, as meaning the competence of a state through its domestic courts to try persons accused of crimes under international law, which have no connection to the said state, i.e. regardless of the place of the commission of the crime, the nationality of the person allegedly committing the crimes nor the victim. In this connection it is important to note that, as mentioned above, the universal jurisdiction and the right to prosecute by third states is, pursuant to some international treaties, an obligation of states²⁷³. However, not all international

²⁶⁸ Beatrice I. Bonafè. *The Relationship Between State and Individual Responsibility for International Crimes*. Martinus Nijhoff Publishers, Leiden. Boston: 2009, at 207.

²⁶⁹ Alston. University of Oslo. *Op. cit.* note 105.

²⁷⁰ *Ibid.*

²⁷¹ Bellamy. *Op. cit.* note 226, at 189.

²⁷² See: Anja Seibert-Fohr. *Reconstruction through accountability*. Michigan State Journal of International Law, 13, 2005, 179.

²⁷³ Such as the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Protection of All Persons from Enforced Disappearance, the 1949 Geneva Conventions.

law violations fall in the scope of application of universal jurisdiction, only the „gravest“ violations, traditionally such as genocide, crimes against humanity, war crimes.

According to examination in subsection 2.4.5 of the thesis there has been some interest from states to pursue prosecutions on the basis of universal jurisdiction. The use of the instrument is, nevertheless, without controversies and has gained opposition, including being labelled as oppression by European judges against Africans.²⁷⁴ On the same subject, calls have been made to create a general and unified practice as a basis for recognition of universal jurisdiction as a generally binding rule under customary international law²⁷⁵.

As viewed in the beginning of the thesis international law has evolved in the direction of, if not regulating, then allowing the existence of fact-finding investigations, albeit with some resistance. What is more, as revealed in this section, the international law has evolved in a manner conducive to the HRC investigations to promote accountability; albeit with constraints.

As mentioned in the beginning of the chapter, and now bearing in mind the international law framework, in the below final subsections I will look into the further possible roles of the HRC investigations to be used to promote accountability, regardless of the effectuation of its recommendations by the HRC.

3.3 Accountability beyond the Human Rights Council

As is clear by now, fact-finding is not an accountability mechanism in itself, but it promotes accountability. Most scholarship does not deny the non-judicial nature of fact-finding. Considering that the investigative bodies are not courts, they can „only“ point out different options to reach accountability, or as per instructions of the mandate. As dealt with in previous parts of the thesis, one of the preconditions for a credible investigation is that its results must match the standard of proof.

²⁷⁴ UNGA Meetings Coverage GA/L/3481. Universal Jurisdiction Principle Must Be Defined to Avoid Abuse, Endangerment of International Law, Sixth Committee Hears as Debate Begins. Sixty-ninth session, 11th & 12th Meetings. 15 October 2014. ... available at: < <http://www.un.org/press/en/2014/gal3481.doc.htm>> (as of 12.04.2015).

²⁷⁵ *Ibid.*

3.3.1 The framework to enhance accountability through investigations

Accountability may come in the form of legal or political accountability with criminal, civil or administrative consequences, and every violation of international law by a state gives rise to a form of accountability.²⁷⁶ The examination in the previous subsection attested to the rise of UN rhetoric and action on the fight against impunity of and accountability for individuals who had perpetrated crimes under international law.

It is noteworthy that the policy paper for states on the promotion accountability through the human rights bodies in Geneva does not address the HRC *ad hoc* investigations as one of the means to promote accountability.²⁷⁷ Notwithstanding this, one may say that at the backdrop of the evolution of international law it is not possible to mandate an investigation on human rights violations and rule out individual criminal responsibility.

According to a general understanding, people must have access to mechanisms that uphold their human rights if national courts fail to do so. As emerged from the empirical part of the thesis, the HRC has, in most instances, mandated the investigations to identify violations of human rights and humanitarian law and the perpetrators of the violations. As the investigations possess non-judicial capacities, albeit sometimes surpassing these by making decisions of a more judicial character, the investigations clearly do not project the same legal implications as a conviction in international criminal proceedings²⁷⁸. Thus, the investigations may be seen as assuming the role of promoting accountability.

It was further apparent from examining in chapter two of the thesis that in most cases investigations were called to find the perpetrators of the crimes. This implies persons rather than states as perpetrators, which is also supported by the fact that many investigations drew up lists of names, confidential or not, of persons who allegedly violated rights. Thus, the investigations are, in this sense, focussed on individual liability.

A decision by the UN to establish an entity to assess individual criminal liability was first made by the Security Council when establishing the ICTY. For some, this power is seen to challenge the separation between establishment of state responsibility and individual criminal liability²⁷⁹.

²⁷⁶ TRIAL and the International Commission of Jurists. Promoting Accountability through the Human Rights Bodies in Geneva. A Working Paper for States. 2013, at 11.

²⁷⁷ *Ibid.*

²⁷⁸ See also: Talsma. *Op. cit.* note 63, at 422.

²⁷⁹ Bonafè. *Op. cit.* note 268, at 203.

Still, for some time already the Security Council has been dealing with resolutions on conduct of individuals and resolutions under Chapter VII of the UN Charter with measures directed at individuals. Thus, this broad interpretation of the powers of the Security Council seems to be accepted, as long as it is aimed at maintaining international peace and security. As discussed in the previous subsection, this attests to the move of international law towards addressing individual responsibility, and to the Security Council's powers to address the conduct of individuals. In this connection, concerns have been expressed that this course of action may sideline the responsibility, for their part, of states or even substitute it²⁸⁰.

Fact-finding bodies may also be used in establishing tribunals for accountability. Returning to the ICTY case, it is undoubted that the creation of the tribunal contributed to the establishment of accountability for the atrocity crimes committed in the former Yugoslavia. However, it may be contested what exactly the role of the original investigation by the Commission of Experts was leading to the creation of the ICTY. Namely, the Security Council had already issued many resolutions on the situation in the former Yugoslavia prior to the establishment of the investigation. The Security Council reacted to the establishment of the tribunal already at the time of the „interim report“ of the commission²⁸¹. Questions arise, whether this was a highly timely response by the Security Council to the interim report or a way to legitimise a plan of action by states in the Security Council, even if this was due to external pressures, that could have been proceeded with without the investigation. Somewhat in this connection, the role of an investigation as a tool of the „political“ was treated under the previous section of the thesis.

Further on a more theoretical note so far, in addressing the issue of whether human rights monitoring staff should be obliged to testify in international courts, Robertson has pointed out that any human rights monitor is competent to give evidence, except for employees or former employees of the Red Cross, due to the special position under the Geneva Conventions; a view that has been upheld by the ICTY²⁸². However, in order to protect the perceived neutrality in case of war correspondence, according to case-law the calls for was correspondents to testify have been limited to cases where the testimonies would be „really significant“²⁸³. The same principle could be applied by way of analogy to UN investigators. The privilege of

²⁸⁰ *Id.* at 208.

²⁸¹ Having considered the recommendations in the interim report of the Commission of Experts it decided that an international tribunal should be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. UN Security Council resolution 808 (1993) of 22 February 1993.

²⁸² Robertson. *Op. cit.* note 70, at 30.

²⁸³ *Id.* at 33.

correspondents to withhold the names of their sources would be retained²⁸⁴. The same principle has been later applied to a UN staff member, who was permitted to not undergo cross-examination nor name his sources due to fear of reprisals against the source²⁸⁵. A public interest also exists in giving assurances of confidentiality to former and future witnesses who tell their stories.

Clearly the effect that the investigation bears on the realm of international law also depends on its outcome, including the degree at which it corresponded to the standard of proof, that is whether it was able to make firm findings on facts, forming a view on a balance of probabilities, or was unable to reach a definite conclusion. In this connection, a fact-finding body has been considered freer in its formulation of the outcome of its work, whereas a court or a tribunal, in considering the evidence needs to make clear decisions on the applicability of the outcome of the investigation²⁸⁶.

Albeit so far more in theory, as shown in the second chapter of the thesis, the work of the investigations may provide crucial elements to judicial procedures: *ad hoc* tribunals and the ICC, and may trigger transitional justice mechanisms²⁸⁷. Another view places little burden on the investigations, as in situations where governments deny or hide gross violations of human rights and „band together to avoid international scrutiny“, recording and publicising gross violations being committed may be „the most that can be done in the quest for justice“²⁸⁸.

The enhancement of criminal justice takes place through interoperability of different mechanisms – either justice mechanisms or others leading to justice. Linkages of HRC investigations with other simultaneous accountability efforts was considered in the empirical analysis, where it was found that the HRC has not been proactive in inserting more specific instructions of cooperation with other accountability mechanisms in the mandates.

There have been voices calling for the gulf between the work of fact-finders and the work of criminal prosecutions to be bridged²⁸⁹. I will next look into possibilities of the HRC investigations to contribute to the investigations of the ICC and truth commissions.

²⁸⁴ *Id.* at 34.

²⁸⁵ *Id.* at 35-36.

²⁸⁶ Ramcharan 2014. *Op. cit.* note 1, at 57-8.

²⁸⁷ OHCHR guide. *Op. cit.* note 37, at 13.

²⁸⁸ Ramcharan 2014. *Op. cit.* note 1, at VII.

²⁸⁹ Wiley, William. The Use of Information Collected by Fact-Finders in International Criminal Proceedings. Fact-finding on gross violations of human rights during and after conflicts. University of Oslo. 17.11.2011 ... available at: <<http://www.jus.uio.no/smr/english/research/areas/conflict/events/conferences/fact-finding/wiley.html>> (as of 17.04.2015).

3.3.2 Cooperation with the ICC

As previously examined in the thesis, none of the calls of the HRC investigations for referral of a case to the ICC has so far materialised. There have been simultaneous efforts by both entities to investigate cases, which nevertheless does not allow to conclude that the investigations were overlapping.

Cooperation between the UN and the ICC is regulated by a Negotiated Relationship Agreement²⁹⁰, the wording of which is very general, only specifying the exchange of information between the organisations. Allegedly the OHCHR and the ICC have begun a dialogue about evidentiary collaboration that might ultimately entail joint training of ICC and OHCHR investigators.²⁹¹

The 2013 report on cooperation between the ICC and the UN described that the Office of the Prosecutor of the ICC had been in contact with international commissions of inquiry set up by the UN Secretary-General, the Security Council and the HRC, including regarding the situations in Darfur, Guinea and Libya.²⁹² It went on to confirm that the investigations may provide valuable source of information on allegations on possible commission of crimes within the jurisdiction of the ICC, especially beneficial during preliminary examinations by the OTP²⁹³. ICC claimed to be most interested in information on possible crimes within the jurisdiction of the Court, such as information on the most serious crimes, any preliminary indication of perpetrators or groups alleged to be responsible, an assessment of the legal qualification of the alleged acts, and any information on the existence and quality of national proceedings in relation to such crimes.²⁹⁴

With reference to the growing number of investigations of violations of international law, including international criminal law called for by the HRC, a pattern may inevitably be evolving whereby the reports of the HRC investigations are turning into a kind of a criminal law test to establish whether or not violations amount to those prosecuted by the ICC or not. Still, this

²⁹⁰ Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Article 20. ... available at: <http://www.iccnw.org/documents/ICC-ASP-3-Res1_English.pdf> (as of 11.04.2015).

²⁹¹ Grace and Bruderlein. *Op. cit.* note 45, at 44.

²⁹² ICC. Assembly of States Parties. ICC-ASP/12/42. Report of the Court on the status of ongoing cooperation between the International Criminal Court and the United Nations, including in the field. 14 October 2013. ... available at: <http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-42-ENG.pdf> (as of 2.04.2015), para. 26.

²⁹³ *Id.* para. 27.

²⁹⁴ *Id.* para 29.

order of things would produce uneven results due to the possibilities of various interpretation of the HRC mandate, qualification of violations by the investigation and so on.

On another account, the HRC investigations may produce added value to ICC's own investigations, as criminal investigators are rarely the first actors arriving at the scene of massive human rights violations²⁹⁵. Admittedly, NGOs and the media are usually more quickly placed in conflict zones than UN entities. Most authors see the added contribution of the HRC investigations in the form of preliminary information on which to build an actual ICC investigation; as an indicator of violations. Frigaard concluded that the information gathered by the fact-finders was most useful as a starting point for the investigation and not as investigating material as such.²⁹⁶ This may be seen as part of the developments whereby fact-finding in general, and HRC fact-finding in particular is seen as something „more“ than its mandate in the strict sense, including by contributing to international criminal law.

As noted by the CoI's themselves in reports, the HRC investigative bodies are „not expected to seek evidence of a standard to support a criminal conviction“, but rather to gather “a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime“.²⁹⁷

However, regardless of their similarities, human rights investigations differ from criminal investigations. The HCHR has enumerated the differences as follows: the human rights inquiries „may pursue a lesser burden of proof“, stop at prima facie evidence, and that the investigations, mostly, do not lead to the identification of individual perpetrators²⁹⁸. In this respect, however, the HRC investigation cases show a trend of increasing calls by the HRC to identify perpetrators, which may lead the investigators increasingly to do so. The HCHR further mentioned as differences the requirement of the human rights investigators to identify themselves and openly record evidence. She further noted the possibility or, in reality rather a necessity, to pursue investigations under limited temporal conditions²⁹⁹, which is indeed often the case. However, the latter might imply that the substance of the human rights investigation's report may not be as comprehensive as it is in criminal investigations, or that it imperatively

²⁹⁵ Talsma. *Op. cit.* note 63, p 422. Frigaard, Siri. The Use of Information Collected by Fact-Finders: A Case Study of East Timor. Fact-finding on gross violations of human rights during and after conflicts. University of Oslo. 17.11.2011 ... available at: <<http://www.jus.uio.no/smr/english/research/areas/conflict/events/conferences/fact-finding/frigaard.html>> (as of 17.04.2015).

²⁹⁶ Frigaard. *Op. cit.* note 295.

²⁹⁷ OHCHR training manual. *Op. cit.* note 35, at 13.

²⁹⁸ Pillay. *Op. cit.* note 121.

²⁹⁹ *Idem.*

need not be so in human rights investigations. Although the inquisitorial, instead of the adversarial, nature of the ICC proceedings allow for the prosecutor to make thorough investigations³⁰⁰, this should not be excluded to the HRC investigations by default.

In the end, similarly to the discretionary powers of the HRC and ultimately the Security Council to act on the results of the investigations, the prosecutor of the ICC holds powers to initiate investigations, thus being open to accusations of inconsistency, selectivity and bias³⁰¹.

Even if seen as evidence by the HRC investigation, no evidence properly called so, exists outside courts, as in international criminal law in general, evidence becomes such only by being admitted in court after being subjected to arguments by parties³⁰². At the same time, unlike domestic courts with strict rules of evidence, it has been proposed that international criminal courts also enjoy „great flexibility“ and should be guided by „general principles of fairness“³⁰³. However, notwithstanding the lowest common denominator evolved under customary international law, this does not exactly apply to the ICC, as it has its own extensive rules of procedure and evidence³⁰⁴. In comparison, as the human rights investigations have very few procedural standards, this also results in a poor compatibility with the rules of procedure of the ICC³⁰⁵.

Further, a multi-disciplinary approach has been promoted in an ICTY compilation of its practices³⁰⁶. It describes the merits of operational teams with staff with various backgrounds. ICC senior analyst and legal scholar Aranburu has widened this approach to include actors outside of a single institution, advocating for a „multidisciplinary approach“ to enhance international criminal investigations as such. Together with the fact-finding missions he gives credit to NGO investigative efforts³⁰⁷. Aranburu suggests using among other specialists the field workers of international organisations as witnesses in criminal tribunals³⁰⁸. This could well

³⁰⁰ William A. Schabas. *An Introduction to the International Criminal Court*. Third Edition. Cambridge University Press: 2009, at 248.

³⁰¹ Bosco. *Op. cit.* note 262, at 159-64.

³⁰² See, e.g. Cassese. *Op. cit.* note 61, at 414.

³⁰³ *Idem.*

³⁰⁴ ICC. Rules of Procedure and Evidence. Second Edition, 2013.... available at: < http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf > (as of 10.03.2015).

³⁰⁵ Talsma. *Op. cit.* note 63, at 408.

³⁰⁶ ICTY and the UN Interregional Crime and Justice Research Institute. *ICTY Manual on Developed Practices*. 2009, at 12.

³⁰⁷ Xabier Agirre Aranburu. *Methodology for the criminal investigation of international crimes*. In: A. Smeulers, ed., *Collective Violence and International Criminal Justice. An Interdisciplinary Approach*. Antwerpen: Intersentia, 2010, at 361.

³⁰⁸ *Id.*, at 374.

be the case for members of investigative bodies of the HRC, as discussed in the previous subsection on witnesses from UN staff. Still, clearly this should not be the primary accomplishment of their work.

The HRC investigations and the ICC share an issue with regard to a possible hierarchy of human rights, where prominence is given to the „grave“ violations. In the case of the ICC, this is more apparent due to the clear stipulations of such crimes in the Rome Statute - the crimes of genocide, war crimes, the crimes against humanity and aggression. In terms of doctrine, according to Alston, there has been an adjustment to the theory of indivisibility of human rights, i.e. the claims that there are no hierarchies of rights. This claim has become less plausible in a situation where „a particular set of crimes are singled out for the strongest possible treatment“³⁰⁹. As seen above, the mandate of the HRC has mentioned the types of crimes that were to be investigated, sometimes to some detail, tilting towards the more grave crimes. One may conclude this to arise from practical considerations. Nevertheless, this threatens to leave „lesser“ crimes without a clear-cut avenue for justice, at least through the HRC, not to mention the ICC.

3.3.3 Accountability – not always through courts

A great deal of fact-finding, such as in the case of the HRC, is of *ad hoc* nature, on a one-off basis, and tends to serve „a broad range of objectives“³¹⁰.

Nowadays, various fora exist for holding perpetrators accountable – national tribunals, domestic trials by third states, international criminal tribunals, commissions of inquiry, civil action³¹¹. And trials are not the only avenue to tackle past crimes and human rights violations by states, as akin to truth commissions, also the means of lustration has been put forward as an example to deal with a difficult past³¹².

Regardless of the scepticism apparent in the use of the recommendations of the investigations by the UN, I would not agree with the statement that the factual findings made by the inquiries are „likely to be more politically and historically important than judicially influential“³¹³.

³⁰⁹ Alston. University of Oslo. *Op. cit.* note 105.

³¹⁰ Philip Alston. Introduction: Commissions of Inquiry as Human Rights Fact-finding Tools. 105 American Society of International Law Proceedings 81. 2011, at 84.

³¹¹ Ratner *et al.* *Op. cit.* note 261, at 372-6

³¹² E.g. see Sikkink. *Op. cit.* note 259, at 16.

³¹³ James G. Devaney. *Op. cit.* note 107.

At the same time, the HRC investigations may be viewed as aiding states in their pursuits for transitional justice. The human rights investigations may well possess the subsidiary role to „record for history, and perhaps for justice“ the violations that have been conducted³¹⁴.

Furthermore, as mentioned previously, some authors have seen „full accountability“ for violations of international law as something *not* worth striving towards, explaining in the first instance that accountability is „not the only value“ to pursue, with further referring to situations of countries in transition from conflict³¹⁵.

In this respect, the main tasks of the HRC investigations regarding criminal law implications, namely the identification of the perpetrated crimes and the perpetrators – either meaning states, individuals or groups, as was examined in subsection 2.1.2 of the thesis indicate a retributive rather than a restorative nature of the HRC investigations³¹⁶.

According to a sympathetic view, the HRC investigations have triggered transitional justice mechanisms, and have therefore informed more sustainable peacebuilding and reconciliation efforts, assisted in the political settlement of conflicts, provided a historical record of serious violations, and influenced positive change in law and practice³¹⁷. While all this may well have happened, the analysis of the HRC cases did not allow to conclude on a link of the investigations with the national peacebuilding endeavours. Admittedly such impact is also dependent on the cooperation of the state.

The UN Principles against Impunity address the notion of „the right to know“, which includes the right to know the truth about past events concerning the perpetration of heinous crimes and the reasons that led to their perpetration³¹⁸. The measures to give effect to this right includes setting up of truth commissions or other commissions of inquiry to establish the facts surrounding the violations, including to preserve evidence³¹⁹.

Although these measures seem to be directed at individual states, the investigations of the HRC investigations may pursue similar aims. At the same time, these mechanisms may still have significant differences, especially concerning that the truth commissions might not always

³¹⁴ Ramcharan 2014. *Op. cit.* note 1, at IX.

³¹⁵ Ratner *et al.* *Op. cit.* note 261, at 371.

³¹⁶ See also: Talsma. *Op. cit.* note 63, at 421.

³¹⁷ OHCHR training manual. *Op. cit.* note 35, at 14.

³¹⁸ Commission on Human Rights. Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity. Updated Set of principles for the protection and promotion of human rights through action to combat impunity. E/CN.4/2005/102/Add.1. 8 February 2005, II.A principle 2.

³¹⁹ *Id.* II.A principle 5.

reach the level of objectivity and comprehensiveness requisite in the HRC investigations. Namely, according to the principles, the investigations by truth commissions should be conducted with the object „in particular of securing recognition of such parts of the truth as were formerly denied“, taking as its basis the „recognition of the dignity of victims and their families“. The HRC investigations seem to be incompatible with transitional justice mechanisms in the sense that the former should, ideally, deal with fact-finding and thus lacks the permission to flexibly take into account the societal changes and other factors necessary in the case of transitional justice, which might cause losing the credibility of a quasi-judicial entity, whose operation has already been challenged by critics as being too flexible. Thus, significant shifts in the focus and scope of investigations may occur. Nevertheless, it is possible to imagine that HRC investigations providing either encouragement to domestic truth processes as a role model or providing factual input in the form of the information gathered.

More generally speaking, the HRC investigations are mandated to investigate violations either after they had been committed or while they were being committed. In many cases the HRC prescribed the temporal scope of the investigations. This poses the wider question of HRC investigations being more of a retributive or restorative nature. I argue that the HRC investigations are not primarily for redressing legacies of human rights abuses, but for finding factual information on certain violations. The essential value of transitional justice lies in the notion of justice, which does not have to mean criminal justice. This latter does not correspond to the aim generally and, in particular, lately pursued by the investigations mandated by the HRC.

On a positive note, in the context of the right to truth the commissions have been encouraged to safeguard evidence „for later use in the administration of justice“³²⁰. This function corresponds to that of the HRC investigations as a possibility to help ensure promotion of accountability by appropriate adjudication.

Furthermore, the Security-General has noted in his 2004 report on rule of law that while tribunals are important, the UN experience with truth commissions showed them to be a potentially valuable complementary tool in the quest for justice and reconciliation, taking the victim-centred approach and helping to establish a historical record and recommend remedial

³²⁰ *Id.* II.A principle 8 (e).

action. And further that they remain key to restoring public trust in national institutions of governance³²¹.

And even here we cannot fully escape the looming role of the Security Council, as assisting in the establishment of transitional justice mechanisms „has become a regular feature in its peacekeeping missions’ mandates“³²².

³²¹ Report S/2004/616 of the Secretary-General. The rule of law and transitional justice in conflict and post-conflict societies. 23 August 2004.

³²² Security Council Report. The Rule of Law: The Security Council and Accountability. 2013, No. 1. 18 January 2013. ... available at: <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/cross_cutting_report_1_rule_of_law_2013.pdf> (as of 13.04.2015).

CONCLUSIONS

As countries keep blatantly violating human rights and not admitting to wrongdoings, the United Nations in general and the Human Rights Council in particular have increasingly resorted to investigative bodies to help respond to violations of international humanitarian and human rights law, and to ensure accountability for these violations. The responses of the international community rely on obtaining truthful information of the alleged violations to pursue possible further action to protect persons from violations and abuses.

In order to fight impunity and for victims to gain relief and redress, the investigations should complement the existing UN and the international criminal justice systems. In the light of the increase in investigations, there has been less action on the outcomes of investigations attesting to violations. The thesis aimed to look specifically into the investigations mandated by the UN HRC to find out the role of the investigations in responding to violations and try to determine if the actions of the HRC in commissioning and following up on the investigations are conducive to obtaining justice or rather act as a „fig leaf“ for substantive HRC inaction.

In the first section I outlined the basis for UN investigation from which HRC investigations form a part. The first look into the human rights fact-finding activity as such revealed that the UN was not built with fact-finding in mind. This was still an era when states resolved disputes between themselves under international law, deriving from the Hague Conventions, at best. The implications in the UN Charter allowing the UN bodies to deal with fact-finding are rather general in their wording. The same follows from examining the documents establishing the HRC. Still, the Secretary-General, the UNGA and the then Commission on Human Rights commenced its practice of investigations from the 1960's, whereas today the bulk of the mandates are initiated by the HRC on its own.

Further to the founders of UN not foreseeing fact-finding as a concrete means for securing peace, security and protection of human rights, it became clear from looking at its definitions and purposes that to this day the phenomenon of fact-finding has failed to generate a common understanding. However, it has changed substantively from the version found in the Hague Conventions, not requiring a situation of a dispute between states or the consent of the state for the initiation of an investigation. Due to its *ad hoc* nature, the UN fact-finding has only recently induced a body of codified methodology to guide its work, which, nevertheless, remains general and not binding.

As all common understanding on the investigations is based on individual *ad hoc* fact-finding instances, I proceeded to examine the practice of the HRC of around 20 cases that have accumulated so far. First, I looked into the mandates of the HRC in order to find out what the investigations had been tasked with. It became clear that on many occasions the mandates were vague and the HRC did not give clear instructions to the investigators on what it wanted them to do. At the same time, in some cases the HRC had become very specific in its demands, ordering the investigative body to identifying crimes and their perpetrators with a view to avoiding impunity and holding accountable those responsible. Thus, an emergence of a clear link between human rights fact-finding and ensuring accountability may be noticed. Tasking investigations to ascertain perpetrators may be considered a considerable shift in modern UN fact-finding work. This undoubtedly raises several questions, including regarding the legal nature of such findings and their implications on the procedural rights of the alleged perpetrators. These issues remain to be thoroughly discussed by the UN and in academic literature.

The HRC has mandated several investigations on Israel, which remain as a separate agenda point of the HRC, inherited from its predecessor the Commission on Human Rights. The investigations on Israel have received attention due to their amount and the one-sided approach, and are an easy target to discredit these fact-finding activities by arguing the selectiveness of the HRC.

In further other cases, the HRC had used non-state entities as subjects for investigation, including ISIL and Boko Haram. Although the resolutions in these cases mentioned state responsibility as primary for the protection of human rights, they failed to include states as the subjects of the investigations.

As in many cases the HRC left ample room for the investigative bodies to conduct their work, my review of the interpretation of the mandates by the investigators revealed further inconsistencies. In many cases the investigators had either expanded or specified their mandate. I discovered that oftentimes the investigation could not cover the mandate either in geographical terms or in terms of substance, due to lack of access to territory, or for reasons of limited resources, especially time-wise.

In most cases the investigations did not endeavour to present mere facts but went to lengths to produce analysis and deduction, not always mandated by the HRC. Thus, the investigators assumed a more judicial role. The investigations also assigned qualifications to either crimes

committed or the perpetrators. In the case of Israel also the conduct of other parties to the conflict was discussed.

I further examined the possible obstacles to fulfilling the mandates of the investigations. Cooperation with the state under investigation did not seem to matter in terms of conduct of the investigation or the credibility of the report, albeit making it more difficult to obtain first-hand information. These more lenient sentiments seem to have emerged, in part, due to the frustrating circumstances of repeated non-cooperation of the state.

Human rights investigations surely raise great expectations. Therefore, I next turned my attention to the steps that the HRC had taken to enhance the implementation of the recommendations by investigations, or: how the report had been utilised to remedy the human rights violations. In some cases, follow-up had been actually effectuated and had brought along concrete actions, as in the case of Lebanon. In some other cases, the investigations had been piled up on previous investigations, showing no visible effect as to enhancement of protection of rights on the ground. In conclusion, it appeared that there is often no lack of follow-up by the HRC but of follow-up that would yield any actual results. There have been some steps towards implementing the recommendations of the investigations on accountability, including, somewhat surprisingly, in the case of the DPRK, albeit this was for a further follow-up structure. The HRC practice regarding follow-up on mandates and their recommendations is inconsistent and the positive impact of the investigations could not always be linked to the HRC follow-up activities.

With regard to referring cases to the ICC, although this has happened before with cases independently investigated by the UN, this has not been the case so far with HRC investigations. In some cases, e.g. the DPRK the HRC has shown consistent follow-up that has translated into added discussion by other bodies of the UN, most notably the Security Council.

It was interesting to trace some recommendations that have also been made lately by the HRC investigations to third states to prosecute the perpetrators of crimes that had been committed in the state under investigation. The explanations for these steps in the respective reports attest to fatigue due to not being able to obtain any relevant action in the highest UN structures, i.e. the Security Council. Although there are yet no significant signs of this, the calls for third state prosecutions and the readiness to surrender information to these countries by the investigations may become an increasing means to overcome the deadlock of the Security Council in addressing impunity.

The third chapter of the thesis focussed on examining the criticism of the HRC investigations and the constraints of the role of the investigations in conducting their work to promote accountability for human rights violations. As the investigations may lead to ascertaining responsibility of individuals, including the political and military leaders of states, the criticism towards the investigations has sharpened. Not surprisingly, the credibility of the investigations and the reports is lessened in rhetoric by referring to the bias of both the conduct of the investigations and the investigators; the HRC is blamed for selectiveness. In order to counter this criticism, no common agreement emerged on whether it would be better to have more or less rules on the conduct and the methodology of the investigations.

As the results of the investigations are applied throughout the UN system, I proceeded to briefly examine the conduct of the UN Security Council. Although the Security Council has treated issues pertaining to individual responsibility, its practice was found to be inconsistent and, at times, contradictory. I further analysed the question of why the HRC is used for investigations if they do not manage to produce actual results. From the perspective of the politisation of human rights, or rather the „political“ inherent in human rights, it can be assumed that the investigations are conducted by the HRC by states exactly because they do not „cost“ anything to the states.

Further, I analysed the possibilities of how the HRC investigations actually may assist in reaching accountability in cases of violations of international law. First, I examined the framework of international law, whereby it emerged that the sovereign still reigns in the investigations of gross human rights violations and is unwilling to leave decisions on these cases to an independent international adjudicative body. Further, the principle of responsibility to protect may have legitimised the desire of some states to intervene in cases of gross violations, although the ultimate use of this principle remains at the hands of the Security Council and therefore the practice application of the R2P principle shall remain unforeseeable and inconsistent. The emergence and evolution of the individual responsibility under international law has been described as a „justice cascade“, which may well enhance the role of the HRC investigations in the bigger picture. The HRC may be a stream in this cascade due to the perception by the members of the HRC of the need to take action on accountability issues. The investigations further play a part in the overarching UN initiative on the rule of law.

It is clear that the investigations by themselves do not create accountability, but that this requires assistance from other entities. Thus, I next turned to inspect ways in which the HRC investigations may be used, regardless of their effectuation by the HRC. First, I clearly stated

the fact that while the HRC investigations do not possess judicial capacities, they do not bear with them the same legal implications as international criminal investigations, and, thus, the HRC investigations should be considered as *promoting* accountability.

From the ensuing analysis on the use of the HRC investigations in relation to the ICC it emerged that there is no considerable investigative cooperation between these entities. Still, the ICC may use the results of the HRC investigations in its pre-preliminary investigations. As criminal investigations differ from human rights investigations, the comparison of the evidence gathered may prove difficult. At the same time, the HRC investigators could also stand as witnesses in the ICC proceedings. I also made a point on the fact that, as both, the ICC and the HRC investigate mostly grave violations of international law, these entities may not be used for investigations of „lesser“ crimes, and that this raises issues regarding the indivisibility of human rights. With regard to the transitional justice framework I found that the HRC investigations may have an input but, as with the ICC, the criteria for investigations differ, this time with the HRC having a more rigid set of rules, including on methodology.

All in all, there seems to be creativity at play in the UN concerning addressing human rights violations, taking into account the *ad hoc* manner in which the investigations' mechanism has developed over time, including in the HRC. From the case-law of the HRC on investigations it became clear that the recommendations of the investigations have gone further from what the UN has provided. Also, it was not possible to arrive at a certain conclusion on the link between the investigations and the few positive outcomes. Alas, the lack of follow-up has not always resulted from the inaction of the HRC, which has frequently used means available to it to refer cases to the General Assembly and ultimately to the Security Council. As it appeared, some investigations have started to „outsource“ the prosecution of individuals to third states under the principle of universal jurisdiction. The „fig leaf“ of inaction might not hang over the HRC but rather somewhere else in the UN.

ÜRO Inimõiguste nõukogu uurimiskehamite roll: enam või vähem vastutust rahvusvahelise õiguse rikkumise korral?

SUMMARY

Rahvusvahelise humanitaarõiguse ja inimõiguste rikkumistega tegelemisel ning rikkumiste puhul vastutuse kohaldamiseks on ÜRO ja täpsemalt selle Inimõiguste nõukogu (IÕN) üha enam hakanud kasutama vastavaid uurimiskehameid olukorras, kus riigid inimõigusi räägelt rikuvad, kuid selle eest vastutust ei võta. Rahvusvahelise kogukonna säärane tegevus tugineb vajadusele saada tõest informatsiooni väidetavate rikkumiste kohta, et tagada inimeste kaitseks vajalike meetmete rakendamine. Karistamatuse vastu võimalikult parimal viisil võitlemiseks ja ohvrite abistamiseks peaks uurimistegevus sobituma olemasolevasse ÜRO ja rahvusvahelise kriminaalõiguse süsteemi. Samas on rikkumisi tõendavate uurimiste kasvava hulga juures olnud märgatavalt vähem uurimiste tegelikke väljundeid.

Magistritöös uurisin IÕNi poolt volitatud uurimisi, et teha kindlaks, kas IÕNi tegevus uurimiskehamite loomisel ja uurimiskehamite uurimistulemuste üle järelevalve teostamisel on aidanud kaasa õiguste tagamisele või on see pigem nõ viigileht IÕNi tegevusetuse varjamiseks. Ühtlasi uurisin ka uurimiste rolli laiemalt.

Esimeses alapeatükis tõin välja ÜRO uurimiste alused, millest ühe osa moodustavad IÕNi uurimised. Faktuurimisi tudeerides selgus esmalt, et ÜROs ilmselt ei mõeldud selle loomisel antud uurimistegevusele. ÜRO harta alused faktuurimisteks on kaudsed ning üldsõnalised. Sama kehtib IÕNi loomise dokumentide osas. Samas on ÜRO erinevad kehamid, nii Peasekretär, Julgeolekunõukogu, Peaassamblee kui toonane Inimõiguste komisjon tegelenud alates 1960-ndatest uurimistega, millest lõviosa moodustavad tänapäeval IÕNi algatatud uurimised. Ühtlasi selgus, et ÜROs ja laiemalt puudub ühene arusaam faktuurimiste määratlusest. Samas on selle sisu muutunud alates Haagi konventsioonide vastuvõtmisest 20. sajandi alguses, kuna uurimiste rakendamiseks pole enam tarvis riikidevahelist vaidlust ega riigi nõusolekut uurimise läbiviimiseks. *Ad hoc* iseloomu tõttu on uurimiste kohta alles hiljaaegu uurimiste läbiviimise kohta avaldatud soovituslikku metodoloogiat.

Järgmisena pöördusin IÕNi uurimiste kaasuste poole, mida on alates 2006. aastast 20 ringis. IÕNi poolt antud volitusi uurides proovisin tuvastada, millise eesmärgiga IÕN uurimisi on loonud. Peagi selgus, et mandaatide enamus oli üldsõnaline, kuid oli ka väga üksikasjalisi nõudmisi, mh kuritegude ja nende toimepanijate tuvastamiseks välistamaks karistamatust ning võttes kurjategijad vastutusele. Ühtlasi oli võimalik tuvastada seos inimõiguste uurimiste ja

vastutuse (i.k. *accountability*) vahel. Kurjategijate tuvastamise aspekti võib pidada ÜRO uurimistes oluliseks muutuseks. See omakorda tekitab küsimusi mh uurimistulemuste õiguslikust staatusest ning nende tähendusest väidetavate õigusrikkujate menetlusega seotud õigustele. Antud küsimusi tuleb ÜROs ning õigusalasest kirjanduses veel lähemalt lahata.

Iisraeli kui IÕNi päevakorra alaline punkt ka pärast Inimõiguste komisjoni töö lakkamist on IÕN palunud uurida mitmel korral. Antud uurimised on pälvinud tähelepanu just hulga ning ühekülse lähenemise eest uurimissubjekti määramisel. Iisraeli kaasuseid on lihtsasti võimalik kasutada IÕNi diskrediteerimiseks ning valikuliste otsuste näitlikustamiseks.

IÕN on uurimiste subjektidena kasutanud ka riigiväliseid ühendusi, nt Boko Harami ja ISILit. Kuigi volituste andmisel on resolutsioonis välja toodud riigi kui inimõigusi tagava üksuse primaarsus, ei kuulunud riigid nende volituste hulka uurimise subjektina.

Kuna IÕN oli jätnud volitustes sõnastuse tõttu palju tõlgendusruumi, keskendusin töö järgmises osas IÕN uurijate tõlgendustele sellest, milleks neid oli volitatud. Mitmel juhul olid uurijad volitusi ületanud või neid täpsustanud. Tihti ei olnud uurimisega olnud võimalik katta kogu uurimiseks volitatud ala või katta uurimist sisuliselt vajalikul määral. Põhjuseks toodi piiratud ressursid, eriti ajalises mõttes.

Lisaks selgus, et uurimistega ei esitata mitte ainult faktilisi asjaolusid, vaid ka nende analüüsi ning järeldusi. Antud tegevus ei olnud mitte alati kooskõlas volitustega, mistõttu täitsid uurijad justkui õigusliku iseloomuga rolli. Juhtus et uurijad kvalifitseerisid kas kuritegusid või nende toimepanijaid. Iisraeli puhul käsitleti selle kõrval ka teisi konflikte osapooli.

Muuhulgas uurisin uurimisvolituse elluviimise võimalikke takistusi. Koostöö riigiga ei tundunud olevat uurimise läbiviimise või selle usaldusväärse seisukohast oluline, kuigi takistas esmase informatsiooni kättesaadavust. Selliste pehmemate seisukohtade tekkimisele võis kaasa aidata frustratsiooni element, mis riiki mittelubamisel uurijaid varasemalt korduvalt oli nõrritanud.

Inimõiguste uurimised tekitavad alati kõrgendatud ootusi. Järgmisena uurisin samme, mida IÕN oli võtnud peale uurimiste lõppemist uurimisaruannete osas selleks, et paremini rakendada neis toodud soovitusi, või kuidas IÕN oli kasutanud aruannet inimõigusi puudutavate rikkumiste heastamiseks. Mõnel puhul oli IÕNi jätkutegevus aset leidnud, kuid teistel juhtudel olid uurimised jätkuks eelnevatele uurimistele, andes pigem tunnistust olukorra mittelähenemisest. Selgus, et tihti polnud probleem IÕNi poolses tegevuses, kuivõrd asjaolus,

et ei olnud võimalik saavutada tegelikke tulemusi. Uurimissoovituste rakendamisel oli tehtud edusamme, nt Põhja-Korea puhul, kuigi see oli sisult uurimise jätkustruktuuri loomine. IÕNi üldine praktika uurimistulemustega edasi tegelemisel oli ebaühtlane ning uurimiste positiivset mõju polnud alati võimalik seostada IÕNi jätkutegevustega.

Kaasuste Rahvusvahelisele kriminaalkohtule (ICC) suunamist polnud IÕNi tegutsemisaja jooksul juhtunud, kuigi suunamisi on tulnud ette ÜRO teiste kehamite moodustatud uurimiskomisjonide töö tulemusel. Põhja-Korea puhul on IÕN saavutanud selle, et antud küsimust arutatakse ÜRO teistes kehamites, mh Julgeolekunõukogus.

Huvitav oli jälgida arengut, mille kohaselt on hiljuti uurimiskehamid soovitanud kolmandatel riikidel kurjategijaid kohtu alla anda. See muutus võib samuti olla tulenenud mõningasest frustratsioonist ÜRO teist kehamite, eelkõige Julgeolekunõukoguga kohase koostöö puudumisest. Kuigi selle kohta puuduvad määravad märgid, võib kolmandatele riikidele tehtud üleskutsetes ning valmiduses neile selleks ka vajalikku informatsiooni anda näidata valmidust vältida Julgeolekunõukogu ummikteed karistamatusega võitlemisel.

Magistritöö kolmas peatükk keskendus IÕNi uurimiste vastu suunatud kriitika uurimisele ning uurimiste rolliga seotud piirangutele nende ülesannete teostamisel vastutuse kohaldamiseks inimõiguste rikkumiste puhul. Kuna uurimised võivad viia isikute, sh riigijuhtidele süüdistamiseni, on kriitika uurimiste suhtes teravnenud. Mitte üllatavalt püütakse pisendada uurimiste ja aruannete usaldusväärust viidates nii uurimiste läbiviimise kui läbiviijate erapoolikusele. IÕNi seevastu süüdistatakse valikulises käitumises. Antud puhul ollakse eri meelt uurimistele kohalduvate reeglite juurde tekitamises või eemaldamises.

Kuna uurimiste tulemusi rakendatakse üldises ÜRO süsteemis, pöördusin järgmisena Julgeolekunõukogu uurimise juurde. Kuigi Julgeolekunõukogu on arutanud isikute vastutusega seonduvaid küsimusi, on sellekohane praktika ebajärjepidev ning kohati vastuoluline. Järgnevalt arutlesin küsimuse üle, miks siis IÕNi kasutatakse uurimiste tarbeks, kui need ei tundu olevat tulemuslikud. Inimõiguste politiseerituse lähtekohast analüüsidest võib arvata, et uurimisi korraldatakse IÕNis just seetõttu, et need ei „maksa“ riikidele midagi.

Edasi kaalusin võimalusi, kuidas IÕNi uurimised saaksid panustada rahvusvahelise õiguse rikkujate vastutusele võtmiseks. Selleks uurisin esmalt rahvusvahelise õiguse vastavat raamistikku. Analüüsis ilmnes riikide suveräänsuse suhteline monopol räigete inimõiguste rikkumiste uurimisel ning ilmne tahte puudumine selliste olukordade lahendamiseks andmiseks sõltumatutele kehamitele. „Kohustus kaitsta“ põhimõte (i.k. *responsibility to protect*, R2P) võis

olevat mõnes mõttes legitimeerinud riikide soovi sekkuda räigete rikkumiste puhul, kuid selle põhimõtte rakendumine on taaskord Julgeolekunõukogu meelevaldas ning seetõttu on R2P võimalik rakendamine ettenägematu. Isikute kriminaalvastutuse nähtuse tekkimist ja süvenemist rahvusvahelises õiguses on kirjeldatud „õiguse kärestikuna“, mis võib samuti tõsta IÕNi uurimiste tähtsust suures pildis. Samuti ehk panustab IÕN kärestikku, kuna arvab endal sellise ülesande olevat. Uurimistel on samuti roll ÜRO õigusriigi initsiatiivi seisukohast.

On selge, et uurimised eraldiseisvalt ei tekita vastutust, vaid selleks on tarvis teiste kehamite abi. Seetõttu pöördusin järgmisena uurima mooduseid, kuidas IÕNi uurimisi on võimalik kasutada, sõltumata nende rakendamisest IÕNi poolt. Esmalt käsitlesin uuesti tõsiasi, et kuna IÕNi uurimistel puudub õiguslik pädevus, ei ole neil sarnast õiguslikku jõudu nagu rahvusvahelisel kriminaaluurimistel ning seetõttu peaks IÕNi uurimisi pigem vaatama vastutuse edendamise seisukohast.

Edasisest analüüsist IÕNi uurimiste kasutamisest seoses ICCga selgus, et IÕNi ja ICC vahel puudub uurimisalane koostöö. Samuti selgus, et ICC võiks kasutada IÕNi uurimisi enda kriminaaluurimiste eelse uurimise käigus. Kuna kriminaaluurimine ja inimõiguste alane uurimine erinevad kriteeriumite poolest, võib nende võrdlemine osutada keeruliseks või kohatuks. Samas võiksid IÕNi uurijad vabalt vajadusel ICCs ütlusi anda. Ühtlasi pöörasin tähelepanu asjaolule, et kuna nii ICC kui IÕN uurivad peaaesjalikult ainult kõige rägemaid rikkumisi, ei pruugi nendest organitest olla abi „vähemate“ rikkumiste puhul, mis omakorda ei pruugi olla kooskõlas inimõiguste jagamatuse põhimõttega. Üleminekuõigusega seotud temaatika osas leidsin, et IÕNi uurimiste panus on võimalik, kuid, nagu selgus ICC puhul, on uurimiskriteeriumite sisu mõnevõrra erinev, seekord rangemana IÕNi puhul.

Kokkuvõtteks võib tõdeda, et ÜRO on inimõiguste rikkumiste adresseerimisel näidanud üles loovust, arvestades uurimismehhanismide kaasusepõhist arengut. Analüüsitud IÕNi kaasustest nähtus, et uurimiste soovitusel on läinud kaugemale sellest, mida ÜRO on võimaldanud. Samuti polnud võimalik jõuda kindla tõdemuseni uurimiste ja vähete positiivsete tulemuste seosest. Samas ei ole rakendamata taga alati IÕNi püüdmatus. IÕN on tihti kasutanud temale võimalikke vahendeid, et suunata juhtum Peaassambleesse ning Julgeolekunõukogusse. Nagu ilmnas, on mõned uurimised hakanud ÜRO tegevusetuse tõttu suunama isikute kohtu alla andmist kolmandatesse riikidesse üleilmse kohtualluvuse alusel. Seetõttu ei pruugi kokkuvõttes too tegevusetuse viigileht paikneda IÕNi kohal, vaid mujal ÜROs.

ANNEX. Investigations mandated by the Human Rights Council

Year	Mandating authority	Commissions/Missions	Reports
2015	Human Rights Council resolution S-23/L.1 of 1 Apr. 2015 (unedited version)	OHCHR to collect information from countries affected by Boko Haram (Nigeria, Cameroon, Niger, Chad)	Report not yet available
2014	Human Rights Council resolution S-22/1 of 1 Sep. 2014	OHCHR Investigation mission to Iraq	Report A/HRC/28/18
2014	Human Rights Council resolution S-21/1 of 23 July 2014	Independent international commission of inquiry to investigate all violations of international humanitarian law and international human rights law in the Occupied Palestinian Territory	Report not yet available
2014	Human Rights Council resolution 26/24 of 27 June 2014	Commission of Inquiry to investigate all alleged violations of human rights in Eritrea	Report not yet available
2014	Human Rights Council resolution 25/1 of 9 Apr. 2014	OHCHR investigation on Sri-Lanka	Report delayed (A/HRC/28/23 of 27 Feb. 2015)
2013	High Commissioner for Human Rights Human Rights Council resolution 23/18 of 13 June 2013	OHCHR Fact-finding mission to Central African Republic	Report A/HRC/24/59 of 12 Sep. 2013
2013	Human Rights Council resolution 22/13 of 21 Mar. 2013	Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea	Reports A/HRC/25/CRP.1 and A/HRC/25/63 of 7 Feb. 2014
2012	Human Rights Council resolution 19/17 of 22 Mar. 2012	Independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem	Report A/HRC/22/63 of 7 Feb. 2013
2011	Human Rights Council resolutions S-17/1 of 23 Aug. 2011; 19/22 of 23 Mar. 2012; 21/26 of 28 Sep. 2012; 22/24 of 22 Mar. 2013; 25/23 of 28 Mar. 2014	Independent international commission of inquiry on Syrian Arab Republic	Reports: A/HRC/28/69 of 5 Feb. 2015; A/HRC/27/CRP.3 of 19 Nov. 2014; A/HRC/27/60 of 13 Aug. 2014; A/HRC/25/65 of 12 Feb. 2014; A/HRC/24/46 of 16 Aug. 2013; A/HRC/23/58 of 18 July 2013; A/HRC/22/CRP.1 of 11 Mar. 2013; A/HRC/22/59 of 5 Feb. 2013; A/HRC/21/50 of 16 Aug. 2012; A/HRC/20/CRP.1 of 26 June 2012;

			A/HRC/19/80 of 8 Mar. 2012; A/HRC/19/69 of 22 Feb. 2012; A/HRC/19/79 of 16 Dec. 2011; A/HRC/S-17/2/Add.1 of 23 Nov. 2011
2011	Human Rights Council resolutions 17/17 of 17 June 2011; S-15/1 of 25 Feb. 2011	International Commission of Inquiry on Libya	Reports A/HRC/19/68 of 28 Jan. 2014, A/HRC/17/44, 12 Jan. 2012
2011	Human Rights Council resolution 16/25 of 25 Mar. 2011	International Independent Commission of Inquiry on the Situation of Human Rights in Côte d'Ivoire	Report A/HRC/17/48, 1 July 2011
2011	Human Rights Council resolution S-16/1 of 29 Apr. 2011	OHCHR Fact-finding mission to the Syrian Arab Republic	Report A/HRC/18/53 of 15 Sep. 2011
2010	Human Rights Council resolutions 13/9 of 25 Mar. 2010	Committee of independent experts to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side	Report A/HRC/15/50 of 23 Sep. 2010; Report A/HRC/16/24 of 5 May 2011
2010	Human Rights Council resolution 14/1 of 2 June 2010	International fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance	Report A/HRC/15/21 of 27 Sep. 2010
2009	Human Rights Council resolution 12/14 of 1 Oct. 2009	OHCHR Mission on situation of human rights in Honduras since the coup d'état on 28 June 2009	Report A/HRC/13/66 of 3 Mar. 2010
2009	Human Rights Council resolution S-9/1 of 12 Jan. 2009	UN Fact-finding mission on the Gaza conflict	Report A/HRC/12/48 of 25 Sep. 2009
2006	Human Rights Council decision S-4/101 of 13 Dec. 2006	High-level Mission on the situation of human rights in Darfur	Report A/HRC/4/80 of 9 Mar. 2007
2006	Human Rights Council resolution S-3/1 of 15 Nov. 2006	High-level fact-finding mission to Beit Hanoun	Reports A/HRC/5/20 of 18 June 2007 and A/HRC/9/26 of 1 Sep. 2008
2006	Human Rights Council resolution S-2/1 of 11 Aug. 2006	Commission of inquiry on Lebanon	Report A/HRC/3/2 of 23 Nov. 2006

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