Domestic Commissions of Inquiry and International Law: The Importance of Normative Authority

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I. Introduction

Most commissions of inquiry can be considered 'domestic' in nature.[1] This chapter examines these domestic commissions of inquiry and, in particular, offers a critique of their intersection with international law. There is relatively little literature devoted to this subject.[2] Scholars have certainly engaged with 'domestic commissions of inquiry', but this has tended to be in relation to particular commissions or groups of commissions created within a single state, rather than with regard to domestic commissions *tout court*.[3]

Moreover, appraisals of domestic commissions of inquiry have tended to focus on the suitability of a commission's procedural mechanisms for ascertaining facts, and its ability to legitimately establish accountability and 'wrong-doing'.[4] This focus means that there has been comparatively little attention devoted to the role of domestic commissions of inquiry as a form

[1] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez, Human Rights Council, 18 January 2012, UN Doc A/HRC/19/61, 7 ('[m]ost commissions of inquiry are established at the initiative of national Government authorities').

[2] Although there has been notable scholarly engagement on the question of the interaction between international law and *international* commissions of inquiry. See, e.g., Larissa J van den Herik, 'An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of International Law' (2014) 13 *Chinese Journal of International Law* 507.

[3] See, e.g., Jason Beer, *Public Inquiries* (Oxford, Oxford University Press, 2011); Colm Campbell and Fionnuala Ní Aoláin, 'Local Meets Global: Transitional Justice in NI' (2003) 26 *Fordham International Law Journal* 871; George Gilligan, 'Royal Commissions of Inquiry' (2002) 35 *Australian and New Zealand Journal of Criminology* 289; and Angela Hegarty, 'The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland' (2003) 26 *Fordham International Law Journal* 1148.

[4] See, e.g., UN Doc A/HRC/19/61 (n 1) (providing a detailed assessment of the 'value' of commissions of inquiry, and particularly domestic commissions).

of social settlement or political reform.[5] A consideration of the underlying politics of commissions of inquiry stands in contrast to an analysis of 'wrong-doing' – albeit that there are obvious overlaps – and, instead, draws attention to a process that involves complex normative decisions.

The primary aim of this chapter is to emphasise that the engagement by domestic commissions of inquiry with international law is hugely dependant on the relevant social context, which generates consequent implications for the *normative authority* of those inquiries. The intersection of domestic commissions of inquiry and international law thus must be viewed through the prism of political and social choice. For reasons of space, this chapter is necessarily an exploratory sketch: our analysis is intended to act as a starting point for further research.

Section II begins by briefly outlining what 'domestic commissions of inquiry' are, at least to the extent that we refer to them herein and as distinct from 'international' commissions. In section III, we explore the fact that national commissions of inquiry are influenced by their domestic context, giving them a clear political dimension. It is argued that the domestic political scene affects, on many levels, the normative authority accorded to any given commission and its findings. Sections IV-VII then explore how normative authority, particularly in relation to international law, is framed through the creation, mandates, composition and substantive findings of domestic commissions. We acknowledge that these frames are somewhat artificial, and there are certainly overlaps between them. However, they are not entirely arbitrary: our selection in sections IV-VII can be seen as something of a

[5] A notable exception is the literature dealing with truth and reconciliation commissions. See, e.g., William Schabas and Shane Darcy (eds), *Truth Commissions and Courts: The Tension Between Criminal Justice and the Search for Truth* (Dordrecht, Kluwer Academic Publishers, 2004).

'chronological survey', in that the sections chart key moments within the timeline of a domestic commission of inquiry.

Overall, our objective is not to argue that the use of (or reference to) international law in a domestic commission cannot have the potential to generate normative authority, nor to argue that there are no benefits to domestic commissions engaging with international law. Instead, we simply wish to highlight that 'benefit' in this regard should not be taken as a given.

II. What Makes a Commission of Inquiry 'Domestic'?

The umbrella term 'domestic commission of inquiry' is used in this chapter to denote any national-level or non-international body mandated to investigate particular factual circumstances and report upon them.[6] However, it is important to note that this understanding is necessarily imprecise, and that domestic commissions can – in most instances – only be identified and described based on their individual characteristics.

Distinguishing 'domestic' commissions from their 'international' counterparts usually must be based on the factual circumstances of their creation. Any attempt to identify jurisdictional or normative differences between the two forms of inquiry is difficult, particularly in meta-theoretical or overarching terms. Many international commissions of inquiry necessarily concern 'international' issues, and thus – at the legal level – will almost inevitably

[6] See, e.g., Marina Aksenova and Morten Bergsmo, 'Non-Criminal Justice Fact-Work in the Age of Accountability' in Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Florence, Torkel Opsahl, 2013), 1, 2 ('the terms "fact-finding" and "inquiry" refer to the methods of ascertaining facts used…for differing purposes…[including] work processes to identify, locate, obtain, verify, analyse, corroborate, summarise, synthesise, structure, organise, present and disseminate these facts').

relate to matters governed by international law.[7] Some domestic commissions of inquiry concern exclusively 'domestic' questions, and so only trigger questions of domestic law.[8] However, given the fact that commissions are usually set up in exceptional circumstances comprising issues of significant social or political concern,[9] many domestic commissions will commonly also trigger international legal questions.[10]

Where a domestic commission's mandate relates to international law, and especially where a commission expressly *engages with* international law, the juridical significance of a formal distinction between 'domestic' and 'international' commissions of inquiry is undermined. No difference may be drawn as to the relevant law: leaving aside potentially divergent interpretations, the provisions of international law are identical whether an international or a domestic body is applying them. The distinction between domestic and international commissions of inquiry is, thus, a factual matter based on how the body was created, and who created it.

While they can be distinguished from international commissions based on the circumstances of their creation, it is clear that domestic commissions of inquiry – as a mechanism – defy a singular definition. As Gilligan has noted, such commissions 'are too diverse in their effects to be tied down to a uniform explanatory model…'[11] Domestic

[7] See, generally, Dov Jacobs and Catherine Harwood, 'International Criminal Law outside the Courtroom: The Impact of Focusing on International Crimes for the Quality of Fact-Finding' in Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Florence, Torkel Opsahl, 2013), 325.
[8] See, e.g., Special Commission of Inquiry into the Greyhound Racing Industry in New South Wales, 2015, www.greyhoundracinginquiry.justice.nsw.gov.au/.
[9] See *Phillips v Nova Scotia* (*Commission of Inquiry into the Westray Mine Tragedy*) [1995] 2 S.C.R. 97, para 62, per Justice Cory (commissions of inquiry 'are often convened, in the wake of public shock, horror, disillusionment, or scepticism…').
[10] As will be seen throughout this chapter, however, international law will not necessarily be considered or applied by domestic inquiries when fulfilling their mandate simply because international legal questions are 'triggered'.
[11] Gilligan (n 3) 289 (in reference to the limited context of Australian Royal Commissions of Inquiry).

commissions take a wide range of forms and operate under a variety of mandates. As such, any attempt to define them runs the risk of being too general and open to exceptions, as well as being normatively abstract (irrespective of the extent to which procedural elements are defined with regard to any particular commission).

Of course, all of this can be said in relation to 'international' commissions of inquiry too,[12] but it is worth noting that such diversity is more pronounced for commissions of inquiry in the domestic context.[13] Given the comparatively underdeveloped and decentralised mechanisms at the international level for both fact-finding and legal determination,[14] the creation of commissions of inquiry has become commonplace and is a useful governance technique at the international level: a fact with which much of this book engages from a range of perspectives. This, in turn, has led to a number of guidelines being developed for commissions of inquiry in the international context,[15] which has begun to foster at least some degree of cross-body coherence.

Domestic commissions of inquiry, in contrast, operate in the context of the existing institutional and legal framework of the state concerned. They are created precisely to respond, on an *ad hoc* basis, to exceptional intervening events that would not otherwise receive adequate

[12] For the difficulties of generalising commissions of inquiry, see Diane Orentlicher, 'International Norms in Human Rights Fact-Finding' in Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (Oxford, Oxford University Press, 2016), 501, 503-506. For a discussion of the various types of commissions of inquiry, see Christian Henderson and Patrick Butchard, 'A Typology of Commissions of Inquiry', in the present volume.

[13] See Fritz Morstein Marx, 'Commissions of Inquiry in Germany' (1936) 30 *The American Political Science Review* 1134, 1134 (domestic '[i]nquiries are ventures into the unknown' and 'officially organised investigations are a relatively recent addition to the mechanism of politics').

[14] See, generally, Karin Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions' (2001) 5 *Max Planck Yearbook of United Nations Law* 67.

[15] See, e.g., United Nations Human Rights Office of the High Commissioner, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice* (Geneva, United Nations, 2015).

treatment by the extant institutional mechanisms of the state in question.[16] Inevitably, the exceptional nature of the circumstances of their creation raises incident-specific and context-specific questions, particularly with regard to the manner in which notions of procedure and justice are understood by inquiries and societies when making determinations of fact and law. The processes that concern domestic commissions of inquiry – including their creation, their mandates and the overall scope of their authority – not only vary significantly from state to state but also, perhaps unsurprisingly, from commission to commission.[17] This inherent plurality and the widely different social and political contexts in which different domestic commissions are created underpin the analysis throughout this chapter.

III. Normative Authority and the Importance of Social Context

We contend in this chapter that a central feature of all commissions of inquiry should be that the inquiries themselves, and the respective societies that they address, mutually recognise and share notions of *normative authority*. The notion of 'normative authority' is an admittedly broad one,[18] but we employ it in reference to the product of a range of considerations and

[16] See Roderick Alexander Macdonald, *An Analysis of the Forms and Functions of Independent Commissions of Inquiry (Royal Commissions) in Canada: Executive Summary and Bibliography* (Montreal, McGill Faculty of Law, 2011), www.mcgill.ca/roled/files/roled/roled_commissioninquiries_en_-roderick_macdonald.pdf, 11-12.

[17] Given the diverse range of circumstances in relation to which commissions of inquiry can be and have been created, this plurality can be viewed as being appropriate. In 2014, the UK's Select Committee on the Inquiries Act 2005 concluded, in a line from the Report highlighted in bold, 'that there neither can nor should be fixed criteria regulating the setting up of inquiries.' Select Committee on the Inquiries Act 2005, House of Lords, Report of Session 2013–14, *The Inquiries Act 2005: Post-Legislative Scrutiny* (London, The Stationery Office Limited, 2014), para 51. However, as will be examined herein, such plurality also poses significant challenges for assessing the 'value' of domestic commissions of inquiry.

[18] The term 'normative authority' is used in the literature, but its meaning is more conceptual rather being open to practical definition. See, e.g., for example, Martti Koskenniemi, 'Hierarchy in International Law: A Sketch' (1997) 8 *European Journal of International Law* 566, 569 ('[s]ystematization aims to make explicit the origin and relationships of norms so as to answer questions about normative authority and to solve problems of normative conflict'); and Lawrence O Gostin, Devi Sridhar and Daniel Hougendobler, 'The Normative Authority of the

potential interaction between law, politics and morality: a product that provides weight and credibility to normative determinations and the subsequent real-world effects of those determinations.

For commissions of inquiry to have meaningful value,[19] the findings that they present (legal or otherwise) must be the product of some degree of legitimate, recognised authority. The need for commissions of inquiry to be normatively authoritative is commonly – albeit largely implicitly – assumed.[20] More than that, however, scholarship has tended to assess commissions of inquiry as transitional or procedural forms of justice, inherently supported by notions of fairness and due process.[21] Where domestic commissions of inquiry have faced critique regarding their normative character, this has predominantly focussed on perceived political failings that are considered 'outside' of the formal character of the inquiry.[22] It is understandable, particularly where fast-moving changes to governments alter their commitment to supporting inquiries and implementing their findings, that one would accept the suggestion that the loss of normative authority may have little to do with the character of the commissions themselves. Lawyers are predisposed to look at 'law' and 'facts' as being 'a-political' and 'objective', and scholarship has been inclined to view formal, quasi-legal inquiries as inherently

World Health Organization' (2015) 129 *Public Health* 854, 854 ('[b]y normative authority, we mean the Organization's power to shape or influence global rules and norms and to monitor compliance').

[19] We use the term 'value' in this chapter both in relation to practical dispute settlement and social justice and the integrity of the wider 'project of international law'.

[20] See, generally, e.g., Isabelle Lassée, 'Coherence in the Design and Implementation of the Mandates of International Fact-Finding Commissions: Internal and External Dimensions' in Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Florence, Torkel Opsahl, 2013), 167.

[21] For discussion and critique, see Alison Bisset, *Truth Commissions and Criminal Courts* (Cambridge, Cambridge University Press, 2012), 10-19; and Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge, Cambridge University Press, 2006), 108-154.

[22] See, e.g., J Sarma Sarkar, *Commissions of Inquiry: Practice and Principle* (New Delhi, Ashish, 1990, reprint 2001) particularly at 5-10.

embodying those characteristics.[23] This lawyerly stance often leans towards a presumption that a domestic commission is either 'supported' or 'failed' by external politics.

On this basis, domestic commissions of inquiry are at times perceived as being 'considerably tainted',[24] especially when it comes to their engagement with international legal standards. In a statement made to the United Nations Human Rights Council (UNHRC) in 2010, for example, Professor Philip Alston asserted that where 'national-level commissions had been established', the overall 'track record of such inquiries' have been 'remarkably poor'.[25] Alston, who was addressing the UNHRC as Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, noted gravely that in many instances, such inquiries 'had in fact resulted in comprehensive impunity.'[26]

It is certainly true that domestic commissions of inquiry have – in some instances – reached highly dubious legal conclusions, seemingly because of the political motivation of the government of the state in which they were created. An example that neatly highlights this involves the violent events that occurred in Conakry, Guinea in 2009.[27] An independent United Nations (UN) Fact-Finding Mission indicated that crimes against humanity had very likely

[23] Scholars have questioned this through various analytical frames, perhaps most notably through the notion of 'fragmentation'. See, e.g., International Law Commission, ILC Study Group on the Fragmentation of International Law, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (2006) UN Doc A/CN.4/L.682; Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999; and Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1.

[24] Cecilie Hellestveit, 'International Fact-Finding Mechanisms: Lighting Candles or Cursing Darkness?' in Cecilia Marcela Bailliet and Kjetil Mujezinović Larsen, *Promoting Peace Through International Law* (Oxford, Oxford University Press 2015), 368, 370.

[25] Statement by UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions before the Human Rights Council, 3 June 2010, www.extrajudicialexecutions.org/application/media/Statement-Alston1.pdf, 1.

[26] ibid.

[27] See Hellestveit (n 24) 370 (referencing this example in this way).

occurred in Guinea,[28] and recommended referrals to the International Criminal Court.[29] However, a national fact-finding commission into the same events came to completely the opposite conclusion.[30] The domestic commission's findings were broadly dismissed as being biased by the wider international community.[31]

However, we argue that the heuristic that domestic commissions of inquiry are 'tainted' by the influence of 'politics' can be unhelpful, at least in itself. When it comes to critical discussions of domestic and international influences upon commissions of inquiry, the implied distinction between 'objective' commissions and the 'subjective' political realities in which they function ignores the fact that any given domestic commission does not merely function within a particular political and social context; it is also the product of it. For a domestic commission of inquiry to acquire normative authority, experts and societies must grasp a relational self-awareness: one that appreciates that normative authority is ultimately given form by comprehensive social deliberation of legal, political and moral concerns. Thus, the value or desirability of a domestic commission of inquiry's engagement with international law depends on the purpose for which the inquiry was created, how it was created, and the wider public consciousness surrounding international law/international legal expertise.

Indeed, rather obviously, it is the inherent subjectivity of the social context that (at least in part) *leads* to calls for commissions of inquiry to be neutral and objective. The need to stand

[28] Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea, 18 December 2009, UN Doc S/2009/693, paras 180-200.
[29] ibid, paras 266 and 278.
[30] See 'National Commission's Findings', Coalition of the International Criminal Court Report, 10 February 2010, www.iccnow.org/?mod=newsdetail&news=3764.
[31] See Hellestveit (n 24) 370; and Report of the Guinea International Commission (n 28) 3 (the 'Government established a National Commission of Inquiry. Its strong-arm tactics, and particularly those of its military wing, seem to intimidate witnesses rather than encouraging them to come forward').

apart from context is referenced through a variety of synonyms in commentary, as exemplified by the following statement by Heller: '[a]ll scholars – and common sense indicates – that, to be credible, [a] … commission of inquiry must be both politically independent and procedurally impartial.'[32] It is difficult to dispute the desirability of such neutrality when it comes to the engagement by commissions of inquiry with international law, but it is important to recognise that characterisations of neutrality (or of other similar concepts) are necessarily a matter of degree. Engagement with international law is not 'a-political' or 'objective'. Policy choices exist (and are made) regarding the extent of that engagement. These policy choices, either to have 'more' or 'less' engagement, not only delimit the institutional powers of any given commission. They are also influenced by attitudes towards international law and inform the nature of a commission's normative voice; moreover, they inform the extent to which that normative voice achieves any degree of subsequent authority in the respective social context.

For obvious reasons, choices regarding the extent of engagement with international law are far more pronounced in relation to domestic commissions of inquiry than is the case for international inquiries. Domestic commissions are likely to have 'distinct domestic political purposes or…additional objectives,'[33] which, for practical reasons, lie outside the standard purview of international legal standards. While it would be naïve to suggest that international commissions do not also operate in a politically-charged milieu, one must keep in mind that the *uniqueness* of each individual domestic commission of inquiry is far more pronounced. The

[32] Kevin Jon Heller, 'The International Commission of Inquiry on Libya: A Critical Analysis' (2012), *SSRN* paper, forthcoming in Jens Meierhenrich (ed), *International Commissions: The Role of Commissions of Inquiry in the Investigation of International Crimes*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2123782 (discussing international commissions).
[33] Hellestveit (n 24) 370.

unique context of any given commission has a direct effect upon the manner in which its normative authority is both constructed and construed. There are four identifiable moments where domestic commissions' intersection with international law is most acute: at their creation, within their mandates, in relation to the composition of their members and their substantive findings. Consequently, in the next four sections, we explore the manner in which engagement with international law and international legal expertise impact domestic commissions of inquiry, particularly as they seek to acquire normative authority within their situational contexts.

IV. The Creation of Domestic Commissions of Inquiry

Normative authority is not inherent in any given commission of inquiry. The entity that creates a commission defines its purposes, and bestows formal authority (of whatever sort) upon it. While normative authority is generally 'assumed' simply on the basis that a body *is* a commission of inquiry, practice indicates that the real picture is more dynamic and contextual.[34]

Domestic commissions of inquiry are created in a wide variety of ways. Most commonly, the process of creation is *ad hoc* and un-formalised. In South Africa, for example – a state that has been referred to as 'the Commission capital of the world',[35] because of the high number of commissions of inquiry that have been created there since 1994 – the

[34] The composition of, and powers given to, any given commission stem from its social context, and, indeed, can change in relation to political changes within that context. For example, the Public Commission to Examine the Maritime Incident of 31 May 2010 (Turkel Commission), www.turkel-committee.gov.il/index-eng.html, created by Israel in 2010, originally lacked powers of subpoena, but such powers were later bestowed upon it by the Israeli government because of public criticism and resulting political pressure. See Barak Ravid, 'Government Expands Authority of Gaza Flotilla Probe Commission' *Haaretz*, 4 July 2010, www.haaretz.com/israel-news/government-expands-authority-of-gaza-flotilla-probe-commission-1.299955.

[35] Dale T McKinley, 'Commissions of Inquiry or Omission?' *South African Civil Society Information Service*, 14 April 2015, www.sacsis.org.za/site/article/2347.

Constitution provides that the President has authority to create commissions of inquiry.[36] However, the only notable regulation of these commissions in South Africa remains the Commissions Act 1947,[37] which gives the President (or, in 1947, Governor-General as then was) almost unlimited power to set their procedures, mandates and rules. Recent high-profile commissions in South Africa, such as the 2011 Arms Procurement Commission[38] or the 2012 inquiry into the massacre of the miners at the Lonmin Marikana Shaft,[39] were therefore created by the presidential order of Jacob Zuma, with *ad hoc* terms of reference and rules of procedure.[40]

Other domestic commissions are created with even less structural background or guiding legislation. The Bahrain Independent Commission of Inquiry,[41] for example, was simply born of a royal order by the King of Bahrain, on 29 June 2011.[42] There was no existing framework for such commissions in Bahrain: *everything* about the Commission's mandate, procedures and terms of reference stemmed from that royal order.[43] Another similar example

[36] Constitution of the Republic of South Africa, 1996, s.84(2)(f).
[37] Commissions Act 8 of 1947, 18 April 1947 (as amended).
[38] Commission of Inquiry into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Packages (SDPP), 2011, www.armscomm.org.za/index.html.
[39] Marikana Commission of Inquiry, 2012, www.marikanacomm.org.za/index.html.
[40] See Government Notice, Department of Justice and Constitutional Development, No. R. 926 4, November 2011, President of the Republic of South Africa, *Staatskoerant*, 4 November 2011 No. 34731 3, www.armscomm.org.za/docs/20111104-gg34731-r926-terms-comms.pdf (Arms Procurement Commission); and Proclamation by the President of the Republic of South Africa, No. 50, *Staatskoerant*, 12 September 2012, No.35680 3, www.justice.gov.za/legislation/notices/2012/20120912-gg35680-nor50-marikana.pdf (Marikana Commission).
[41] See Report of the Bahrain Independent Commission of Inquiry, 23rd November 2011, www.bici.org.bh/.
[42] Bahrain, Royal Order No.28 of 2011, www.bici.org.bh/wp-content/uploads/2011/08/RoyalOrder28of2011.pdf.
[43] On the legal framework of the Commission, see www.bici.org.bh/indexa2d7.html?page_id=313.

is the Ad Hoc Inquiry Commission in Charge of the Question of Disappearances,[44] created in Algeria by presidential decree, again entirely *ad hoc*, in 2003.[45]

In some states, however, there is a degree of standardisation and formality to the creation of commissions of inquiry, which can help to strengthen neutrality and objectivity, and, thus, impact upon the normative authority of the findings of the commission in question. In Canada, for example, Royal Commissions of Inquiry are formally created by the government under statute. The Inquiries Act 1985 retains a measure of flexibility for the creation of Canadian domestic commissions, while at the same time providing a set of framework rules governing scope, procedure and evidence.[46] The Act is buttressed by a series of federal or provisional acts – the most recent of which being the 2011 Ontario Public Inquiries Act[47] – that provide more bespoke regulation for inquiries focussed on matters of regional public concern.[48]

While there is no constitutional, or even legal, guarantee of independence of Royal Commissions (or, indeed, other public commissions) in Canada, their formalised yet flexible nature has contributed to them being highly valued internally, and thus to a corresponding (deeply rooted) social norm of *expected* independence.[49] The public perception of domestic inquiries in Canada is an extremely positive one.[50] The consequent normative authority, acquired from this social context, has allowed some Canadian commissions to apply

[44] Commission d'Enquête ad hoc chargée de la question des disparus, 2003-2005. The final Report of the Commission was confidential, but public data its work is available from the United States Institute of Peace, www.usip.org/publications/commission-of-inquiry-algeria.
[45] Presidential Decree, www.joradp.dz/JO2000/2003/055/F_Pag.htm.
[46] Inquiries Act, R.S.C., 1985, c. I-11.
[47] Public Inquiries Act, 2009, S.O. 2009, c. 33, Sched. 6.
[48] For discussion, see Zahra Fatima Ahmed, 'UN Fact-Finding Inquiry Commissions for Assassinations of Prominent Individuals' (2012) unpublished thesis, University of Toronto, https://tspace.library.utoronto.ca/bitstream/1807/33314/1/Ahmed_Zahra_F_201211_LLM_thesis.pdf, 6-13.
[49] Macdonald (n 16) 13-14.
[50] ibid, 20-21. Having said this, some fears of partiality persist, see n 100 – n 102 and accompanying text.

international legal rules in a notably credible, court-like manner. A good example of this is the Arar Report's evaluation of the prohibition of torture and unqualified assertion of that prohibition's *jus cogens* status.[51]

The formalisation of the creation of domestic commissions of inquiry can be a double-edged sword, however. It can mask policy choices in a way that may undermine that value of a commission's work. In the UK, for example, a clear distinction is drawn between 'statutory' and 'non-statutory' inquiries.[52] In recent years, the former primarily have been set up under the Inquiries Act 2005,[53] although a few have also been created under other pre-existing statutory provisions.[54] The general academic perception has been that the 2005 Act, (and the subsequent, extensive Inquiry Rules 2006[55]) have been 'good', because such formalisation has improved the transparency and procedural certainty of commissions in the UK.[56]

In practice, however, even under the 2005 Act, ministers retain a huge range of powers in relation to commissions of inquiry: they can limit the attendance of the public, restrict the disclosure of documents, withhold material from publication and bring inquiries to premature conclusions.[57] More than this, non-statutory inquires can still be created, and commonly still *are* created,[58] often based on dubious assertions of efficiency (of both cost and speed).[59] Public

[51] The Report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar, Analysis and Recommendations, 2006, http://publications.gc.ca/collections/Collection/CP32-88-1-2006E-AR.pdf, particularly at 52.
[52] See Cabinet Manual, 2008, Public Inquiries, www.cabinetmanual.cabinetoffice.govt.nz/4.69.
[53] Inquiries Act 2005, c.12.
[54] See Select Committee Report (n 17) Appendix 5 for a list of the statutory inquiries between 1990 and 2014 that were created under legislation other than the 2005 Act.
[55] Inquiry Rules 2006, no. 1838.
[56] See Emma Ireto, 'The Inquiries Act 2005 – Fit for Purpose?', *Law Society Gazette*, 27 March 2014, www.lawgazette.co.uk/law/the-inquiries-act-2005-fit-for-purpose/5040566.fullarticle.
[57] Select Committee Report (n 17) 6.
[58] See Ireto (n 56). A list of the non-statutory inquiries that were created in the UK between 1990 and 2014 is appended to the Select Committee Report (n 17) Appendix 5.
[59] ibid, 6.

confusion as to the statutory or non-statutory nature of any given inquiry in the UK – and the lack of formalisation of non-statutory inquiries in particular – has meant a corresponding lack of confidence in relation to inquiries *per se*.[60]

The *partial* formalisation of domestic inquiries in the UK has in fact given, at least in some instances, the British government a strategic choice regarding the extent of public scrutiny, especially in circumstances where public inquiries intersect with matters of national security. The Iraq (Chilcot) Inquiry, for example, is a non-statutory inquiry into the events that led to the 2003 intervention: it has been repeated presented as an 'open', 'public' inquiry,[61] while at the same time being constituted and conducted in a way that has clouded many aspects of its work.[62]

The normative authority of the findings of domestic commissions of inquiry in general is significantly weakened by the *ad hoc* and comparatively unregulated way in which they are often created. Equally, it is also important to note that *more* regulation or increased 'formalisation' of the creation process is not necessarily a remedy for this issue. The creation and ultimate findings of the Bahrain Independent Commission of Inquiry, for example, have generally been considered to be credible and legitimate,[63] irrespective of the fact that the Commission was created entirely *ad hoc*. There are certainly instances where domestic

[60] See, e.g., Adrian Hamilton, 'The One Thing Chilcot Won't Reveal is the Truth', *The Independent*, 26 November 2009.
[61] See, e.g., Statement by Sir John Chilcot, Chairman of the Iraq Inquiry, at a news conference on Thursday, 30 July 2009, www.iraqinquiry.org.uk/about/statement.aspx.
[62] A statement by Gordon Brown at the Inquiry's launch in 2009 is telling in this regard, *Hansard*, 15 Jun 2009, col. 23, www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090615/debtext/90615-0004.htm ('evidence will be heard in private. I believe that that will also ensure that evidence given by serving and former ministers, military officers and officials is as full and candid as possible').
[63] It is worth noting that while the Bahraini Commission's Report itself was seen in this way, there has been significant criticism of the *implementation* of the Report's findings. See Jane Kinninmont, *Bahrain: Beyond the Impasse*, (London, The Royal Institute of International Affairs, 2012), particularly at xi, 1 and 11.

commissions have valuably engaged with international law irrespective of how they were set up; however, it may broadly be said that the way(s) in which such bodies are created will often mean that the application and elucidation of international law may have been strategically excluded.

V. International Law in the Mandates of Domestic Commissions of Inquiry

As Aksenova and Bergsmo have stated, '[t]he diversity of fact-finding missions manifests itself…in the scope of their mandates, which can be formulated in very broad or very narrow terms.'[64] For the purposes of this chapter, our focus is with the possibilities that some of the (diverse) mandates of domestic commissions of inquiry may or may not provide for engagement with international law.

Not every domestic commission will have a mandate to engage with legal questions: for some, their terms of reference will not provide for this, or will explicitly exclude it.[65] It is generally not the case, however, that a domestic commission's terms of reference will allow for engagement with domestic law but preclude the consideration or application international law.[66] For the most part, once 'law' is on the table, commissions can generally consider international as well as domestic law.

[64] Aksenova and Bergsmo (n 6) 9.

[65] See, e.g., Commission for Investigation of the Events in and around Srebrenica between 10th and 19th July 1995, Republic of Serbia, June 2004, www.justiceinperspective.org.za/images/bosnia/Srebrenica_Report2004.pdf, 6 ('[t]he Commission is not a judicial body and has no mandate to consider legal issues…').

[66] Although this does happen on occasion. See, e.g., the 2010 New Zealand Royal Commission on the Pike River Coal Mine Tragedy (which had a mandate that required its engagement with 'the law' to be limited to domestic provisions concerning 'underground coal mining and related operations…[and] health and safety in underground coal mining and related operations'). See http://pikeriver.royalcommission.govt.nz/Terms-of-reference.

Yet, even where a domestic commission's terms of reference leave the door open for the consideration of international law in this way (either implicitly or explicitly), when a commission's mandate allows for or requires legal appraisal, domestic law commonly will be the 'first port of call': indeed, international law may well not be a port of call at all.[67] A commission's *interpretation* of its own mandate in this regard is likely to be crucial. For example, one might consider the Linden Commission in Guyana, which was created in 2012 and reported in February 2013.[68] The Commission was created by presidential order[69] to investigate the events that occurred at the Mackenzie-Wismar Bridge, Linden, in July 2012, and particularly the deaths, at the hands of police, of a number of persons who were protesting energy-rate increases.[70]

While the Linden Commission's terms of reference did not expressly refer to either 'international law' or, indeed, 'law' *per se*, they did not exclude legal analysis.[71] As such, the Commission directly applied Guyanese domestic law at a number of points in its Report.[72] However, it ultimately decided to reference international human rights law standards only

[67] It is perhaps telling that Beer (n 3) – the leading comprehensive text on commissions of inquiry set up in the UK – does not even mention international law. Such lack of engagement with international law can be contrasted with *international* commissions where any legal focus will inevitably be on international law. See, e.g., the Independent International Commission of Inquiry on the Syrian Arab Republic, which was created by the UNHRC with an explicit mandate to 'investigate all alleged *violations of international human rights law* since March 2011 in the Syrian Arab Republic'. Resolution adopted by the Human Rights Council at its seventeenth special session, Situation of human rights in the Syrian Arab Republic, 22 August 2011, UN Doc A/HRC/S-17/1, para 13, emphasis added. This was the only reference to law in the Commission's terms of reference.

[68] Linden Commission of Inquiry, Appointed to Inquire into the Death of Allan Lewis, Ron Somerset and Shemroy Bouyea and the Injuries of Several Other Persons on July 18, 2012 at the Mackenzie-Wismar Bridge, Linden, Report of the Commission, presented in Georgetown, Guyana, 28 February 2013, www.guyana.org/govt/THE_LINDEN_COMMISSION_OF_INQUIRY_FINAL_REPORT.pdf.

[69] ibid, para 6.

[70] 'Linden Protest Turns Deadly…Four Dead, Two Dozen Injured', *Kaieteur News Online*, 19 July 2012, www.kaieteurnewsonline.com/2012/07/19/linden-protest-turns-deadly-four-dead-two-dozen-injured/.

[71] Linden Commission Report (n 68) para 8.

[72] ibid, throughout, but, e.g., at paras 164-5 (applying the Constitution of the Co-operative Republic of Guyana).

extremely obliquely.[73] In the Commission's view, it was beyond its mandate to consider international law, even though the mandate itself could certainly have been interpreted so as to allow for this.

One might therefore argue that a commission's mandate can have as much to do with its own interpretation of its terms of reference than its terms of reference themselves. However, as was noted in the previous section,[74] the 'nature' of commissions of inquiry is heavily dependent on the entity that creates them, and this extends not just to the framing of a commission's terms of reference, but also how the commission then interprets them. This can again be seen with the Linden Commission's Report, which – while being notably critical of the police[75] – was essentially exoneratory in relation to the Guyanese government and, particularly, the Minister of Home Affairs.[76] Leaving aside the merits of its findings in that regard, one may certainly say that there was no political will on the part of the Linden Commission to interpret its mandate so as to meaningfully engage with international human rights law: the *reasons* for this lack of political will, however, undoubtedly stemmed from beyond the Commission itself.

In some instances, one can observe that domestic inquiries have been set up to rival other inquiries, to act as a more acquiescent alternative to the courts,[77] or generally to offer a false perception of impartiality or justice 'being done'. We have, for example, already seen this with regard to the domestic commission in Guinea, concerning the 2009 Conakry protests.[78]

[73] ibid, paras 188-91. For further discussion, see n 124 – n 125 and accompanying text.
[74] See section IV, particularly n 34 and accompanying text.
[75] ibid, throughout, but, e.g., at para 261.
[76] ibid, paras 114-30.
[77] Macdonald (n 16) 16 ('investigative inquiries are sometimes accused of acting as a substitute for criminal proceedings…').
[78] See n 27 – n 31 and accompanying text.

The mandate of the commission in question in such cases is designed to provide the preferred political outcome of its creator.

Of course, not all domestic commissions are, or are designed to be, at odds with their international counterparts (or other mechanisms for dispute settlement) in this way. At times, the function of a domestic commission is fully intended to be complimentary in this regard. Canada is a good example here: the Inquiries Act 1985 explicitly envisages the complimentary interaction between domestic and international commissions, by allowing for the conference 'on an international commission or tribunal all or any of the powers conferred on commissioners [in a domestic one]'.[79] In a similar vein, the Supreme Court of Canada made it clear in *Starr v Houlden* that '[t]he inquiry process cannot be used to circumvent the federally prescribed criminal procedure'.[80]

An illustration of the complexity inherent in assessing the mandates of domestic commissions in relation to international law is the Turkel Commission, which was appointed by the Israeli Government in June 2010 to examine the naval blockade of the Gaza Strip and the steps taken by Israel to enforce that blockade.[81] Somewhat unusually for a domestic commission, international law was at the very forefront of its terms of reference. Israel explicitly tasked the Commission with assessing *the conformity with international law* of 1) the imposition of the naval blockade on the Gaza Strip; 2) the actions taken by Israel to enforce the naval blockade on 31 May 2010; and 3) Israel's mechanism for examining and investigating

[79] Inquiries Act (n 46) s. 14(1).
[80] *Starr v Houlden* [1990] 1 S.C.R. 1366, 1368 (*per* Dickson C.J. and Lamer, La Forest, Sopinka, Gonthier and Cory JJ).
[81] Turkel Commission (n 34).

complaints and claims raised in relation to violations of the laws of armed conflict (generally and in relation to the enforcement of the blockade).[82]

The Turkel Commission's purported *raison d'etre* was thus predicated on the application of international law. Its two final Reports were certainly extremely detailed and involve significant factual and legal analysis.[83] On that basis, it has been argued that they 'might have a meaningful impact [in relation to international law] beyond the concrete Israeli context.'[84] Equally, the Commission was clearly set up as an indirect response to the 2009 UNHCR-instigated Goldstone Report.[85] The substantive findings of the Turkel Commission go beyond the scope of this section, but suffice to say here that its legal conclusions were highly contentious,[86] and – from inception – the Commission had limited international credibility.[87] To assert a lack of credibility in this way is only partially based on a technical legal conclusion;

[82] Turkel Commission, Commission's Mandate, www.turkel-committee.gov.il/content-189.html.

[83] See Turkel Commission, Report – Part 1, January 2011, www.turkel-committee.gov.il/files/wordocs//8707200211english.pdf; and Turkel Commission, Report – Part 2, February 2013, www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf.

[84] Alon Margalit, 'Some Observations on the Turkel Report and the Investigation of Wrongdoing by the Armed Forces' *EJIL:Talk!*, 13 March 2013, www.ejiltalk.org/some-observations-on-the-turkel-report-and-the-investigation-of-wrongdoing-by-the-armed-forces/. See also Michelle Lesh, 'A Critical Discussion of the Second Turkel Report and How It Engages with the Duty to Investigate Under International Law' (2013) 16 *Yearbook of International Humanitarian Law* 119.

[85] Report of the United Nations Fact-Finding Mission on the Gaza Conflict (Goldstone Report), Human Rights Council, 25 September 2009, UN Doc A/HRC/12/48. See Margalit (n 84); and Anthony Dworkin, 'Goldstone and After: Judicial Intervention and the Quest for Peace in the Middle East' *European Council on Foreign Relations*, background paper, November 2013 www.ecfr.eu/ijp/case/israel_palestine.

[86] For just one example of the academic critique, see Amichai Cohen and Yuval Shany, 'The Turkel Commission's Flotilla Report (Part One): Some Critical Remarks' *EJIL:Talk!*, 28 January 2011, www.ejiltalk.org/the-turkel-commissions-flotilla-report-part-one-some-critical-remarks/. See also Russell Buchan, 'Quo Vadis? Commissions of Inquiry and their Implications for the Coherence of International Law', in the present volume (particularly in relation to the Report's conclusion that customary international humanitarian law recognises the right to impose a naval blockade in non-international armed conflicts).

[87] UN Secretary-General Ban Ki-Moon notably asserted that the Commission was 'not sufficient enough to have international credibility'. See Neil MacFarquhar, 'U.N. Leader Criticizes Israeli Plan for Inquiry' *New York Times*, 18 June 2010, www.nytimes.com/2010/06/19/world/middleeast/19nations.html?_r=0.

it equally reveals contrasts between cross-institutional perspectives on the appropriate manner in which international disputes ought to be investigated and determined.

However much it may seem valuable to have international law 'front and centre' in the mandate of a domestic commission (especially in relation to such fundamental issues of humanitarian and human rights law), the wider societal and political context surrounding the Turkel Commission clouds the extent to which its creation and mandate may be said to be of true benefit for the implementation of international law (both specifically in relation to the Gaza blockade, and more generally).

For the creator of a domestic commission of inquiry (usually the national executive[88]) to prescribe the commission's terms of reference so as to require or allow it to engage with legal questions is for it to give an *ad hoc* body quasi-judicial powers: no small matter. The creator is thus only likely to do so where there is 1) a genuine willingness on its part for an independent finding/legal appraisal, or 2) a desire to create and control an authoritative interpretation of international law as it applies within the domestic context. This requires a high degree of 'trust' in the commission on the part of its creator, either in it 'correctly' and 'impartially' applying the law, or in it being willing to 'play ball' and reach legal conclusions that reflect the preferences of the creator (and, perhaps, the preferences of the wider domestic society). It is precisely because such 'trust' is so often absent that the mandates of domestic commissions commonly will not provide for the engagement with international law (or why commissions themselves will refrain from interpreting their mandates so as to provide for this).

[88] See UN Doc A/HRC/19/61 (n 1) 7.

VI. International Legal Expertise in Domestic Commissions

International commissions of inquiry are often composed, at least in part, of international law experts.[89] This is not commonly so for domestic commissions. Indeed, where domestic commissions of inquiry have members with legal expertise, such expertise is often in the domestic law of the state concerned.

The independent 9/11 Commission,[90] created in the US in 2002, is illustrative of the conventional composition of domestic commissions when it comes to legal expertise. Half of its members were – or had been – 'lawyers' of one sort or another.[91] However, none had a meaningful international law background. This absence of international legal expertise seems incongruous with the fact that aspects of the Commission's mandate[92] *prima facie* engaged a range of international legal standards. Ultimately, aside from a passing reference to Common Article 3 of the 1949 Geneva Conventions,[93] the Commission's near-600 page Report was silent on international law; it had a good deal to say, however, on the application and enforcement of the law of the United States.[94]

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[89] For example, consider the 2004 International Commission of Inquiry on Darfur, where all five members of the commission – Antonio Cassese, Mohamed Fayek, Hina Jilani, Dumisa Ntsebeza and Therese Striggner-Scott – had significant legal expertise and at least some (and in some cases, a *lot*) of *international* law expertise. 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, www.un.org/news/dh/sudan/com_inq_darfur.pdf.

[90] National Commission on Terrorist Attacks upon the United States, created 22 November 2002, http://govinfo.library.unt.edu/911/report/index.htm.

[91] For official biographies of the 9/11 Commission's members, see http://govinfo.library.unt.edu/911/about/bios.htm.

[92] See Public Law 107-306, Nov. 27, 2002 116 Stat. 2383, s.602 ('purposes'), http://govinfo.library.unt.edu/911/about/107-306.title6.pdf, emphasis added.

[93] Final Report of the National Commission on Terrorist Attacks upon the United States, 22 July 2004, http://govinfo.library.unt.edu/911/report/911Report.pdf, 380.

[94] See, generally, ibid.

Domestic commissions of inquiry tend to reflect any nation's (and given government's) conventional practices of administrative review. There is good reason for this in straightforward practical terms. Technical expertise and support is often a matter of availability: the type and existence of expert resources is significantly dependent on social circumstances.[95]

From a general point of view, there is no doubt that expertise is a cornerstone of normative authority.[96] A society's confidence in the findings of an inquiry only goes as far as its confidence in the expertise of the commission's commissioners, to the point that it has been argued that '[t]he success or failure of a Commission of Inquiry depends mainly on the proper selection of personnel.'[97] It is worth noting that – in spite of the fact that independence and autonomy need to be preserved – the existence of governmental pathways for the scrutiny and oversight of any technical expertise is of critical importance. For example, in the UK, members of parliament regularly participate in the process of scrutiny and oversight of domestic commissions of inquiry, such as during the deliberative process of parliamentary debates.[98]

[95] Such complexity may be illustrated in reference to the UK's Independent Inquiry into Child Sexual Abuse (IICSA), www.iicsa.org.uk/. The UK government was forced to seek foreign professional expertise after the Inquiry's first two Chairs stepped down. Furthermore, the Home Affairs Select Committee asserted that the Home Secretary's nondisclosure of the Chair's salary package was 'not in line with the open and transparent approach we would expect in the course of a pre-appointment process'. Home Affairs Committee, *Appointment of the Chair of the Independent Inquiry into Child Sexual Abuse*, 11 February 2015, HC 710 2014-15, para 15.

[96] See, generally, Mátyás Bódig, 'Doctrinal Knowledge, Legal Doctrinal Scholarship and the Problem of Interdisciplinary Engagement' in Helge Dedek and Shauna Van Praagh (eds), *Stateless Law: Evolving Boundaries of a Discipline* (Farnham, Ashgate, 2015), 61, 62-65; and Abner S Greene, *Against Obligation: The Multiple Sources of Authority in a Liberal Democracy* (Cambridge, Harvard University Press, 2012), 31.

[97] Sarkar (n 22) 49.

[98] An example of such deliberation is the following contribution from John Mann MP in one such debate: '[w]e can learn a lot from abroad. …Whoever is the Minister, and whoever sits on the Select Committees and all the rest, should get out there, steal their good ideas, bring them back and implement them here. … *I need from the Government a clear undertaking that the resources and expertise will be there*.' House of Commons Debates, HC Deb, 17 March 2015, vol 594 c245, emphasis added.

For the purposes of this section, the potentially esoteric nature of expertise raises a significant question about the extent to which there can be reasonable public scrutiny and oversight of expert knowledge. The proceedings of the Chilcot Inquiry exposed this difficulty in relation to international law and international legal expertise. This was profoundly highlighted when a member of the Inquiry asked Sir Michael Wood (giving oral evidence as former Legal Adviser to the Foreign and Commonwealth Office): 'Would you agree with the Foreign Secretary's characterisation that international law is an uncertain field?' [99] Notwithstanding Sir Michael's reasoned reply to that question, the very fact that the question was asked in the first instance underlines that one ought not to presume that there is a shared understanding of even very basic axioms of professional expertise.

Thus, the exact manner in which expert knowledge feeds into normative authority depends on how well the 'knowledge' in question is understood by those wishing to scrutinise such use of expert tools. Clearly, for normative authority to be grasped, some minimum understanding of expertise is required by other members of society (both governmental and general public).

Beyond the general problems of translating knowledge between experts and non-experts, there is no doubt that expertise is a tool that brings value to commissions of inquiry. This importance can be seen from the 2010 Protocol issued by the Canadian Judicial Council (Canada's chief judicial governing body).[100] The Protocol provided a set of guidelines on the appointment of judges to domestic commissions following concerns raised in relation to a

[99] Iraq Inquiry, Sir Michael Wood Transcript, Oral evidence of Legal Adviser, Foreign and Commonwealth Office, 2001 – 2006, 26 January 2010, www.iraqinquiry.org.uk/media/44205/20100126am-wood-final.pdf.
[100] Protocol on the Appointment of Judges to Commissions of Inquiry, Adopted by the Canadian Judicial Council August 2010, https://www.cjc-ccm.gc.ca/cmslib/general/JIC-CIsc-protocol-finalE-Augsut-2010.pdf.

number of high-profile inquiries.[101] Although the Protocol was focussed on the integrity of legal expertise *per se* (and not international law expertise specifically), it nonetheless demonstrates that notable fears persist as to the normative authority even of Canadian domestic commissions,[102] particularly in relation to concerns over the perception of legal expertise in the public consciousness.

The discussion so far in this section has considered more prosaic elements of expertise. However, as noted in section III,[103] one ought to remember that starker political tensions might be at play. Furthermore, such tensions may have a causal link with regards to the absence of international legal expertise; or, at least, certainly there are perceivable substantive and normative effects when international legal expertise is absent. When internationalised expertise or standards contrast with national political moralities or goals, inherently political choices are made as to respective prioritisation. As noted above,[104] it should perhaps not be a surprise that the context-specific social interests that underpin the creation of domestic commissions of inquiry mean that there they are often composed without international lawyers as part of their membership. However, this fact may significantly undermine the normative authority of international legal claims made by a commission.

The Malaysian Commission on Immigrants in Sabah (2012-2014),[105] for example, was composed largely of legal experts,[106] but – as with the 9/11 Commission – none of its members

[101] See Craig Forcese, 'Judicial Supervision of Anti-Terrorism Laws in Comparative Democracies' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Cheltenham, Edward Elgar, 2014), 521, 527-528.
[102] Which are generally positively viewed in the Canadian public consciousness, see n 50 and accompanying text.
[103] See section III, particularly n 31 – n 33 and accompanying text.
[104] See n 95 and accompanying text.
[105] Report of the Commission of Enquiry on Immigrants in Sabah, presented to Seri Paduka Baginda Yang di-Pertuan Agong, 3 December 2014, www.sapp.org.my/rci/RCI-Eng.pdf.
[106] ibid, iii.

had any meaningful *international law* expertise. This was in spite of the implications for international law of the Commission's terms of reference relating to immigration and citizenship. In the view of the present authors, the substantive 'international law' findings of the Commission – at least on refugee status and on the status of stateless persons[107] – were wholly unsatisfactory, both in terms of their brevity and lack of understanding of customary international law obligations in these areas beyond treaties to which Malaysia is not party.[108]

Interestingly, where domestic commissions *have* included members with suitable international legal expertise (when international law questions are at issue), this has at times directly fed not only into the substantive quality of the legal conclusions reached by these commissions, but also the wider perception of credibility with which those conclusions have been received. The 2011 Kyrgyzstan Inquiry Commission (KIC)[109] serves as an example of this. The KIC's Report engaged in detail with international law, and produced a number of credible and balanced legal findings, particularly with regard to international criminal law.[110]

The international community – including the European Union, the Organisation for Security and Co-operation in Europe (OSCE), the United States and Russia – commended the quality of the KIC's Report and its findings.[111] Undoubtedly, the reason for the international

[107] See ibid, 227-229.
[108] For example, the Commission dismissed the definition (and notion) of a stateless person on the basis that 'the Convention on the Status of Stateless Persons 1951 [*sic*, 1954] and the Convention on the Reduction of Statelessness 1961…[are treaties to which] Malaysia is not a signatory'. See Sabah Enquiry Report (n 105) 228-229. However, as the International Law Commission has made very clear, the 1954 definition of a stateless person 'can no doubt be considered as having acquired a customary nature', obliging all states to adopt it. Draft Articles on Diplomatic Protection, with commentaries, 2006, text adopted by the International Law Commission at its fifty-eighth session, UN Doc A/61/10, 48-49.
[109] Kyrgyzstan Inquiry Commission (KIC), Report of the Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan in June 2010, 3 May 2011, www.cmi.fi/images/stories/activities/blacksea/kic/kic_report_english_final.pdf.
[110] See n 134 – n 137 and accompanying text.
[111] See Anna Matveeva, 'Kyrgyzstan: Balancing on the Verge of Stability' (2011) 19 *EUCAM* 1, 3.

credibility of the Report is in no small part due to the presence of *specific* international legal expertise in the Commission. There are three notable reasons for this. First, the KIC's terms of reference explicitly stipulated that it would 'be composed of a panel of eminent personalities as well as a group of experts', and further specified the need for 'requisite expertise in human rights, conflict analysis, international humanitarian law and international criminal law'.[112] Secondly, the Commission's ultimate composition included notable legal expertise, including but not limited to international legal expertise.[113] Thirdly, the Crisis Management Initiative (CMI) 'assisted [the Commission] by [providing] the necessary administrative and technical staff' and served as the Secretariat for the KIC.[114] In spite of all this, however, in terms of normative authority, such embedded international legal expertise was not enough to alter the Kyrgyzstani government's ultimately critical view of the Report.[115]

Sri Lanka's Paranagama Commission[116] serves as a contrast to the KIC example. Whereas there was a presence of international legal expertise embedded within the KIC and around it, international legal expertise – in the form of an 'Advisory Council' – was only appointed belatedly to assist the Paranagama Commission.[117] Though there were some

[112] KIC Report (n 109) para 4.
[113] For a list of the KIC's members, including their expertise, see ibid, para 5.
[114] For more information, see www.cmi.fi/en/about-us/who-we-are/history/past-projects/kyrgyzstan-inquiry-commission. The CMI is a non-profit organisation founded by Finland's Nobel Peace Prize winning President Martti Ahtisaari, who had extensive prior mediation and peace brokering experiences in Namibia, Kosovo and Aceh.
[115] See n 150 and accompanying text.
[116] Presidential Commission to Investigate into Complaints Regarding Missing Persons, created in August 2013. For the terms of reference of the Paranagama Commission and biographies of its members, see www.pcicmp.lk/.
[117] 'Rajapaksa Invites Foreign Experts to Disappearances Commission, as International Pressure Escalates', *Tamil Guardian*, 17 July 2014, www.tamilguardian.com/article.asp?articleid=11565.

concerns about whether this additional support, having finally been provided, was prematurely taken away, the Advisory Council brought a wealth of legal assistance to the Commission.[118]

However, because the President of Sri Lanka appointed the Advisory Council belatedly, externally (to the Commission), and conspicuously *after* the Office of the United Nations High Commissioner for Human Rights (OHCHR) formally established its own investigation,[119] questions were raised about the move. One Sri Lankan government official opined that the appointment of the Advisory Council was 'just to advise the commission', which would 'decide whether to accept the advice or to set it aside'.[120] The same official went further in stating that the Advisory Council's role was 'to double check … and to get some international backing… not a re-correction.'[121] Another Sri Lankan official was altogether more critical, saying that the Sri Lankan government 'was under pressure' and that this pressure was why it 'had to resort to these measures [of appointing the Advisory Council part way through the Commission's work]'.[122]

The Paranagama Commission highlights how international legal expertise may not necessarily be received neutrally, particularly where is has been brought in *ad hoc*. It seems likely that the external reliance on international legal expertise would have faced less criticism if the Commission itself had appointed the Advisory Council, instead of the President. This

[118] See 'Sir Desmond's Mandate was Not Extended', *Colombo Gazette*, 23 August 2015, http://colombogazette.com/2015/08/23/sir-desmonds-mandate-was-not-extended/.
[119] The OHCHR received its mandate to establish the OHCHR Investigation on Sri Lanka (OISL) from the UNHRC: 'to undertake a comprehensive investigation into alleged serious violations and abuses of human rights and related crimes by both parties in Sri Lanka during the period covered by the Lessons Learnt and Reconciliation Commission'. Resolution adopted by the Human Rights Council at its twenty-fifth session, Promoting reconciliation, accountability and human rights in Sri Lanka, 9 April 2014, UN Doc A/HRC/RES/25/1, para 10.
[120] 'Sri Lanka to Investigate War Crimes; Appoints Foreign Experts', *Reuters*, 17 July 2014, http://uk.reuters.com/article/uk-sri-lanka-warcrimes-idUKKBN0FM1MM20140717.
[121] ibid.
[122] ibid.

would have helped with the credibility of such an initiative and would have had a more positive influence on the Commission's normative authority (dependant, as that is – in part – on wider perceptions of credibility).

By way of summary, international law expertise certainly has the potential to impart upon domestic commissions of inquiry a degree of normative authority. This potential ought not to be uncritically assumed, however. As has been discussed in this section, international legal expertise might not necessarily be available, it may not be adequately understood and it may ultimately not be received without criticism. The discussion in this section is merely an illustrative guide to the normative significance that international legal expertise might bring to domestic commissions of inquiry. In the limited space available here, it has not be possible to flesh out good lawyerly techniques in greater detail.[123]

VII. Substantive Engagement with International Law in Domestic Commissions

Previous sections have explored the main technical barriers that determine the extent to which domestic commissions of inquiry have (or have not) engaged with international law. Insofar as engagement with international law has occurred, there are two standpoints from which one could assess the quality of such engagement: first, by considering the commission's expressed substantive findings themselves, and, secondly, by examining the manner in which those findings are received. Although some of the representative examples given in previous sections

[123] Though not directly relating to commissions of inquiry *per se*, international law scholarship does contain numerous examples where such good practices have been discussed. See, e.g., United Nations, *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (New York, United Nations Office of Legal Affairs, 1999); and Chanaka Wickremasinghe (ed), *The International Lawyer As Practitioner* (London, British Institute of International and Comparative Law, 2000).

have alluded to these two ways in which appraisal can be undertaken, this section looks in greater detail at both the manner and extent of commissions' engagement with international law, and the reception and implementation of their findings and reports.

It will be recalled, for example, that the findings of the Linden Commission in Guyana demonstrated a lack in political will on the part of the Commission to meaningfully engage with international law; this was irrespective of the fact that its mandate would have allowed for such engagement, and that questions of international human rights law were undoubtedly at issue.[124] Indeed, the Commission explicitly noted that international law standards might be applicable to the facts under investigation but then refrained even from identifying what these standards were:

> It would serve no useful purposes for us to attempt to…reinvent the wheel. It [i.e., 'the wheel', meaning international human rights law] exists…We are of the clear view that the United Nations has adequately provided guidance on how to deal with the pernicious and pervasive practice of human rights abuse.[125]

Examples of this sort are relatively commonplace: international law being referenced only to a limited extent, or sometimes even being ignored, in instances where one might perhaps expect engagement. Nonetheless, there are, of course, instances where extensive international legal findings have been reached by domestic commissions. The *value* of such findings, though, is dependent on the overall normative authority possessed by the commission in question: that level of normative authority both includes and influences the wider perception of those findings (in the media, expert opinion and the public consciousness).

[124] See n 68 – n 76 and accompanying text.
[125] Linden Commission Report (n 68) paras 188-9.

In the following analysis in this section, we consider aspects of the substantive engagement with international and the reception of that engagement by referencing three examples: domestic commissions of inquiry set up in Nigeria, Kyrgyzstan and the Netherlands. These are selected as illustrations rather than as an in-depth comparative survey.

The Oputa Panel,[126] which was created by the Obasanjo government in Nigeria in 1999,[127] engaged extensively with international legal standards: in particular, it considered international human rights law in depth (both treaty law and customary international law).[128] The Panel had a clear mandate to do so,[129] and had wide-ranging investigative powers of summons/subpoena.[130] However, it was also given an extremely limited time to produce its Report,[131] and had only a negligible budget to conduct its work.[132] The international legal conclusions that were reached in the (leaked) Oputa Panel Report, while extensive, read as being rather rushed: indeed, much of the analysis involves an appraisal of *how Nigeria has perceived* its international human rights obligations, rather than a truly objective assessment of those obligations.[133] While it would perhaps be unfair to admonish the Panel itself for this –

[126] Report of the Human Rights Violations Investigation Commission (Oputa Panel), May 2002 (nine volumes, plus Summary, Conclusions and Recommendations), never officially released: available as a private publication by the Nigerian Democratic Movement and Nigeria-based Civil Society Forum at www.dawodu.com/oputa1.htm.
[127] See Truth Commission: Nigeria', United States Institute of Peace, 14 July 1999, www.usip.org/publications/truth-commission-nigeria.
[128] Report of Oputa Panel (n 126) volume 2, chapters 3-6.
[129] See ibid, volume 1, 29-30 (setting out the Panel's sweeping mandate).
[130] See ibid, 31-2.
[131] Initially, this was a mere 3 months, although it was then extended to 1 year: see ibid, 30.
[132] The Panel's budget was never formally agreed, but see 'Nigeria: Oputa Panel Wraps Up Hearings', *WikiLeaks*, 24 November 2001, https://wikileaks.org/plusd/cables/01ABUJA2973_a.html, para 3 (leaked statement of a Panel Member, making it clear that it had a 'limited budget').
[133] See, e.g., Report of Oputa Panel (n 126) volume 2, 16-7 ('*Nigeria demonstrated in practice* her commitment to the implementation of IHL … *Nigerian state practice recognizes* the distinction between a combatant and a civilian', emphasis added).

given its obvious attempts to accurately identify and apply international human rights law – the value of its substantive international legal conclusions are ultimately rather limited.

As previously identified in section VI,[134] the Kyrgyzstan example – KIC – illustrates significant and meaningful engagement by a domestic commission with international law. The KIC's Report examined and applied international human rights law, international humanitarian law and international criminal law, each in notable depth.[135] It ultimately took the view 'that the violence of June [2010] does not qualify as either war crimes or genocide' but that certain acts, if conclusively proven in law, 'would amount to crimes against humanity'.[136] The Commission also held that 'serious human rights violations have occurred and are still occurring within Kyrgyzstan'.[137] More importantly, it reached these various conclusions – in the view of the present authors – based on rigorous and detailed analysis of the law, and balanced application of that law to the facts.

The 2010 independent Dutch Committee of Inquiry on the War in Iraq (Davids Committee)[138] serves as an example where the normative authority of a commission is even more extensive.[139] The Committee can be distinguished from the Oputa Panel and the KIC, not merely in terms of the extent of its substantive engagement with international law, but also

[134] See n 109 – n 115 and accompanying text.
[135] KIC Report (n 109) particularly paras 236-300.
[136] ibid, Executive Summary, para 5.
[137] ibid, para 300.
[138] Rapport Commissie-Davids, *Rijksoverheid* (Dutch Government), 12 January 2010, www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2010/01/12/rapport-commissie-davids/rapport-commissie-irak.pdf.
[139] The Davids Committee Report contains a summary, in English, including its 49 conclusions. See ibid, 517-533. In addition, Chapter 8 of the Report was translated into English, which dealt with international law questions. See 'Report of the Dutch Committee of Inquiry on the War in Iraq' (2010) 57 *Netherlands International Law Review* 81.

based on the characteristics of its normative authority within the given social context.[140] Unlike the two prior examples, there were no domestic human rights abuses or instances of domestic violence for the Davids Committee to investigate.

In procedural terms, the Committee primarily 'perceived its task as one of fact-finding'.[141] It is worth noting, however, the Committee's broad remit of investigation: 'with regard to the Netherlands' political support for the invasion of Iraq in general, and with regard to matters pertinent to international law, to intelligence and information provision and to alleged military involvement in particular.'[142] The Davids Committee thus not only engaged with issues of public international law in depth – Chapter 8 of its Report dealt expressly with the legal basis for military intervention in Iraq under international law[143] – but it also was able to take a critical view of the Dutch government (with which the Committee had a candid debate),[144] as well as being able to itself present a nuanced and diverse analysis.[145] All of this is noteworthy, as it reveals demonstrable maturity of the democratic context in the Netherlands, which allowed for in-depth governmental scrutiny, as well as scrutiny of the complex topics of foreign policy and international law. In our view, the mature socio-political context of the

[140] For this chapter's purposes, we have focused our discussion on the context of the Committee's findings. For analysis of the substantive international law content of the Davids Committee Report, see Janne Nijman, 'After 'Iraq': Back to the International Rule of Law? An Introduction to the NYIL 2011 Agora' (2011) 42 *Netherlands Yearbook of International Law* 71; and Tanja E Aalberts, 'Forging International Order: Inquiring the Dutch Support of the Iraq Invasion' (2011) 42 *Netherlands Yearbook of International Law* 139.
[141] Rapport Commissie-Davids (n 138) 521.
[142] ibid
[143] ibid, 215-273.
[144] See 'PM Survives Iraq No Confidence Motion', *Dutch News*, 17 February 2010, www.dutchnews.nl/news/archives/2010/02/pm_survives_iraq_no_confidence/; and 'Balkenende Oneens met Conclusies Davids over Irak', *NU*, 12 January 2010, www.nu.nl/politiek/2160846/balkenende-oneens-met-conclusies-davids-irak.html.
[145] The Report contained a separate comment by one of the Committee's members, much like minority dissenting opinions in judicial judgments. Peter Walsum endorsed the Committee's conclusion that there lacked legal basis for intervention, however, refrained 'from concluding that hence the Dutch government was wrong in its political support for the invasion.' Aalberts (n 140) 170.

Netherlands – allowing for democratic deliberation – was key to the manner in which the normative authority of the Davids Committee was framed.[146]

In addition to highlighting the influence of the domestic context on the extent of substantive international law engagement, the three examples also reveal that the domestic context is key to the reception and implementation of the findings of commissions of inquiry. This is evident in relation to the Report of the Oputa Panel, which was essentially disavowed and 'annulled' by the Nigerian government. Moreover, *none* of the Panel's recommendations were implemented[147] and, tellingly, its Report has never officially been made public.[148] One could at least argue that the creation of the Oputa Panel did more harm than good to the *implementation* of international human rights law in Nigeria, despite there being a clear attempt on the part if the Panel to apply human rights standards to the factual circumstances that it was investigating.[149]

In the case of the KIC, which reached rather more compelling international law conclusions than did the Oputa Panel, the Kyrgyzstani government rejected much of the substance of the 2011 Report produced by the KIC (a Commission that it had, of course, itself created), *especially* regarding the KIC's findings concerning international law.[150] Kyrgyzstan

[146] Importantly, the Davids Committee itself took a broader view of the whole Iraq question to the Netherlands, asserting that '[t]he Government's reasoning was influence by public opinion to a significant extent, Accordingly [*sic*] the Committee felt it appropriate to describe public opinion on Iraq in the Netherlands (and elsewhere) and to consider the extent to which the government used public opinion research to shape its policy.' Rapport Commissie-Davids (n 138) 522.
[147] Hakeem O Yusuf, *Transitional Justice, Judicial Accountability and the Rule of Law* (Abingdon, Routledge, 2010), 45.
[148] See 'Oputa Panel Report: Matters Arising - Guardian Editorial', *Nigerian Muse*, 28 December 2006, www.nigerianmuse.com/nigeriawatch/oputa/?u=Guardian_editorial_Oputa_panel_December04.htm.
[149] Yusuf (n 147) 44-5 (alluding to this position rather than explicitly adopting it).
[150] 'Comments by the Government of Kyrgyzstan in Response to the Report of the Kyrgyzstan Inquiry Commission into the Events in Southern Kyrgyzstan in June 2010', www.ndi.org/files/KG-comments-final-ENG.pdf, particularly at paras 56-72 (rejecting most of the KIC's conclusions regarding international law, other than that no war crimes or acts genocide had been established).

also has failed to implement any of the recommendations made. In contrast, the implementation of the Davids Committee's conclusions was more encouraging. Not only did the Committee's work lead to public deliberations, it also resulted in substantive reforms relating to the manner in which Ministers receive legal advice in the Netherlands.[151]

Overall, it may be said that substantive engagement with international law is beneficial in terms of the credibility and functionality of a commission and its findings. The three examples highlighted in this section demonstrate this, but they also indicate that any wider benefits must be understood in terms of the interaction between public deliberation and governmental techniques. The whole process of a commission's engagement international law not only operates in narrow 'legal' terms – such as fact-finding and quasi-judicial capacities – but also has a capacity to transform the wider normative arena. This helps to explain why we have chosen to analyse commissions of inquiry from the perspective of *normative authority*. The engagement with international law and other international standards is often the first and only time that a new standard of appreciating a domestic issue occurs. This potentially leads – as was the case in the Davids Committee example – not just to the critical appraisal of particular state practice (or practices), but to reform.

Of course, holding domestic practices to an external standard is fraught with difficulty. Nonetheless, engagement with international law can be seen as a form of normative entrepreneurism. For international law to have a positive effect with regards to the normative authority of domestic commissions – both in terms of engagement and implementation – the

[151] Specifically, an independent legal adviser (who could provide both solicited and unsolicited advice to the Minister) was appointed. 'André Nollkaemper benoemd tot externe volkenrechtelijk adviseur', *Rijksoverheid* (Dutch Government), 25 May 2011, www.rijksoverheid.nl/actueel/nieuws/2011/05/25/andre-nollkaemper-benoemd-tot-externe-volkenrechtelijk-adviseur/.

domestic context needs to be actively deliberating on international legal standards. Both the general public and government of the state in question must be willing to deliberate upon the international legal standards that domestic commissions of inquiry might refer to, so as not to merely pay lip service to them.

VIII. Conclusion

It is perhaps axiomatic that 'fact-finding missions are diverse, plentiful, geographically dispersed, and established by different bodies and under different circumstances.'[152] Domestic commissions of inquiry are unsurprisingly a product of the varied social and political contexts in which they are established. Their engagement with international law (or lack of) is similarly a product of that context, as is the *desirability* of that engagement (which will be dependent on the nature of the inquiry in question and, thus, the social context that bore it and in which it exists).

It is tempting for an international lawyer to view engagement with international law in commissions of inquiry as being inherently 'positive', especially with respect to potential violations of human rights or humanitarian norms, and especially given that such a commission may well be the most formal and 'authoritative' forum in which international law standards are considered in relation to the given factual circumstances. However, commissions of inquiry – whether domestic or international – ought not to be perceived as an automatic legal panacea for dealing with severe social injustices. Similarly, it is a mistake to view their engagement with international law as being inherently desirable.

[152] Aksenova and Bergsmo (n 6) 5.

It is worth noting that the establishment of any given commission of inquiry may belie a genuine attempt to revitalise commitment to social standards that had not been followed or affirmed sufficiently in past practice. In some instances, the circumstances that enabled injustices to arise continue to be present within society. The character of the prevailing sociological context, whether one wishes to emphasise its strengths or weaknesses, is not entirely separable from the historic problems that brought about the need to conduct an inquiry in the first instance.

We have argued in this chapter that it is only where the international legal claims of domestic commissions of inquiry are made with a degree of normative authority that they can be, or should be, viewed as being of value. The ultimate composition of such normative authority in domestic commissions – which, after all, are *ad hoc* bodies – is complex and varied, and involves developing a consensus of political, legal and moral considerations. Not all domestic commissions will be irredeemably 'tainted' by any means; valuable contributions to international law can and have been made by them. However, the notable increase in number of these commissions over the last twenty years and the engagement by them with international law must be treated with extreme caution, and approached contextually. Members of commissions of inquiry, and of the societies that they address (including the international community), must be acutely aware of the nature of legal objectivity and political consensus in these highly diverse, and largely unregulated investigatory bodies. Ultimately, 'international law' should not be uncritically transposed to the substantive national context, and more scholarly attention needs to be paid to the selectivity that is inherent in such transpositions.