

Stanford Law School: Law & Policy Lab

Designing Commissions of Inquiry With A View Towards Promoting Accountability

A Report to the Office of Global Criminal Justice (J/GCJ) & the Bureau of International Organization Affairs (IO)

U.S. Department of State

April 2016

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EXECUTIVE SUMMARY

Since the early 1990s, the United Nations (UN), its subsidiary bodies, and other international organizations have established international commissions of inquiry (COIs) to investigate potential human rights violations and abuses around the world. COIs have been formed in response to some of the gravest human rights and humanitarian law violations, including in the former Yugoslavia,¹ Darfur,² and the ongoing crisis in the Syrian Arab Republic.³ There is no standardized threshold for the quantity or severity of violations that necessitates or generates a COI; mandates have ranged broadly, from investigating a single violation of human rights law to monitoring ongoing situations in the context of armed conflicts. COIs have had a number of objectives: to document and report on human rights abuses and violations of international humanitarian and criminal law, to assess a state's capacity to manage such violations, to establish whether violations of international law have occurred, and to make recommendations about transitional justice and accountability.

In recent years, these last objectives have become a heightened priority in the field of international human rights. A 2011 conference held by the Geneva Academy of International Humanitarian Law and Human Rights found that “every commission of inquiry’s primary objective should be to establish accountability for violations that have taken place, ensuring that those responsible for violations are brought to justice.”⁴ Since the mid-2000s, COI mandates have increasingly included specific language that charges the COI with “ensuring full accountability”⁵ and uncovering violations of international human rights law, international humanitarian law, and/or international criminal law. For example the mandate for the 2004 Darfur Commission authorized the mission “to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not

¹ Commission of Experts on the former Yugoslavia (1992-94) established by Security Council resolution 780 (1992) of 6 October 1992.

² International Commission of Inquiry on Darfur (2004) established by Security Council resolution 1564 (2004) of 18 September 2004.

³ Independent International Commission of Inquiry on the Syrian Arab Republic (2011-14), established by Human Rights Council resolution S-17/1 of 23 August 2011; preceded by the Fact-finding Mission to the Syrian Arab Republic (2011) established by the High Commissioner for Human Rights pursuant to Human Rights Council resolution S-16/1 of 29 April 2011.

⁴ *The UN Human Rights Council: Commissions of Inquiry Conference Brief*, 1 December 2011 at 2, available at <http://www.geneva-academy.ch/docs/news/HR-council-inquiry-conference-brief.pdf>.

⁵ See for example the mandate for the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (2013), which states “. . . the commission of inquiry will investigate the systematic, widespread and grave violations of human rights in the Democratic People's Republic of Korea . . . with a *view to ensuring full accountability*, in particular where these violations may amount to crimes against humanity” (emphasis added). The language of “full accountability” is also found in the mandates for the 2011 OHCHR Fact-finding Mission to the Syrian Arab Republic and the OHCHR Investigation Mission to Iraq (2014).

acts of genocide have occurred, and to identify the perpetrators of such violations *with a view to ensuring that those responsible are held accountable.*”⁶

The shift in mandates’ language towards a greater focus on accountability reflects a push amongst some elements of the international community for COIs to take on a more prosecutorial role. However, a number of barriers currently impede COIs from laying the groundwork for, and becoming a more integral part of, international or domestic prosecutions. Some of these relate to the fact that COIs are more ephemeral than international criminal courts, often only lasting for a few months.⁷ Others stem from significant resource constraints, including limited funding and small analyst and support staffs. And still further obstacles can be traced to concerns about due process rights and the safety of individuals who provide information to the COI.

With these obstacles in mind, the purposes of this paper are threefold:

- 1) To identify and assess the significant logistical barriers to COIs taking on a more prosecutorial role, specifically looking at witness protection, witness statements, subpoena powers, and evidence collection and storage.
- 2) To analyze one specific barrier impeding COIs from effectively contributing to accountability—the current system of recruiting and hiring commissioners and staff—that can be addressed through financially feasible reforms.
- 3) To suggest two achievable changes to the recruitment and hiring of commissioners and staff:
 - a) To appoint commissioners with knowledge of and specialized experience in both international criminal law and international humanitarian law;
 - b) To create a roster of qualified candidates for positions on future UN commissions, to ensure competency and diversity.

⁶ United Nations Security Council resolution 1564 (2004), para. 12 (emphasis added).

⁷ However, the timeframe of COIs is evolving. The Independent International Commission of Inquiry on the Syrian Arab Republic was established by Human Rights Council resolution S-17/1 of 23 August 2011 with no endpoint. As of April 2015, its activities remain ongoing.

1. Commissions of Inquiry

This paper will focus specifically on COIs established within the UN framework, by the Secretary-General,⁸ the General Assembly,⁹ the Security Council,¹⁰ the Office of the High Commissioner for Human Rights (OHCHR),¹¹ or most recently, the Human Rights Council.¹² The earliest UN-established COI was created in 1943: the United Nations War Crimes Commission (UNWCC) was established to investigate allegations of war crimes committed by the German Nazi regime. The modern COI came into being in the early 1990s in response to atrocities committed in the former Yugoslavia. Over the following three decades, COIs have become a critical tool for the UN to respond to violations of international human rights or mass atrocity situations. More than fifty COIs and fact-finding missions have been deployed to countries on five continents.¹³ (The accompanying spreadsheet details various characteristics of these commissions of inquiry and fact-finding missions).

A closer look at one particular COI—the International Commission of Inquiry for Burundi (Burundi Commission)—illustrates the procedure by which a UN body can establish a COI. In the early 1990s, Burundi was plagued with ethnic violence and political instability. In October 1993, the first Hutu head of state, Melchior Ndadaye, and several of his ministers were assassinated by officers within the administration.¹⁴ Following the coup, massacres of both Hutu and Tutsi resulted in the death of between 50,000 and 100,000 civilians.¹⁵

On August 28, 1995, the UN Security Council created a COI for Burundi with resolution 1012 (1995). The resolution set out the mandate:

- a) To establish the facts relating to the assassination of the President of Burundi on 21 October 1993, the massacres and other related serious acts of violence which followed;
- b) To recommend measures of a legal, political and administrative nature, as appropriate, after consultation with the Government of Burundi, and measures with regard to the bringing to justice of persons

⁸ International Commission of Inquiry on Guinea (2009), Secretary-General's Investigative Team charged with investigating serious violations of human rights and international humanitarian law in the Democratic Republic of the Congo (1997).

⁹ Group of Experts for Cambodia (1998).

¹⁰ International Commission of Inquiry on the Central African Republic (2013), International Commission of Inquiry on Darfur (2004).

¹¹ OHCHR Inquiry into Alleged Massacre in the Chocó Region of Colombia (2002), Independent Special Commission of Inquiry for Timor-Leste (2006).

¹² United Nations Independent Investigation on Burundi (2015), Independent International Commission of Inquiry on Eritrea (2014).

¹³ In this paper the term “commissions of inquiry” will refer collectively to both commissions of inquiry and fact-finding missions.

¹⁴ *Crisis in Burundi, April 1995*, University of Pennsylvania, African Studies Center, April 1995, available at http://www.africa.upenn.edu/Urgent_Action/DC_Brndi495.html.

¹⁵ *Id.*

responsible for those acts, and to prevent any repetition of deeds similar to those investigated by the commission and, in general, to eradicate impunity and promote national reconciliation in Burundi.¹⁶

The Secretary-General appointed five commissioners hailing from Canada, Madagascar (the chair), Morocco, Turkey, and Venezuela. The Burundi Commission worked for two distinct periods: from October 25, 1995 to December 20, 1995, resulting in the drafting of a preliminary report, and from January 7, 1996 to July 22, 1996, concluding with the submission of the final report to the Secretary-General.¹⁷ The final report detailed the state's political and ethnic history, witness testimony of the days surrounding the assassination of President Nadadaye, and the COI's conclusions regarding individual responsibility.¹⁸

The 1995 Burundi Commission illustrates a typical procedure for the creation of a COI. A subsidiary body of the UN establishes the mandate, which creates the COI and compels the COI to investigate either an ongoing situation involving human rights violations, or, as in the case of Burundi, one particular instance of a human rights violation. The mandate determines the investigation's scope and timeframe. By the conclusion of this time period, the COI drafts and presents a report on the situation to the governing body that established the COI.

Depending on the results of the investigation, accountability mechanisms occasionally result from such reports. Though no such accountability mechanism arose from the Burundi Commission's final report, other COIs have resulted in the referral of the situation in question to the International Criminal Court (ICC), or the creation of a special international tribunal to try individuals involved in the situation.¹⁹

2. COIs: Shifting Towards a Pre-Prosecutorial Role

Over the past two decades, COIs have increasingly focused on holding responsible individuals accountable for violations of international law. Two ways in which COIs have played a role in ensuring accountability are (1) being tasked with suggesting means of ensuring that those found responsible for such violations are held accountable, and (2) identifying the persons responsible for such violations.

¹⁶ International Commission of Inquiry for Burundi, established by Security Council resolution 1012 (1995) of 28 August 1995.

¹⁷ Report of the International Commission of Inquiry for Burundi (S/1996/682), 22 August 1996.

¹⁸ *Id.*

¹⁹ Examples of such COIs include the Commission of Experts on Rwanda (1994), the Commission of Experts on Yugoslavia (1994), the Group of Experts for Cambodia (1998), and the International Commission of Inquiry on Darfur (2004).

a) Mandates

A COI's mandate defines its tasks and the scope of its work, as well as the applicable law. The language of mandates varies considerably depending on the situation under investigation, the nature of the human rights and/or humanitarian law violations, and the purposes of the investigation. For example, some mandates narrowly focus on a certain event, such as the International Commission of Inquiry on Guinea (2009),²⁰ which focused specifically on the events of 28 September 2009, the day of a protest and opposition rally that culminated in civilian deaths. Other commissions are guided by more general mandates to investigate alleged violations of human rights and/or humanitarian law. More recently, the Commission of Inquiry on the Syrian Arab Republic (Syria Commission) is investigating ongoing violations of international human rights.²¹

Over the past two decades there has been an increasing trend of mandates specifically mentioning accountability. Mandates before 2004 focused more on investigating and establishing facts related to responsibility. For example, the mandate for the Commission of Experts on Yugoslavia (1992) did not address accountability. Security Council Resolution 780 (1992), which established the commission, instead:

Request[ed] the Secretary-General to establish, as a matter of urgency, an impartial Committee of Experts to examine and analyse the information submitted . . . together with such further information as the Committee of Experts may obtain through its own investigations and efforts . . . with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.²²

The concept of “accountability” is not mentioned in the mandate for the Yugoslavia commission, and accountability did not play a role in commissions’ mandates over the next twelve years.

However, a shift occurred with the mandate for the International Commission of Inquiry on Darfur (2004). The Darfur Commission was mandated “to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also 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.*”²³ This was the first

²⁰ Established by the United Nations Secretary-General on 16 October 2009 (S/2009/556).

²¹ Human Rights Council resolution S-17/1 of 23 August 2011, extended by the Human Rights Council in its resolution 19/22 of 23 March 2012.

²² Security Council resolution 780 (1992), para. 2.

²³ Security Council resolution 1564 (2004), para.12.

mandate to use language regarding the commission's role in ensuring that those responsible were held accountable.

In the years since 2004, mandates have increasingly focused on laying a groundwork for accountability. The mandate for the Independent Special Commission of Inquiry for Timor-Leste (2006) included “recommend[ing] measures to ensure accountability for crimes and serious violations of human rights.”²⁴ The International Commission of Inquiry on Libya (2011) was directed to “identify those responsible, to make recommendations, in particular, on accountability measures, all with a view to ensuring that those individuals responsible are held accountable.”²⁵ The mandate for the Syria Commission (2011) instructed the Commission to “identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.”²⁶ The mandates for the International Commission of Inquiry on the Central African Republic (2014)²⁷ and the United Nations Independent International Commission of Inquiry on the 2104 Gaza Conflict (2014)²⁸ also include language about ensuring that “those responsible are held accountable.”

b) Naming Persons Responsible for Violations

A second means by which COIs have increasingly focused on accountability is by identifying the specific persons responsible for human rights and international humanitarian law violations. The mandates for some COIs require the commission to identify the persons responsible for the violations. This requirement first occurred in the mandate for the Darfur Commission in 2004, which required it to “identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.”²⁹ Other mandates that required commissions or missions to identify perpetrators are summarized in the table below.

The table illustrates the increasing frequency with which mandates have empowered COIs to “name names.” However, in practice commissions have infrequently actually publicly named perpetrators. Only two commissions have named perpetrators in their public reports: Guinea (2009) and Timor-Leste (2006).³⁰

²⁴ Report of the Independent Special Commission of Inquiry for Timor-Leste (S/2006/822), annex, para. 4(c).

²⁵ Human Rights Council resolution S-15/1 of 25 February 2011, para. 11.

²⁶ Human Rights Council resolution S-17/1 of 23 August 2011, para. 13.

²⁷ Security Council resolution 2127 (2013) of 5 December 2013, para. 24.

²⁸ Human Rights Council resolution S-21/1 of 23 July 2014, para. 13.

²⁹ Security Council resolution 1564 (2004), para. 12.

³⁰ OHCHR, *Commissions of Inquiry and Fact-finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice* (2015) at 14.

Commission of Inquiry/Fact-Finding Mission	Mandate Language Regarding Identification of Persons Responsible for Violations of International Law
Guinea (2009)	To “determine responsibilities and, where possible, identify those responsible”
Côte d’Ivoire (2011)	To “identify those responsible for such acts and to bring them to justice”
Libya (2011)	To “identify those responsible, to make recommendations, in particular, on accountability measures, all with a view to ensuring that such individuals responsible are held accountable”
Syria (October 2011)	To “identify those responsible with a view of ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable”
Syria (March 2013 extension of the mandate)	To “identify those responsible with a view of ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable”
Central African Republic (2014)	To “help identify the perpetrators of such violations and abuses, point to their possible criminal responsibility and to help ensure that those responsible are held accountable”
Gaza Conflict (2014)	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”

In practice, it is more common for commissions to either not name perpetrators, or to include the names in a confidential list that is handed to the Secretary-General or the High Commissioner for Human Rights. For example, the Commission of Inquiry on Darfur placed the names of persons reasonably be suspected of being involved in the commission of a crime in a sealed file that was placed in the custody of the United Nations Secretary-General.³¹ The Commission recommended that this file be handed over to a competent prosecutor (the Prosecutor of the ICC, according to the Commission’s recommendations), who would then use that material as he or she deemed fit for his or her investigations.³² When the UN Security Council later referred the situation in Darfur to the ICC, the Secretary-General sent the list of names to the ICC Office of the Prosecutor, who eventually issued indictments.³³

The Darfur Commission explained that it had decided to withhold the names of alleged perpetrators from the public domain for three reasons: “1) the importance of the principles of due process and respect for the rights of the suspects; 2) the fact that the Commission has not been

³¹ Report of the International Commission of Inquiry on Darfur to the Secretary-General (S/2005/60), 25 January 2005, para. 645.

³² *Id.*

³³ Freeman, Mark, *Truth Commissions and Procedural Fairness* (2006) 274-75;

vested with investigative or prosecutorial powers; and 3) the vital need to ensure the protection of witnesses from possible harassment or intimidation.”³⁴ The Commission of Inquiry on Libya (2011) also did not publish names, stating “[t]his is to prevent risk of harm to those who are held in custody and to avoid jeopardizing the fair trial rights of any persons who may be brought to trial in the future.”³⁵ To date, the Commission of Inquiry for Syria has refrained from publicly “naming names.”

These concerns for the due process rights of individuals who might be named by a COI finds expression in Principle 9 of the *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, which states:

Before a commission identifies perpetrators in its report, the individuals concerned shall be entitled to the following guarantees: (a) The commission must try to corroborate information implicating individuals before they are named publicly; (b) The individuals implicated shall be afforded an opportunity to provide a statement setting forth their version of the facts either at a hearing convened by the commission while conducting its investigation or through submission of a document equivalent to a right of reply for inclusion in the commission’s file.³⁶

The statements from the Libya and the Darfur commissions, along with Principle 9, set out three of the key rationales for COIs not naming perpetrators: (1) the importance that above all COIs “do no harm” and protect cooperating persons from possible risks, (2) the importance of guaranteeing procedural fairness and due process rights to possible perpetrators, and (3) not politicizing future judicial processes.³⁷

These considerations present significant barriers to the role that COIs can play in ensuring accountability. The following section of the paper will discuss procedural barriers to COIs playing a greater role in ensuring that perpetrators are held accountable for their violations of international law. These barriers include COIs’ lack of witness protection programming, their reliance on voluntary cooperation, and the absence of procedures for collecting physical evidence and ensuring a chain of custody for that evidence.

³⁴ S/2005/60, para. 645.

³⁵ Report of the International Commission of Inquiry on Libya (A/HRC/19/CRP.1), para. 760.

³⁶ Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity, 8 February 2005 (E/CN.4/2005/102/Add.1).

³⁷ See also *The UN Human Rights Council: Commissions of Inquiry Conference Brief*, 1 December 2011 at 3 <http://www.geneva-academy.ch/docs/news/HR-council-inquiry-conference-brief.pdf>.

3. Barriers to COIs Contributing More Effectively To the Prosecution of Perpetrators

Proponents of international justice have advocated for reforming COIs' methodologies so that the materials they produce can be more effectively used in subsequent legal prosecutions, if there are such prosecutions domestically or before an international tribunal. As an example, they cite the work of the Commission of Experts on the former Yugoslavia (1992-1994),³⁸ which was for the most part not used in the subsequent International Criminal Tribunal for the Former Yugoslavia (ICTY).³⁹ In many cases, prosecutors had to begin from scratch in collecting evidence and witness statements. However, there are currently significant logistical barriers to COIs developing a more effective pre-prosecutorial role. Before COIs can take on a larger role in laying the groundwork for criminal prosecutions, these barriers must be addressed. The following section of this paper will analyze four current barriers: (1) protection of victims, witnesses, sources, and other persons cooperating with commissions, (2) the taking of statements, (3) the absence of a subpoena power, and (4) document collection and storage.

a) Protection of Victims, Witnesses, Sources, and Other Persons Cooperating with Commissions

First, COIs must interact with victims and witnesses in order to fulfill their mandate, but they are unable to guarantee witness protection or relocation to these cooperating persons. COIs' activities can put witnesses and victims at risk of retaliation. For example, the Darfur Commission's report noted that there were "episodes indicative of pressure put by some regional or local authorities on prospective witnesses, or on witnesses already interviewed by the Commission," including internally displaced people (IDPs) being given bribes to not talk to the Commission, the deployment of infiltrators posing as IDPs in some camps, and trucks driving through IDP camps with people shouting threats.⁴⁰ In other cases, practitioners have reported that threats against those who cooperate with commissions have actually materialized.⁴¹

The OHCHR's *Guidance and Practice for Commissions of Inquiry and Fact-finding Missions on International Human Rights and Humanitarian Law* (2015) provides operational guidelines for the protection of persons cooperating with commissions/missions—including victims, witnesses and other sources of information—as well as persons facilitating the commission's/mission's work in other ways.⁴² These guidelines are based on the experience of and lessons drawn from

³⁸ Established by Security Council resolution 780 (1992) of 6 October 1992.

³⁹ Officially the "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991."

⁴⁰ S/2005/60 at 16.

⁴¹ HPCR Advanced Practitioner's Handbook on Commissions of Inquiry: Monitoring, Reporting, and Fact-Finding, Harvard Humanitarian Initiative Program on Humanitarian Policy and Conflict Research, March 2015 at 43.

⁴² OHCHR, *Commissions of Inquiry and Fact-finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*, 2015.

previous commissions.⁴³ The OHCHR guidelines emphasize the importance of respecting and protecting the confidentiality of sources. However, the report reveals the limited role that commissions can play in protecting participants. Under guiding principles for the protection of cooperating persons, the report states “[t]he primary responsibility for the protection of cooperating persons rests with the Government of the State(s) concerned.”⁴⁴ The report also directs commissions to “[g]ather[] information about existing witness protection programmes operated by the national police or any other national security agencies; the effectiveness and integrity of any such programmes, means or mechanisms should be carefully analysed.”⁴⁵

The OHCHR guidelines reflect the fact that COIs do not have their own independent mechanisms for protecting cooperating persons. They must rely on the state for protection. This reliance is demonstrated by the Report of the Commission of Inquiry on Human Rights in Eritrea, which acknowledges that “the most significant investigative challenge the commission faced was fear of reprisal among witnesses” but that “primary responsibility for protecting all persons cooperating with the commission rests with their States of residence and nationality.”⁴⁶ As a result, the commission could only “urge Member States to provide additional protection measures where necessary.”⁴⁷

Similarly, the 2009 report of the Guinea Commission called on the Government to “fulfill its obligations in this area [witness protection] and the commitments it has given to victims and witnesses, in particular those who have cooperated with the Commission, taking due account of gender specificities.”⁴⁸ It also recommended that other states “provide refuge in accordance with the provisions of international law governing asylum to all victims or witnesses who may be in danger.”⁴⁹ Following the completion of the field mission, OHCHR established a post-mission protection presence in Conakry for three months to provide support and advice to persons facing threats to safety and prevent reprisals against them.⁵⁰ However, this practice cannot be implemented for all COIs due to financial constraints and because states may not have existing or effective programs for witness protection.⁵¹

Commissions associated with the United Nations have an additional tool at their disposal for putting pressure on governments to support the work of COIs: the UN Secretary-General presents an annual report to the Human Rights Council on “Cooperation with the United Nations,

⁴³ *Id.* at 74.

⁴⁴ *Id.* at 75.

⁴⁵ *Id.*

⁴⁶ Report of the Commission of Inquiry on Human Rights in Eritrea (A/HRC/29/42), 4 June 2015 at 4.

⁴⁷ *Id.*

⁴⁸ Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea (S/2009/693), 18 December 2009 para. 281 (a)-(b).

⁴⁹ *Id.*

⁵⁰ Annex to the Letter Dated 18 May 2012 from the Permanent Representative of Portugal to the United Nations Addressed to the President of the Security Council (S/2012/373) (2012) at 48.

⁵¹ *Id.*

its representatives and mechanisms in the field of human rights.”⁵² As mandated by Human Rights Council resolution 12/2,⁵³ these reports document cases of intimidation and reprisal against persons who have cooperated with the United Nations. The report seeks to exert a deterrent effect by naming countries where reprisals are alleged to have occurred, but it is an exercise in “naming and shaming” without a mechanism for protecting people from these reprisals.

An additional problem with leaving witness protection to the state is that the state may be in an antagonistic relationship with the COI and may not be incentivized to protect witnesses. The Syrian Government, for example, has actively impeded the work of the Syria Commission, and as of March 2015, it had not yet allowed the Commission to undertake investigations inside the country except for a single courtesy visit.⁵⁴

The Syrian COI’s first report emphasizes the importance of protecting cooperating persons, stating:

The protection of victims and witnesses lies at the heart of the methodology of human rights investigations. While the collected information remains confidential, the commission is deeply concerned about the possibility of reprisals against individuals who cooperated with it, and against their relatives in the Syrian Arab Republic. It is also concerned about the protection of those individuals who openly spoke to the media in an attempt to counter the news blockade imposed by the Government.⁵⁵

However, the report does not state what the COI’s mechanisms for protecting victims and witnesses are. It merely calls upon the Syrian Arab Republic to “Protect[]all those who are in contact with the commission in connection with the inquiry; no such person shall, as a result of such appearance or information, suffer harassment, threats of intimidation, ill-treatment, reprisals or any other prejudicial treatment.”⁵⁶ Therefore, the COI is calling on a government that refuses to cooperate with the COI’s activities to take responsibility for protecting those individuals who have cooperated with the commission.

Given the limitations of their witness-protection measures, COIs must carefully take into account the security situation and individual protection needs before working with victims, witnesses,

⁵² The 2015 report is A/HRC/30/29, 17 August 2015.

⁵³ A/HRC/RES/12/2, 12 October 2009.

⁵⁴ As stated in the Commission’s February 2016 report, “The Commission’s investigations remain curtailed by the denial of access to the Syrian Arab Republic.” Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (A/HRC/31/68), 11 February 2016 at 3, Annex 1.

⁵⁵ Report of the independent international commission of inquiry on the Syrian Arab Republic (A/HRC/S-17/2/Add.1), 23 November 2011 at 5.

⁵⁶ *Id.* at 25

and sources. At the same time, COIs cannot independently provide witness protection without governmental assistance, so their hands are in effect tied. This is a significant barrier to working with cooperating persons. People are less likely to interact with investigators if they cannot be assured protection in return—whereas they may be willing to testify in a criminal trial if there are protection measures available, such as induction into a witness protection program. Furthermore, cooperating persons are far more vulnerable if they are not provided protection, and may be scared into silence, injured, or even killed. In cases of intimidation or violence, cooperating persons would then be unavailable to later testify at a criminal trial—and as discussed in the next sub-section, *viva voce* testimony is preferred in criminal trials.

b) Evidence Collection: Taking of Statements

A second barrier to COIs playing a greater pre-prosecutorial role is that COIs take witness statements in a form that normally cannot be submitted into evidence in criminal proceedings. COIs generally record statements in the third person; in other words, they write from the third-person point of view and use pronouns such as he, she, it, or they. For example, a publication from the Syrian Commission featuring twelve selected testimonies from victims of international law violations includes statements such as “The interviewee is from Minbeij countryside in Aleppo province. He left Syria to become a refugee in [] 2014.”⁵⁷ The introduction to the report states that the “[t]he statements are recorded in the third person to provide additional protection to interviewees in the event that they become witnesses in future judicial proceedings.”⁵⁸

The use of the third person can also be seen in the report from the Darfur Commission. The report does not include signed affidavits or first-person testimony, and states “[m]ost of the persons the Commission has interviewed took part on the basis of assurances of confidentiality.”⁵⁹ The Commission therefore did not take signed witness statements, but rather made careful accounts of the testimony given by witnesses.⁶⁰ The reports from the COIs for Guinea⁶¹ and the Central African Republic,⁶² among others, also employ the third-person in witness statements and factual accounts.

Although the rules of evidence for international criminal tribunals have been liberalized far more than other areas of international criminal procedure, statements taken in the third person do not meet the procedural requirements adopted by international criminal tribunals.

⁵⁷ Selected testimonies from victims of the Syrian conflict (A/HRC/27/CRP.1), 16 September 2014 at 9.

⁵⁸ *Id.* at 3.

⁵⁹ S/2005/60 at 65, 70.

⁶⁰ *Id.* at 134.

⁶¹ S/2009/693.

⁶² Final report of the International Commission of Inquiry on the Central African Republic (S/2014/928, annex), 22 December 2014.

For an example of rules of criminal procedure that were significantly liberalized but still would not allow the third-person statements collected by COIs we can look to the Rules of Procedure and Evidence of the ICTY. These rules were modified in 2001 to delete a preference for oral statements over written statements under Rule 90(A)⁶³ and to add a new Rule 89(F), which states that a chamber may receive a witness's evidence orally or—where the interests of justice allow—in written form.⁶⁴ Furthermore, Rule 92bis was introduced, which allows for the admission of some written witness statements (so long as they do not go towards proving the acts or conduct of the accused).⁶⁵ Rule 92bis does not require statements to be made in formal accordance with domestic law if the witness is deceased; the Chambers could still find such evidence to be admissible depending on other factors, such as reliability.⁶⁶

As described by Judge Patricia M. Wald of the ICTY, “[t]hese Rule revisions represent a 180 degree turn from earlier emphasis on the ‘principle’ of live testimony.”⁶⁷ However, notwithstanding this liberalization of the preference for *viva voce* testimony, the rules for the submission of evidence in these tribunals still required “a written statement or a transcript of evidence, which was given by a witness.”⁶⁸ A statement recorded in the third person by COI staff is not a statement that is “given by a witness” and thus would not meet this requirement.

Under the ICTY rules, a written statement can be admissible even if the witness is not in attendance if a declaration by the person making the written statement is attached to the statement, declaring that the content is true to the best of that person's knowledge and belief. But COIs such as the Syria Commission do not take such formal declarations, in part to protect the identities of witnesses. Therefore, the written statements collected by COIs would be inadmissible in a criminal tribunal, despite substantial liberalization of the procedural rules. Such statements, however, could still be used for lead and background purposes.

c) Subpoena Power

A third barrier to COIs playing a greater pre-prosecutorial role is that COIs have historically not had the power to compel testimony or cooperation. Subpoenas to compel testimony and the production of documents have been used by domestic truth commissions in Uganda, Chad, Sri Lanka, Haiti, South Africa, Nigeria, Grenada, Timor-Leste, Ghana, Sierra Leone, Liberia, and

⁶³ Rule 90 previously said that, subject to Rules 71 and 71bis, dealing with depositions and video-links, “[w]itnesses shall, in principle, be heard directly by the Chambers.” ICTY Rules of Procedure and Evidence, Rule 90, (IT/32) (1994).

⁶⁴ ICTY Rules of Procedure and Evidence, Rule 89(F), (IT/32/Rev.20) (2001).

⁶⁵ *Id.* Rule 92bis.

⁶⁶ *Id.*

⁶⁷ *To “Establish Incredible Events by Credible Evidence”: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 Harv. Int'l L.J. 535, 548 (2001).

⁶⁸ ICTY Rules of Procedure and Evidence (IT/32/Rev.48) 28 November 2012 (emphasis added).

the DRC.⁶⁹ In these cases, domestic commissions have been given subpoena power under domestic law. They have also been Commonwealth COIs, such as in Australia and India, which were empowered to issue subpoenas. Most U.S. congressional committees also have full subpoena powers. However, COIs formed under the UN and its subsidiary bodies have not been endowed with this power.

Broadly, there are two kinds of subpoenas that are common in courts and some truth commissions: *subpoenas ad testificandum* (subpoenas to testify) and *subpoenas duces tecum* (subpoenas compelling production of documents).⁷⁰ Subpoenas can be employed when a person with relevant information or evidence is unwilling to volunteer that information or comply with informal requests for it. Subpoenas can also be useful in situations in which a person is willing to comply, but is concerned about the possible consequences of disclosure in the absence of a binding subpoena or does not want to give the impression of voluntary cooperation. A person, such as a police officer or other public official, might also be barred by a domestic statute from disclosing information unless s/he is compelled by a subpoena.

By comparison, COIs formed by the UN Secretary General or UN subsidiaries do not have a subpoena power. For example, the final report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General states:

The Commission has not been endowed with the powers proper to a prosecutor (in particular, it may not subpoena witnesses . . .). It may rely only upon the obligation of the Government of the Sudan and the rebels to cooperate. Its powers are therefore limited by the manner in which the Government and the rebels fulfill [sic] this obligation.⁷¹

Security Council-formed COIs could mandate that states cooperate with a COI. Chapter VII of the United Nations Charter sets out the UN Security Council's powers and allows the Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to take military and nonmilitary action to "restore international peace and security."⁷² Chapter VII gives the Security Council broad powers; for example, in September 2013 the Council, by adopting Resolution 2118 (2013), required scheduled destruction of Syria's chemical weapons arsenal. The Resolution called for full implementation of the Organisation for the Prohibition of Chemical Weapons (OPCW)'s 27 September decision, which contains special procedures for the expeditious and verifiable destruction of Syria's chemical weapons. If the Council determined that a state's refusal to cooperate with a COI also constituted a "threat to the peace" and to

⁶⁹ This paragraph and the following paragraph draw heavily from Mark Freeman, *Truth Commissions and Procedural Fairness* (2006) at 188-90.

⁷⁰ In this section the term "subpoena" will refer to both kinds of subpoenas.

⁷¹ S/2005/60.

⁷² UN Charter art. 39.

international security, it could theoretically adopt a resolution requiring the state to cooperate—but to date this has not occurred even in the face of significant resistance to the work of the COI, as in Syria. COIs formed by the Human Rights Council do not have the same ability as commissions formed by the Security Council, because they do not have Chapter VII power. However, the Council could empower them with such powers with a supportive Chapter VII resolution as it did with respect to the work of the OPCW.

The absence of a subpoena power distinguishes COIs from criminal tribunals, which can employ subpoenas, order searches and seizures, and issue arrest warrants. For example, Rule 54 of the Rules of Procedure and Evidence for the ICTY states “At the request of either party or proprio motu, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.” As a result, criminal tribunals have significantly greater power to compel evidence than COIs.

d) Evidence Collection and Storage

A fourth barrier to COIs playing a greater pre-prosecutorial role is that COIs are generally not equipped to collect and archive documents that they review over the course of their investigation. Proper documentation and handling of evidence, particularly the maintaining of a chain of custody, is imperative for the evidence to be admissible as evidence at a later criminal trial. Therefore, the absence of procedures for evidence collection and storage jeopardizes the potential for such evidence to later be used in a criminal prosecution, and thus limits the COI’s pre-prosecutorial role.

The OHCHR’s report on Guidance and Practice states: “A range of official documents, including autopsy reports, court records, military personnel records, official press statements and public speeches, may be collected by investigators. As a general rule, original documents should not be collected, but rather copied or photographed and such copies/photographs stored with a detailed information report.”⁷³ It goes on to state that “[i]n very exceptional circumstances investigators may have to exercise judgment as to whether they should go further than merely document and actually collect physical information, for instance if there is a risk that the object may otherwise be destroyed or irretrievably lost.”⁷⁴

Collecting original documents requires infrastructure and institutional support that COIs do not currently have. Documents may be fragile and require temperature and humidity-controlled storage. They also require a careful categorization system. If sufficient resources were made

⁷³ OHCHR, *Commissions of Inquiry and Fact-finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice* (2015) at 45, 51.

⁷⁴ *Id.* at 54.

available, a permanent evidence vault could be created in Geneva—but currently COIs do not have sufficient resources or staffing, and as a result they generally do not collect original documents.

Furthermore, for documents (or physical evidence) to be introduced as evidence in a later criminal tribunal, it is important that a “chain of custody” or continuity is maintained, with strong documentation of the handling, transport, and storage of the items collected. If the chain of custody is in dispute, claims can be made that the exhibit is inauthentic or has been tampered with. COIs to date have not employed protocols for preserving the chain of custody, because they avoid collecting original documents and physical objects. While the OHCHR’s report on guidance and practice states that ensuring a chain of custody is “essential,” it provides no specific guidelines or directions on how to maintain the requisite continuity. This means that commission members may not be acquainted with the importance of a chain of custody, and that there are no clear protocols to follow to ensure that any evidence that is collected can later be used in a later criminal tribunal or trial. As a result, documents collected by a COI may later be found inadmissible by a criminal tribunal or court.

An additional barrier to recording the chain of evidence is the ephemeral nature of COIs. Commissions are not permanent bodies; they are established for a set period of time and disbanded once the terms of the mandate have been fulfilled. As a result, there is no obvious and permanent institutional home for documents and physical evidence collected by commissions. The OHCHR’s report on guidance and practice states:

On the completion of the work of the commission/mission, each staff member shall be responsible for managing the information he or she has gathered and produced. An archivist/data management officer or designated staff member shall oversee and advise on all issues pertaining to information management and storage with a view to ensuring, among other things, that all data are security-classified and that records of archival value have been created. The printed information and records and the electronic copies are stored at the United Nations Archives in Geneva or the United Nations Secretariat Archives in New York, as appropriate.⁷⁵

Even though the OHCHR report notes that in exceptional circumstances investigators may have to collect physical evidence,⁷⁶ the guidance on evidence storage provides no guidelines on how to store such collections. Furthermore, there does not seem to be standard practice for the storage of documents. For example, the report of the Guinea commission states “[t]he documents, testimony and images received by the Commission have been archived and will be turned over to

⁷⁵ *Id.* at 74.

⁷⁶ *Id.* at 54.

OHCHR”⁷⁷—but does not specify whether they will be stored at the United Nations Archives in Geneva or the United Nations Secretariat Archives in New York. The lack of clear guidelines for how COIs’ materials should be stored creates potential issues for the maintaining and establishing their chain of custody. These issues may later result in documentary and physical evidence being found inadmissible in a criminal tribunal or national court.

The recent work of the Commission for International Justice and Accountability (CIJA), a commission investigating war crimes in Syria that operates independent of the UN’s Syria Commission, highlights the magnitude of resources needed to collect documentary evidence for future prosecutions. Since 2012, the CIJA has smuggled over six hundred thousand documents out of Syria.⁷⁸ In order to do so, the organization has had to coordinate with rebel groups, train Syrian activists, ensure the safe passage of the documents out of the country, analyze those documents, and then store them securely at CIJA headquarters. Each of these initiatives has required significant funding and resources.

CIJA investigators have had to train the collaborators who collect the documents not only on the importance of storing such documents, but also the precise methods necessary to secure documents so they can later be used in criminal trials. In order to preserve chain of custody, the rebel groups are trained to (1) keep a record of when and where the documents were found, (2) ensure the documents were not touched or moved out of order in any way, (3) box the documents up and seal them so they could not be tampered with, and (4) chart the movement of those sealed boxes of documents as they are slowly moved out of the country into safer territory.⁷⁹

Once the documents arrive at the CIJA headquarters in Western Europe, each document is scanned, assigned a bar code, and stored underground in secure, temperature-controlled rooms to ensure the preservation of the documents until trial, if there is a trial.⁸⁰

In total, the CIJA’s current budget is approximately eight million dollars per year with a staff of one hundred and fifty, all dedicated to the collection, transportation, preservation, and analysis of these documents.⁸¹ Typical UN-established COIs, by contrast, employ as few as six staff members. The current Syria COI has a significantly larger staff than what is typically used, with 21 staff members. In order for the Syria COI to conduct an investigation that, like the CIJA’s work, collects evidence that may be used at trial, the funding and available resources for UN COIs would have to increase significantly.

⁷⁷ S/2009/693 at 21.

⁷⁸ Ben Taub, *The Assad Files: Capturing the top-secret documents that tie the Syrian regime to mass torture and killings*, *The New Yorker*, 18 April 2016, available at <http://www.newyorker.com/magazine/2016/04/18/bashar-al-assads-war-crimes-exposed>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

e) Summary of Existing Barriers to COIs Playing a Greater Pre-Prosecutorial Role

Addressing the four barriers outlined above would allow COIs to play a more pre-prosecutorial role, producing evidence such as witness statements and documents that could be used in future criminal trials and tribunals. There are significant efficiency gains to allowing prosecutors to use COIs' work directly. However, putting COIs in a place where they can take first-hand witness statements, provide witness protection, compel testimony, and collect original documents would require significant funding and structural reforms. These reforms also elicit more theoretical questions about what the proper role of a COI is, and whether it should even be playing a pre-prosecutorial role.

4. Proposed Reforms to The Composition and Recruitment of COIs

The barriers to COIs playing a greater role in ensuring accountability, discussed in the previous section, could only be overcome through significant funding increases and structural changes that mandate more power to COIs. Given the resource constraints facing the UN, these reforms may not be feasible in the short-term. However, there is a fifth barrier to COIs having a greater role in accountability that can be addressed through financially feasible reforms: the recruitment and hiring of COI commissioners and staff.

Commissions operate within a limited time frame, with an even more limited budget, and often with limited access to the country or region under investigation. Its commissioners and staff must have an understanding of the applicable law set forth in the mandate—usually international human rights and international humanitarian law, and sometimes international criminal law⁸²—as well have an understanding of burdens of proof and be able to clearly indicate the standard(s) of proof that they adopt. They must be familiar with and capable of gathering information from a variety of sources, including primary sources such as interviews with witnesses. Sometimes the investigation must be carried out during an ongoing armed conflict. The commission must evaluate the information it collects for relevance, reliability, and validity. Commissions then conduct both a factual analysis to establish whether the incident or event under investigation occurred and what happened, as well as a legal analysis to match the facts to specific provisions of human rights law and/or international humanitarian law to determine whether the facts established constitute violations.⁸³ Lastly, if mandated, the commission may also establish what entities or individuals were responsible for the violations.⁸⁴

⁸² For example, the Commission of Inquiry on the Syrian Arab Republic was required to “establish the facts and circumstances . . . of the crimes perpetrated” and to also identify perpetrators of violations “that may constitute crimes against humanity.” Human Rights Council resolution S-17/1, para. 13.

⁸³ OHCHR, *Commission of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice* (2015) at 60.

⁸⁴ *Id.*

Considering these significant operational constraints and the level of expertise required to complete these tasks, it is imperative that COIs can be assembled quickly and that they can be staffed with highly qualified professionals. However, a number of problems related to recruitment and composition continue to plague COIs. These problems must be addressed if COIs are to take on a more pre-prosecutorial role in the future. As explained in this section of this paper, the main problems facing COIs are the commissioners and staff lacking expertise in international criminal law (ICL) and international humanitarian law (IHL), and a cumbersome and inefficient recruitment process for the COI staff.

The following sections of the paper will (1) analyze the problems associated with current staffing practices, looking first at the commissioners and then at the larger secretariat, and then (2) propose two reforms to the current system of recruitment and hiring.

a) Problems with Current Staffing Practices

There are two types of roles for personnel working in a COI: commissioners and staff.⁸⁵ Commissioners are appointed by the mandating body that establishes the commission. The secretariat is the staff that assist the mission by providing substantive and technical expertise and support. This section of the paper will analyze two significant problems that have arisen with current staffing practice: (1) the commissions' lack of experience and expertise, specifically in regard to IHL and ICL, and (2) the lack of a readily accessible, diverse pool of qualified candidates for positions in the secretariat.

i) Commissioners' Experience and Expertise

COIs are composed of an odd number of commissioners, typically three or five.⁸⁶ The purpose of having an odd number of commissioners is to ensure majority decision-making in all aspects of the commission's activities.⁸⁷ Older commissions, such as the commissions for East Timor (1999) and Darfur (2004), had five commissioners, whereas most of the major commissions in the past 5 years—including the commissions for Burundi (2015), Eritrea (2014), the Central African Republic (2013), North Korea (2013), Syria (2011), and Libya (2011)—have had three commissioners.⁸⁸ The mandating body that establishes the commission appoints the commissioners. Consultations with those close to the appointment process indicate that the selection of commissioners can be subject to political lobbying by UN member states. States may

⁸⁵ *Id.* at 18.

⁸⁶ *Id.* at 24

⁸⁷ Cherif Bassiouni & Christina Abraham, *Siracusa Guidelines for International, Regional, and National Fact-Finding Bodies*, International Institute of Higher Studies in Criminal Science, September 2013.

⁸⁸ Library of the United Nations Office at Geneva, *Research Guide: International Commissions of Inquiry and Fact-finding Missions*, available at <http://libraryresources.unog.ch/chronolist>.

favor the appointment of a high level political figure, such as a former foreign minister or head of state, or they may push for geographic and/or gender diversity on the panel.

While the processes vary, the assembly of the Commission for the Democratic People's Republic of North Korea (DPRK) illustrates how commissioners can be appointed. On March 21, 2013, the 47-member state, Geneva-based Human Rights Council (HRC), a subsidiary organ of the United Nations General Assembly, adopted a resolution that established a COI to investigate human rights violations in North Korea. The commission consisted of three "eminent persons," the first of whom was the "Special Rapporteur on the situation of human rights in the DPRK," Marzuki Darusman, the former Attorney General of Indonesia. The other two commissioners were selected by the revolving President of the HRC from a list of potential candidates proposed by the member states and the OHCHR.⁸⁹ The team was then supported by a team of nine human rights officials comprising the secretariat.⁹⁰

The commissioners are the nominal heads of the COI; their primary responsibility is to fulfill the commission's object and purpose by interpreting the text of the commission's mandate and respecting the intent of the legislative authority.⁹¹ As COI mandates focus more on accountability for violations of international humanitarian law and international criminal law, it is imperative that at least one commissioner has expertise in these specific areas of law. Without such a background, commissioners cannot adequately interpret their mandates, understand the applicable law, or apply the facts to the relevant standards of proof.

The guidelines for COIs published by the OHCHR directly address the need for commissioners to have this expertise, stating that candidates for appointment should be considered based on nine separate criteria, including "recognized competence and proven substantial knowledge and experience in . . . international humanitarian law, and/or international criminal law, as relevant."⁹² This recognized competence and proven substantial knowledge would be relevant for commissions whose mandates compel them to investigate violations of these bodies of law.

The OHCHR guidelines later imply that all commissioners should demonstrate knowledge of ICL and IHL. For only one of the nine distinct criteria ("Knowledge of the country, situation, or region"), the guidelines state that "this [criterion] may not be required of all members."⁹³ Since this caveat is not provided for any of the other eight criteria, it can be inferred from the

⁸⁹ Introduction: Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, United Nations Human Rights Office of the High Commissioner (2013), available at <http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/AboutCoI.aspx>.

⁹⁰ *Id.*

⁹¹ HPCR Advanced Practitioner's Handbook on Commissions of Inquiry at 7.

⁹² Commission of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice at 19.

⁹³ *Id.*

guidelines that every commissioner appointed to a COI charged with investigating violations of specific fields of law should demonstrate experience in those relevant fields.

However, it appears that even commissions established under the OHCHR have not followed its guidelines in practice. An examination⁹⁴ of past commissioners' professional backgrounds reveals that commissioners rarely have any kind of specialized background in the fields of IHL or ICL. In the past five years, commission mandates for Gaza (2014), Eritrea (2014), North Korea (2013), the Central African Republic (2013), and Guinea (2009) have incorporated specific language regarding investigation of violations of international criminal law. Yet of these commissions, there was not a single case in which all commissioners appointed to the COI had demonstrated experience in the field of international criminal law. Three of these COIs did not have a single appointed commissioner with a background in criminal law. Some commissioners did not have any formal legal education.

Commissioners' lack of expertise in ICL and IHL will hinder COIs' ability to focus more on accountability and to play a greater pre-prosecutorial role. Without professional legal training and relevant work experience, commissioners may lack familiarity and understanding of critical terms related to the applicable law or the standard of proof being applied. For example, terms like "siege," "disproportionate attack," "extermination," and "crimes against humanity" all have very specific legal definitions in the context of international criminal law that only someone with a background in ICL would understand and be able to apply to the facts at hand. As stated by a former member of an international COI, background in international law generally, or even a background in IHL, is not enough when a commissioner needs to understand the intricacies of criminal law.

The OHCHR guidelines suggest that candidates for commissioner be judged based on "recognized competence and proven substantial knowledge and experience in international human rights law, including women's rights and gender issues, international humanitarian law, and/or international criminal law, as relevant."⁹⁵ This treatment of IHL and ICL as subsidiary categories of human rights law reveals a fundamental misunderstanding of ICL and IHL is. In reality, humanitarian law is a separate body of law limited to situations of armed conflict. A senior staff member of a COI established under the OHCHR commented that there was not sufficient regard within the OHCHR for the complexities of international humanitarian law and international criminal law; instead, the staffer said, the institutional attitude was that those bodies of law could be learned on the job. Such an attitude will hinder the appointment of the most qualified and suitable commissioners to COIs, and be a barrier to COIs effectively fulfilling their mandates.

⁹⁴ This examination was performed by conducting online searches of each commissioner's CV, available published works, and news articles reporting on any recent professional activities. In particular, we focused on finding teaching experience, specialized legal education, published articles, or work experience in the relevant legal fields.

⁹⁵ *Id.*

ii) Recruitment and Composition of the Secretariat

Once the mandating body established the commission and the commissioners are appointed, the next step in the process of assembling a COI is the recruitment of the secretariat—the staff who assists the mission by providing substantive and technical expertise and support. The expertise and support provided by staff members ranges widely, from interviewing witnesses, to conducting legal analysis, to assessing military strategy. The particular kinds of expertise the secretariat requires depends on the COI’s mandate, its tasks, and the context in which it is operating.

For COIs originating within the UN, the mandating authority has recruited internally and externally, pulling both from the pool of staff within the UN and from independent experts who were available to join the secretariat. However, there has not been a systematic approach to recruiting experts from outside the UN. To expedite the recruitment process for OHCHR-mandated COIs, in 2006 the OHCHR established a Rapid Response Unit composed of a small group of UN officials who manage a roster of 70 experienced human rights experts “ready to be deployed at short notice.”⁹⁶ In theory, this roster is meant to be consulted not only to supplement the secretariat for a COI or fact-finding mission, but also to provide surge capacity to OHCHR field offices around the world.⁹⁷ The Rapid Response Unit has established a human rights monitoring team based in Lebanon and sent fact-finding teams to Mali, Central African Republic, and Ukraine.⁹⁸

However, OHCHR’s current roster system faces a number of significant challenges: maintaining variability of roster member profiles, ensuring availability of roster members, and managing the roster itself.⁹⁹ Consultations with members of the secretariats of recent and ongoing COIs indicate that they have not been educated on how the Rapid Response Unit functions, and do not even know how to apply to be a member of the unit, even though they have experience on UN-mandated COIs and are currently working within that system. This is a troubling sign that the Rapid Response Unit is not actively recruiting qualified individuals, and that its procedures remain opaque. Until the Rapid Response Unit recruits more systematically and thoroughly, and until it establishes more transparent procedures, it cannot effectively function as a centralized roster for recruiting COI staff.

⁹⁶ Responding to human rights issues, OHCHR News Release, 1 September 2009, available at <http://www.ohchr.org/EN/NewsEvents/Pages/Respondingtopressinghrissues.aspx>.

⁹⁷ OHCHR, OHCHR in the World: making human rights a reality on the ground, available at <http://www.ohchr.org/EN/Countries/Pages/WorkInField.aspx>.

⁹⁸ *Id.*

⁹⁹ OHCHR Human Rights Induction Seminar for Parliamentarians of the Mediterranean Region: Rapid Deployment Missions, Geneva, 18 June 2015, available at http://cdn02.abakushost.com/pam/downloads/Rapid_Deployment_Missions-OHCHR.pdf.

Variability of expertise among the roster members—and the availability of those members—is crucial for the recruitment of professionals to COIs, because a wide variety of expertise is required to fulfill a given mandate. The OHCHR guidelines for COIs catalogs more than 20 distinct professional roles that are necessary for a secretariat to ensure the successful execution of a COI mandate. This list of professional roles includes:

- Coordinator/head of the secretariat/chief of staff
- Investigation team leader
- Human rights investigators
- Legal advisor
- Analyst
- Translators
- Criminal investigators
- Forensic experts
- Military analyst/military weapons expert¹⁰⁰

With such a diverse set of skills required of staff for COIs, it is imperative that the roster membership reflects this range of skill sets. However, consultations with internal OHCHR sources and external experts indicate that this diversity of qualifications is notably absent from the Rapid Response Unit. Therefore, the Rapid Response Unit, as it currently operates, should not be the main, centralized roster for recruiting COI staff.

(1) Example of the Importance of International Humanitarian Law Expertise: The Goldstone Report

It is critical that commissioners have expertise in IHL and are familiar with commonly accepted understandings of IHL terms. This is shown by the Goldstone Report,¹⁰¹ the final product of a UN Human Rights Council-established fact-finding mission tasked with investigating allegations of war crimes that occurred during the Gaza conflict in 2008-09.

The United Nations Fact Finding Mission on the Gaza Conflict (2009) was established by Human Rights Council resolution “to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after.”¹⁰² The resulting 574-page Goldstone

¹⁰⁰ OHCHR, Commission of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice (2015) at 23-27.

¹⁰¹ Named for the fact finding mission’s chair, South African jurist Richard Goldstone.

¹⁰² Human Rights Council resolution S-9/1 of 12 January 2009.

Report found evidence of potential war crimes and possibly crimes against humanity conducted by both Israel and Hamas.¹⁰³

The mission operated in a volatile political environment. Israel refused to engage with the mission, did not submit any evidence to it, and would not allow the mission's members to travel to the Gaza Strip via Israel. As a result, the mission had limited evidence before it.

While the mandate contained specific language about investigating violations of international law, subsequent reviews and criticisms of the Goldstone Report asserted that it contained a number of significant errors regarding the interpretation of international humanitarian law and the analysis of evidence regarding such violations.¹⁰⁴ Academics have claimed that the report's definitions of collective punishment, terrorism, distinction and proportionality, human shielding, and perfidy do not comport with their commonly accepted understandings in IHL doctrine.¹⁰⁵

For example, the Goldstone Report found that the Israeli blockade of the Gaza strip amounted to collective punishment, stating that "Israel . . . has chosen to punish the whole Gaza Strip and the population in it with economic, political and military sanctions. This has been seen and felt by many people with whom the Mission spoke as a form of collective punishment inflicted on the Palestinians because of their political choices."¹⁰⁶ Legal scholar Avi Bell has argued that this interpretation of collective punishment does not comport with the traditional meaning of the principle, which has been understood to refer to the imposition of penal and quasi-penal punishment on the basis of association rather than criminal guilt.¹⁰⁷ As a result, the Goldstone Report has been criticized for expanding the term "collective punishment" to cover political and economic sanctions.

These criticisms of the Goldstone Report's legal methodology generated significant debate in the international human rights community, and to some they undermined the Report's findings. The Goldstone Report illustrates the importance of all commissions, particularly those operating in volatile political environments, applying a careful analysis of IHL. It also illustrates the importance of COIs engaging all parties involved in the investigation. Otherwise the legitimacy of the COI's findings may later be called into question and politicized.

¹⁰³ Report of the United Nations Fact-Finding Mission on the Gaza Conflict (Goldstone Report) (A/HRC/12/48), 25 September 2009.

¹⁰⁴ Report of an Expert Meeting Which Assessed Procedural Criticisms made of the UN Fact-Finding Mission on the Gaza Conflict (The Goldstone Report), Chatham House, 27 Nov. 2009, available at <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/il271109summary.pdf>.

¹⁰⁵ Abraham Bell, *A Critique of the Goldstone Report and Its Treatment of Humanitarian Law*, Proceedings of the Annual Meeting (American Society for International Law) (2010) at 79-86.

¹⁰⁶ Goldstone Report at 369.

¹⁰⁷ Bell at 79-86.

(2) Example of the Recruitment and Hiring Process Impeding Fulfillment of the COI's Mandate: The Syria Commission (2011)

The recruitment process for the 2011 Syrian Commission's secretariat illustrates the problems with the OHCHR's current model of recruiting and hiring staff. The breadth and depth of the investigation in Syria required the commission to take on a larger staff than a typical COI; in total, 21 staff currently work on the commission. Because the COI was charged with investigating violations of IHL and ICL, the analysis team needed a number of staff with expertise in those fields of law; this, in turn, necessitated that the COI recruit staff outside of the OHCHR. The Rapid Response Unit roster managed by the OHCHR would not have been useful in this recruitment process for several reasons. First, the roster is mostly composed of OHCHR staff, who often lack the kinds of relevant legal skills needed by COIs with complicated legal mandates. Second, the Rapid Response Unit cannot guarantee the immediate availability of the members on the roster; but because of the speed at which the Syria COI needed to be put together, the COI could not afford to wait for a roster member with the requisite skill set to become available.

As a result of the absence of an adequate roster system, the Syria COI recruited staff the old-fashioned way: an open-call mass recruitment process. Consultations with individuals close to this process indicated that it was a time- and resource-intensive exercise that detracted from the COI's substantive activities and fulfillment of its mandate. The OHCHR published vacancy announcements that attracted between 300 and 400 applications, each of which had to go through a preliminary consideration process. Commission staff had to go through the applications; the hiring process was not outsourced outside of the COI. Qualified applicants were then screened and interviewed before the final hiring of staff. This cumbersome process of hiring via vacancy announcements consumed a significant amount of the commission's time, and took the secretariat's attention away from its important investigations into human rights and international humanitarian law abuses in Syria.

b) Two Proposed Reforms to the Recruitment and Hiring Process

Having described the challenges facing the appointment of commissioners and the recruitment of the secretariat, the following section of the paper will propose two financially-feasible solutions: (1) ensuring that every COI has commissioners with international criminal law and international humanitarian law expertise, and (2) establishing a roster of suitable, pre-screened candidates who could be deployed at short notice to join COI secretariats.

i) Appointing Commissioners with International Criminal Law and International Humanitarian Law Expertise

For the problem of commissioners lacking necessary experience in the fields of IHL and ICL, the proposed solution is simple: ensure that at least one of the commissioners heading each COI has formal legal education and experience in the relevant fields of law (whether those fields are ICL, IHL and/or international human rights law will depend on each individual mandate). The UN need only follow its own advice as set forth in the OHCHR Guidelines in order to solve this problem. The international community is not devoid of experts in these fields; this reform would simply require that, for one of the available positions as commissioner, the mandating body that appoints the commissioners must prioritize that specialized legal experience over other qualifications of candidates that guide the appointment process, such as a candidate's public profile or any formal or informal geographic quota system.¹⁰⁸ If none of the commissioners heading a COI possesses the experience in those bodies of law, it is impractical to expect COIs to focus on violations of those laws.

ii) Creating a Roster of Qualified Candidates

Looking forward, commissions could also be improved by creating a roster of suitable candidates who have been pre-screened and who could be deployed to a COI at short notice. A roster would serve two important purposes. First, it would enable the United Nations to act more quickly and decisively when COIs are first formed. Second, it would allow members of commissions to dedicate more time to their substantive work and less time to the time- and resource-intensive process of hiring. Consultations with former and current members of OHCHR-created commissions indicate that hiring analysts and staff consumes a disproportionate amount of time and resources, and impedes fulfillment of the commissions' mandates.

Several existing rosters could inform the development of a roster within the UN framework, or outside the UN framework but with experts who could work on UN commissions. An expert roster was recently compiled at the national level by the UK Preventing Sexual Violence Initiative (PSVI). Justice Rapid Response is a multilateral stand-by facility that can rapidly deploy active-duty criminal justice and related professionals. A third model for a roster derives from the world of international arbitration, where arbitrators are chosen from pre-vetted lists. The following sub-sections of this paper will examine each of these roster models, in turn.

¹⁰⁸ The OHCHR Guidelines for COIs recommends that a candidate's "public profile and exposure to leadership roles in human rights at the national, regional or international level" should be one of the qualifications that should be considered when appointing commissioners. The Guidelines go on to state that "having eminent personalities as members could be beneficial for mandates that require a high-profile approach." OHCHR, Commission of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice (2015) at 19.

(1) Model 1: UK Preventing Sexual Violence Initiative

On May 29, 2012, the British Foreign Secretary, William Hague, launched the Preventing Sexual Violence Initiative (PSVI). The initiative is working to address the culture of impunity that exists for crimes of sexual violence in conflict, increase the number of perpetrators held to account, and ensure better support for survivors.¹⁰⁹ It aims to raise awareness, promote international cooperation, and increase the political will and capacity of states to do more to prevent and respond to widespread sexual violence in conflict zones and elsewhere.¹¹⁰

As part of this PSVI initiative, the UK government has established a team of experts (UK ToE) who can be deployed to conflict areas to help support local responses to conflict-related sexual violence. The UK ToE includes police investigators, lawyers, psychologists, doctors, forensic experts, gender-based violence experts, and experts in the care and protection of survivors and witnesses. In 2013, there were 73 members on the UK ToE, 35 of whom were women.¹¹¹

The experts are deployed to support on-going international and national efforts in fragile and conflict-affected countries. Since 2013, experts from the ToE have been deployed to:

- The Syrian borders, to work with the non-governmental organization (NGO) Physicians for Human Rights to train Syrian health professionals and human rights defenders in how to document reports of sexual violence;
- Bosnia-Herzegovina, to support training by the Organisation for Security and Cooperation in Europe (OSCE) for the judiciary, to combat impunity for wartime sexual violence crimes and deliver justice to survivors;
- Libya, to assess how the UK can provide further assistance in terms of justice and support for survivors;
- Mali, to help strengthen the capacity of the Malian armed forces to protect civilians from human rights violations including sexual and gender based violence;
- Democratic Republic of Congo, to work with Physicians for Human Rights to build local capacity among Congolese health, legal and law enforcement professionals to investigate sexual violence crimes;
- Kosovo, to train local participants on specific therapeutic issues such as sexual violence disclosure, rehabilitation needs for survivors and documentation of cases.¹¹²

¹⁰⁹ Government of the United Kingdom, Policy paper, 2010 to 2015 government policy: sexual violence in conflict, 8 May 2015, available at <https://www.gov.uk/government/publications/2010-to-2015-government-policy-sexual-violence-in-conflict/2010-to-2015-government-policy-sexual-violence-in-conflict>.

¹¹⁰ *Id.*

¹¹¹ UK Government, News Article, First Preventing Sexual Violence Initiative team deployment to Bosnia and Herzegovina, 14 March 2013, available at <https://www.gov.uk/government/world-location-news/first-preventing-sexual-violence-initiative-team-deployment-to-bosnia-and-herzegovina>.

¹¹² Policy paper, 2010 to 2015 government policy: sexual violence in conflict, 8 May 2015, App. 2: UK team of experts on preventing sexual violence in conflict.

The deployment of two experts to Bosnia-Herzegovina is illustrative of how the UK ToE works in practice. The Organisation for Security and Cooperation in Europe (OSCE) requested experts to support training for the judiciary in Bosnia-Herzegovina. The goals of the training were to combat impunity for wartime sexual violence crimes and deliver justice to survivors. Two experts were deployed from the UK ToE. One expert had extensive experience investigating, prosecuting, and adjudicating cases, with a particular focus on the sensitivities of managing cases of sexual violence in conflict.¹¹³ The second expert had experience with psychosocial issues, particularly working with victims of severe sexual trauma, both for the purposes of prosecution and for rehabilitation.¹¹⁴

The UK Government, along with the UN and partners, identifies those countries where the UK ToE can contribute specialist expertise. Deployments can support a UN mission, assist a NGO working on the ground, or be put at the disposal of the national authorities of that country.¹¹⁵ The group can be contacted through the Stabilisation Unit of the UK Government. A team of experts is then selected in response to specific needs to provide targeted support.

The PSVI has sent successfully deployed experts to at least seven different countries. However, it has been criticized for the amount of money spent at its End Sexual Violence in Conflict Summit in 2014 (5 million pounds), compared with the limited and short-term funding available for actual activities.¹¹⁶ The absence of long-term funding has caused some critics to question whether the initiative can be sustained.

(2) Model 2: Justice Rapid Response

Justice Rapid Response (JRR) is a multi-stakeholder facility established to improve the international community's ability to end impunity for genocide, war crimes, crimes against humanity, and other human rights violations.¹¹⁷ To achieve this goal, JRR has established a roster of criminal justice, human rights and related professionals who can be rapidly deployed to assist with fact-finding, inquiries, and investigations. The roster boasts 60 professional categories, including criminal and human rights investigators, legal advisors and prosecutors, forensic specialists, analysts, sexual and gender-based violence (SGBV) experts, children's

¹¹³ First Preventing Sexual Violence Initiative team deployment to Bosnia and Herzegovina, 14 March 2013

¹¹⁴ *Id.*

¹¹⁵ Foreign & Commonwealth Office, Speech, Preventing Sexual Violence Initiative: UK team of experts, 30 January 2013, available at <https://www.gov.uk/government/speeches/preventing-sexual-violence-initiative-uk-team-of-experts>.

¹¹⁶ Mark Townsend, Revealed: how the world turned its back on the rape victims of Congo, *The Guardian*, 13 June 2015, available at <http://www.theguardian.com/world/2015/jun/13/rape-victims-congo-world-turned-away>.

¹¹⁷ Justice Rapid Response Annual Report, 2015 at 2, available at http://www.justicerapidresponse.org/wp-content/uploads/2016/03/JRR_Annual_Report_2015_Email_Final.pdf. Unless otherwise indicated, the information in this section is based on JRR's 2015 Annual Report and the Justice Rapid Response Fact Sheet, available at http://www.supportjustice.org/wp-content/uploads/2015/03/Justice_Rapid_Response_Fact_Sheet_ENGLISH_March-2015.pdf.

rights experts, and witness protection specialists. Professionals are provided to entities that have the jurisdiction or mandate to investigate, fact-find, or carry out inquiries where mass atrocities may have occurred.

Certification to the JRR roster requires the completion of specialized training on international investigations offered in collaboration with the Institute for International Criminal Investigations (IICI), JRR's training partner. The trainings are focused on "the conduct of investigations under international law, in high stress, complex, conflict and post-conflict situations."¹¹⁸ Training participants are selected through a call for nominations process under which professionals wishing to be considered are nominated by their government or institution. JRR has employers nominate candidates not only for quality control, but because nominating employers agree in principle to make their experts available for deployments. JRR also conducts its own outreach with law enforcement agencies and national judiciary authorities. JRR makes a preliminary selection of candidates based on their credentials, while also taking into account the need for balanced cultural, geographic, and gender representation. JRR then conducts its own background checks and interviews. In 2015, the ratio of applications to available training spots was usually 10:1. For those who are selected, training courses are free of charge.

JRR describes its roster of experts as geographically diverse and gender-balanced. According to the organization's 2015 annual report, it has over 550 rapidly deployable experts representing 104 nationalities and 90 languages. Forty-three percent are from the global South and over half are women. To ensure immediate access, information about the experts and their employers is updated regularly. According to the annual report, the roster is also "regularly reviewed to ensure it meets the evolving needs of the international community."¹¹⁹ According to the 2015 Annual Report, members of the roster include employees of the Centre for the Study of Violence and Reconciliation in South Africa, Combined Forces Special Enforcement Unit of British Columbia, Legal Action Worldwide, United Nations Development Programme (UNDP), United Nations International Criminal Tribunal for the former Yugoslavia, and a number of universities.

Oversight and strategic direction for the work of the JRR facility is provided by an Executive Board that currently consists of Finland (Chair), Switzerland (Vice-Chair), Argentina, Canada, Colombia, Draper Richards Kaplan Foundation, The Netherlands, Republic of Korea, Sierra Leone, Sweden, Uganda, and UN Women. It has a small Secretariat based in Geneva, Switzerland, as well as liaison offices in New York and The Hague. It relies on voluntary contributions and had an operational budget of EUR 1.6 million in 2015. Justice Rapid Response USA, a US not-for-profit entity, was established in 2015 to help diversify and expand the funding base through philanthropic and grant-making institutions.

¹¹⁸ JRR Annual Report, 2015 at 6.

¹¹⁹ Id. at 15.

By the end of 2015, JRR had assisted in 78 missions around the world. Examples of experts deployed in 2015 include:¹²⁰

Investigation/Inquiry/Mission	Entity that requested JRR expertise	Number and type of expertise deployed
Extraordinary Chambers in the Courts of Cambodia (ECCC)	ECCC	Three police investigators
National investigation and prosecution, Guatemala	UN Women	One senior prosecutor (SGBV)
Boko Haram Fact-Finding Mission	UN Women in Support of the OHCHR	One SGBV investigator
Commission for the Verification of Survivors of Sexual Violence, Kosovo	UN Women Kosovo	One gender specialist
Libya Fact-Finding Mission	UN Women in Support of the OHCHR	One SGBV investigator/gender advisor
Commission of Inquiry on Human Rights in Eritrea	OHCHR	One investigator
Independent International Commission of Inquiry on the Syrian Arab Republic	UN Women in Support of the OHCHR	One SGBV investigator, one interpreter
OSCE Special Monitoring Mission to Ukraine	Organization for Security and Cooperation in Europe (OSCE)	One human rights monitor
Extraordinary African Chambers, Senegal	Extraordinary African Chambers, Senegal	One international criminal law expert

(3) Model 3: International Arbitration Rosters

A third model for expert rosters can be found outside the realm of human rights, in the world of international arbitration. Arbitration is an increasingly popular, flexible method of dispute resolution by which parties from different states can have their disputes determined by an impartial tribunal appointed by a commonly agreed method. Arbitrations are typically conducted by either one or three arbitrator(s), referred to in each case as the tribunal—equivalent to a judge or panel of judges in a court action. However, unlike judges, arbitrators are usually selected by the parties, either directly or indirectly through a third party or institution.

Several organizations provide lists of arbitrators, including specialty lists identifying those with international training and expertise. Some lists are available publicly, such as the JAMS Roster

¹²⁰ Information in the chart comes from the Justice Rapid Response Annual Report, 2015 at 4.

(maintained by a private provider of mediation and arbitration services) and the International Institute for Conflict Prevention and Resolution. Other providers, such as the American Arbitration Association (AAA)¹²¹ and the International Centre for Dispute Resolution (ICDR), only provide names of potential arbitrators once a case has been filed with them. The AAA, a not-for-profit organization, maintains a National Roster of Commercial Arbitrators has qualification criteria including:

- Minimum of 10 years of senior-level business or professional experience or legal practice;
- Educational degree(s) and/or professional license(s) appropriate to one's field of expertise;
- Honors, awards and citations indicating leadership in one's field;
- Training or experience in arbitration and/or other forms of dispute resolution;
- Membership in a professional association(s);
- Other relevant experience or accomplishments (e.g. published articles);
- When requested by the AAA to do so, letters from at least three active professionals in one's field, but outside of one's firm or professional associations;
- Submission of a personal letter and current curriculum vitae.¹²²

Membership in the roster is reviewed on an annual basis. There are approximately 8,500 arbitrators in the AAA's roster of neutrals. The AAA monitors the size of the roster, recruiting for special needs and rotating some arbitrators off of the roster each year.¹²³

If the parties to AAA arbitration have not appointed an arbitrator and have not provided any other method of appointment, the AAA sends each party an identical list of 10 or 15 names of persons chosen from the National Roster. The list is provided by a case management staff and is based on criteria provided by the parties and their counsels. Potential arbitrators are analyzed according to geographic area, subject-matter expertise, and caseload type. The AAA also employs a computerized database to help refine the search for potential arbitrators. The AAA maintains an online database of biographies for its arbitrators, so that parties can examine their education, legal and professional experience, ADR practice experience, publications and speaking engagements, licensing, locale and rates charged.¹²⁴ The parties then agree to an arbitrator(s) from the submitted list and advise the AAA of their agreement.¹²⁵

¹²¹ As established by AAA Commercial Rules, §§ R-3 and R-11.

¹²² American Arbitration Association, Criteria for Admittance to AAA National Roster of Arbitrators, 14 November 2011, available at https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003878.

¹²³ India Johnson, senior vice president of the AAA, Reality v. Myth: The Truth About Management of the AAA Commercial Roster, AAA, March 2003, available at https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003904.

¹²⁴ Arbitrator Search Tool for AAA/ICDR Parties and Counsel, AAA, available at https://www.adr.org/cs/groups/marketing/documents/document/dgdf/mdi1/~edisp/adrstg_025838~2.pdf.

¹²⁵ AAA Commercial Rules, § R-11(a).

The ICDR, established by the AAA to administer international legal proceedings, has a similarly structured roster of over 600 independent arbitrators and mediators, though applicants must have a minimum of 15 years of senior-level business or professional experience.¹²⁶

(4) Lessons from Existing Rosters

The UK Preventing Sexual Violence Initiative, Justice Rapid Response, and rosters from the world of international arbitration each provide a different model for creating a UN roster for both potential commissioners and potential analysts and staff. These rosters all have the potential to both (1) enable the United Nations to act more quickly and decisively when COIs are first formed and (2) allow commission staff to dedicate more time to their substantive work and less time to the time- and resource-intensive process of hiring.

There are several different means by which a roster could be employed to improve the process of appointing commissioners and staffing commissions. One option is for the international community to commit to strengthening Justice Rapid Response and use this organization located outside of the UN as a resource for hiring commissioners and staff. Consultations with individuals involved in past and current COIs indicate that JRR is highly regarded and that it has deployed qualified individuals. Furthermore, an interview with a U.S. government official closely involved in the process of appointing commissioners indicated that it would be beneficial to have the roster located outside the UN. Locating the roster outside of the UN would have two main benefits: (1) insulating the roster from UN politics, and (2) attracting a more diverse range of candidates than the candidates that would be available from only within the UN pool.

A second option is to create a separate roster within the UN, either expanding (and significantly reforming) the Rapid Response Unit, or creating a new roster system. If a separate roster is created within the UN, the three models discussed above can provide some helpful guidance on how to structure and operate such a model. Key lessons that have been determined through both consultation and research include:

- Consistent, long-term funding is critical for the sustainability of the roster.
- Membership on the roster should be actively recruited.
- Experts from a range of organizations and universities, and not just from within the United Nations, should be recruited and should be represented on the roster.

¹²⁶ Application Information ICDR Panel of Arbitrators and Mediators, 21 July 2014, available at <https://www.adr.org/aaa/ShowPDF?doc=ADRSTAGE2022019>.

- Given that geographic diversity, religious diversity, and gender balance, among other factors, can be important in both choosing commissioners and hiring staff, it is important that the roster have a diverse pool of experts.
- Expertise in both international humanitarian law and international criminal law should be represented on the roster.
- The roster should be actively curated and updated to meet evolving needs in international fact-finding and commissions of inquiry.

5. Conclusion

Over the past two decades, COIs have increasingly focused on holding individuals responsible for violations of international law accountable. However, several significant barriers stand in the way of COIs taking on a greater role in ensuring accountability or even serving a pre-prosecutorial function. These barriers include (1) inadequate resources to protect victims and witnesses, (2) COIs taking of statements without the procedural requirements necessary to introduce a statement as evidence in court, (3) the absence of a subpoena power to compel testimony or document production, and (4) inadequate procedures and resources to collect and store documents and other evidence that COIs may come across while conducting their activities.

Addressing each of the aforementioned four problems would require significant financial resources and an expansion of COIs' mandated power. Given the financial and political constraints faced by the UN, these changes would be difficult to achieve and would require strong political will.

However, COIs are also plagued by problems with the appointment of commissioners and the recruitment of staff. Ultimately, it is the *people* on a commission, and not outside constraints or procedures, that determine the quality of the investigation and the final report. Therefore, it is of the utmost importance that COIs are comprised of qualified, dedicated individuals with the necessary expertise—particularly legal knowledge and experience with the fields of international human rights law and international criminal law. The international community is not devoid of qualified individuals; the challenge is making sure that these individuals are aware of opportunities on COIs as soon as they arise, and ensuring that they are available to serve on COIs. Implementing a roster system for recruiting the secretariat and guaranteeing that at least one commissioner on every COI has formal legal education and experience with the specific applicable law are two low-cost reforms that can tremendously benefit COIs, ultimately delivering higher-quality investigations and fact-finding missions, and better ensuring that individuals who have committed international law violations can be brought to justice.

Annotated Bibliography

While by no means an exhaustive list, the following sources provide a valuable starting point for understanding how COIs have evolved in recent years, how they function in practice, the barriers to accountability that they currently face, and proposed best practices.

Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice, Office of the High Commissioner for Human Rights, New York and Geneva, 2015.

A report presenting the OHCHR's guidelines and standard operating procedures relevant to each state of United Nations COIs and fact-finding missions. It specifically looks at operational aspects including the selection and appointment of members, methodological aspects including gathering and assessing information, and the writing of reports and recommendations.

Harvard Program on Humanitarian Policy and Conflict Research (HCPR) Advanced Practitioner's Handbook on Commissions of Inquiry: Monitoring, Reporting, and Fact-Finding, Harvard Humanitarian Initiative Program on Humanitarian Policy and Conflict Research, March 2015.

A review of methodological issues facing monitoring, reporting, and fact-finding mechanisms, and a proposed methodological approach based on the experiences of past missions and established professional standards. The Handbook specifically looks at (1) mandate interpretation, (2) the processes of establishing facts, drawing legal conclusions, and employing a standard of proof, (3) mitigating risks to witnesses and victims that result from their exposure to the mission, and (4) the level of information that should or can be publicly communicated during the mission.

International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law, UK Foreign and Commonwealth Office, First Edition, June 2014.

A protocol for a specific type of fact-finding mission (investigations of sexual violence) produced by the United Kingdom's Foreign and Commonwealth Office as part of the UK's Preventing Sexual Violence Initiative (PSVI).

M. Cherif Bassiouni & Christina Abraham, eds., *Siracusa Guidelines for International, Regional and National Fact-finding Bodies*, (Cambridge: Intersentia, 2013).

The Siracusa Guidelines, developed from input by more than 80 experts, provide rules and principles applicable to creating, investigating, reporting and follow-up for different types of fact-finding endeavors.