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Investigations into Military Operations: What Impact on Transitional Justice?

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The recent proliferation of external investigations into military operations raises important questions for the conduct of military operations and the interpretation and implementation of international law. The impact of such investigations and their reports, however, extends beyond how they influence the military and the implementation of the law of armed conflict. As countries and societies embroiled in lengthy conflicts begin to explore the value and effectiveness of undertaking transitional justice efforts during conflict, rather than only after conflict, investigations into military operations and specific incidents can play an important – and perhaps unexpected – role. This article focuses specifically on the inter-relationship between investigations and transitional justice efforts. As investigations into military operations become a common tool in the international and national arsenal, understanding how they interact with and affect broader transitional justice efforts and goals becomes important, both for the conceptualisation of investigations and the development of transitional justice mechanisms. This article addresses the relationship between investigations and the truth-telling aspect of transitional justice mechanisms, as well as the impact of the use of law and legal analysis on the legitimacy of the investigations and on potential transitional justice mechanisms.

Keywords: transitional justice, investigations, law of armed conflict, justice, reconciliation, military operations

1. Introduction

International and regional investigations of military operations are a growing trend.[1] The United Nations Secretary General (UNSG), the United Nations Human Rights Council (UNHRC) and the European Union, most prominently, have carried out extensive investigations into conflicts both within and between states and, in some cases, into specific isolated incidents. In some situations, states have also created commissions of inquiry outside the military chain of command for such purposes. Perhaps no single incident has spawned more investigations of this type than the 31 May 2010 flotilla incident in which Israeli naval forces intercepted six ships attempting to break the blockade of Gaza – a UNHRC report,[2] an Israeli independent commission report

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[1] This article focuses solely on investigations (including fact-finding missions in some cases) into ongoing armed conflicts or specific incidents (such as the May 2010 Gaza flotilla incident) subsumed within such a conflict. It does not address international or regional investigations into repression, massive human rights abuses or other similar situations – which also certainly have a significant contribution with regard to transitional justice, but lie outside the scope of the instant analysis.

[2] Human Rights Council, Report of the International Fact-Finding Mission to Investigate Violations of International Law, including International Humanitarian and Human Rights Law, resulting from the Israeli

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(the Turkel Commission),[3] a Turkish National Commission report[4] and the report of the UNSG's Palmer Commission.[5]

Sri Lanka, Lebanon, Gaza, Georgia and Russia, Côte d'Ivoire, Libya, Darfur – these conflicts and many others have sparked international, regional or national investigations, and sometimes combinations of one or more investigative commissions and reports. More recently, in September 2011 the UNHRC established a Commission of Inquiry to investigate serious allegations of crimes against humanity and other violations of international human rights law during the months-long protests and government crackdown in Syria.[6] The Commission builds on the work of an earlier United Nations fact-finding mission to Syria.[7] In 2011 alone, the UN also authorised commissions of inquiry to investigate violations of international human rights and international humanitarian law in Libya and Côte d'Ivoire. In Libya, the Commission of Inquiry investigated allegations of violations that occurred both before and during the protests and rebellion that erupted in February 2011, as well as alleged violations during the armed conflict that developed as a result.[8] The Côte d'Ivoire Commission examined violations that occurred during the violence that resulted from President Gbagbo's refusal to accept his country's 2010 election results.[9] Other recent investigations include UN Commissions tasked with investigating alleged violations in Guinea[10] and Darfur,[11] and the Mapping Exercise in the Democratic Republic of the Congo.[12]

Without a doubt, this proliferation of external investigations into military operations raises important questions for the conduct of military operations and the interpretation and implementation of international law. Such investigations have analysed both the legality of the resort to force in particular situations – the *jus ad bellum* – and the lawfulness of the conduct of

Attacks on the Flotilla of Ships Carrying Humanitarian Assistance, 27 September 2010, UN Doc A/HRC/15/21 (2010) (Flotilla Report).

[3] Turkel Commission, Report of the Public Commission to Examine the Maritime Incident of 31 May 2010.

[4] Turkish National Commission of Inquiry, Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010, February 2011 (Turkish Report).

[5] Report of the Secretary General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, September 2011 (Secretary General's Flotilla Report).

[6] Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 23 November 2011, UN Doc A/HRC/S-17/2/Add.1 (2011).

[7] Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic, 15 September 2011, UN Doc A/HRC/18/53 (2011).

[8] Human Rights Council, Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in Libyan Arab Jamahiriya, 1 June 2011, UN Doc A/HRC/17/44 (2011) (Libya Report).

[9] Human Rights Council, Situation of Human Rights in Côte d'Ivoire, 16th Session, UN Doc A/HRC/RES/16/25 (2011).

[10] UN Commission of Inquiry on the Violence in Conakry, Report of the International Commission of Inquiry Mandated to Establish the Facts and Circumstances of the Events of 28 September 2009 in Guinea, UN Doc S/2009/693 (2009).

[11] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, 25 January 2005, http://www.un.org/news/dh/sudan/com_inq_darfur.pdf (Darfur Report).

[12] Office of the High Commissioner, Report of the Mapping Exercise Documenting the most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003, August 2010, http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf.

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hostilities – the *jus in bello*. In both areas, the analysis and the conclusions can shed light not only on what happened during the conflict at issue, but offer a broader look at the interpretation of international law in situations of conflict. Thus, beyond exploring and framing allegations of violations of the law of armed conflict,[13] these reports have provided, among other matters, analyses of complex issues such as the parameters of self-defence, the legality of blockades, the principle of proportionality, the identification of military objectives, the existence of a belligerent occupation, the challenges of protecting civilians during military operations in densely populated civilian areas, and the protection of human rights during conflict. Both the existence of the reports and the lengthy debates surrounding their creation and conclusions demonstrate the richness of current analysis of legal and policy issues relating to the implementation and enforcement of the law of armed conflict.

The impact of such investigations and their reports, however, extends beyond how they influence the military and the implementation of the law of armed conflict. As countries and societies embroiled in lengthy conflicts begin to explore the value and effectiveness of undertaking transitional justice efforts during conflict,[14] rather than only after the conflict has come to an end, investigations into military operations and specific incidents can play an important – and perhaps unexpected – role. Understanding how investigations into military operations, now a common tool in the international and national arsenal, interact with and affect broader transitional justice efforts and goals becomes important for both the conceptualisation of investigations and the development of transitional justice mechanisms. Investigations by international bodies such as the UNHRC, or commissions authorised by the UN Secretary General, as well as investigations by state commissions, such as those carried out after the May 2010 Gaza flotilla incident, have the potential to coincide with the goals of nascent or ongoing transitional justice efforts. In September 2011, for example, the United States called on the UN Commission of Inquiry for Libya to 'continue its critical mandate' during the 'sensitive time of transition'.[15] At the same

[13] The law of armed conflict, otherwise known as international humanitarian law or the law of war, applies to situations of armed conflict and governs the conduct of hostilities and the protection of persons during conflict. See International Committee of the Red Cross, 'War and International Humanitarian Law', 23 September 2011, http://www.icrc.org/eng/war-and-law. The law of armed conflict is set out primarily in the four Geneva Conventions of 12 August 1949 and their Additional Protocols: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31 (GC I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered in to force 21 October 1950) 75 UNTS 85 (GC II); Geneva Convention (III) Relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135 (GC III); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (entered into force 7 December 1978) 1125 UNTS 3 (AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (entered into force 7 December 1978) 1125 UNTS 609 (AP II).

[14] See, eg, Lisa J Laplante and Kimberly Theidon, 'Transitional Justice in Times of Conflict: Columbia's Ley de Justicia y Paz' (2006) 28 *Michigan Journal of International Law* 49, 50 (discussing how transitional justice normally occurs after a conflict but can, at times, begin during a conflict).

[15] US Mission Geneva, 'Crisis in Libya is Not Over; Commission of Inquiry Must Continue its Mandate', 19 September 2011, http://geneva.usmission.gov/2011/09/19/libya-2.

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time, such investigations can have significant second-order effects that seem to directly undermine the goals and purposes of such transitional justice conversations or mechanisms. For example, when multiple investigations by different authorities or bodies examine the same incident, what impact does that have on the truth-telling process going forward? What impact does it have on questions of legitimacy, accountability and impunity?

Efforts to seek justice and reconciliation in the aftermath of repression or conflict are not new, but transitional justice truly came into its own as a field of extensive study in the aftermath of the transitions to democracy in Latin America and Eastern Europe in the late 1980s and 1990s. It 'includes that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law'.[16] In essence, it encapsulates efforts to achieve a just and peaceful society based on the rule of law out of the ashes of violence, dictatorship and other oppressive environments. At the broadest level, 'transitional justice offers a deeper, richer and broader vision of justice which seeks to confront perpetrators, address the needs of victims and assist in the start of a process of reconciliation and transformation'.[17]

The two main forms of transitional justice – those garnering the most attention from both academics and policymakers – are truth commissions and criminal prosecutions or tribunals. Overall, transitional justice includes 'judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof'.[18] Underlying all of these various mechanisms are the primary and foundational components of all transitional justice efforts: accountability, truth recovery or truth-telling, reconciliation, institutional reform and reparations.[19] Throughout the process, it is essential to balance the need for accountability with the need to build a stable society and a sustainable peace, in which both the rule of law and reconciliation can flourish. In pursuit of the multiple goals of accountability, truth, reconciliation and justice, efforts began to focus not on either truth or justice, but on combinations and complementary mechanisms that could promote all of the goals comprehensively. Thus,

> [t]ruth-telling followed by neither reparations nor prosecutions seemed to make victims' accounts meaningless, while reparations without public acknowledgement of the facts looked to many victims like 'blood money' paid for their silence. Prosecutions without a forum where a larger narrative

[16] Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (Cambridge University Press 2006) 2.

[17] Alexander L Boraine, 'Transitional Justice: A Holistic Interpretation' (2006) 60 *Journal of International Affairs* 17, 18.

[18] Report of the Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 23 August 2004, UN Doc S/2004/616 (2004) para 8.

[19] See generally Boraine (n 17); see also Priscilla B Hayner, *Unspeakable Truths: Confronting State Terror and Atrocities* (reprint, Routledge 2001) 24: '[A] truth commission may have any or all of the following five basic aims: to discover, clarify, and formally acknowledge past abuses; to respond to specific needs of victims; to contribute to justice and accountability; to outline institutional responsibility and recommend reforms; and to promote reconciliation and reduce conflict over the past' (ibid).

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> could emerge created a partial, fortuitous view of history (dependent on evidence and the ability to apprehend defendants), while a truth commission without a tie to judicial actions against perpetrators begged the question of what the consequences of truth should be. Only by interweaving, sequencing and accommodating multiple pathways to justice could some kind of larger justice in fact emerge.[20]

This article does not purport to analyse or examine transitional justice, particular transitional justice mechanisms, or the relative effectiveness of different approaches – issues that are addressed in extensive detail and sophistication in the academic and policy literature on transitional justice. Others have explored the complementary nature of international prosecutions and truth commissions, the effectiveness of alternative or traditional justice mechanisms, and the impact of one mechanism versus another in particular post-conflict environments.[21] All of these questions are indeed crucial to the analysis of what can be effective and successful in a given situation. This article does not address these broader issues in the implementation of transitional justice; instead, it focuses specifically on the interrelationship between investigations into military operational and transitional justice efforts.

As noted above, the number of international, regional, and even national (non-military) investigations has grown rapidly over the past decade and more.[22] For the purposes of the instant analysis, this article relies most heavily on four such recent investigations: (i) the Goldstone Report on the Israeli military operation in Gaza; (ii) the European Union (EU) report on the Georgia–Russia conflict; (iii) the myriad of reports stemming from the May 2010 Gaza flotilla incident; and (iv) the Panel of Experts Report on Sri Lanka. Each of these reports has sparked debate, ranging from debate between or among the various parties to the incident or conflict to extensive international debate (in the case of the Goldstone Report and the flotilla reports), over the validity of the reports and their conclusions, the legitimacy of the commissions, and so forth. There are, of course, many other investigations that offer the same opportunity for analysis with regard to the relationship with and impact on transitional justice; these four investigations are used as representative examples: one from an interstate conflict (Georgia–Russia); one from an internal conflict (Sri Lanka); one that garnered extensive worldwide attention (the Goldstone Report); and one that spawned multiple international and national reports from one incident (the Gaza flotilla).

First, the Goldstone Report – formally known as 'Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza

[20] Roht-Arriaza and Mariezcurrena (n 16) 8.

[21] William Schabas, 'The Relationship between Truth Commissions and International Courts: The Case of Sierra Leone' (2003) 25 *Human Rights Quarterly* 1035; Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 *European Journal of International Law* 481; Carsten Stahn, 'Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor' (2001) 95 *American Journal of International Law* 952; Brandon Hamber and Richard A Wilson, 'Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies' (2002) 1 *Journal of Human Rights* 35.

[22] For example, Theo Boutruche, 'Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice' (2011) 16 *Journal of Conflict & Security Law* 105, 106 (discussing how international organisations have increasingly resorted to fact-finding missions).

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Conflict',[23] – investigated allegations of violations of the law of armed conflict and international human rights law stemming from Operation Cast Lead, the Israeli military operation in the Gaza Strip from December 2008 to January 2009. Mandated to investigate possible violations of international humanitarian law and human rights law during the conflict in Gaza, the Goldstone Commission engaged in a sweeping review of the conflict, as well as the historical underpinnings of the Israeli–Palestinian conflict, human rights in the West Bank and in Israel proper, and Israel's strategic aims.[24]

Second, in the aftermath of the conflict in Sri Lanka, which ended in May 2009, the UN Secretary General appointed a panel of experts to assess the 'nature and scope of the alleged violations'[25] of the law of armed conflict committed by both the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE) during the conflict. Unlike most other international investigations,

> [the] Panel's mandate however [did] not extend to fact-finding or investigation. The Panel analysed information from a variety of sources in order to characterize the extent of the allegations, assess which of the allegations are credible, based on the information at hand, and appraise them legally.[26]

In March 2011, the panel submitted the report to the Secretary General, finding credible allegations that both sides had committed extensive violations of humanitarian law during the conflict, including the deliberate targeting of civilians, shelling of hospitals, use of child soldiers and indiscriminate attacks against the civilian population.[27]

Third, the European Union established the Independent International Fact-Finding Mission on the Conflict in Georgia in December 2008, after a five-day conflict erupted between Georgia and Russia over the breakaway Georgian republic of South Ossetia. The mission's task was 'to investigate the origins and the course of the conflict in Georgia, including with regard to international law, humanitarian law and human rights, and the accusations made in that context'.[28] In

[23] HRC, Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact Finding Mission on the Gaza Conflict, 23 September 2009, UN Doc A/HRC/12/48 (2009) (Goldstone Report).
[24] For extensive critiques of the Goldstone Report and its application of international law, see Laurie R Blank, 'The Application of IHL in the Goldstone Report: A Critical Commentary' (2009) 12 *Yearbook of International Humanitarian Law* 347; Chris Jenks and Geoffrey S Corn, 'Siren Song: The Implications of the Goldstone Report on International Criminal Law' (2011) 7 *Berkeley Journal of International Law* 1; Richard D Rosen, 'The Protection of Civilians during the Israeli-Hamas Conflict: The Goldstone Report' in David W Lovell and Igor Primoratz (eds), *Protecting Civilians during Violent Conflict* (Ashgate 2012) 251; Peter Berkowitz, 'The Goldstone Report and International Law' (2010) 162 *Policy Review*, http://www.hoover.org/publications/policy-review/article/43281/The-Goldstone-Report-and-International-Law-Hoover-Institution; Abraham Bell, 'A Critique of the Goldstone Report and its Treatment of International Humanitarian Law' (2010) 104 *American Society of International Law Proceedings* 1; Laurie R Blank, 'Finding Facts but Missing the Law: The Goldstone Report, Gaza and Lawfare' (2010) 43 *Case Western Reserve Journal of International Law* 279.
[25] Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, 31 March 2004, I (Sri Lanka Report).
[26] ibid.
[27] ibid iii–iv.
[28] Council Decision 2008/901/CSFP of 2 December 2008 concerning an Independent International Fact-Finding Mission on the Conflict in Georgia, [2008] OJ L 323/66 (EU Decision).

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September 2009, the mission issued its report, finding that Georgia started the conflict with its shelling of South Ossetia but that Russia's response was disproportionate and that both sides committed violations of humanitarian law and human rights law during the five days of fighting.[29]

Finally, it is the shortest incident that has provoked the most extensive domestic and international investigative attention: the flotilla incident on 31 May 2010, in which Israeli naval commandos forcibly boarded six vessels attempting to breach the Israeli blockade of Gaza, leading to the deaths of nine Turkish activists on the *Mavi Marmara*, the largest of the vessels. A UNHRC report, released in September 2010, concluded that Israel's actions violated international law both in the imposition of the blockade and the use of force against the ships and the individuals attempting to break the blockade.[30] In June 2010, Israel established an independent public commission, the Turkel Commission, to 'examine the legality of the naval blockade imposed on the Gaza Strip and the legality of the actions carried out by the IDF in order to enforce the naval blockade and in accordance with the rules of international law'.[31] The Turkel Commission concluded that the maritime blockade of Gaza was lawful under international law and that the military operation to enforce the blockade was, while flawed in its planning, carried out in accordance with international law.[32] In January 2011, Turkey issued its own report on the flotilla incident, finding that the Israel Defence Forces used excessive, indiscriminate and disproportionate force against the civilians on board the *Mavi Marmara* and the other vessels in the flotilla.[33]

The UN Secretary General also created the Palmer Committee, a panel of inquiry to examine the flotilla incident, which operated by receiving and analysing national commission reports from Israel and Turkey, examining the facts and circumstances of the incident and then issuing a report with its conclusions.[34] Unlike many other commissions, the Palmer Committee obtained information solely through diplomatic channels and did not engage in fact finding or other investigative efforts. The report concluded that the Israeli blockade of Gaza was lawful under international law, the flotilla participants acted recklessly in seeking to breach the blockade, and Israel used excessive force in the process of boarding and securing the *Mavi Marmara*.[35]

These examples of international, regional and national investigations into military operations, conflicts and specific incidents have varying direct impacts on transitional justice or related reconciliation efforts resulting from the relevant situation – indeed, some occur far in advance or in the absence of any serious efforts at transitional justice or reconciliation, and some occur

[29] Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (Vol 1, 2009) 22–24, 26 (EU Report).
[30] Flotilla Report (n 2).
[31] Turkel Commission (n 3) Pt One, Report Summary, 2011, para 3, http://turkel-committee.gov.il/files/wordocs/7896summary-eng.PDF.
[32] Turkel Commission (n 3) Pt One, 2011, http://www.turkelcommittee.gov.il/files/wordocs//8707200211english.pdf.
[33] Turkish Report (n 4) 4. See also Tulay Karadeniz, 'Turkey Slams Israeli Flotilla Report, Issues Own', *Reuters*, 24 January 2011.
[34] Secretary General's Flotilla Report (n 5) 3.
[35] ibid 3–4.

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outside the parameters of traditional transitional justice paradigms altogether. Nonetheless, they all offer useful lessons and opportunities in understanding the issues that can arise when investigations into military operations interrelate in some way with transitional justice efforts, either as a precursor to or as a parallel component with such efforts.

This article addresses these issues from multiple perspectives. The first section explores how investigations into military operations and transitional justice mechanisms interact with regard to the core transitional justice goals of truth and reconciliation. Through truth-seeking and the establishment of a narrative, transitional justice mechanisms seek to find ways of enabling the parallel goals of truth-telling, punishment and reform to co-develop and coexist. Investigations raise a range of complex questions in this area, stemming in some ways from the intermediary place such investigations inhabit between reports and prosecution, as more than a compilation of facts and less than a judicial exercise in the pronouncement of accountability.[36] Investigations into military operations and conflicts – even those that are not tasked with fact finding – are highly fact-dependent, just like any other type of investigation. Facts are, obviously, critical to any legal analysis and conclusion. Facts also tell a story, a crucial component of any transitional justice effort.

Reconciliation is another central pillar of transitional justice. Truth-telling contributes directly to efforts at reconciliation, which requires 'acknowledgement of the past and the acceptance of responsibility'.[37] Although the historical analysis and fact-finding components of investigations seem, at first glance, to fit directly within the central truth-telling purpose of transitional justice, frequent disputes regarding the validity or credibility of such fact finding can have a comprehensive impact on ongoing or future efforts at story-telling through transitional justice.

Finally, this section examines how the use of law and legal analysis in the reports and the investigative processes plays a major role in the perception of their legitimacy or lack thereof – and thus in the potential for accountability and reconciliation, or continued intransigence and discord. Underlying the processes of both finding the truth and promoting reconciliation is the foundational requirement and theme of legitimacy.[38] As recent investigations demonstrate, legitimacy is essential to an effective investigation and report, and yet is often a direct casualty of fact-finding missions and investigations. While transitional justice mechanisms must manage these types of challenge all the time, the impact of formal investigations of military operations in

[36] Geneva Academy of International Law and Human Rights, 'The UN Human Rights Council: Commissions of Inquiry Conference Brief', December 2011, Annex 1, http://www.geneva-academy.ch/docs/news/HR-council-inquiry-conference-brief.pdf (table comparing the mandates and characteristics of commissions of inquiry, fact-finding missions, etc.). See also Libya Report (n 8) 2 (explaining that '[t]he commission opted for a cautious approach in the present report by consistently referring to the information obtained as being distinguishable from evidence that could be used in criminal proceedings, whether national or international').

[37] Boraine (n 17) 22. Reconciliation 'can refer to actions that sometimes help transform a destructive conflict or relationship, the processes by which that transformation occurs, or the outcome of such processes': Louis Kreisberg, 'Comparing Reconciliation Actions Within and Between Countries' in Yakov Bar-Siman-Tov (ed), *From Conflict Resolution to Reconciliation* (Oxford University Press 2003) 82.

[38] Legitimacy is 'the belief that authorities, institutions, and social arrangements are appropriate, proper, and just': James L Gibson, 'The Contributions of Truth to Reconciliation: The Lessons from South Africa' (2006) 50 *Journal of Conflict Resolution* 409, 416.

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this arena is as yet unexplored and of growing importance; the present analysis seeks to introduce some of these questions and spur further discussion and consideration.

The second section addresses broader policy considerations that arise as a result of the potential confluence of such investigations with potential, nascent or ongoing transitional justice efforts. Reports and conclusions help in advocating for changes in policies and have the potential to change the dynamics in the relations between the parties to a conflict and promote accountability. By the same token, they can also create the impression that there is no common ground for discussion and no opportunity for collaboration, thus reinforcing perceptions of impunity. For these reasons, it is critical to examine how and in what circumstances investigations and reports are a positive tool for potential reconciliation and justice efforts, and when they are more likely to be used as just one more tool in an ongoing conflict waged beyond the immediate battlefield. Just as questions of how to coordinate prosecutions and truth commissions have arisen in previous conflicts, such as in Sierra Leone, this new trend of external investigation of military operations poses important and challenging questions of how to manage these processes within the context of a broader conflict and ongoing efforts at reconciliation, peace and justice.

2. INVESTIGATIONS AND CORE TRANSITIONAL JUSTICE GOALS

2.1 TRUTH-SEEKING, TRUTH-TELLING AND THE NARRATIVE

Tribunals, truth commissions, vetting and other mechanisms may have different approaches and different specific goals and purposes, but they each depend on seeking and finding the truth. Upon the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), Madeleine Albright stated:[39]

> Truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes. And it is only the truth that can [end] the ethnic and religious hatreds and begin the healing process.

This statement could just as easily apply to a truth commission as to the international criminal tribunal process to which she referred. Tribunals seek the truth in order to assign criminal responsibility and promote accountability. Truth commissions use truth-telling 'to document and analyze the structures and methods used in carrying out illegal repression [or committing atrocities], taking into account the political, economic and social context in which these violations occurred'.[40] In either case, however, both the process itself and the truth identified must

[39] US Department of State Dispatch, 'UN Security Council Adopts Resolution 827 on War Crimes Tribunal', 7 June 1993, http://www.accessmylibrary.com/article-1G1-13208377/un-security-council-adopts.html. See also Nataša Kandic, 'Preserving the ICTY Legacy through Partnership, Oversight, and a Regional Institution' in Richard H Steinberg (ed), *Assessing the Legacy of the ICTY* (Martinus Nijhoff 2011) 79, 83 (arguing that reconciliation might have been an ambitious goal for the ICTY).
[40] Boraine (n 17) 20.

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rest on a foundation of legitimacy and credibility for the process to be effective, successful and productive.

Tasked with fact finding, the types of investigation explored here inevitably provide both historical context and legal analysis to frame the results of that fact finding. The historical analysis and fact finding seem, at first glance, to fit directly within the central truth-telling purpose of transitional justice. Indeed, such investigations can offer a critical contribution in this way, with regard to documentation, the testimony of combatants and victims and general increased knowledge of violations and incidents. Truth commissions are not the only transitional justice mechanisms that rely on truth-telling as a means to promote transition to justice and peace: the ICTY was specifically established to promote reconciliation through justice[41] by using the unimpeachable factual record of a trial, an authoritative record of the origins and nature of the violence. Often, however, the very information in the investigation reports is disputed because of charges of bias, lack of cooperation, control of sources or other claims. Indeed, simply identifying the actual truth can be one of the most difficult components for such investigations – as the EU Report on the Georgia–Russia conflict noted, 'the truth seems increasingly difficult to ascertain and verify'.[42] Such disputes can have a comprehensive impact on ongoing or future efforts at story-telling through transitional justice, effects that must be explored and considered further as transitional justice mechanisms and investigations into military operations begin, and continue to function concurrently.

In each of the four investigations (or series of investigations) highlighted here, the parties immediately disputed the validity of the 'truth' that was presented, or the legitimacy of the story that was told, as evidenced by triumphant claims of 'rightness' by one party or immediate denunciations of bias or propaganda by another. For example, the government of Sri Lanka responded to the UN report by dismissing the allegations and the process as supporters of the LTTE using false propaganda: 'It is none other than the Tamil diaspora that is behind the preparation of the report by the UN panel of experts',[43] stated the External Affairs Minister several months after the release of the report. Similarly, the government declared that the report was based on unverified facts.[44] In the case of the EU report on Georgia, Russia declared that the finding that Georgia's initial force was not justified was the 'unequivocal answer', clearly seeking to capitalise on the report's finding that Georgia was responsible for starting the war and also minimise the findings regarding Russia's violations.[45]

[41] Ruti Teitel, 'The Law and Politics of Contemporary Transitional Justice' (2005) 38 *Cornell International Law Journal* 837, 857.
[42] EU Report (n 29) 7.
[43] L Niroshadharshan, 'Sri Lanka Minister says Tamil Diaspora Behind UN Report on Alleged War Crimes', *BBC Monitoring*, 20 August 2011.
[44] President Mahinda Rajapaksa, 'See the Truth about Sri Lanka against Barrage of Lies by Agents of Terror', 12 September 2012, http://www.ft.lk/2012/09/12/see-the-truth-about-sri-lanka-against-barrage-of-lies-by-agents-of-terror-president-tells-cpa.
[45] Leo Cendrowicz, 'Both Sides to Blame for Russia-Georgia War', *Time*, 30 September 2009, http://www.time.com/time/world/article/0,8599,1927033,00.html.

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Without going any further, the manner in which either side uses the information presented in the report to challenge the report or use it in a propaganda campaign shows that even though the truth – through fact finding – is a central goal of nearly every commission of inquiry and investigation, the truth will immediately be attacked and challenged. Particularly when one side feels its story was not heard or told in the report, this competition for the truth occurs in most instances. As one commentator explained[46] in relation to the EU report,

> [that] Russia and Georgia can both find justification in this report has its pluses and minuses. The pluses are that each government has something to offer its public and no excuse for not accepting the conclusions. The minuses are that both can avoid admitting responsibility, while finding ample grounds for mutual recrimination. All too predictably, the war of words was rejoined as the report came out.

Although investigations into these military operations and conflict have a complementary goal with transitional justice mechanisms – the truth, or at least an accounting that leads in that direction – the actual nature of the reports and their aftermath suggests that perhaps they do not accomplish that goal and, in fact, may undermine efforts to find a common truth or common memory. Indeed, the competitive approach to the truth that seems to follow most investigations into conflicts or military operations appears to operate directly at cross-purposes with the goals of transitional justice.[47]

Two primary facets of investigations and fact-finding missions can pose obstacles to the truth-telling process of transitional justice: the process of establishing and implementing the investigation, and the narrative that the report tells. With regard to the process, the United Nations has offered some guidance on the appropriate process for fact-finding missions, although it has not promulgated any formal criteria or guidelines. General Assembly Resolution 46/59 in 1991 stated that fact-finding missions must be objective and impartial.[48] Other guidelines for fact-finding missions – by the International Law Association, the International Bar Association and Raoul Wallenberg Institute, for example – emphasise that the 'organ of an organization establishing a fact finding mission should set forth objective terms of reference which do not prejudge the issues to be investigated'.[49] Beyond avoiding 'predetermined conclusions about the situation under investigation',[50] the mission must comprise individuals 'who are and are seen to be unbiased'[51] so as to ensure impartiality, objectivity and integrity in the process.

Although an objective and impartial mandate does not guarantee that both parties will view the fact-finding and investigative process as fair and impartial, there is little doubt that a mandate

[46] 'Georgia Started It and Russia Continued It –To Excess: The EU Report on the War Offers Lessons that Go Beyond the Combatants', *The Independent*, 1 October 2009.
[47] This issue is not specific to investigations into military operations, of course, but appears also in criminal prosecutions and other transitional justice mechanisms.
[48] UN Doc A/RES/46/59, 9 December 1991, Annex, para 3.
[49] International Law Society, 'The Belgrade Minimal Rules of Procedure for International Human Rights Fact-Finding Missions' (1981) 75 *American Journal of International Law* 163.
[50] Raoul Wallenberg Institute, 'Guidelines on International Human Rights Fact-Finding Visits and Reports (The Lund-London Guidelines)', 1 June 2009, para 5, http://www.factfindingguidelines.org.
[51] ibid para 8.

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viewed as suspect in its impartiality will immediately undermine the potential truth-telling value of an investigation and report. For example, the mandates for the Sri Lanka report and the EU report on the Georgia–Russia conflict incorporated all parties to the conflict in setting out the respective mission's tasks. The EU report's mandate was 'to investigate the origins and the course of the conflict in Georgia, including with regard to international law, humanitarian law and human rights, and the accusations made in that context'.[52] The Sri Lanka panel of experts was tasked with addressing accountability processes for 'violations of international humanitarian and human rights law committed during military operations between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE)'.[53] Both of these focus on the violations rather than pre-identifying one party or the other as the source of the violations.

In contrast, the United Nations Human Rights Council resolution calling for a fact-finding mission after Operation Cast Lead in Gaza set out its conclusions[54] at the same time that it called for a fact-finding mission:

> *Recognizing* that the massive ongoing Israeli military operation in the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, has caused grave violations of the human rights of the Palestinian civilians therein, exacerbated the severe humanitarian crisis in the Occupied Palestinian Territory and undermined international efforts towards achieving a just and lasting peace in the region.
>
> *Decides* to dispatch an urgent, independent international fact-finding mission, to be appointed by the President of the Council, to investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression.

This deliberate pre-judging of the situation on the ground and focusing on the responsibility of one party alone has led to extensive charges of bias against the Goldstone Commission and the findings in the Goldstone Report.[55] Notwithstanding verbal confirmation of a revised mandate to address violations by Hamas and other Palestinian armed groups, the formal mandate remained intact and the subject of extensive debate and criticism.[56] The aftermath of the Goldstone

[52] EU Decision (n 28).
[53] Sri Lanka Report (n 25) 2.
[54] UNHCR, 'The Grave Violations of Human Rights in the Occupied Palestinian Territory, particularly due to the Recent Israeli Military Attacks against the Occupied Gaza Strip', UN Doc A/HRC/S-9/L 1 (12 January 2009), para 14.
[55] See, eg, Bell (n 24) 3, 6; Irwin Cotler, 'The Goldstone Mission – Tainted to the Core (I)', *The Jerusalem Post*, 16 August 2009; Irwin Cotler, 'The Goldstone Mission – Tainted to the Core (II)', *The Jerusalem Post*, 21 August 2009; Richard D Rosen, 'Goldstone Reconsidered' (2011–12) 21 *Journal of Transnational Law and Policy* 35; Nick Cumming-Bruce, 'UN Investigator Presents Report on Gaza War', *The New York Times*, 30 September 2009; Robert O Freedman, 'A Biased War Report; UN's Human Rights Council's Gaza Study was Destined to Unfairly Criticize Israel', *Christian Science Monitor*, 20 October 2009; Gerald M Steinberg, 'Goldstone's Report: Fundamentally Flawed, or a Step Toward Sanctions?', *The Jerusalem Post*, 15 September 2009; Robert Goot, 'A Blind Eye to Hamas Atrocities', *The Australian*, 6 November 2009.
[56] After raising concerns about the wording of the mandate, Judge Richard Goldstone received verbal confirmation of a revised mandate to address violations by Hamas and other Palestinian armed groups as well: see H Rettig Gur, 'Goldstone to "Post": Mandate of My Gaza Probe has Changed. There's No Reason for Israel Not to Cooperate.

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Report – in which supporters and detractors of the report and the overall mission engaged in a lengthy and vitriolic debate on the report, the investigative process and the consequences of the report – demonstrates that such bias will essentially doom any chances that an investigation could contribute to the recording of truth or to a broader process of transitional justice.

Most investigations of military operations or conflicts tell a story of sorts about the conflict, providing background to give context to the fact finding and conclusions constituting the bulk of the report. It is here that investigations have the potential to interact and engage directly with transitional justice efforts – one key aspect of transitional justice, regardless of the mechanism, is to create an opportunity for all sides to tell their story and, ideally, for society 'to create a common memory that can be acknowledged'[57] by all those involved, whether victims, perpetrators, those caught in the middle and more. As the EU report on the Georgia–Russia conflict states on its introductory page, '[t]he Mission believes that there can be no peace in the South Caucasus as long as a common understanding of the facts is not achieved'.[58] Perhaps in view of a similar goal, almost all international, regional and national investigations into military operations include a description of the background to the conflict. The Sri Lanka report, for example, addresses the historical and political background to the conflict, including the growth and militarisation of the Tamil Tigers, the concentration of power in the presidency and the progress of the conflict through the final stages of the war.[59] The EU report expends over one hundred pages on historical background, relations between Georgia and Russia and with NATO and the international community, and the almost twenty year-old conflict in South Ossetia. Historical context occupies 16 pages at the beginning of the Goldstone Report and additional discussions of historical context appear throughout the report. In the case of the flotilla incident, the four different reports between them include more than 15 pages of history or contextual information.

At first glance, this attention to historical detail and factual background appears to establish fertile ground for nascent and ongoing transitional justice efforts. Recognising the need for victims to tell their stories is, in some ways, the essential backdrop of truth commissions in particular, but also tribunals and other mechanisms. 'The official acknowledgement of previously denied events, especially by a state-sponsored body such as a truth commission, can thus be extremely powerful'.[60] To the extent that a fact-finding mission or investigation were to produce a historical background and narrative of the conflict that could be acceptable – at least on a broad and general level – to more than one party to the conflict, it could make a substantial starting contribution to transitional justice efforts by enabling the beginning of a conversation about the past. In many situations, however, the very narrative of the conflict or the military operation is greatly disputed, making any common steps forward on the basis of the narrative highly unlikely.

Israel Disagrees: There's Been No Formal Change. The Goal is Not to Find Truth but to Attack Us', *The Jerusalem Post*, 17 July 2009.

[57] Boraine (n 17) 22.

[58] EU Report (n 29) 2.

[59] Sri Lanka Report (n 25) 7–13.

[60] Hayner (n 19) 135.

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In response to the report of the UN Panel of Experts, for example, the Sri Lankan government issued its own report and documentary. The report tells the story of what the government terms its 'humanitarian mission' and the documentary specifically attacks a widely viewed documentary produced by the BBC, denouncing its 'doctored footage and deliberate lies'.[61] In doing so, the government sought to tell its own version of the story, rejecting the narrative set out in the UN report. Immediately upon release of the EU report on the Georgia–Russia conflict, Georgia attacked the foundational factual findings of the report. The report's conclusion that Georgia started the war relied on a finding that Georgia's attack on South Ossetia was not in self-defence; Georgia's instantaneous response was that 'European investigators had ignored evidence that Russian soldiers and volunteers were already in South Ossetia';[62] that is, the fact-finders did not tell the whole story. For their part, Russian officials chose to simply ignore the report's findings that 'years of provocations, mutual accusations, military and political threats and acts of violence both inside and outside the conflict zone'[63] contributed greatly to the conflict, stating instead that they had been vindicated.[64]

The narrative and its limitations is an overarching critical theme in most critiques of the Goldstone Report also. Although Israel's refusal to cooperate with the mission no doubt contributed to the mission's fact-finding failures, the report's narrative problems go far beyond issues of access. In many ways, the Goldstone Report simply tells a single version of history, picking and choosing which information to present for the purposes of a broader narrative. Thus, the report relies on statements of current and retired Israeli officials to bolster its theory that Israel carried out a pre-planned disproportionate attack on the civilian population of Gaza.[65] At the same time, the report disregards statements by Hamas officials that the use of the civilian population as human shields – in direct contravention of international law – was a central part of Hamas' strategy.[66] This type of cherry-picking strikes a fatal blow at legitimacy – the underlying thread that runs through both investigations and transitional justice and forms the link for the former to contribute positively to the latter.

2.2 Reconciliation – or a Hardening of Positions?

Legitimacy and the manner in which investigations and fact-finding missions – in both the process and the actual report and conclusions – carry out their mandates stretches into another core transitional justice function. 'In the context of political conflict or violence, reconciliation has been described as "developing a mutual conciliatory accommodation between antagonistic or formerly antagonistic persons or groups"'.[67] Knowing the truth about past repression or conflict,

[61] Kurt Achin, 'Sri Lanka Issues Report & Documentary to Dispute War Crimes Claims', *Voice of America*, 2 August 2011.
[62] Ellen Barry, 'Georgia Challenges Report that Says it Fired First Shot', *The New York Times*, 30 September 2009.
[63] EU Report (n 29) 31.
[64] Barry (n 62).
[65] Goldstone Report (n 23) paras 63–64, 1192–212, 1215–16, 1877, 1894.
[66] ibid paras 473–79.
[67] Hayner (n 19) 155.

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about crimes that were committed and the perpetrators who committed such crimes, is an essential ingredient in the search for reconciliation. Thus, '[r]econciliation can begin when perpetrators are held to account, when truth is sought openly and fearlessly, when institutional reform commences, and when the need for reparations is acknowledged and acted upon'.[68]

On some occasions, reconciliation is the direct goal of an investigation, such as in Sri Lanka, where the Panel of Experts' mandate was to 'advise [the Secretary General] on the issue of accountability'.[69] The Panel explained[70] its view of accountability as

> a broad process for ascertaining the political, legal and moral responsibility of institutions and individuals for past violations of human rights and dignity; accountability necessarily includes the achievement of truth, justice, and reparations for victims and is integral to a larger dynamic aimed at achieving sustainable peace in a State after conflict.

Civil society latched onto the reconciliation theme after the release of the report, calling on the Government of Sri Lanka[71] to

> engage in an effective and non-confrontational response to the Report with the international community. The Government should in addition address, as a matter of urgency, the issues of good governance specifically referred to in the Report. These matters have been frequently raised in the country after the end of the internal armed conflict in May 2009 as a crucial aspect of reconciliation, rehabilitation, restorative justice, and creating the context for a sustainable peace.

Yet the parties seemed to use the concept of reconciliation solely as a mechanism to critique the report rather than as a way in which to use the report to move forward towards reconciliation. Thus, the government's response to the report was that it is 'divisive, and disrupts our efforts to reinforce peace, security and stability in Sri Lanka'.[72] Perhaps over time the report will spark the reconciliation process that civil society seeks to promote, but at present it appears to be more of a tool for the hardening of positions rather than movement towards a middle ground for conversation and transition.

When an investigation results in competing versions of events, it will not help parties to proceed along the path to reconciliation in any meaningful way. The flotilla incident and the multiple reports it spawned offers a prime example, even though it diverges from the traditional model of transitional

[68] Boraine (n 17) 23.
[69] Sri Lanka Report (n 25) 2. See also United States Institute of Peace, International Commission of Inquiry for Burundi: Final Report (2002) para 2, http://www.usip.org/sites/default/files/file/resources/collections/commissions/Burundi-Report.pdf ('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 responsible for those acts, 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').
[70] Sri Lanka Report (n 25) 3.
[71] 'Friday Forum on Darusman Report', *DailyFT*, 27 May 2011, http://www.ft.lk/2011/05/27/friday-forum-on-darusman-report.
[72] 'SL Govt Slams UN Report, Uses Rajiv's Last Photo to Show LTTE Carnage', *Hindustan Times*, 27 April 2011.

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justice in that it was a single incident stemming from an ongoing armed conflict that affected relations between two sovereign states (one of which was involved in the conflict and the other was not). The aftermath of the UN Palmer Committee's report, which was specifically designed to seek a middle ground of sorts between the divergent views of Turkey and Israel, shows that its goals remained out of reach for some time. In a substantive sense, the report did reach a middle ground, concluding that Israel's blockade was legal and that Israel had the right to enforce the blockade, while at the same time finding that Israel used excessive force in boarding the ships and subduing the activists and other passengers. That middle ground, however, did not extend to the relations between the two key parties. Although both Israel and Turkey had some substantive result that met their goals in some way, relations between the two countries continued to deteriorate after the release of the report, seemingly because of direct attempts to emphasise each side's desired findings.[73] Involving multiple actors and components of society in an attempt to hear different points of view and reconcile competing stories is, in many ways, a hallmark of transitional justice. In the context of investigations, however, having multiple competing players seems only to reinforce or harden the parties' positions and provides fuel for the fires of discord.

2.3 Legitimacy, Law and Legal Analysis

Investigations can also have a major impact on reconciliation and other transitional justice goals, either positively or negatively, through the use of law and legal analysis in the reports and the investigative process. Where parties on both sides grant legitimacy to the investigative body and its report, its conclusions regarding violations, potential responsibility and the need for further accountability can promote such accountability and help to fight perceptions of impunity. The legal analysis itself – even though fact-finding missions consistently emphasise that they are not tribunals or other judicial bodies – can have an effective contribution to the discourse about the conflict. For example, if the parties generally agree on the legal paradigm and the application of specific legal precepts to the events at issue, then they have an excellent starting point for discussing and resolving disputes over the facts and for promoting accountability. Investigations also have great potential to help to bridge the gap between the moral response to conflict and the legal analysis of events. This gap between how an incident actually transpires and how it appears in news coverage is exacerbated by the speed with which news is reported around the world and the tendency to view all civilian deaths as war crimes.

> Ascertaining the facts through an impartial and independent body contributes to ensuring an objective and complete representation of the circumstances surrounding a given act. Second, if coupled with a legal assessment, it provides a means to explain the evaluation under IHL and limit the misunderstanding between public opinion and legal experts, consequently reducing the aforementioned 'gaps'.[74]

[73] In 2013 Israel and Turkey reached a rapprochement, after Israel's apology for the deaths of the Turkish nationals, and agreed to dispatch envoys after having recalled them in 2011: Jodi Rudoren and Mark Landler, 'With Obama as Broker, Israelis and Turkey End Dispute' *The New York Times*, 22 March 2013.
[74] Boutruche (n 22) 110.

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Indeed, such situations are the foundation of transitional justice – a recognition of the need for accountability and a general framework for moving forward, even with significant complexities and challenges for the process.

When the investigation's initial legitimacy is in question, by one side or the other, or when multiple entities conduct such investigations, the results in the legal analysis arena will be far less clear. In many ways, the reports and the conclusions therein simply reinforce each side's existing perceptions and beliefs, and can solidify an existing unwillingness to work together because of what appears to be an inability to see the other's viewpoint. The flotilla incident and accompanying reports offer a prime example. One side sees the blockade as illegal and a form of prohibited collective punishment; the other views it as both legal and essential for national security. The two sides have no common ground in the legal sphere to set the stage for a process to find common ground in the factual sphere.

The legal differences then only reinforce the disagreements over narrative: from the Israeli perspective, the failure to recognise the legality of the blockade amounts to a more fundamental failure to recognise Israel's right to self-defence and the threat from Hamas and other groups in Gaza; from the Turkish perspective, the failure to question the blockade's legality contributes directly to the failure to recognise the existence of a humanitarian crisis in Gaza and the purely peaceful intentions of the flotilla participants. Disputes over the actual application of the law and the legal analysis at issue have hounded the Goldstone Report since its release, and have led to extensive critiques of the report and concern regarding its impact on the application of the law in future situations.[75] Goldstone's so-called retraction in the spring of 2011 served only to diminish the report's legal effect even more.[76] Moreover, the fact that the reports of such investigative bodies are not part of a criminal process can give weight to claims that they are simply one version of the truth or one side's story of events. While transitional justice mechanisms must manage this type of challenge all the time, the impact of formal investigations of military operations in this arena is as yet unexplored and is of growing importance.

Components of reconciliation, such as hearing victims' stories, documenting violations and providing recommendations for change, do constitute a substantial portion of the work of investigations. However, these are not intentionally included in the fact-finding and investigative process for the purposes of reconciliation and truth-telling, but rather because any effective investigation must, at the most basic level, find facts and attribute responsibility in some manner; many investigations are also tasked with making recommendations. Investigations can certainly play a positive preliminary role towards reconciliation in a preventative manner

> by contributing to the establishment of facts about past abuses as well as debunking unfounded allegations of IHL violations. Undisputed false allegations for a prolonged period may fuel resentment between communities and belligerents and lead to acts of vengeance, including further violations of IHL in the case of renewed armed conflict.[77]

[75] eg Blank (2009) and (2010) (n 24); Jenks and Corn (n 24) 3; Berkowitz (n 24).
[76] Richard Goldstone, 'Reconsidering the Goldstone Report on Israel and War Crimes', *The Washington Post*, 1 April 2011. See also Laurie R Blank, 'Why Goldstone's "Retraction" Is Not Enough', *Jurist*, 17 April 2011.
[77] Boutruche (n 22) 109.

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In the same way, the investigation as a truth-seeking exercise does offer the opportunity to serve as a precursor for prosecutions, whether formally – such as in the case of the UN Report on Darfur, which directly recommended, and resulted in, referrals to the International Criminal Court[78] – or informally through a longer transition process. However, the competitive nature of the investigation process, in the context of multiple investigations or simply in the sense of divergent responses to the process and the report, currently tends to undermine efforts at reconciliation through a hardening of each side's viewpoint, the use of the law as a tool for further disputes, and the struggle for control of the narrative.

3. Policy Considerations: Should Investigations Take Transitional Justice Goals into Account?

The uncertain coexistence between investigations into military operations and transitional justice goals poses broader policy considerations that arise as a result of the potential confluence of such investigations with potential, nascent or ongoing transitional justice efforts. Given that an investigation's reports and conclusions may be used for purposes beyond the next military operation or the accountability of those involved in the investigated operation, it is wise to question whether such considerations should be addressed in planning and implementing future investigations. By advocating for changes in policies and providing the legal framework for accountability, investigations have the potential to change how the parties to a conflict relate to each other. However, they can also reinforce existing conceptions that no common ground for discussion and no opportunity for collaboration exist, thus reinforcing perceptions of impunity. For these reasons, it is critical to examine how, and in what circumstances, investigations and reports are a positive tool for potential reconciliation and justice efforts, and when they are more likely to be used as just one more tool in an ongoing conflict waged beyond the immediate battlefield. Still more, understanding how investigations can interrupt or threaten nascent transitional justice efforts will be essential in going forward.

On one level, several considerations of the interrelationship between investigations and transitional justice are directly relevant to improving the fact-finding and investigative process. Uniform standards for fact finding would help to eliminate the easy claims that parties can make regarding the failure of a fact-finding mission to comport with basic standards. Charges of bias – in mandate, selection, process and conclusions – will thoroughly undermine a report's conclusions and impact in terms of recommendations for accountability and effect on future military operations. For example, both Georgians and Russians levelled charges of bias against experts used by the fact-finding mission or against the 'politicized approach' of many members of the European Union as represented in the report.[79] The Goldstone Report is also a prime example, with numerous reports about the bias of commission

[78] Darfur Report (n 11) 5.
[79] Barry (n 62).

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members.[80] With longer-term transitional justice goals of truth-seeking and the establishment of a common memory in mind, fact-finding missions necessarily would have to pay significantly greater attention to how they are constituted, how their members are viewed, and how they carry out their primary mission of gathering information and investigating allegations. Doing so – while helping with the long-term goals – would have a direct impact on the report's effectiveness in terms of its specific mandated goals. Here, consideration of transitional justice goals could greatly help the process of investigations into military operations.

However, the direct incorporation of transitional justice goals into investigations may not always have positive results. Certainly, investigations and transitional justice mechanisms share two broad goals: '(1) to respond to the suffering from past abuses; and (2) to prevent similar suffering from happening in the future'.[81] But how the two divergent paradigms pursue these and more specific targeted goals can lead to different needs and potentially different results. With reconciliation looming large as an overarching goal, an investigative commission might refrain from issuing bold and potentially divisive recommendations. When the investigation has the primary goal of ensuring better implementation and enforcement of international humanitarian law and human rights law, it needs to identify all different types of violation and the relevant legal parameters, even if that means a significantly lopsided report that focuses predominantly on the conduct of one party. Doing so is likely to contribute to justice in the sense of accountability, but may not contribute in any positive way to reconciliation and even justice in the broader societal sense. Taking transitional justice needs into account up front can then result in the investigation's goals being diluted from their original mandate and purpose if the investigative commission refrains from issuing comprehensive findings and recommendations out of a desire to promote reconciliation.

Moreover, the need for inclusion, cooperation and buy-in from all parties – a hallmark of effective transitional justice mechanisms – simply may not be a need that an investigation can or should satisfy. Some investigations will never make it off the drawing board and others will die a slow death in such circumstances. International and domestic investigations will encounter different scenarios here because the access and cooperation questions are unlikely to arise in the case of the latter. To be sure, an investigation that faces limits on access or cooperation must take that into account and cannot, as the Goldstone Commission unfortunately did, simply disregard the information it does not have and act only on the testimony and information provided by one side. Waiting for inclusion and buy-in from all concerned, however, can take a long time and thus undermine the effectiveness of the fact-finding process. Here, too much attention to the needs of transitional justice may hamper an investigation by delaying it to the point where memories are not as fresh and evidence is no longer available. Careful reliance on a combination of the law and appropriate fact-finding standards should meet the needs of

[80] For example, Anshel Pfeffer, 'Military Expert on Goldstone Report "Severely Biased"', *The Jewish Chronicle Online*, 11 February 2010; Haviv Rettig Gur, 'Lawyers, Watchdog Allege Goldstone Bias', *The Jerusalem Post*, 14 September 2009.

[81] Roht-Arriaza and Mariezcurrena (n 16) 325.

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an investigation that fails to obtain the necessary cooperation and access without the added layer of concern for fulfilment of broader transitional justice goals.

Sequencing considerations also play a role in understanding the appropriate level of cooperation between investigations and transitional justice mechanisms and the manner in which investigations should incorporate transitional justice goals into their own processes. The past decade has seen a growing recognition that truth and justice are complementary rather than exclusionary goals in times of transition. Instead of focusing on which transitional justice mechanism is most appropriate, current efforts emphasise the need to manage multiple institutions, where '[t]ruth commissions are now often seen as complements to criminal processes, [and] prosecutions, amnesty, fact-finding and reparations to victims [may be] all bound up together in a single multifaceted process'.[82] Where can investigations into military operations fit into this complex sequencing and collaborative process? Perhaps investigations can only work as a precursor, both because of the fact-gathering nature of the investigation process – a helpful component of a broader transitional justice effort – and because of the divisive effect many investigations have – surely a detrimental development in the middle of ongoing and potentially fragile transitional justice efforts. Some might argue, however, that the foundation of a broader transitional justice effort would help to minimise the divisive nature of an investigation's findings by housing that process within a broader societal process of reconciliation that can absorb the competition over narrative, the charges of bias and the disputes over legal analysis. Sequencing issues thus offer a means to tie together the range of considerations addressed in this article and examine how, and whether, investigations into military operations can and should coexist with transitional justice.

Investigations into military operations, whether carried out by international, regional or national bodies, have an important role to play in understanding the reasons behind the flare up of conflict and the launching of military operations, the implementation of the law of armed conflict and human rights during conflict, and the opportunities for effective investigation and accountability in the aftermath of conflict. At the same time, such investigations and the reports they produce interact with and have the potential to affect nascent, ongoing or even future transitional justice efforts, because of their inherent connection with the truth, reconciliation, legitimacy and accountability issues at the heart of transitional justice. For these reasons, further consideration of the challenges and benefits analysed herein, as well as other potential useful interactions and interrelationships, is essential.

[82] ibid 9.

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