

FACT-FINDING IN INTERNATIONAL LAW AND THE ROLE OF THE INTERNATIONAL HUMANITARIAN FACT-FINDING COMMISSION

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This paper examines fact-finding in international law and the recent practice of the International Humanitarian Fact-Finding Commission (IHFFC). Once described as “a sleeping beauty,” the IHFFC has since been formally activated twice: in 2017 by the Organization for Security and Cooperation in Europe with respect to an incident in Ukraine and in 2024 by the Government of Poland with respect to an incident in the Gaza Strip. The recent practice of the Commission demonstrates that its good offices mandate has proven a functional workaround to the strict jurisdictional requirements provided for under the fact-finding mandate. This is a positive development because, as many Commissioners have noted, the strict jurisdictional requirements of the fact-finding mandate were intended to ensure that the IHFFC never became operational. Whereas fact-finding conducted by human rights bodies blurs the lines between international human rights law (IHRL) and international humanitarian law (IHL) and risks becoming a propaganda tool of belligerents, fact-finding conducted by the IHFFC is narrowly focused on IHL and is confidential between the parties. As the IHFFC develops its expertise, it will further contribute to mediating tensions and the pacific resolution of disputes.

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1. This phrase was first coined by Professor Frits Kalshoven. *The Independent Humanitarian Fact-Finding Commission: Has the ‘Sleeping Beauty’ Awoken?*, HUMAN. L. & POL’Y (Jan. 9, 2018), <https://blogs.icrc.org/law-and-policy/2018/01/09/the-independent-humanitarian-fact-finding-commission-has-the-sleeping-beauty-awoken/>.

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I. OVERVIEW OF FACT-FINDING IN INTERNATIONAL LAW

A. *Hague fact-finding and post-Cold War fact-finding*

International fact-finding can be divided into two broad temporal categories: the quasi-arbitral scheme envisioned by the Hague Peace Conferences in 1899 and 1907 and the quasi-judicial scheme envisioned by UN bodies in the post-Cold War period.² Commissions of inquiry (COIs) as envisioned by the Hague Peace Conferences were

2. See, e.g., Max Lesch, *Contested Facts: The Politics and Practice of International Fact-Finding Missions*, 25 INT'L STUD. REV. (2023) (showing that the commissions of inquiry under the Hague Conventions were closely linked to the settlement of disputes between states whereas modern-day fact-finding missions are quasi-adjudicative); Cecile Hellestveit, *International Fact-Finding Mechanisms: Lighting Candles or Cursing Dark-ness?*, in PROMOTING PEACE THROUGH INTERNATIONAL LAW (Cecilia M. Baillet & Kjetil M. Larsen eds., 2015) (noting that fact-finding missions originating with the Human Rights Council are initial tools for securing subsequent accountability under international law); Larissa J. van den Herik, *An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of International Law*, 13 CHINESE J. INT'L L. (2015) (demonstrating the trend toward juridification and the move away from pure fact-finding).

based on respect for sovereignty and the notion of reciprocity,³ and were intended to serve as a preventive tool of conflict mitigation.⁴ Friedrich Martens, the intellectual father of COIs and a Russian diplomat to the Hague Peace Conferences, emphasized their dual function as the search for truth and the calming of tensions.⁵ Notably, COIs could only be activated with the consent of the disputing parties, and only states could be parties to a dispute.⁶ In Martens' words, "this double and important practical result cannot be obtained except on one condition, and that is that the interested governments shall both agree to take upon themselves the mutual obligation to name these commissions."⁷

Today, COIs are by and large carried out by human rights bodies, nearly always without the express consent of the state in question.⁸ Rather than simply determine a set of objective facts, these COIs serve an accountability function. Philip Alston and Sarah Knuckey have described their goals as: (1) ascertaining the facts about alleged human rights abuses; (2) determining state responsibility and perhaps also individual responsibility for violations of human rights; and (3) making recommendations as to reform and reparations.⁹ Thus, their scope is much wider than that envisioned by the Hague Peace Conferences. Hun Joon Kim has posited that "the expansion of UN commissions should be understood as a representation of the increase in this investigative function with regard to international human rights and transitional justice norms."¹⁰ Some scholars have suggested that state cooperation with UN mechanisms is necessary for achieving compliance

3. Antonio Cassese, *Fostering Increased Conformity with International Standards: Monitoring and Institutional Fact-finding*, in *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW* 296 (Antonio Cassese ed., 2012).

4. Hellestveit, *supra* note 2, at 369.

5. *THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: TRANSLATION OF THE OFFICIAL TEXTS* 114 §80 (1920).

6. Rob Grace, *From Design to Implementation*, 20 *J. CONFLICT & SEC. L.* 30 (2015).

7. *Id.*

8. Out of the seventy-nine COIs issued by UN bodies, only five received the express consent of the State where the investigation was being carried out (Burundi in 1993, Timor-Leste in 2006, Togo in 2000, the Ivory Coast in 2000, and Colombia in 2002).

9. Philip Alston & Sarah Knuckey, *The Transformation of Human Rights Fact-Finding: Challenges and Opportunities*, in *THE TRANSFORMATION OF HUMAN RIGHTS FACT-FINDING* 5 (Philip Alston & Sarah Knuckey eds., 2016).

10. Hun Joon Kim, *Are UN Investigations into Human Rights Violations a Viable Solution? An Assessment of UN Commissions of Inquiry*, 11 *J. HUM. RTS. PRAC.* 99 (2019).

with human rights standards,¹¹ while others have argued that fact-finding mechanisms fill an institutional gap in applying international humanitarian law (IHL).¹²

However, several scholars have pushed back on the notion that Hague fact-finding is distinct from the fact-finding carried out in the post-Cold War era. For example, Michael A. Becker has articulated that COIs prior to the post-Cold War era addressed matters relating to legal concepts and developed legal norms.¹³ Therefore, the Hague concept of “pure fact-finding” is more myth than reality. Nonetheless, it is clear that the primary goal of COIs established by the Hague Peace Conferences was the pacific resolution of disputes, whereas contemporary human rights commissions aim to condemn and impose an objective and formal legal truth.¹⁴

Today, several international bodies have the capacity to authorize fact-finding mandates. The only express authorization can be found in Article 34 of the UN Charter, which grants the UN Security Council (UNSC) the power “to investigate any situation or dispute that may endanger international peace and security.”¹⁵ However, Article 34 has fallen into disuse.¹⁶ Unlike the UNSC, the UN Secretary-General (UNSG), UN General Assembly (UNGA), the Office of the High Commissioner for Human Rights (OHCHR), and the Human Rights Council (HRC) possess “implied powers” to request COIs.¹⁷ Since 1963, these bodies together have authorized a total of 79 mandates: the UNSC has authorized eight mandates; the UNSG ten; the UNGA five; the OHCHR thirteen; the Commission on Human Rights (CHR) seven¹⁸; and the HRC a whopping thirty-six.¹⁹

11. Felice D. Gaer, *Picking and Choosing? Country Visits by Thematic Special Procedures*, in *THE UNITED NATIONS SPECIAL PROCEDURES SYSTEM 127* (Aoife Nolan, Rosa Freedman, & Therese Murphy eds., 2017).

12. See, e.g., Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 247 (2000) (arguing that human rights bodies give IHL an even more pro-human-rights orientation).

13. Michael A. Becker, *Challenging Some Baseline Assumptions About the Evolution of International Commissions of Inquiry*, 55 VAND. J. TRANSNAT'L L. 559-629 (2022).

14. Van den Herik, *supra* note 2, at 519.

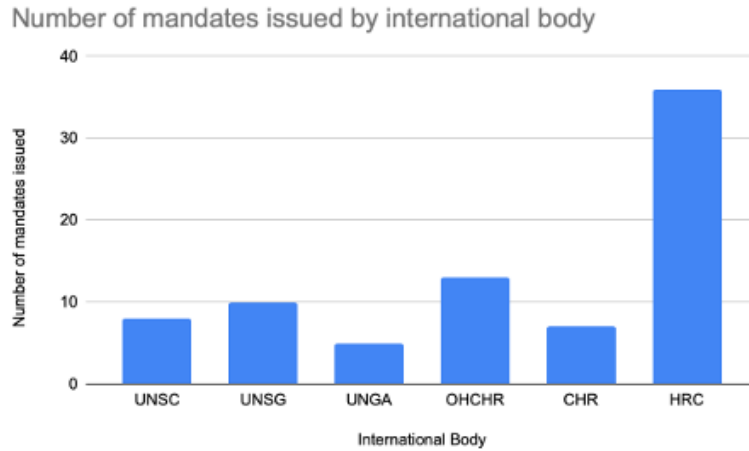
15. U.N. Charter.

16. Van den Herik, *supra* note 2, at 523.

17. Lesch, *supra* note 2, at 5.

18. The CHR was replaced by the HRC in 2006.

19. *United Nations Research Guides: International Commissions of Inquiry, Fact-finding Missions*, <https://libraryresources.unog.ch/factfinding>.



B. Contemporary issues

Much of the literature on fact-finding in international law focuses on its shortcomings. For one, scholars point out that the legalization of fact-finding is problematic. Frédéric Mégret has emphasized that attaching legal norms to facts makes fact-finding vulnerable to the accusation that it is a form of adjudication without adjudication.²⁰ The greater the legalization of facts, the more vulnerable a fact-finding mission is to accusations of bias.²¹ Relatedly, Shiri Krebs has argued that legal fact-finding is likely to trigger cognitive biases and belief polarization, in the sense that terms such as “war crimes” are likely to trigger emotional biases and reduce the perceived fairness of the report.²² In times of war, an inevitable tension exists between the moral evaluation by public opinion and the evaluation under IHL.²³ As such, fact-finding bodies constantly “risk becoming tools in the struggle between the parties to define history.”²⁴ Indeed, claiming that the adversary

20. Frédéric Mégret, *Do Facts Exist, Can They Be ‘Found’, and Does It Matter?*, in *THE TRANSFORMATION OF HUMAN RIGHTS FACT-FINDING* 35 (Philip Alston & Sarah Knuckey eds., 2016).

21. Grace, *supra* note 6, at 28.

22. Shiri Krebs, *The Legalization of Truth in International Fact-Finding*, 18 *CHI. J. INT’L L.* 83–163 (2017).

23. Théo Boutruche, *Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice*, 16 *J. CONFLICT & SEC. L.* 110 (2011).

24. Hellestveit, *supra* note 2, at 391.

systematically violates IHL, especially in a non-international armed conflict (NIAC), is an important propaganda tool for every belligerent.²⁵

Another prominent issue is the lack of standardization of fact-finding. Though the 1991 UNGA Declaration on Fact-Finding and the 2015 OHCHR guidelines represent attempts at standardization, in practice fact-finding mechanisms have various underlying purposes and, as such, employ different methods, guidelines, and legal regimes. For example, whether an alleged violation is characterized as a *fact* depends on the standard of proof required; however, the standard of proof varies depending on the mandate and procedure governing the fact-finding mission.²⁶ A lack of standard operating procedure negatively impacts efficiency, performance, consistency, and predictability as to methods, outcomes, and comparability of results.²⁷ The lack of standardization also makes it easier for malign actors to undermine the credibility of fact-finding missions.

C. *The applicable legal regime*

A central issue to any COI is the identification of the applicable legal framework. COIs have generally included IHL, in addition to international human rights law (IHRL), where applicable.²⁸ Catherine Harwood has identified five self-stated rationales among COIs for their choice of legal regime(s): (1) the legal lenses identified as most appropriate by the mandating authority; (2) engagement with concerned states' views; (3) the objective applicability of legal fields to the situation on the ground; (4) the interrelationship of fields of law; and (5) the purpose of ensuring accountability.²⁹ Harwood's classification begs the question: in the case that a COI decides that it is competent to apply both IHL and IHRL, how does it do so?

25. Marco Sassoli, *Respect of the Law*, in INTERNATIONAL HUMANITARIAN LAW: RULES, CONTROVERSIES, AND SOLUTIONS TO PROBLEMS ARISING IN WARFARE 82 (Edward Elgar ed., 2022).

26. Boutruche, *supra* note 23, at 113.

27. M Cherif Bassiouni, *Appraising UN Justice-Related Fact-Finding Missions*, 5 WASH. U. J. L. & POL'Y 40-41 (2001).

28. Catherine Harwood, *Identification of the Applicable Legal Framework*, in THE ROLES AND FUNCTIONS OF ATROCITY-RELATED UNITED NATIONS COMMISSIONS OF INQUIRY IN THE INTERNATIONAL LEGAL ORDER: NAVIGATING BETWEEN PRINCIPLE AND PRAGMATISM 174 (2020).

29. *Id.*

William A. Schabas has identified two prominent approaches.³⁰ The first, as adopted by the International Court of Justice (ICJ) in *Nuclear Weapons and the Wall*, treats IHL as the *lex specialis* when a genuine norm conflict arises, meaning that concepts derived from IHL inform the meaning of human rights norms during situations spelled out in the Geneva Conventions.³¹ For example, IHL provides for the internment of enemy personnel who qualify as prisoners of war based solely on status and without court review of the lawfulness of internment, whereas the International Covenant on Civil and Political Rights (ICCPR) mandates that anyone who is deprived of his liberty is entitled to a court proceeding without delay to determine the lawfulness of his detention.³² However, states disagree about what *lex specialis* actually means, with some states like Israel and the United States of America arguing that in situations when IHL applies, resort to IHRL is entirely excluded.³³

The second approach, as adopted by the HRC, is that the two systems are essentially additive in nature.³⁴ This largely maps onto Judge Trindade's *lex protector* approach, which he articulated in a separate opinion in *Las Palmeras*:

I think, however, that the concrete and specific purpose of development of the obligations *erga omnes* of protection (the necessity of which I have been likewise sustaining for some time) can be better served, by the identification of, and compliance with, the *general obligation of guarantee* of the exercise of the rights of the human person, *common to the American Convention and the Geneva Conventions (infra)*, rather than by a correlation between substantive norms - pertaining to the protected rights, such as the right to life - of the American Convention and the Geneva Conventions.³⁵

30. William A. Schabas, *Lex Specialis? Belts and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum*, 40 ISRAEL L. REV. 592-613 (2007).

31. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 ¶ 106 (July 9).

32. ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War* ¶ 104 (2d ed. 2020); ICCPR art. 9(4), adopted Dec. 16, 1966, 999 U.N.T.S. 171.

33. Paul Eden & Matthew Happold, *The Relationship between International Humanitarian Law and International Human Rights Law*, 14 J. CONFLICT & SEC. L. 442 (2009).

34. Schabas, *supra* note 30, at 593.

35. Case of *Las Palmeras v. Colombia*, Judgment of February 4, 2000 (Preliminary Objections), Inter-Am. Ct. H.R. (ser. A), ¶ 7 (Feb. 4, 2000).

Thus, Judge Trindade urges applying both regimes simultaneously in order to ensure that the greatest level of protection is available to civilians during situations of armed conflict.

It is worth noting that the majority in *Las Palmeras* determined that the Court did not have competence to apply IHL, because it was limited to applying the American Convention—a human rights treaty—in a strict sense.³⁶ However, nine months later, in *Bámaca Velásquez v. Guatemala*, the Court changed its position, determining that “it can observe that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3.”³⁷

States and scholars alike have raised issues with the *lex protector* approach. As mentioned earlier, the United States and Israel object to the application of IHRL to situations of armed conflict, articulating the hard-line position that the two bodies of law are mutually exclusive. Along those lines, Daphné Richemond-Barak has argued that, though fact-finding mechanisms provided for by the HRC apply both IHL and IHRL, the HRC is not explicitly authorized to apply IHL and therefore, when it does so, it is exceeding its subject-matter jurisdiction.³⁸ Philip Alston, Jason Morgan-Foster, and William Abresch have disagreed, arguing that the HRC and its predecessor, the CHR, have treated IHL as lying within their remit and therefore that IHL applies by way of practice.³⁹

These competing views at their core reflect different understandings of what the relationship between IHL and IHRL should be in the context of fact-finding carried out by international human rights bodies. In addition to the jurisdictional issue, there is also a question as to whether human rights bodies have the expertise necessary to interpret and apply IHL.⁴⁰ Moreover, it is possible that blurring the two regimes in a fact-finding analysis can cause states to regard standards issued by

36. *Las Palmeras*, *supra* note 35, at ¶ 33-34.

37. *Case of Bámaca-Velásquez v. Guatemala*, Judgment of November 25, 2000 (Merits), Inter-Am. Ct. H.R. (ser. A), ¶ 208 (Nov. 25, 2000).

38. Daphné Richemond-Barak, *The Human Rights Council and the Convergence of Humanitarian Law and Human Rights Law*, in *SHAPING A GLOBAL LEGAL FRAMEWORK FOR COUNTERINSURGENCY: NEW DIRECTIONS IN ASYMMETRIC WARFARE*, 6 (William Banks ed., 2013).

39. Philip Alston, Jason Morgan-Foster, and William Abresch, *The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflicts: Extra-judicial Executions in the 'War on Terror'*, 19 *EUR. J. INT'L L.* 198 (2008).

40. *Id.*, 17.

these bodies as out of sync with the reality on the ground during armed conflict and thus may make them less inclined to comply with them.⁴¹ Ultimately, empirical analysis is needed to assess expertise and state compliance to reach definitive conclusions.

II. FACT-FINDING IN INTERNATIONAL HUMANITARIAN LAW

Unlike the large number of human rights bodies that are empowered to investigate possible violations of IHRL and IHL, there are relatively few bodies explicitly empowered under international law to investigate compliance with IHL exclusively. They include the International Committee of the Red Cross (ICRC) and the International Humanitarian Fact-Finding Commission (IHFFC).

A. ICRC

1. *Mandate*

Created in 1863, the ICRC provides humanitarian assistance to people affected by armed conflict and other violence.⁴² The First Geneva Convention recognizes the right of the ICRC to assist the wounded and sick, and requires parties in a conflict to provide information concerning the wounded and sick to the ICRC.⁴³ The Third Geneva Convention grants the ICRC special rights to visit with prisoners of war privately, examine conditions of confinement to ensure the Convention's standards are being met, and distribute relief supplies.⁴⁴ The Fourth Geneva Convention authorizes the ICRC to transmit family news between people separated by frontlines, assist with family reunifications, register detainees, register and respond to inquiries by family members, clarify the fate of missing persons with parties to the conflict, and facilitate relief shipments.⁴⁵ The ICRC has a functional international legal personality based both upon the mandate it is given by IHL treaties and on customary international law.⁴⁶

41. *Id.*, 18.

42. Int'l Comm. Red Cross, "Our history" <https://www.icrc.org/en/our-history> (last visited Jan. 23, 2026).

43. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 9, Aug. 12, 1949, 75 U.N.T.S. 31.

44. Geneva Convention (III) relative to the Treatment of Prisoners of War, art.125, 75 U.N.T.S. 135.

45. Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, at arts. 25, 26, 59, 61, 76, 109, 143, 75 U.N.T.S. 287.

46. Marco Sassòli, *Respect of the Law* in INTERNATIONAL HUMANITARIAN LAW: RULES, CONTROVERSIES, AND SOLUTIONS TO PROBLEMS ARISING IN WARFARE, at 145 (2d. ed. 2022).

Beyond activities undertaken in wartime, the ICRC holds confidential discussions with governments, armed forces, and non-state groups in order to remind them of their IHL obligations. The ICRC also develops and promotes implementation of IHL through technical cooperation with legal advisors, armed forces, and police.

2. *Collaboration with the IHFFC*

Moreover, the ICRC works closely with the IHFFC to ensure that the IHFFC can fulfill its mandate to promote respect for IHL. The ICRC does this in a number of ways. First, it encourages states that have not already done so to recognize the competence of the IHFFC. Second, it facilitates connections between members of the IHFFC and relevant government officials. Third, it provides opportunities for IHFFC members to speak at conferences and liaise with interested parties.

B. *IHFFC*

1. *Mandate*

The IHFFC is the only standing fact-finding body authorized to investigate alleged violations of IHL. Under Article 90 of Additional Protocol I (AP I), it is competent to: (i) inquire into any facts alleged to be a grave breach of the Geneva Conventions or AP I or other serious violation of the Conventions or Protocol and; (ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.⁴⁷ In the fulfillment of its mandate, the IHFFC observes the principles of neutrality, independence, impartiality, and confidentiality.⁴⁸

2. *UNGA resolutions*

The IHFFC has been explicitly referenced in the UNGA biennial resolution entitled “Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts” since 1984—the first time the resolution was adopted.⁴⁹ The

47. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 90(2)(c), June 8, 1977, 1125 U.N.T.S. 3.

48. IHFFC, “Who We Are,” <https://www.ihffc.org/> (last visited Jan. 28, 2026).

49. G.A. Res. 39/77, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/RES/39/77 (Dec. 13, 1984); G.A. Res. 41/72, *Status of the Protocols Additional to the Geneva Conventions of*

resolutions generally urge respect for IHL and call on states to make declarations recognizing the IHFFC's competence *ipso facto*. The resolution referenced the good offices mandate for the first time in 1999⁵⁰ and, in 2004, physically separated the fact-finding mandate from the good offices mandate in two distinct preambular paragraphs:

1949 and Relating to the Protection of Victims of Armed Conflicts, U.N. Doc. A/RES/41/72 (Dec. 3, 1986); G.A. Res. 43/161, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/RES/43/161 (Dec. 9, 1988); G.A. Res. 45/38, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/RES/45/38 (Nov. 28, 1990); G.A. Res. 47/30, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/RES/47/30 (Nov. 25, 1992); G.A. Res. 49/48, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/RES/49/48 (Dec. 9, 1994); G.A. Res. 51/155, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/RES/51/155 (Dec. 16, 1996); G.A. Res. 53/96, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/RES/53/96 (Dec. 8, 1998); G.A. Res. 55/148, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/RES/55/148 (Dec. 12, 2000); G.A. Res. 57/14, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/RES/57/14 (Nov. 14, 2002); G.A. Res. 59/36, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/RES/59/36 (Dec. 2, 2004); G.A. Res. 61/30, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/RES/61/30 (Dec. 4, 2006); G.A. Res. 63/125, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/RES/63/125 (Dec. 11, 2008); G.A. Res. 65/29, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/RES/65/29 (Dec. 6, 2010); G.A. Res. 67/93, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/RES/67/93 (Dec. 14, 2012); G.A. Res. 69/120, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/RES/69/120 (Dec. 10, 2014); G.A. Res. 71/144, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/RES/71/144 (Dec. 19, 2016); G.A. Res. 73/204, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/RES/73/204 (Dec. 20, 2018); G.A. Res. 75/138, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/RES/75/138 (Dec. 16, 2020); G.A. Res. 77/111, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/RES/77/111 (Dec. 15, 2022); U.N. GAOR, 6th Comm., *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/C.6/79/L.17 (Dec. 4, 2024).

50. G.A. Res. 53/96, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/RES/53/96 (Feb. 11, 1999).

Stressing the possibility of making use of the International Fact-Finding Commission in relation to an armed conflict, pursuant to Article 90 of Protocol I to the Geneva Conventions of 1949,

Stressing also the possibility for the International Fact-Finding Commission to facilitate, through its good offices, the restoration of an attitude of respect for the Geneva Conventions and Protocol I.⁵¹

The apparent distinction made between the fact-finding mandate and the good offices mandate suggests that states interpret the good offices mandate as independent from the fact-finding mandate. This is an important clarification, as the requirements for triggering the IHFFC's competence differ significantly depending on whether it is conducting a fact-finding mission or a good-offices mission, as will be explored in the following section.

3. *Legal interpretation of competence*

There are several ways that the IHFFC's competence can be triggered. Article 90(2) is reproduced in its entirety below for reference.

2. (a) The High Contracting Parties may at the time of signing, ratifying or acceding to the Protocol, or at any other subsequent time, declare that they recognize ipso facto and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the Commission to enquire into allegations by such other Party, as authorized by this Article.

(b) The declarations referred to above shall be deposited with the depositary, which shall transmit copies thereof to the High Contracting Parties.

(c) The Commission shall be competent to:

(i) enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol;

(ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.

(d) In other situations, the Commission shall institute an enquiry at the request of a Party to the conflict only with the consent of the other Party or Parties concerned.

(e) Subject to the foregoing provisions of this paragraph, the provisions of Article 52 of the First Convention, Article 53 of the Second Convention, Article 132 of the Third Convention and Article 149 of the Fourth Convention shall continue to apply to any alleged violation of the Conventions and shall extend to any alleged violation of this Protocol.

51. G.A. Res. 59/36, *supra* note 50; G.A. Res. 53/96, *supra* note 50.

First, Article 90(2)(a) covers the type of situation in which both state parties to an armed conflict have accepted the competence of the IHFFC *ipso facto*. The IHFFC's competence can be triggered under Article 90(2)(a) at the request of one of those states, or by a third state that has also recognized the competence of the IHFFC *ipso facto*. All other situations are governed by Article 90(2)(d). One possible scenario that would fall under Article 90(2)(d) is that one state party to an armed conflict has accepted the competence of the IHFFC *ipso facto* and the other has not. If the state party that has accepted the competence of the IHFFC *ipso facto* seeks to trigger the IHFFC's competence, the IHFFC will need to receive the specific consent of the other state party. If the state party that has not accepted the competence of the IHFFC *ipso facto* requests the IHFFC's competence, then the IHFFC does not need the specific consent of the other state party.

The practice of the IHFFC makes clear that it reads Article 90's triggers of competence as applying only to its fact-finding mandate and not to its good offices mandate. The IHFFC's good offices mandate has been activated twice. In 2017, the Commission conducted an independent forensic investigation into the incident of April 23, 2017, in which a routine patrol of the Organization for Security and Cooperation in Europe (OSCE) Special Monitoring Mission (SMM) in the non-government controlled area of Ukraine was damaged in an explosion.⁵² Recently, the Commission finalized a report for the Polish government regarding the April 1, 2024 incident in the Gaza Strip in which seven people working with the NGO World Central Kitchen (WCK) were killed, including a Polish citizen.⁵³ In neither of these cases did the IHFFC receive a request by a party to the conflict nor the consent of all parties concerned, as required under Article 90(2)(d).

With respect to the OSCE mission, the Secretary-General of the OSCE, Lamberto Zannier, requested the IHFFC to lead an independent forensic investigation into the incident in Luhansk Province that caused the death of a paramedic and the injury of two monitors of its SMM.⁵⁴ The memorandum of understanding (MoU) described the

52. OSCE, *Executive Summary of the Report of the Independent Forensic Investigation in relation to the Incident affecting an OSCE Special Monitoring Mission to Ukraine (SMM) Patrol on 23 April 2017*, <https://www.osce.org/files/f/documents/1/e/338361.pdf> (last visited Jan. 23, 2026).

53. IHFFC, "Poland: Signing of the Memorandum of Understanding," June 21, 2024, <https://www.ihffc.org/news/poland-signing-memorandum-understanding.html>, (last visited Jan. 28, 2026).

54. IHFFC, "International Humanitarian Fact-Finding Commission to lead an independent forensic investigation in Eastern Ukraine (Luhansk province)" May 19, 2017, <https://www.ihffc.org/news/independent-forensic-investigation-eastern-ukraine.html> (last visited Jan. 23, 2026).

purpose of the investigation as establishing the facts of the incident by conducting a post-blast scene forensic and technical assessment against the background of IHL.⁵⁵ Though the IHFFC classified the mandate as a good offices mission, the MoU suggests that it was, in practice, a fact-finding mission.

The IHFFC classified the mandate as a good offices mission, because if it had been classified as a fact-finding mission, then the IHFFC would have been incompetent to investigate. Per Article 90(2)(d), in order to trigger the IHFFC's competence under the fact-finding mandate, the OSCE would have needed to be a party to the conflict, and the IHFFC would have needed the consent of the other parties concerned,⁵⁶ namely Ukraine and the Russian Federation. However, the OSCE is not a party to the conflict; it is a regional security organization that is in Ukraine with the goal of facilitating a comprehensive political settlement to the conflict.⁵⁷ Moreover, the IHFFC did not receive the consent of the Russian Federation. While Ukraine recognizes the competence of the Commission *ipso facto*,⁵⁸ the Russian Federation does not.⁵⁹ Therefore, absent the Russian Federation's consent, the mission could not have proceeded.

With respect to the incident in the Gaza Strip, through letters dated April 4, 2024 and April 8, 2024, the IHFFC offered its good offices to the governments of states whose citizens were killed, including Australia, Canada, Palestine, Poland, the United Kingdom of Great Britain, and the United States of America.⁶⁰ Poland accepted the offer

55. *Ibid.*

56. At the time of the request, in 2017, it was recognized by states and UN bodies alike that the Russian Federation was in an international armed conflict with Ukraine and in a posture of belligerent occupation in the area of Ukraine where the incident occurred. U.S. Dep't of State, *Ukraine 2023 International Religious Freedom Report*, https://www.state.gov/wp-content/uploads/2024/05/547499_UKRAINE-2023-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf; OHCHR, *Report on the human rights situation in Ukraine: 16 February to 15 May 2017*, para.184, https://www.ohchr.org/sites/default/files/Documents/Countries/UA/UARep18th_EN.pdf.

57. The OSCE comprises 57 states, including Ukraine and the Russian Federation. OSCE, "About us," <https://www.osce.org/about-us> (last visited Jan. 28, 2026).

58. Ukraine deposited a declaration recognizing the competence of the Commission *ipso facto* in 1990.

59. The Russian Federation withdrew its declaration in 2019. IHFFC, "Continued cooperation with Russia," Nov. 1, 2019, <https://www.ihffc.org/news/continued-cooperation-with-russia.html> (last visited Jan. 23, 2026).

60. IHFFC, "Offer of good offices," Apr. 8, 2024, <https://www.ihffc.org/news/offer-good-offices.html> (last visited Jan. 23, 2026).

of good offices on April 11, 2024.⁶¹ On June 20, 2024, the President of the IHFFC, Thilo Marauhn, and the Minister of Foreign Affairs of Poland, Radoslaw Sikorski, signed an MoU stating that the IHFFC would establish the facts of the incident and reaffirm applicable IHL.⁶²

Similar to the OSCE mandate, if the Polish mandate had been classified as a fact-finding mission, it would not have met Article 90(2)(d)'s requirements for triggering the IHFFC's competence.⁶³ As of the date of the incident, Israel and Palestine were engaged in an international armed conflict (IAC) and Israel and Hamas were engaged in a NIAC.⁶⁴ Thus, the IHFFC would have needed to receive a request from either Israel, Palestine, or Hamas (assuming that a non-state armed group can be a party to the conflict and that the IHFFC is competent to investigate NIACs) and would have needed the consent of the other parties to proceed.⁶⁵

Thus, the IHFFC has developed a clever workaround to the practical difficulties of securing the agreement of all parties to a conflict. The good offices mandate enables the IHFFC to conduct fact-finding missions absent the consent of all parties concerned. However, this is a potentially dangerous strategy because several states invoke strict constructionist arguments when a legal interpretation does not suit their interests. In order to maintain credibility and withstand pressure from states that may seek to undermine it, the IHFFC ought to be able to explain how the text of Article 90 enables it to conduct good offices missions without securing the agreement of all parties to the conflict.

The IHFFC's textual analysis may look something like the following. The fact-finding mandate, spelled out in 90(2)(c)(i), empowers the IHFFC to "enquire" into facts alleged to be grave breaches of the Conventions and Protocol. By contrast, the good offices mandate, spelled out in 90(2)(c)(ii), empowers the IHFFC to "facilitate" respect for the Conventions and Protocol. Article 90(2)(a), which describes one of the scenarios by which the competence of the IHFFC can be triggered,

61. IHFFC, "Poland accepts offer of good offices," May 23, 2024, <https://www.ihffc.org/news/poland-accepts-offer-good-offices.html> (last visited Jan. 23, 2026).

62. IHFFC, "Poland: Signing of the Memorandum of Understanding," June 21, 2024, <https://www.ihffc.org/news/poland-signing-memorandum-understanding.html> (last visited Jan. 23, 2026).

63. Whereas Palestine has recognized the competence of the IHFFC *ipso facto*, Israel has not.

64. ICC, *Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine*, Press Release (May 20, 2024). <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>.

65. Palestine recognized the competence of the Commission *ipso facto* in 2018.

specifically refers to the competence of the IHFFC “to enquire.” Article 90(2)(d) states that the IHFFC shall only institute an “enquiry” with the specific consent of the parties concerned. Since the word “enquire” is common to the fact-finding provision and the provisions concerning requirements for triggering the IHFFC’s competence, it can be inferred that those requirements apply exclusively to the fact-finding mandate.

A critical state may respond that the order of the text suggests that the requirements for triggering the Commission’s competence were intended to apply to the good offices mandate in addition to the fact-finding mandate. Article 90(2)(a) provides for triggering the competence of the Commission *ipso facto* “to enquire into allegations.” Only further down in the article, in 90(c), is the distinction made between inquiring into facts (the fact-finding mandate) and facilitating the restoration of an attitude of respect (the good offices mandate). The language in 90(2)(a)—and 90(2)(d) for that matter—is broader than that in 90(c)(i) and therefore suggests that both inquiring into facts and facilitating the restoration of an attitude of respect are but two objectives of an inquiry. This view is reflected in the scholarship of Françoise Krill, an ICRC legal advisor. In 1991, she wrote that the IHFFC would be “quite unable [to facilitate the restoration of an attitude of respect for IHL] without assessing the facts in terms of the law.”⁶⁶ Since the good offices mandate is inextricably linked to the fact-finding mandate, it must be subject to the same jurisdictional requirements.

Problematically for the IHFFC, this view seems to be reflected in the IHFFC’s own rules of procedure.⁶⁷ Rule 28(1) states that:

After each enquiry the Commission shall draw up, in the light of the Chamber’s findings, a report to be transmitted to the parties concerned. In particular, the Commission shall consider, as appropriate, whether it should take steps to facilitate, through its good offices, the restoration of an attitude of respect for the Geneva Conventions and the Protocol.

Thus, the IHFFC seems to conceive of good offices as an add-on to a fact-finding mission, which would automatically render the good offices mandate subject to the same jurisdictional requirements as the fact-finding mandate.

The travaux is also problematic for the IHFFC’s interpretation of the different jurisdictional requirements for fact-finding missions as opposed to good offices missions. During the Diplomatic Conference

66. Françoise Krill, *The International Fact-Finding Commission: The ICRC’s Role*, INT’L REV. RED CROSS No. 281, at 199 (Apr. 1991).

67. Under Article 90(5)(c), the IHFFC is empowered to establish its own rules.

of 1974-1977, there was a serious rift between the participants over the jurisdiction of the IHFFC, with one side insisting on a system of compulsory inquiry, and the other firmly opposed to what they regarded as an intolerable encroachment on the sovereignty of States.⁶⁸ By allowing the contracting parties to choose between recognizing the IHFFC's compulsory competence *a priori* and an optional acceptance in each case, the final text achieved a balance between those two conflicting points of view.⁶⁹ In an effort to incorporate states' concerns about encroachment on their sovereignty, the final text established a high bar for triggering the IHFFC's competence.

Nonetheless, as noted above, the UNGA resolution entitled "Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts" has explicitly separated the good offices mandate from the fact-finding mandate since 1999. Moreover, beginning in 2018, the resolution noted with approval that the IHFFC conducted its first operational mission in 2017.⁷⁰ These references can be seen as an implicit endorsement of the IHFFC's interpretation that the good offices mandate is not subject to the jurisdictional requirements of the fact-finding mandate, and that it is appropriate for the IHFFC to conduct fact-finding under the guise of the good offices mandate.

In any case, the IHFFC's interpretation can only be rejected and corrected by a UNGA resolution, a UNGA request for an advisory opinion from the International Court of Justice (ICJ), a UNSC resolution, or a re-negotiation of AP I, none of which are likely. Thus, the IHFFC can feel emboldened to continue using the good offices work-around.

III. CASE STUDY: FACT-FINDING IN UKRAINE

We now turn to a comparative analysis of three fact-finding mandates in Ukraine: the Human Rights Monitoring Mission in Ukraine (HRMMU), the Independent International Commission of Inquiry on Ukraine (COI), and the IHFFC mission. While the HRMMU has reported on the situation in Ukraine since Russia's invasion of Crimea in 2014, the COI was not established until after Russia launched a full-scale invasion of Ukraine in 2022. The IHFFC good offices mission, for its part, was established to investigate a singular incident that took

68. Krill, *supra* note 66, at 193.

69. *Id.*

70. G.A. Res. 75/138, *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, U.N. Doc. A/RES/75/138 (Dec. 16, 2020).

place on April 23, 2017. In order to make the comparison as close as possible, we will investigate the HRMMU report covering events from February 16 to May 15, 2017, which includes the incident investigated by the IHFFC. Since the COI was not established until March 2022, we will look at its first report, issued on October 18, 2022.

Unfortunately, the author was not granted access to the confidential IHFFC report. All information thus derives from the executive summary of the report, which is publicly available. This lack of access hampers the ability to draw conclusions, but the author has nonetheless attempted to make inferences where she feels that they are warranted by the text of the executive summary and her knowledge of the IHFFC.

A. Mandate

1. IHFFC

As mentioned earlier, the Secretary-General of the OSCE, Lamberto Zannier, requested the IHFFC to lead an independent forensic investigation into the April 23, 2017 incident in which a paramedic in the services of the SMM was killed.⁷¹ The mandate stated that the purpose of the independent forensic investigation was to establish the facts of the incident by conducting a post-blast scene forensic and technical assessment against the background of IHL.⁷² The IHFFC was clear to note that criminal responsibility and accountability for the explosion are outside the scope of the mandate.⁷³ The Independent Forensic Investigation Team (IFI) was led by Ambassador Alfredo Labbé of Chile, Vice-President of the IHFFC, and composed of members proposed by the IHFFC and selected by Ambassador Labbé in consultation with the OSCE Secretary-General.⁷⁴

3. HRMMU

The HRMMU's mandate was established by an ad-hoc agreement between OHCHR and the Government of Ukraine in March 2014. Following his visit to Ukraine, the UN Assistant Secretary-General for Human Rights Ivan Simonovic expressed the "urgent need for independent monitors to objectively assess the human rights implications

71. IHFFC, *International Humanitarian Fact-Finding Commission to Lead an Independent Forensic Investigation in Eastern Ukraine (Lubansk Province)*, May 19, 2017, <https://www.ihffc.org/news/independent-forensic-investigation-eastern-ukraine.html> (last visited Jan. 28, 2026).

72. *Id.*

73. *Id.*

74. *Id.*

of recent events and to monitor the current human rights situation throughout the country.”⁷⁵ Given the dire situation, he announced the immediate deployment of the HRMMU.⁷⁶ A resolution adopted by the UNGA thirteen days later welcomed the efforts of the UN to assist Ukraine in protecting the rights of all persons in Ukraine.⁷⁷ Nearly two years later, on December 19, 2016, a UNGA resolution expanded the scope of the HRMMU when it requested that the OHCHR prepare a report on the situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol.⁷⁸

3. COI

The COI’s mandate is provided for in a resolution adopted by the HRC on March 4, 2022.⁷⁹ The resolution establishes an independent COI, comprising three human rights experts, to investigate all alleged violations and abuses of human rights and violations of IHL and related crimes in the context of the aggression against Ukraine by the Russian Federation.⁸⁰ It also authorized the COI to establish the facts, circumstances, and root causes of such violations, and, where possible, to identify those responsible, as well as make recommendations, in particular on accountability measures.⁸¹ In addition, the COI should complement, consolidate, and build upon the work of the HRMMU.⁸² The three experts selected were Erik Møse of Norway, Pablo de Grieff of Colombia, and Jasminka Džumhur of Bosnia and Herzegovina.⁸³ Together, the commissioners have expertise in IHRL and international criminal law (ICL), but none has expertise in IHL.

75. U.N. Off. High Comm’r for Hum. Rts., *UN Assistant Secretary-General for Human Rights Ivan Simonovic Press Conference in Kiev, Ukraine* (Mar. 14, 2014), <https://www.ohchr.org/en/statements/2014/03/un-assistant-secretary-general-human-rights-ivan-simonovic-press-conference-kiev?LangID=E&NewsID=14371>.

76. *Id.*

77. G.A. Res. 68/262, ¶ 4, U.N. Doc. A/RES/68/262 (Mar. 27, 2014).

78. G.A. Res. 71/205, ¶ 5, U.N. Doc. A/RES/71/205 (Dec. 19, 2016).

79. Hum. Rts. Council Res. 49/1, U.N. Doc. A/HRC/RES/49/1 (Mar. 4, 2022).

80. *Id.* ¶ 11.

81. *Ibid.*

82. *Ibid.*

83. U.N. Hum. Rts. Council, *Human Rights Expert Members of the Independent International Commission of Inquiry on Ukraine*, <https://www.ohchr.org/en/hr-bodies/hrc/iicshr-ukraine/members> (last visited Dec. 17, 2024).

B. Sources

1. IHFFC

The IFI reviewed documents, interviewed witnesses, and examined the damaged vehicle, the site near Pryshyb where the incident occurred, and material collected at the site.⁸⁴ It also conducted a forensic medical analysis of injuries.⁸⁵

2. HRMMU

HRMMU obtained information from in-depth interviews with 252 witnesses and victims of human rights violations and abuses, as well as site visits in both Government-controlled and armed groups-controlled territory.⁸⁶ It also relied extensively on data collected by the SMM.⁸⁷ In the absence of access to Crimea, OHCHR monitored the human rights situation from its offices in mainland Ukraine.⁸⁸

3. COI

The COI relied on 191 interviews conducted in person and remotely, inspected sites of destruction, graves, places of detention and torture, as well as weapon remnants, and consulted primary and secondary sources from states, UN agencies, funds and programs, civil society organizations, media, and other relevant actors.⁸⁹

C. Applicable Law and Legal Analysis

1. IHFFC

The IFI established that the munition most likely to have caused the incident was a Russian-manufactured anti-tank mine that was probably laid just one or two days before the incident.⁹⁰ Applying

84. Org. for Sec. & Co-operation in Eur., *Executive Summary of the Report of the Independent Forensic Investigation in relation to the Incident affecting an OSCE Special Monitoring Mission to Ukraine (SMM) Patrol on 23 April 2017*, <https://www.osce.org/files/f/documents/1/e/338361.pdf>.

85. *Id.*

86. HRMMU, *Report on the Human Rights Situation in Ukraine, 16 February to 15 May 2017*, ¶ 2, https://www.ohchr.org/sites/default/files/Documents/Countries/UA/UAReport18th_EN.pdf.

87. *Id.* ¶ 3.

88. *Id.* ¶ 12.

89. Indep. Int'l Comm'n of Inquiry on Ukr., Rep., ¶¶ 9-12, U.N. Doc. A/77/533 (Oct. 18, 2022)..

90. OSCE, *supra* note 84.

exclusively IHL, the IFI concluded that the SMM was likely not the intended target of an attack because the SMM infrequently used the track, the patrol planned to travel along the track last-minute, and there was limited opportunity to lay mines during the patrol.⁹¹ However, given that the road was frequently used by civilian traffic—as was commonly known—any recent laying of anti-vehicle mines constitutes a violation of IHL because of the predictable indiscriminate effect.⁹²

2. HRMMU

The HRMMU applied IHL and IHRL in an additive manner, employing a *lex protector* approach. In one illustrative example, HRMMU reiterated that

presence in or use of civilian housing by Ukrainian Armed Forces and armed groups puts civilians at risk, and violates the obligation of parties to a conflict to take all feasible measures to spare civilians from harm, besides violating the rights to adequate housing and property.⁹³

This implies that IHL does not displace IHRL during armed conflict. Interestingly, the HRMMU specifically referenced the incident investigated by the IFI. It noted that:

In violation of their commitments under the Minsk agreements, all sides continued laying new mines rather than systematically clearing or marking mines and other hazards, or fencing them off. On 23 April, a vehicle of an OSCE SMM patrol was destroyed in an explosion, most likely caused by a landmine, on a regularly used road in Pryshyb village (controlled by armed groups) of Luhansk region, killing one and injuring two patrol members.⁹⁴

Though the HRMMU refrained from coming to a legal conclusion, it suggested that the presence of a large number of mines posed a serious threat to civilians, possibly in violation of the customary IHL principle of precaution in attack.⁹⁵

91. *Ibid.*

92. *Ibid.*

93. HRMMU, *supra* note 86, ¶ 25.

94. *Id.* ¶ 20.

95. AP I, *supra* note 47, art. 57.

3. COI

Pursuant to HRC resolution 49/1, the COI applied IHRL, IHL, and ICL.⁹⁶ In a section on the conduct of hostilities, the COI found violations of IHL. In particular, the COI concluded that the Russian Federation launched multiple indiscriminate attacks in Chernihiv between February 25, 2022 and March 31, 2022.⁹⁷ It reached this conclusion on the grounds that “the type and number of munitions used in the attacks impacted civilians and civilian objects in a wider area, beyond the apparent military objective,” despite the fact that the COI collected credible information about the presence of Ukrainian armed forces at or near the impact locations.⁹⁸

While there is good reason to believe that these kinds of attacks are indiscriminate,⁹⁹ the military can still show that the military advantage of a particular strike outweighed the civilian harm. Such a conclusion cannot be ruled out until the COI has the opportunity to review the information the military had *ex ante*. That being said, the COI’s analysis must be understood in light of its purpose to collect and analyze evidence in view of any future legal proceedings and to make recommendations with respect to accountability measures.¹⁰⁰ Therefore, its analysis should not be seen as an end in itself but as a means to individual criminal accountability.

D. Comparative analysis

The different analyses conducted by the IFI, HRMMU, and COI showcase the added value of the fact-finding conducted by the IHFFC in situations of armed conflict. First, most controversies on whether IHL has been violated in contemporary armed conflicts revolve around the facts and not the law, as evidenced in this case by the need to determine what happened to the SMM vehicle.¹⁰¹ Whereas the HRMMU brushed past this incident as merely one among many, the IFI focused exclusively on it. This allowed the IFI to conduct an in-depth IHL

96. Indep. Int’l Comm’n of Inquiry on Ukr., *supra* note 89, ¶ 14.

97. *Id.* ¶ 46.

98. *Id.* ¶ 47.

99. See, e.g., Hum. Rts. Watch, *Memorandum to CCW Delegates: Cluster Munitions and International Humanitarian Law: The Need for Better Compliance and Stronger Rules*, <https://www.hrw.org/legacy/backgrounders/arms/clusters0704/clusters0704.pdf>, p. 3 (showing that cluster munition strikes have the potential to be indiscriminate because the weapons cannot be precisely targeted).

100. Resolution adopted by the Human Rights Council on 4 March 2022, *supra* note 79, ¶ 11.

101. Sassoli, *supra* note 25, at 158.

analysis that led to a highly accurate conclusion. Such specificity is necessary for any IHL inquiry, especially since conclusions can only be reached after reviewing the information the parties had *ex ante* and parties are more likely to share information if they are certain that the final report is confidential.

Second, members of the IHFFC have expertise in IHL. This is evidenced by the highly technical nature of the investigation conducted by the IFI, which required ballistic and forensic expertise. Unfortunately, the human rights experts involved in the COI inquiry and the HRMMU inquiry do not have this kind of expertise, even though such knowledge is essential for conducting an IHL analysis. Because information collected by IHL experts is considered more credible, final reports produced by these experts are less likely to be subject to allegations of bias.

Finally, investigations conducted by the IHFFC are more likely to bring about peaceful cessation of hostilities. As Charles Garroway, a former Commissioner, has observed: the task of the Commission is to “try to take some of the heat out of the propaganda wars that develop at present.”¹⁰² The IFI was able to mediate tensions between the OSCE, the Russian Federation, and Ukraine. As the HRMMU’s reliance on data collected by the SMM demonstrates, the OSCE is a crucial partner in monitoring the security situation in Ukraine. The confidential inquiry conducted by the IFI demonstrated that the OSCE vehicle was not intentionally struck, allowing the OSCE to continue operating in Ukraine and providing crucial support to civilians. The IFI report also created space for closed-door negotiations between the parties regarding the use of mines, thereby paving the way for greater protection of civilians.

IV. CONCLUSION

The IHFFC has been developing expertise in the resolution of disputes between humanitarian organizations and parties to an armed conflict. This is a particularly welcome development, as there are few institutional channels through which humanitarian organizations can request (confidential) investigations into incidents in which their members are injured or killed in situations of armed conflict. Humanitarian organizations and states seem to be awakening to the IHFFC’s potential for mediating tensions, with all signs pointing to an upcoming watershed moment.

102. *Quoted in* van den Herik, *supra* note 2, at 522.