# U.N. HUMAN RIGHTS FACT-FINDING: ESTABLISHING INDIVIDUAL CRIMINAL RESPONSIBILITY?

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## INTRODUCTION

On September 28, 2009, more than 150 Guineans were massacred during a demonstration in a stadium in Conakry, Guinea.[1] Tens of thousands of people had gathered in the stadium to protest against the government when security forces entered the stadium and opened fire.[2] During the events, members of the Guinean security forces also brutally raped numerous women.[3]

In response to the violence, the U.N. Secretary-General established a Commission of Inquiry to investigate the gross human rights violations.[4] This Commission was mandated to "qualify the crime perpetrated," to "determine responsibilities," and to "identify those responsible."[5] The Commission's report listed the names of government and militia officials, and other individuals suspected of bearing individual criminal responsibility for the atrocities.[6] The Commission

1. HUMAN RIGHTS WATCH, BLOODY MONDAY: THE SEPTEMBER 28 MASSACRES AND RAPES BY SECURITY FORCES IN GUINEA 4 (2009), *available at* http://www.hrw.org/reports/2009/12/16/bloody-monday-0.

2. *Id.* at 4, 6.

3. *Id.* at 7-8.

4. U.N. Security Council, *Report of the International Commission of Inquiry Mandated to Establish the Facts and Circumstances of the Events of 28 September 2009 in Guinea*, 1, U.N. Doc. S/2009/693 (Dec. 18, 2009), *available at* http://www.unhcr.org/refworld/docid/4b4f49ea2.html [hereinafter *Guinea Report*].

5. *Id.* ¶ 1.

6. *Id.* ¶¶ 215, 253.

concluded that there was "prima facie evidence"[7] or, in other cases, "sufficient grounds"[8] to assume that the people listed in the report were criminally responsible.[9] In its recommendations, the Commission called upon the Security Council to refer the cases of these individual suspects to the International Criminal Court (ICC).[10]

The human rights violations investigated by U.N. missions often are so atrocious that they amount to international crimes, such as genocide and crimes against humanity. From the early use of human rights fact-finding by the United Nations, these missions have been authorized to establish the types of crimes committed, and even to draw conclusions on the accountability or responsibility for such crimes.[11]

In the first few decades of human rights fact-finding, U.N. responses to such conclusions were in most cases of a political nature, as a means to put pressure on governments.[12] From the 1990s, these conclusions on criminal responsibility in fact-finding reports increasingly led to responses of a criminal prosecutorial nature.[13]

For example, investigations into human rights violations formed the basis for the establishment of international criminal tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[14] With the creation of the ICC, the U.N. Security Council was granted the authority to refer cases to the Office of the Prosecutor of the Court.[15] Such referrals could (and can) be based on the conclusions of a fact-finding

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7. *Id.* ¶¶ 216, 229.

8. *Id.* ¶ 236.

9. *Id.* ¶¶ 216, 229, 236.

10. *Id.* ¶ 275. In May 2010, the Office of the High Commissioner for Human Rights established an office in Conakry as a follow-up to the Commission's recommendations. *See* Press Release, Office of the High Commissioner for Human Rights, U.N. Human Rights Chief Navi Pillay to Visit Guinea and Senegal, 13-18 Mar. (Mar. 11, 2011), *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10837&LangID=E (last visited Sept. 6, 2011). It follows from U.N. High Commissioner Navi Pillay's statement in Conakry on March 15, 2011 that, although relative security had returned to Guinea and presidential elections were held without incident, no justice mechanisms had been put in place either nationally or internationally to deal with the question of culpability and reparation for the alleged crimes committed. *See* Press Release, Office of the High Commissioner for Human Rights, Statement by the U.N. High Commissioner for Human Rights to the Press in Guinea (Mar. 15, 2011), *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10852&LangID=E (last visited Sept 30, 2011).

11. *See generally* BERTRAND G. RAMCHARAN, THE PROTECTION ROLES OF U.N. HUMAN RIGHTS SPECIAL PROCEDURES 125-31 (2009).

12. *See id.* at 131-32; *infra* text accompanying notes 36 & 121-22; *infra* Part I.C.1.

13. *See infra* text accompanying notes 91-92.

14. *See infra* text accompanying notes 36 & 121-22; *infra* Part I.C.1.

15. Rome Statute of the International Criminal Court, art. 13(b), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

report.[16] In addition, the Office of the Prosecutor of the ICC has based some of its decisions to start investigations (partly) on fact-finding reports.[17]

The increased use of U.N. fact-finding for criminal prosecutorial purposes, and the practice of drawing conclusions on criminal responsibility in fact-finding reports, have so far caused little study and debate. This is surprising, given the possible far-reaching political implications and potentially severe consequences of individual criminal prosecutions.

In almost fifty years of U.N. human rights fact-finding practice, only a few authors have directly or indirectly addressed this issue. For example, M. Cherif Bassiouni argues that the function of fact-finding is to establish accountability. He writes:

> Fact-finding and investigation are a means to an end. With respect to the values of truth and justice, the end is accountability of the perpetrators, particularly the leaders of *jus cogens* crimes of genocide, crimes against humanity, war crimes, torture, slavery and slave-related practices, and apartheid. But accountability has yet to be clearly established as one of the goals of fact-finding missions.[18]

It is, however, not explicitly clear whether Bassiouni understands accountability within this context to mean individual criminal responsibility, political accountability or both.[19] Given that he calls for accountability of perpetrators in the context of "truth and justice," I assume the emphasis is on individual criminal responsibility.[20]

In a discussion of the Goldstone report, which investigated the military actions of the Israel Defense Forces in Gaza in 2009,[21] Geert-Jan Knoops warns against conclusions by U.N. fact-finders on criminal culpability.[22] Knoops argues that the members of U.N. fact-finding

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16. *See infra* text accompanying notes 36 & 121-22; *infra* Part I.C.1.

17. *See infra* text accompanying notes 103-04.

18. M. Cherif Bassiouni, *Appraising U.N. Justice-Related Fact-Finding Missions,* 5 WASH. U. J.L. & POL'Y 35, 45 (2001).

19. *Id.*

20. *Id.*

21. The fact-finding mission led by Justice Richard Goldstone was mandated "to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after." U.N. General Assembly, Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict,* ¶ 151, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009).

22. GEERT-JAN KNOOPS, BLUFFPOKER: DE DUISTERE WERELD VAN HET INTERNATIONAAL

commissions are not judges, and that they therefore should refrain from voicing legal judgments on the criminal responsibility.[23] Rather, such committee members should focus on establishing the facts without evaluating them.[24] Knoops believes that conclusions regarding the criminal responsibility could even be dangerous and have a polarizing effect between the parties in dispute.[25]

Lyal S. Sunga, in contrast, pleads for closer cooperation between fact-finding by the United Nations and fact-finding for the purposes of international criminal prosecutions.[26] He reasons that, given the lack of resources of the ICC, it is necessary to look for additional sources.[27] According to Sunga, U.N. human rights fact-finding "can . . . help the ICC: understand the general background or situation; place discrete events or incidents such as massacres into wider perspective; and, in some cases, identify cases ripe for prosecution."[28]

The purpose of this Article is to start a debate on whether human rights fact-finding conducted under the auspices of the United Nations should be used to establish individual criminal responsibility, and whether the information obtained through such missions should be used in international criminal prosecutions. Throughout this Article, I look into the goals, functions, and mandates of human rights fact-finding, and the working methods used in fact-finding missions. My analysis includes a comparison of the methods applied in human rights fact-finding and the procedural rules of international criminal law. Using three cases—the missions to Rwanda, Darfur, and the Democratic Republic of the Congo (DRC)—I show that there are no procedural and methodological standardized rules on how to conduct human rights fact-finding. As a result, each mission applies its own standards for establishing criminal responsibility.

On the basis of this research, I raise questions about the current and future practice of fact-finding by the United Nations. For example, I ask whether human rights fact-finding missions should at all be authorized "to establish individual criminal responsibility" and, if so, what that authorization does or should entail. Another pertinent question I raise is whether fact-finding should be aimed at or the information used in (possible) future criminal prosecutions, as Sunga argues. I conclude by

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RECHT [BLUFF POKER: THE DARK WORLD OF INTERNATIONAL LAW] 94-95 (2011).

23. *Id.* at 95.

24. *Id.*

25. *Id.*

26. *See* Lyal S. Sunga, *How Can U.N. Human Rights Special Procedures Sharpen ICC Fact-Finding?*, 15 INT'L J. HUM. RTS. 187, 188 (2011).

27. *Id.* at 188.

28. *Id.* While Sunga addresses the relationship between fact-finding and international criminal trials, he limits his discussion to international criminal trial and does not get into detail in the merits of human rights fact-finding by the United Nations. *See id.* at 187-202.

suggesting several legal, political and practical considerations that ought to be taken into account when answering these questions. In doing so, I argue that at the very least, the methods used in fact-finding need to be revised and standardized in order for fact-finding reports to represent a verifiable and uniform source for decision makers.

## I. UNDERSTANDING U.N. HUMAN RIGHTS FACT-FINDING

### A. *Introduction*

Prior to the foundation of the United Nations, fact-finding was employed only to help settle disputes of an international nature.[29] The first fact-finding exercises can be traced back to the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes.[30] By the time the League of Nations was founded, the instrument of fact-finding had become an institutionalized mechanism entrenched in the international system.[31] Over the years, states gradually gave up pieces of sovereign power to the benefit of international institutions by relinquishing the power not only "to settle facts disputed by two states, but also to provide a basis for collective action by international bodies."[32] These efforts paved the way for further development of the instrument of fact-finding within the U.N. framework.

The United Nations expanded the use of fact-finding from the settlement of international disputes to investigations within state borders in cases involving human rights violations. Such violations are often committed by a government against its citizens or by non-state actors domestically, while the government is unable or unwilling to act. Some states have argued that human rights issues fall within their domestic sovereignty and that Article 2(7) of the U.N. Charter prevents the United Nations from intervening in the domestic sphere on these issues.[33] Several scholars, in contrast, have expressed their belief that,

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29. For more information about the development in the utilization of fact-finding for the settlement of international disputes, prior to the establishment of the United Nations, see Thomas M. Franck & Laurence D. Cherkis, *The Problem of Fact-Finding in International Disputes*, 18 W. RES. L. REV. 1483, 1483-524 (1966-67); *see also* WILLIAM SHORE, FACT-FINDING IN THE MAINTENANCE OF INTERNATIONAL PEACE 1-49 (1970).

30. *See* Permanent Court of Arbitration, *Founding Conventions*, http://www.pca-cpa.org/showpage.asp?pag_id=1037 (last visited Feb. 20, 2012).

31. *See generally* Franck & Cherkis, *supra* note 29; SHORE, *supra* note 29.

32. David Weissbrodt & James McCarthy, *Fact-Finding by International Nongovernmental Human Rights Organizations*, 22 VA. J. INT'L L. 1, 20 (1981).

33. U.N. Charter art. 2, para. 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction

with the adoption of the U.N. Charter, human rights became no longer solely a domestic matter but an issue of international concern.[34] In any event, over the years, most states have accepted the intervention of the United Nations by way of human rights fact-finding.

From the earliest fact-finding missions, the mandate-holders investigated state responsibility, as well as individual and corporate responsibility for human rights violations.[35] With some exceptions, international responses to such conclusions were primarily of a political nature, such as raising sanction and condemning government activities.[36] The last two decades have shown an increase in and an institutionalization of the international criminal prosecution of individuals as a response to the conclusions in fact-finding reports.[37] To lay the background to this development, I examine below the legal basis and different forms of fact-finding missions.

### B. *The Legal Basis for Fact-Finding*

Two of the main purposes of the United Nations are "[t]o maintain international peace and security"[38] and "[t]o develop friendly relations among nations."[39] Different U.N. organs have been given the (implied) authority to create fact-finding missions, based on tasks related to the fulfillment of the goal of maintaining international peace and security.

For instance, Article 34 of the U.N. Charter authorizes the Security Council to "investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security."[40] To fulfill its

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of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."). *See also* Robert Miller, *U.N. Fact-Finding Missions in the Field of Human Rights*, AUST. Y.B. INT'L L. 40, 40-41 (1970-73) (noting, however, that missions have marked a "significant development" in human rights).

34. *See* Stephen Kaufman, *The Necessity for Rules of Procedure in Ad Hoc U.N. Investigations*, 18 AM. U.L. REV. 739, 748-50 (1969) (referring to Professor Cassin, Sir Hirsch Lauterpacht, and Professor Brunet).

35. RAMCHARAN, *supra* note 11, at 125.

36. In Part IV.C., I discuss how decisions on criminal prosecution, or in any case, referral by the Security Council, are in fact often political. However, I use the word "political" to distinguish between criminal prosecutorial consequences and other responses, such as sanctions.

37. *See* Part II.C.

38. U.N. Charter art. 1, para. 1.

39. *Id.* art. 1, para. 2.

40. *Id.* art. 34. The words "any situation" are a clear indication that fact-finding under the U.N. auspices is no longer merely a mechanism for dispute settlement between states, but that it has also become an instrument that can be used in situations where the tension arises within a state. Weissbrodt & McCarthy, *supra* note 32, at 21.

investigatory function the Security Council "may [also] establish . . . subsidiary organs."[41]

In addition, the General Assembly "may discuss any questions relating to the maintenance of international peace,"[42] and is further authorized to "recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations."[43] Like the Security Council, "[t]he General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions."[44]

Finally, "[t]he Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security."[45] On December 9, 1991, the General Assembly adopted the *Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security*.[46]

In Section IV, the Declaration states:

> The Secretary-General should monitor the state of international peace and security regularly and systematically in order to provide early warning of disputes or situations which might threaten international peace and security. To this end, the Secretary-General should make full use of the information-gathering capabilities of the Secretariat and keep under review the improvement of these capabilities.[47]

With this Declaration, the Secretary-General has been given "an explicit and wide-ranging mandate to monitor situations as close as he sees fit."[48]

As part of the aim to have "peaceful and friendly relations among nations," Article 55 of the U.N. Charter stipulates that, as a whole, "the

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41. U.N. Charter art. 29.

42. *Id.* art. 11, para. 2.

43. *Id.* art. 14.

44. *Id.* art. 22. Such functions include those described in Articles 11 and 14.

45. *Id.* art. 99. *Accord* SHORE, *supra* note 29, at 95; Franck & Cherkis, *supra* note 29, at 1496 n.98.

46. Declaration on Fact-finding by the United Nations in the Field of Maintenance of International Peace and Security, G.A. Res. 46/59, U.N. Doc. A/RES/46/59 (Dec. 9, 1991) [hereinafter Declaration on Fact-finding], *available at* http://www.un.org/Docs/asp/ws.asp?m=A/RES/46/59. *See also supra* Part II.B.

47. Declaration on Fact-finding, *supra* note 46, Special Procedures § 4.

48. A. Walter Dorn, *Keeping Watch for Peace: Fact-Finding by the United Nations Secretary-General*, *in* E. FAWCETT & H. NEWCOMBE, UNITED NATIONS REFORM: LOOKING AHEAD AFTER FIFTY YEARS, SCIENCE FOR PEACE 138-54 (1995), *available at* http://walterdorn.org/pub/39 (last visited Sept. 30, 2011).

United Nations shall promote: . . . universal respect for, and observance of, human rights and fundamental freedoms for all . . ."[49] Although Article 55 is directed at all the U.N. organs, it is the General Assembly that has been given explicit powers to "initiate studies and make recommendations" for the "realization of human rights and fundamental freedoms."[50] In addition, the General Assembly has the responsibility to ensure the promotion of human rights, which it can delegate to the Economic and Social Council (ECOSOC).[51] This responsibility and delegation of powers does not, however, exclude the other organs from promoting respect for human rights by means such as fact-finding.

In its turn, the ECOSOC has been given the authority to conduct fact-finding in the context of human rights. The ECOSOC is authorized to "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all"[52] and is required to "set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions."[53] In the exercise of its task, the ECOSOC established the Commission on Human Rights. The Commission was composed of fifty-three Member States and designed to deal with "the whole range of human rights problems."[54] To carry out this task, it was allowed to create working groups or appoint individual experts on an *ad hoc* basis.[55]

From the 1980s, the Commission on Human Rights also started to develop more permanent mechanisms of inquiry, named Special Procedures.[56] These Special Procedures are either executed by an individual or a working group dealing with human rights issues that either arise in a specific country ("country mandates"), or that relate to

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49. U.N. Charter art. 55.

50. *Id.* art. 13, para. 1.

51. *Id.* art. 60.

52. *Id.* art. 62, para. 2.

53. *Id.* art. 68.

54. G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (Apr. 3, 2006). There has been a debate on whether the authority of the Commission on Human Rights derived from the ECOSOC, or from the ECOSOC and the General Assembly. *See* Kaufman, *supra* note 34, at 745; Miller, *supra* note 33, at 44.

55. Kaufman, *supra* note 34, at 745 n.32.

56. Office of the High Commissioner for Human Rights, *Special Procedures of the Human Rights Council*, http://www.ohchr.org/EN/ HRBodies/SP/Pages/Welcomepage.aspx (last visited June 23, 2012) [hereinafter *Special Procedures of the Human Rights Council*]. *See also* Philip Alston, *Hobbling the Monitors: Should U.N. Human Rights Monitors be Accountable?*, 52 HARV. INT'L L.J. 561, 569 (2011). The Commission started working with special procedures to address the concerns expressed by several countries, including the former Eastern bloc and military regimes in Argentina and Chile, that the United Nations would be conducting investigations in the domestic sphere. *See* RAMCHARAN, *supra* note 11, at 1-2, 55-56.

human rights themes of a specific concern ("thematic mandates").[57] When the Human Rights Council replaced the Commission on Human Rights in 2006,[58] it assumed the mandates of the Special Procedures established by the Commission on Human Rights,[59] and still today "it continues to work closely with the Special Procedures."[60] In the late 1970s, the Commission on Human Rights decided, for logistical reasons, to start working with a single Special Rapporteur in Special Procedures, rather than with a working group of three to five experts.[61] Even at present, most Special Procedures mandate-holders are individual Special Rapporteurs.[62] They are independent experts who work for the United Nations on a voluntary basis and in an independent capacity.[63] The resolutions that establish the mandates also define what the mission will entail.[64] The functions carried out by the Special Procedures have expanded over the years, but the core duties include situational analysis, fact-finding and reporting, taking urgent action, and providing advice to governments and the Commission on Human Rights, now the Human Rights Council.[65]

### C. *Development of the Practice of U.N. Human Rights Fact-Finding: From Political to Criminal Accountability*

#### 1. Introduction

From the earliest human rights fact-finding missions in the 1960s, mandate-holders have been given the authority to investigate and

57. *Special Procedures of the Human Rights Council*, *supra* note 56. Currently, there are twelve country mandates: Office of the High Commissioner for Human Rights, *Country Mandates*, http://www.ohchr.org/EN/HRBodies/SP/Pages/Countries.aspx (last updated July 6, 2012); and thirty-six thematic mandates, such as the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and the Working Group on Arbitrary Detention: Office of the High Commissioner for Human Rights, *Thematic Mandates*, http://www.ohchr.org/EN/HR Bodies/SP/Pages/Themes.aspx (last updated July 6, 2012).

58. U.N. Office of the High Commissioner for Human Rights, *Background Information on the Human Rights Council*, http://www.ohchr.org/EN/HRBodies/HRC/Pages/About Council.aspx (last visited June 23, 2012).

59. *Id.*

60. United Nations, *Global Issues: Human Rights*, http://www.un.org/en/globalissues/humanrights/ (last visited Aug. 31, 2012).

61. RAMCHARAN, *supra* note 11, at 52.

62. *See Special Procedures of the Human Rights Council*, *supra* note 56, Introduction. There are five thematic working groups and no working groups with a country mandate; the mandate-holders for a country mandate are all Special Rapporteurs. *Id.*

63. RAMCHARAN, *supra* note 11, at vii. *See also Special Procedures of the Human Rights Council*, *supra* note 56.

64. *Special Procedures of the Human Rights Council*, *supra* note 56.

65. RAMCHARAN, *supra* note 11, at 1, 3.

evaluate individual responsibility for committing human rights violations that might reach the level of international crimes. The Working Group of Experts to Southern Africa, established by the Commission on Human Rights in 1967,[66] was given the task to inquire whether certain persons were "guilty of the crime of apartheid or of a serious violation of human rights, in accordance with article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid."[67] Consequently, the General Assembly "invited the Commission on Human Rights to compile periodically a progressive list of individuals, organizations, institutions and representatives of States deemed responsible for crimes enumerated in Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid . . ."[68] The General Assembly then requested the Secretary-General to publish and distribute that list in order to make known to the public who was considered guilty of the crime of apartheid.[69] As a result of its publication, the list transformed a political instrument, putting pressure on the apartheid government of South Africa by way of naming and shaming, rather than merely indicating the criminal responsibility of certain individuals.

With the establishment of various international and mixed criminal tribunals in the 1990s, the criminal implications of human rights fact-finding have augmented significantly. For example, prior to the establishment of the ICTY, U.N. fact-finding missions conducted extensive investigations.[70] Reports from the Special Rapporteur on the Former Yugoslavia and pressure from the international community led the Security Council to request that the Secretary-General create a Commission of Experts to investigate the breaches of international humanitarian law.[71]

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66. ECOSOC Res. 1235 (XLII), U.N. Doc. E/4393 (XLII) (1967).

67. *Id.* at 130. It was not until 1973, six years after establishment of the mission, that the crime of apartheid was declared a crime against humanity. International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068 (XXVIII), U.N. Doc. A/RES/3068 (XXVIII), art. I (Nov. 30, 1973). The working group was given the mandate to investigate the crime of apartheid in 1977. RAMCHARAN, *supra* note 11, at 130.

68. RAMCHARAN, *supra* note 11, at 131.

69. *Id.* at 131-32.

70. Bassiouni, *supra* note 18, at 46. On previous occasions, commissions of inquiry had also preceded war tribunals. *See* M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT (3d ed., 2008) [hereinafter INTERNATIONAL CRIMINAL LAW]. For example, the 1919 Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties (for war crimes during WWI), the 1943 U.N. War Crime Commission (that investigated German war crimes during World War II and that was followed by Nuremberg Tribunal), and the 1946 Far Eastern Commission (for the investigation of Japanese war crimes during World War II). INTERNATIONAL CRIMINAL LAW, *supra*, at 3.

71. Sunga, *supra* note 26, at 191-92. *See also* S.C. Res. 780, U.N. Doc. S/RES/780 (Oct. 6, 1992).

The resulting document consisted of eighteen months of investigation by that Commission and was later handed to the Prosecutor of the ICTY.[72] Although "most of the information gathered or received by the Commission of Experts could not be used directly as evidence in prosecutions[, it was] useful more to help establish the location, character and scale of violations."[73] Bassiouni, chairman of the Commission, stressed that "if it had not been for the work of the Commission, the ICTY Prosecutor . . . would not have been able to start his work as fast and as efficiently."[74]

The interplay between human rights fact-finding and international criminal prosecution has intensified even more as a result of the creation of the ICC. The Rome Statute, which created the ICC, not only authorizes the Prosecutor to "seek additional information from . . . organs of the United Nations[,]"[75] but also authorizes the Security Council to refer cases to the ICC.[76] Below, through the use of three cases in which U.N. fact-finding missions had criminal implications, I further exemplify the ways in which this interplay takes place. These cases are the missions to Rwanda, Darfur, and to the DRC.

### 2. Rwanda 1994

In May 1994, in response to the genocide in Rwanda, the Commission on Human Rights appointed a Special Rapporteur to conduct an investigation into the human rights situation there.[77] The mandate of the Special Rapporteur included "report[ing] . . . on the situation of human rights in Rwanda, including the root causes and responsibilities," and "mak[ing] available . . . systematically compiled information on possible violations of human rights and of international humanitarian law."[78]

The mandate further described that these two elements of the mandate should be understood as entailing two complementary stages: in the first stage, more general information would be collected, which could serve to clarify information of the second stage, which was

72. Sunga, *supra* note 26, at 192.

73. *Id.* at 193.

74. Bassiouni, *supra* note 18, at 47.

75. Rome Statute, *supra* note 15, art. 15(2).

76. *Id.* art. 13(b).

77. *See* Comm'n on Human Rights, *infra* note 78, ¶ 1.

78. Commission on Human Rights, Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories, ¶ 8, U.N. Doc. E/CN.4/1995/7 (28 June 1995) [hereinafter Comm'n on Human Rights], *available at* http://www1.umn.edu/humanrts/commission/country51/7.htm.

collected through more in-depth investigation into specific cases.[79] This two-stage process was illustrated by the following example: information on the organization of the military might be necessary to provide general information on the situation with a view to finding adequate responses, as well as to establish individual responsibility through command responsibility.[80] To make sure that the information collected at each stage would be complementary, the mandate instructed that information be "collected, recorded and analyzed in a way such that it [would] be usable in the event of a trial by a national or, if appropriate, international court."[81]

In his evaluation of the facts, the Special Rapporteur concluded that the events that occurred in Rwanda met the elements of the crime of genocide of the Tutsi population.[82] In addition, he established that assassinations of Hutus and other violations had occurred.[83] The Rapporteur drew up a list of individuals who were "involved in the planning and execution of the atrocities."[84] However, he explained that he would need more time "to establish the chain of responsibility and draw up a list of the perpetrators as they are identified."[85] In the report, the Rapporteur did, however, immediately name organs and authorities that bore responsibility for the atrocities.[86]

Following the report of the Special Rapporteur (and with a view to the establishment of a criminal tribunal for Rwanda, although the resolution did not explicitly state this goal),[87] the Security Council decided to establish another mission, the Commission of Experts.[88] The

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79. *Id.* ¶¶ 9-10.
80. *Id.*
81. *Id.* ¶ 11.
82. *Id.* ¶¶ 45-46.
83. *Id.* ¶¶ 49-50.
84. *Id.* ¶ 62.
85. *Id.*
86. *Id.* ¶ 63.
87. *See* Sunga, *supra* note 26, at 193.

> At the very least, the UN had to do its utmost to prosecute the perpetrators and assist Rwanda to re-establish the rule of law and promote conditions that would enable recovery from the catastrophe. Politically therefore, the Security Council had little choice but to establish the Commission of Experts on Rwanda.

*Id.* at 194. *But see* Bassiouni, *supra* note 18, at 42-43 (claiming that that the Commission of Experts was nothing more than a procedural step the Security Council felt it had to take, before it could establish the ICTR, as was done with the ICTY, and as a way to buy time to work out the logistical aspects of establishing a new tribunal).

88. S.C. Res. 935, ¶ 1, U.N. Doc. S/RES/935 (July 1, 1994).

Commission was to "review and update information."[89] Based on that information, the Commission was instructed to "draw its own conclusions" and "to determine whether and to what extent certain individuals might be held responsible for having committed those violations."[90] In its report, the Commission, like the Special Rapporteur, concluded that acts of genocide had been committed against Tutsis, but as for individual criminal responsibility, it did not go much further than stating that individuals from both sides had committed crimes against humanity.[91] The Security Council based its decision to establish the ICTR on the information supplied by these reports.[92]

### 3. Darfur 2004

In 2004, the Security Council established the Commission of Inquiry for Darfur.[93] This decision was sparked by the fact that hardly anything had been done by the Sudanese government to end the humanitarian crisis in Darfur.[94] In fact, the parties to the conflict, including the government, had recently violated the existing ceasefire agreement.[95] The purpose of the Commission of Inquiry was "to investigate reports of violations of international humanitarian law and human rights law in Darfur[,] . . . to determine also whether or not acts of genocide [had] occurred, and to identify the perpetrators of such violations with a view to ensuring those responsible are held accountable."[96]

The five-member commission investigated events that had taken place between February 2003 and mid-January 2005.[97] The Commission concluded that no acts of genocide had been committed because it could

89. U.N. Secretary-General, Letter dated 1 Oct. 1994 from the Secretary-General addressed to the President of the Security Council, ¶ 3, U.N. Doc. S/1994/1125 (Oct. 4, 1994) [hereinafter *Letter from the Secretary-General*].

90. *Id.*

91. *Id.* ¶¶ 146-48.

92. S.C. Res. 955, para. 2, U.N. Doc. S/RES/955 (Nov. 8, 1994). The Special Rapporteur went on a second mission resulting in a report, which contributed to the decision to establish the ICTY; however, the report does not deal with the actual genocide but with its aftermath. *See* Commission on Human Rights, Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories, U.N. Doc. E/CN.4/1995/12 (Aug. 12, 1994), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/%28Symbol%29/E.CN.4.1995.12.En?Opendocument.

93. S.C. Res. 1564, ¶ 12, U.N. Doc. S/RES/1564 (Sept. 18, 2004).

94. *Id.* ¶ 2.

95. *Id.* ¶ 1.

96. U.N. Secretary-General, Letter dated 31 Jan. 2005 from the Secretary-General addressed to the President of the Security Council, para. 1, U.N. Doc. S/2005/60 (Feb. 1, 2005) [hereinafter *Darfur Report*].

97. *Id.* ¶¶ 2, 3.

not be established that the government had "a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds."[98] However, the Commission did find that crimes against humanity had been committed.[99]

Based on the evidence collected, the Commission drew up a non-exhaustive list of possible suspects,[100] which remained confidential and was "placed in the custody of the U.N. Secretary-General."[101]

The Commission emphasized that by drawing up the list it did not establish guilt; it had intended only to "pave the way for future investigations and possible indictments by a prosecutor, and convictions by a court of law."[102] Those future investigations became reality when the Security Council referred the case of Darfur to the Office of the Prosecutor of the ICC, which opened the investigation.[103] After the referral, the documentation gathered by the Commission of Inquiry to Darfur was sent to the Prosecution's Office and formed part of the materials the prosecutor used as the basis for his decision to open an investigation.[104] Currently, there are five cases, concerning the situation in Darfur, pending before the Court.[105]

### 4. Democratic Republic of the Congo (DRC) 2010

Following the discovery by the peacekeeping operation in the DRC of a mass grave in 2005, the U.N. Secretary-General decided to approve a Mapping Exercise to the DRC.[106] The Mapping Exercise was an unprecedented form of fact-finding, established by the Secretary-

98. *Id.* ¶ 518.

99. *See id.* ¶ 519.

100. *Id.* ¶¶ 644, 646.

101. *Id.* ¶ 645.

102. *Id.* ¶ 643.

103. Press Release, Office of the Prosecutor, Int'l Criminal Court, The Prosecutor of the ICC Opens Investigation in Darfur (June 6, 2005), *available at* http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2005/the%20prosecutor%20of%20the%20icc%20opens%20investigation%20in%20darfur.

104. *Id.*

105. *Situations and Cases*, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/(last visited Mar. 16, 2012).

106. Office of the High Commissioner of Human Rights, *Democratic Republic of the Congo, 1993-2003: 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*, ¶¶ 1-2, *unofficial translation from French original*, (Aug. 2010), http://www.ohchr.org/en/Countries/AfricaRegion/Pages/RDCProjetMapping.aspx [hereinafter *DRC Report*]. *See also* Office of the High Commissioner of Human Rights, *DRC: Mapping Human Rights Violations 1993-2003*, UNITED NATIONS HUMAN RIGHTS, http://www.ohchr.org/en/Countries/AfricaRegion/Pages/RDCProjetMapping.aspx (last visited Mar. 16, 2012).

General through the approval of the Terms of Reference, rather than by means of a resolution providing a mandate.[107] The discoveries resulting from the Mapping Exercise were compiled in a report by the Office of the High Commissioner of Human Rights in August 2010.[108]

The report held that the purpose of the Mapping Exercise was:

> [T]o gather, analyse, and publish *prima facie* evidence of human rights and international humanitarian law violations and, on the basis of the findings of the exercise, to carry out an assessment of the existing capacities within the national justice system in the DRC to address such violations as might be uncovered.[109]

Further, the Exercise "[did] not seek to gather evidence that would be admissible in court, but to 'provide the basis for the formulation of initial hypotheses of investigation by giving a sense of the scale of the violations, detecting patterns and identifying potential leads or sources of evidence.'"[110]

The report further explained that it was not the mission's intention "to establish or to try to establish individual criminal responsibility of given actors."[111] However, the report did include the names of perpetrators who were already subject to an arrest warrant or who had already been convicted of the crimes concerned.[112] Additionally, the mission drew up a confidential list with the names of "alleged perpetrators," which was stored in the database of the U.N. High Commissioner for Human Rights.[113] Finally, the report also included the names of groups that should be held accountable for crimes committed.[114] The Commission explained it felt compelled to include such information in order to be able "to classify these serious violations of international humanitarian law."[115]

Among the accused in the DRC Report was the government of neighboring country Rwanda. Facing allegations of committing war crimes and possibly genocide against Hutu in the DRC, the Government of Rwanda reacted to the accusations by submitting a highly critical

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107. *DRC Report*, *supra* note 106, ¶¶ 89-93 (summarizing and analyzing the Terms of Reference).

108. *Id.*

109. *Id.* ¶ 87.

110. *Id.* ¶ 95 (quoting OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS, RULE-OF-LAW TOOLS FOR POST CONFLICT STATES: PROSECUTION INITIATIVES 6 (2008)).

111. *Id.* ¶ 103.

112. *Id.* ¶ 104.

113. *Id.*

114. *Id.*

115. *Id.*

response to the DRC Report.[116] Among other things, the Government of Rwanda argued that the Mapping Exercise did not have a legal basis in the U.N. framework.[117] It also criticized the methodology of the draft mapping report, particularly the reliability of witnesses, and it objected to the analysis of the standard of proof criterion applied by the mission.[118] Although the question of the legal basis of the Mapping Exercise could be a valid one, given that it was an unprecedented exercise, in Part II of this Article, I focus on the questions of methodology and the standard of proof applied by the report.

### D. *Conclusion*

The U.N. framework introduced the possibility of investigating human rights violations in the domestic sphere of a member state. Currently, all U.N. organs have the power to start an investigation into the human rights situation of a country, with the purpose of "maintaining the peace" or of "developing friendly relations among nations."[119] An individual expert, as well as a group of experts in the form of a commission or a working group, can carry out such investigations.

From the early days of U.N. fact-finding, the missions looked into the responsibility of states, corporations and individuals for human rights violations.[120] The Working Group of Experts to Southern Africa concluded that the human rights violations committed also reached the threshold of the crime of apartheid, and it published lists of alleged perpetrators of the crime.[121] Like most responses in the first decades of U.N. fact-finding, these lists were not used for individual criminal prosecutions.[122] From the 1990s onward, the conclusions on individual criminal responsibility in fact-finding reports were increasingly used to hold individuals criminally responsible in international trials, and in some cases, even formed the basis for the establishment of international criminal tribunals.

The three African cases exemplify this use of fact-finding with a

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116. Republic of Rwanda, Ministry of Foreign Affairs and Cooperation, Official Government of Rwanda Comments on the Draft U.N. Mapping Report on the DRC 3 (2010), http://www.gov.rw/IMG/ pdf/DRC_Report_Comments_Rwanda.pdf [hereinafter Government of Rwanda Report].

117. *Id.* at 5.

118. *Id.* at 3. *See infra* Part III.B for more on the issue of standard of proof.

119. *See generally UN at a Glance*, UNITED NATIONS, http://www.un.org/en/aboutun/ index.shtml (listing two of U.N. main purposes as "keep[ing] peace throughout the world," and "develop[ing] friendly relations among nations").

120. RAMCHARAN, *supra* note 11, at 125.

121. *See id.*

122. *Id.* at 131-32.

view to the eventuality of criminal prosecutions. The missions sought to establish criminal responsibility in the following ways: first, the reports aimed to establish that certain crimes had been committed; second, the missions sought to identify individual perpetrators;[123] third, the *Report by the Special Rapporteur to Rwanda* and the DRC report also identified organs, authorities, and groups that were involved in the atrocities and crimes classified in the reports; fourth, the missions to Rwanda and the DRC sought to identify priorities for an investigation or to provide the basis for an initial hypothesis for investigation. Hereinafter, I focus on the second and fourth categories: the identification of individual perpetrators by fact-finders, and the possibility of initiating international criminal prosecution (partly) on the basis of U.N. fact-finding.

## II. METHODS OF HUMAN RIGHTS FACT-FINDING

### A. *Introduction*

The differences in mandate between the three cases described in the previous Part can be partly explained by the lack of standard rules of procedure or a standard model for the execution of human rights fact-finding. Justice Abdoulaye Dieye, who was a member of the first working group to Chile in the 1980s, believed that "[it] was for a fact-finder to choose the means and methods of inquiry he or she deemed appropriate in each instance."[124] This still seems to be the case today.

Neither the U.N. Charter nor the resolutions constituting fact-finding missions give any guidance as to how the investigation could or should be conducted. Each mission has its own mandate, describing the mission's competence, as laid down in the U.N. Resolution that establishes the mission.[125] The Terms of Reference (ToR) elaborate on that mandate, and further specify the mission's tasks and responsibilities.[126] Naturally, these ToR differ according to the

123. As mentioned, although the Mapping Exercise to the DRC claimed it intended to avoid establishing individual responsibility, it did list the names of both individuals already subject to an arrest warrant or already convicted, and of alleged perpetrators. *DRC Report*, *supra* note 106, ¶ 104.

124. RAMCHARAN, *supra* note 11, at 52.

125. Felix Ermacora, *The Competence and Functions of Fact-Finding Bodies*, *in* INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS 83, 83 (Bertrand G. Ramcharan ed., 1982).

126. *Id.* The Mapping Exercise to the DRC formed an exception, in the sense that the mission was not established by a voted upon resolution but by the Secretary-General who approved its Terms of Reference. *See supra* Part I.C.4 of this Article.

mission's goals and the mandate-holder's approach.[127] Generally, the ToR are very broadly formulated and therefore leave significant room for the mandate-holder to interpret the terms as he sees fit.[128]

After the first experiences in the field of fact-finding, there were calls to create standard procedures on the conduct of fact-finding missions. During the 1968 International Conference of Human Rights, a resolution was adopted that "call[ed] upon the Commission of Human Rights to draw up model rules of procedure for the guidance of the United Nations' bodies concerned."[129] Since then several attempts have been made to standardize the *modus operandi* of fact-finding missions.[130]

### B. *Attempts to Standardize Fact-Finding Procedures*

The first effort to standardize rules of procedure was made by the Secretary-General in 1970, when he issued the *Draft Model Rules of Fact-Finding procedure for U.N. bodies dealing with violations of human rights*.[131] The Draft Model Rules were adopted by the ECOSOC in 1974, after the Commission on Human Rights had abbreviated the rules and had "substantially watered them down."[132] Despite this watering down, the Draft Model Rules retained some provisions concerning the admissibility and gathering of evidence.[133] Although the Draft Model Rules have served as the basis for some missions' rules of procedure, they never had much influence, partly because when the ECOSOC adopted the Draft Model Rules, it merely "drew the attention of the U.N. member states to [their] existence," but it did not

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127. *See* Philip Alston, *The Commission on Human Rights, in* THE UNITED NATIONS AND HUMAN RIGHTS 126, 167 (Philip Alston ed., 1992).

128. *Id.*

129. Kaufman, *supra* note 34, at 740.

130. Non-U.N. bodies and U.N. bodies in other areas than human rights have adopted guidelines and principles that are frequently referred to and might be valuable as a reference. It will suffice to mention the following: Thomas M. Francke, *The Belgrade Minimal Rules of Procedure for International Human Rights Fact-Finding Missions*, 75 AM. J. INT'L L. 163, 163-65 (1981); INTERNATIONAL BAR ASSOCIATION AND THE RAOUL WALLENBERG INSTITUTE, THE GUIDELINES ON INTERNATIONAL HUMAN RIGHTS FACT-FINDING VISITS AND REPORTS 1-9 (2009), *available at* http://www.factfindingguidelines.org/; *see U.N. Sanctions Committee Guidelines*, U.N. Security Council, Letter dated Dec. 18, 2006 from the Chairman of the Informal Working Group of the Security Council on General Issues of Sanctions addressed to the President of the Security Council, U.N. Doc. S/2006/997 (Dec. 22, 2006).

131. U.N. Doc. E/CN.4/1021/Rev.1 (1970), *in* B.G. RAMCHARAN, INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS 239 (1982) Annex II.

132. INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 1025 (Richard B. Lillich & Hurst Hannum eds., 2006) [hereinafter LILLICH & HANNUM]; *see also* Weissbrodt & McCarthy, *supra* note 32, at 22-23.

133. Weissbrodt & McCarthy, *supra* note 32, at 23; *see infra* Part III.C.

"recommend that U.N. human rights fact-finding bodies take them into account in their work."[134]

To strengthen the role of the United Nations, in 1991 the General Assembly established new guidelines for fact-finding by adopting the *Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security*.[135] Article I, paragraph 2, of the Declaration defines fact-finding as "any activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent United Nations organs need in order to exercise effectively their functions in relation to the maintenance of international peace and security."[136]

Otherwise, the Declaration gives little guidance as to how fact-finding missions should be carried out. It merely states that "[f]act-finding should be comprehensive, objective, impartial, and timely."[137] It further holds that decisions by the United Nations to establish a fact-finding mission "should always contain a clear mandate" and that the report of the mission "should be limited to a presentation of findings of a factual nature."[138] As demonstrated, in reality, many reports contain more than just the facts; they often evaluate these facts, draw conclusions that have legal import, and give recommendations for further action.[139] Finally, paragraph 27 of the Declaration states that "[w]henever fact-finding includes hearings, appropriate rules of procedure should ensure their fairness."[140] However, it is not made clear what should be considered appropriate or fair.

Even after these attempts to create standardized rules of procedure, Philip Alston observed in 1992 that "the existing methodology for fact-finding by U.N. rapporteurs is *ad hoc*, inconsistent, and often unsatisfactory."[141] Several undertakings by U.N. organs tried to address these issues. Unfortunately, however, the below discussion of the various initiatives demonstrates that the United Nations has not succeeded in achieving much more coherency in the methodology of fact-finding.

A further such effort to standardize fact-finding procedures was the adoption of the *Code of Conduct* for special mandate-holders by the Human Rights Council on June 18, 2007.[142] In the Code, the Council

134. LILLICH & HANNUM, *supra* note 133, at 1025.

135. *See* Declaration on Fact-Finding, *supra* note 46.

136. *Id.* art. I, ¶ 2.

137. *Id.* art. I, ¶ 3.

138. *Id.* art. II, ¶ 17.

139. This was the case in the mission reports on Rwanda, Darfur, and the DRC. *See supra* Part I.C.2-4.

140. Declaration on Fact-Finding, *supra* note 46, art. III, ¶ 27.

141. Alston, *supra* note 127, at 170.

142. H.R.C. Res. 5/2, U.N. GAOR, 62d Sess., Supp. No. 53, U.N. Doc. A/62/53, at 74

wished to define standards of ethical behavior and professional conduct of special mandate-holders carrying out their duty.[143] Most of the provisions in the Code of Conduct, therefore, deal with the behavior of mandate-holders; they must "[a]ct in an independent capacity;"[144] "[e]xercise their functions in accordance with their mandate;"[145] and "exercise their functions on a personal basis, their responsibilities not being national but exclusively international."[146]

In relation to this conduct, Article 8 of the Code of Conduct makes some reference to the use of sources; it provides that the confidentiality of testimonies must be preserved;[147] that the "mandate-holders shall . . . [r]ely on objective and dependable facts based on evidentiary standards that are appropriate to the non-judicial character of the reports;"[148] and that states be given the opportunity to respond to the findings of the mandate-holder.[149] The Code thus emphasizes the non-judicial character of the missions.[150] As Nigel S. Rodley analyzes:

> On the one hand, it reflects the limitations of fact-finding on the basis of written material (normally without benefit of direct access to the parties to an alleged violation) and does not impose an unwarranted burden of proof on mandate-holders. On the other hand, it is guidance to special procedures to be careful about drawing peremptory conclusions in individual cases.[151]

In addition to the Code of Conduct, in June 2008, at the Fifteenth Annual Meeting of special procedures, the Special Procedures mandate-holders adopted the *Manual of Operations of the Special Procedures of the Human Rights Council*.[152] The Manual aims to give guidance to the

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(June 18, 2007).

143. *Id.* art. 1.

144. *Id.* art. 3(a).

145. *Id.* art. 3(c).

146. *Id.* art. 4, ¶ 1.

147. *Id.* art. 8(b).

148. *Id.* art. 8(c).

149. *Id.* art. 8(d).

150. Nigel S. Rodley, *On the Responsibility of Special Rapporteurs*, 15 INT'L J. HUM. RTS. 319, 325 (2011).

151. *Id.* Rodley also contends that "most special procedures do not interpret their mandates to extend to finding violations in individual cases." *Id.* at 335 n.39.

152. Human Rights Council, *Report on the Fifteenth Meeting of Special Rapporteurs/Representatives, Independent Experts and Chairpersons of Working Groups of the Special Procedures of the Human Rights Council*, June 23-27, 2008, A/HRC/10/24 (Nov. 17, 2008), *available at* http://www2.ohchr.org/english/bodies/chr/special/annual_meetings/15th.htm. The Manual was first adopted at the 6th Annual Meeting in 1999, but was revised at the 15th Annual Meeting in 2008. *Id.* at 1. The introduction to the Manual states that "[i]t is a living document, subject to periodic review and updating by the mandate-holders. They are

mandate-holders and to reflect best practices. It contains a chapter on methodology that includes some of the best practices on how to seek and use the sources of information and on how to conduct country-visits.[153] These best practices, however, offer very few detailed criteria on how to gather evidence and conduct the actual research. Some of the most detailed guidelines are that information should be cross-checked "to the best extent possible,"[154] that government representatives should be given "[a]ppropriate opportunities . . . to comment on allegations,"[155] and that "[a]t the end of a visit, mandate-holders [should] generally organize a press conference."[156]

The mandate-holders at the Fifteenth Annual Meeting also adopted an *Internal Advisory Procedure to Review Practices and Working Methods*.[157] As the title suggests, this document establishes an internal review procedure that allows any stakeholder to bring to the attention of the Coordinating Committee situations where the mandate-holder allegedly acted in non-alignment with the above-mentioned *Manual of Operations*, where there are concerns regarding the "effectiveness or appropriateness of methods of work," or where "integrity, independence or impartiality" is at stake.[158] The *Internal Advisory Procedure* also notes that "the principle of self-regulation is crucial to the coherence and viability of a system,"[159] thus emphasizing that the decisions on the methods of work are the responsibility of the mandate-holder, rather than suggesting that these decisions should follow from standard rules.[160]

Finally, in 2001, the Office of the High Commissioner for Human Rights (OHCHR) published a *Training Manual on Human Rights Monitoring*, which is currently being revised.[161] The document provides "practical guidance principally for the conduct" of human rights officers

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responsible for its content and for its revision." *Id.*

153. *See id.* ¶¶ 23-27, 52-74.

154. *Id.* ¶ 23.

155. *Id.* ¶ 24.

156. *Id.* ¶ 72.

157. Coordination Committee of Special Procedures, *Internal Advisory Procedure to Review Practices and Working Methods*, (June 25, 2008), http://www2.ohchr.org/english/bodies/chr/special/docs/IAP_WorkingMethods.pdf[hereinafter *Internal Advisory Procedure*].

158. *Id.* at 1.

159. *Id.*

160. *Id.* The next paragraph of the *Internal Advisory Procedure*, however, does stipulate that it is the professional responsibility of the mandate-holders to "draw upon" standards in the *Manual of Special Procedures* and *Code of Conduct* "as guidance in aligning" their practices and protect human rights. *Id.*

161. Office of the High Commissioner for Human Rights, Training Manual for Human Rights Monitoring, Professional Training Series Nov. 7, 2001 [hereinafter Training Manual], *available at* http://www.ohchr.org/EN/PublicationsResources/Pages/TrainingEducationtwo.aspx (last visited Aug. 28, 2012);*see* LILLICH & HANNUM, *supra* note 132, at 1017.

who carry out human rights fact-finding and monitoring under U.N. auspices.[162] Although the *Training Manual* certainly affords some guidance for human rights officers and trainers, its status is nothing more than a service provided by the OHCHR.

### C. *Methods of Human Rights Fact-Finding in Practice*

Most fact-finding reports give little information on the methods applied. It is therefore difficult to establish how the missions conducted the investigation, what methods they applied, how they dealt with witnesses, including the protection of witnesses, and how they approached the reliability of evidence, the corroboration of evidence or the evaluation of that evidence.

The Rwanda reports merely describe the mandate and give limited information on meetings and consultations with officials and some witnesses.[163] The report on Darfur is a little more extensive, but it does not provide much detail on how the investigation was conducted.[164] The latter report notes that

> [t]he Commission has not been endowed with the powers proper to a prosecutor; in particular, it may not subpoena witnesses, or order searches or seizures, nor may it request a judge to issue arrest warrants against suspects. It may rely only upon the obligation of the Government of Sudan and the rebels to cooperate.[165]

Given these limitations, the Commission had to collect its "reliable body of material" as much as possible within the boundaries of the support of the Sudanese government.[166] Some of the necessary material the Commission collected by interviewing witnesses, government officials, and detainees, by examining documents and by visiting places, including mass graves.[167]

The Mapping Exercise by the mission to the DRC differed strikingly from most reports because it included a section dedicated to methodology.[168] The report explained that prior to the mission, "[a]

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162. Training Manual, *supra* note 161, at iii. Some of these standards will be discussed in Part III.

163. Comm'n on Human Rights, *supra* note 78, ¶¶ 112-24.

164. *Darfur Report*, *supra* note 96, ¶¶ 12-17.

165. *Id.* ¶ 6.

166. *Id.*

167. *Id.* ¶ 16.

168. *See DRC Report*, *supra* note 106, ¶¶ 94-105. Many reports contain some information on the methodology, but it is often not addressed in detail or as a separate issue, as it was in this report.

document outlining the methodology to be followed by the Mapping Team was drafted . . ."[169] This document discussed, among other things, the following elements of methodology: "a gravity threshold for the selection of serious violations, standard of evidence required, identity of perpetrators and groups, confidentiality, witness protection, witness interviewing guidelines with a standardised [format], and physical evidence guidelines (including mass graves), among others."[170]

The mission also assessed the reliability of information by applying the "admiralty scale," which includes both an assessment of the reliability and credibility of the sources, and a check on the validity of the information obtained.[171] This largely involved finding corroboration for the evidence and comparing the data to other available information from a different source.[172] However, "different reports on the same incident and based on the same primary source would not constitute corroboration by a separate source."[173] While the *DRC Report* was more helpful due to its defined methodology, it unfortunately remains an exception to the rule.

### D. *Conclusion*

A standard set of procedures and a *modus operandi* for fact-finding missions do not exist. The rules, manuals and guidelines that have been drafted are non-binding and are often not very explicit. Furthermore, it seems that, in practice, mandate-holders pay little attention to these rules. As the examples of the missions to Rwanda, Darfur, and the DRC show, different missions apply different working methods, and interpret the mandate and terms of reference as they see fit. Generally speaking, the reports provide little information on the methodology applied. So, even if certain common standards or practices existed, it would be difficult to identify them, owing to the lack of information in the fact-finding reports.

Some may argue that it is better to not have detailed standards because every mission is different, and flexibility is required to address the issues at stake in the mission at hand. However, a lack of cohesive minimum standards can be detrimental to the efficiency, continuity, and credibility of the missions.[174] As Bassiouni wrote:

> [N]o manual exists to describe how an investigation should be

169. *Id.* ¶ 97.
170. *Id.*
171. *Id.* ¶ 102.
172. *Id.*
173. *Id.*
174. *See generally* Bassiouni, *supra* note 18, at 40-42.

> conducted and there is no standard, though adaptable, computer program to input collected data. Worst of all, there is no continuity. In short, there is nothing to guide, instruct, or assist the heads and appointees to these missions of how to better carry out their mandates. It strains one's belief that in fifty years the most elementary aspects of standardized organization, planning, documentation, and reporting have not been developed. Thus, each mission has to reinvent the wheel and, in an organizational sense, has to reinvent itself as a mission.[175]

Even today the storage of data through modern-day computer programs still seems to be an issue. Sunga, who himself like Bassiouni has played a role in fact-finding missions, recently recommended that human rights fact-finders "employ up-to-date technical means by which to collect, organize and analyze information. . . ." [176] In addition to questions of efficiency, the need for a *modus operandi* or standard procedures should also be considered from a perspective of protecting individuals' procedural rights, which will be further explored in the next Parts.

## III. COMPARING STANDARDS FOR ESTABLISHING INDIVIDUAL CRIMINAL RESPONSIBILITY

### A. *Introduction*

Establishing individual criminal responsibility is typically done in criminal proceedings before a court, where the proceedings help ensure the rights of due process and a fair trial. The violations of human rights and humanitarian law investigated through U.N. fact-finding might constitute international crimes and even *jus cogens* crimes, such as genocide,[177] certain crimes against humanity[178] and war crimes.[179]

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175. *Id.* at 40-41.

176. Sunga, *supra* note 26, at 201.

177. *See generally* Rome Statute, *supra* note 15, art. 6 (defining genocide to include five acts committed with the intent to destroy); ICTY, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 4 (2009), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [hereinafter ICTY Statute] (identifying the same five acts to constitute genocide as the Rome Statute, but also stipulating five specific acts that were punishable); ICTR, Basic Documents: Statute, art. 2 (2010), http://www.unictr.org/Portals/0/English/Legal/Statute/2010.pdf [hereinafter ICTR Statute] (following the ICTY's two-part definition).

178. *See generally* Rome Statute, *supra* note 15, art. 7(1) (recognizing eleven acts that constitute "crime[s] against humanity" when committed with knowledge against a civilian population); ICTY Statute, *supra* note 177, art. 5 (identifying nine acts); ICTR Statute, *supra* note 177, art. 3 (same). Some crimes, such as rape, enforced disappearance and apartheid, have

These crimes are considered the most heinous crimes for which the perpetrators must not go unpunished.[180] This notion has led the international community to develop *ad hoc* and permanent international tribunals to prosecute suspects of such crimes.[181] These institutions are complementary to national proceedings and come into play when the domestic criminal system is unwilling or unable to prosecute.[182]

The international procedural law that deals with questions of evidence and proof is developed at the international level; accordingly, international criminal tribunals are not bound by national rules of procedure.[183] The treaties creating the tribunals, contain very few provisions regarding the procedural standards that should apply before the corresponding international criminal court;[184] as a result, the responsibility of implementing more detailed rules has always been left to the judges.[185]

The ICTY and ICTR judges drafted and adopted rules of procedure and evidence before the start of the trials, which were laid down in Rules of Procedure and Evidence (RPE).[186] For the ICC, a Preparatory Commission of Judges worked for two years on drafting rules of procedure and evidence that were adopted in 2000 as the RPE of the ICC.[187] The different tribunals have further developed these rules

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been deemed crimes against humanity, but there is no consensus as to whether these crimes also constitute *jus cogens* crimes. INTERNATIONAL CRIMINAL LAW, *supra* note 70, at 14-16.

179. *See generally* Rome Statute, *supra* note 15, art. 8 (defining war crimes extensively to include numerous breaches of the Geneva Conventions of 1949 and other violations of laws and customs of international armed conflict); ICTY Statute, *supra* note 177, art. 3 (providing a non-extensive list of violations eligible for prosecution as war crimes).

180. For more on *jus cogens* crimes, see generally INTERNATIONAL CRIMINAL LAW, *supra* note 70, at 11-17. Bassiouni stipulates that, for these crimes, "there is a duty to prosecute and punish[.]" INTERNATIONAL CRIMINAL LAW, *supra* note 70, at 5.

181. *See* INTERNATIONAL CRIMINAL LAW, *supra* note 70, at 29; Rome Statute, *supra* note 15, pmbl.

182. Rome Statute, *supra* note 15, pmbl.; ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 399 (2d ed. 2008).

183. GEERT-JAN KNOOPS, THEORY AND PRACTICE INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS 183 (2005). For example, the ICTY RPE states that the Chamber shall apply the rules it establishes in its rules of evidence section, and "shall not be bound by national rules of evidence." ICTY R. P. & EVID. 89(A) (1994) (amended 2000).

184. *See* M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 583 (2003) (finding that because international investigating commissions and international criminal tribunals "have been shaped by political leaders more than by jurists" there has been "little attention [paid] to rules of procedure and evidence applicable in these institutions.").

185. ICTY Statute, *supra* note 177, art. 15; ICTR Statute, *supra* note 177, art. 14; RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 22 (2002).

186. *See* ICTY R. P. & EVID., *available at* http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/it032rev46e.pdf; ICTR R. P. & EVID., *available at* http://unictr.org/Portals/0/English/Legal/ROP/100209.pdf.

187. BASSIOUNI, *supra* note 184, at 587-88.

through their case law. General principles on the rules of evidence in international criminal proceedings can thus be derived from the Treaties of the Tribunals, the Rules of Procedure and Evidence, and the ICT jurisprudence.[188]

In the following Part, I compare the procedural rules and practices regarding the establishment of criminal responsibility in both fact-finding missions and international criminal trials. I recognize that some ICT standards are criticized as too minimal to provide a sufficient guarantee that the rights of the parties involved are respected.[189] However, I only address such criticism where it serves the comparison between ICT and fact-finding procedures—for example, where there is the possibility of closer coordinated collaboration between the two.

### B. *Standards of Proof*

Similar to domestic criminal law proceedings, each stage of an international criminal law procedure warrants a different level of proof. For example, the level of proof required for an indictment is different from the level of proof that must be met for a conviction. Relevant to the standard of proof, the proceedings before the ICTY and the ICTR can be divided into the investigation stage, the indictment stage, and the trial stage.

The prosecutors of both the ICTY and the ICTR are competent to start an investigation *ex officio* or following information obtained from governments or U.N. organs. In the latter situation, the prosecutor decides whether the information provides "sufficient basis to proceed."[190] When the prosecutor, on the basis of this research, concludes that there is a *prima facie* case, he or she submits an indictment for approval to the judge.[191]

In order to confirm an indictment, the judge must be satisfied that

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188. For the following analysis, this Article will only use the rules of evidence and procedure as developed by the most recent international criminal tribunals, being the ICTY, ICTR, and ICC. Other international tribunals include the International Military Tribunal sitting in Nuremberg (IMT), which dealt with the atrocities committed by the Nazis during the Second World War, and the International Military Tribunal for the Far East (IMTFE), which prosecuted international crimes committed by the Japanese during the Second World War. *See generally* INTERNATIONAL CRIMINAL LAW, *supra* note 70, at 32-37. Next to the international tribunals, several "mixed" or "special" courts have been created in the last two decades. *Id.* at 38-39. These courts, such as the Special Court for Sierra Leone and the Cambodia Tribunal, are not entirely national or international, but carry elements of both. *Id.*

189. *See generally* MAY & WIERDA, *supra* note 185, at xiii-xviii.

190. ICTY Statute, *supra* note 177, art. 18(1); ICTR Statute, *supra* note 177, art. 17(1); *see also* CASSESE, *supra* note 182, at 395.

191. ICTY Statute, *supra* note 177, art. 18(4); ICTR Statute, *supra* note 177, art. 17(4); *see also* CASSESE, *supra* note 182, at 404.

the prosecutor has established a *prima facie* case.[192] Geert-Jan Knoops explains that according to case law, *prima facie* "means that the prosecutor must provide sufficient evidence which, if it *were* accepted, would be sufficient for the conviction of the accused in that the tribunal *could* be satisfied beyond a reasonable doubt of the guilt of the accused."[193] When the judge confirms the indictment, the suspect becomes the accused. For a conviction of the accused, his or her guilt must be proven "beyond reasonable doubt."[194]

With the adoption of the Rome Statute, however, some adjustments have been made in the investigation and indictment stages. Under the Rome Statute, the prosecutor may start an investigation *proprio motu*, when a state party has requested so, or when the U.N. Security Council has referred a case to the ICC.[195] In the case of an investigation *propio motu*, the prosecutor first starts with preliminary research that must establish "a reasonable basis to proceed with an investigation."[196] Subsequently, the prosecutor must file a "request for authorization of an investigation" to the Pre-Trial Chamber, after whose approval the prosecutor can start with the actual investigation.[197]

This process of obtaining permission from the Pre-Trial Chamber does not apply when a state party or the Security Council has referred the case to the ICC.[198] Rather, it is assumed that for a state or the Security Council to request that the prosecutor commence an investigation, a reasonable basis for further investigation has already been established by the inquiry conducted at the national or U.N. level that led to the referral.[199]

After the start of the investigation, the Pre-Trial Chamber can issue an arrest warrant (following an application by the prosecutor), when there are "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court"[200] and when the arrest of the person is critical to the case.[201] After the investigation, the prosecutor

192. ICTY Statute, *supra* note 177, art. 19, para. 1; ICTR Statute, *supra* note 177, art. 18, para. 1; GEERT-JAN KNOOPS, AN INTRODUCTION TO THE LAW OF INTERNATIONAL CRIMINAL TRIBUNALS: A COMPARATIVE STUDY 128 (2003) [hereinafter INTERNATIONAL CRIMINAL TRIBUNALS].

193. INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 192, at 128.

194. ICTY R. P. & Evid. 87(A); ICTR R. P. & Evid. 87(3).

195. Rome Statute, *supra* note 15, art. 15. *Compare id.* art. 13.

196. *Id.* art. 15, para. 3. *See also* CASSESE, *supra* note 182, at 399.

197. Rome Statute, *supra* note 15, art. 15, para. 4. *See also* CASSESE, *supra* note 182, at 396, 399 (discussing the distinguishing features of the ICC system).

198. CASSESE, *supra* note 182, at 396.

199. *Id.* at 396-97. Cassese specifically mentions the case of Darfur, in which the referral decision was based on the report of the Commission of Inquiry, discussed above. *Id.*

200. Rome Statute, *supra* note 15, art. 58(1)(a).

201. *See id.* art. 58(1)(b) (listing three situations where arrest of the person is deemed

submits the charges before a judge.[202] A public hearing will be held to confirm that there is "sufficient evidence to establish substantial grounds to believe that the person committed the crime charged" and that therefore the case can be assigned to a Trial Chamber for trial.[203]

Finally, like with the ICTY and the ICTR, the standard required for a conviction by the ICC is proving guilt "beyond reasonable doubt."[204] In reaching the conclusion of conviction, the accused will receive the benefit of the doubt.[205]

There are no written rules or guidelines on the standard of proof to be applied in fact-finding missions. The Rwanda reports make no mention of any standard of proof that was applied.[206] In contrast, both the missions to Darfur and to the DRC at the start of their mandates, established a standard of proof that was to be applied by the missions.[207]

In order to establish individual responsibility, the Darfur Commission reasoned that it would "obviously not make final judgements [sic] as to criminal guilt; rather it would make an assessment of possible suspects . . ."[208] Therefore, the Commission would also not apply the standards employed by criminal tribunals, such as those described above. Instead, the Commission chose to adopt the following standard for criminal liability: "a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime."[209]

The standard applied by the Mapping Exercise to the DRC was very similar, but, while the Darfur mission focused on the individual perpetrator, the Mapping Exercise aimed to identify events. Acknowledging that the level of evidence required was lesser than that required by a criminal court, the Mapping Exercise held that a reasonable suspicion that the incident had occurred was most appropriate.[210] The Mapping Team subsequently defined reasonable suspicion as "a reliable body of material consistent with other verified

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necessary).

202. *Id.* art. 61(1).

203. *Id.* art. 61(5) (here the phrase is used to describe the type of evidence the prosecutor needs to support the charge); *id.* art. 61(7) (here the phrase is used as the standard from which the Pre-Trial Chamber is to move forward with the charges).

204. *Id.* art. 66(3); ICTY R. P. & EVID. 87(A); ICTR R. P. & EVID. 87.

205. CASSESE, *supra* note 182, at 418.

206. Comm'n on Human Rights, *supra* note 78; *Letter from the Secretary-General*, *supra* note 89.

207. *Darfur Report*, *supra* note 96, ¶ 15; *DRC Report*, *supra* note 106, ¶ 101.

208. *Darfur Report*, *supra* note 96, ¶ 15.

209. *Id.*

210. *DRC Report*, *supra* note 106, ¶ 101.

circumstances tending to show that an incident or event did happen."[211] Despite the intention to avoid identifying individual suspects, the mission did draw up a confidential list of alleged perpetrators.[212]

To summarize, one can make a distinction between four different standards of proof in international criminal investigations: the standard required to start an investigation (a "reasonable basis" or a referral from a state party or the Security Council);[213] the standard required for an arrest warrant ("reasonable grounds that the person has committed a crime within the jurisdiction of the Court");[214] the standard required for an indictment ("substantial grounds to believe that the person committed the crime charged"[215] or, for the ICTY and ICTR, a "prima facie" case);[216] and the standard required for a conviction ("beyond reasonable doubt").[217] The fact-finding missions analyzed in this Article neglected to mention the standard applied, or they applied standards unlike any of the criminal standards mentioned above.

### C. *Admissibility of Evidence*

Article 89 of the ICTY and ICTR RPE states: "[a] Chamber may admit any relevant evidence which it deems to have probative value."[218] In similar fashion, Article 69(4) of the Rome Statute provides:

> The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.[219]

Article 63(2) of the ICC RPE adds that "a Chamber shall have the authority . . . to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69."[220] According to Richard May and Marieke Wierda, relevant evidence is evidence which helps to prove or disprove an element of the case.[221] It is up to the judges to "weigh the evidence in light of all the

211. *Id.*
212. *Id.* ¶¶ 103-04.
213. *E.g.*, Rome Statute, *supra* note 15, art. 15(3).
214. *E.g.*, *id.* art. 58(1).
215. *E.g.*, *id.* art. 61(7).
216. *E.g.*, ICTY Statute, *supra* note 177, art. 19(1).
217. *E.g.*, ICTY R. P. & EVID. 87(A).
218. ICTY R. P. & EVID. 89(C); ICTR R. P. & EVID. 89(C).
219. Rome Statute, *supra* note 15, art. 69(4).
220. ICC R. P. & EVID. 63(2).
221. *See* MAY & WIERDA, *supra* note 185, at 102.

circumstances of the case and its context."[222]

In line with this flexible procedure, certain kinds of evidence that in some national criminal systems would be inadmissible are not considered inadmissible in international criminal proceedings. For example, none of the ICC RPE addresses the issue of hearsay evidence.[223] However, hearsay evidence has been accepted by both the ICTY[224] and the ICTR.[225] In the cases of *Prosecutor v. Blaskic* and *Prosecutor v. Musema*, both the ICTY and the ICTR emphasized that judges will hear all the evidence, and only after the trial will they make an assessment of the evidence presented, its relevance, its probative value, and its reliability.[226]

Rule 63 of the ICC RPE provides that these rules of evidence "shall apply in proceedings before *all* Chambers."[227] This implies that the rules of evidence apply in Pre-Trial Chamber proceedings, and thus will operate when the prosecutor has filed a request for authorization of investigation. Following that line of reasoning, these rules of evidential admissibility would not apply to any of the investigatory stages discussed earlier.

Antonio Cassese further explains that any information that is used by a party can "only become evidence *if admitted in court* after being the subject of arguments by the parties."[228] Thus, to be accepted as evidence, the parties must first have had the opportunity to discuss the information in court, and subsequently the court must have explicitly admitted that piece of information as evidence to the trial.[229] Finally, Article 64(2) of the ICC RPE holds that "[a] Chamber shall give reasons for any rulings it makes on evidentiary matters."[230]

As described in Part II, there are no binding rules on the admissibility of evidence in U.N. fact-finding exercises. Rather, all

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222. KNOOPS, *supra* note 183, at 184.

223. *Id.* at 137.

224. Cases involving the use of hearsay evidence include *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on the Defence Motion on Hearsay, ¶ 14 (Aug. 5, 1996); *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Decision on Standing Objection of the Defence to the Admission of Hearsay with Inquiry as to its Reliability (Jan. 26, 1998); and *Prosecutor v. Aleksovski*, Appeals Chamber Decision on Prosecutor's Appeal on Admissibility of Evidence, ¶ 15-19 (Feb. 16, 1999). *See* KNOOPS, *supra* note 183, at 188-90.

225. For examples of hearsay evidence in the ICTR, *see* Prosecutor v. Akayesu Case No. ICTR-96-4-T, Judgment, ¶ 136 (Sept. 2, 1998); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 51 (Jan. 27, 2000).

226. *See* Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶¶ 34-36 (Int'l Crim. Trib. For the Former Yugoslavia Mar. 3, 2000); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 51 (Jan. 27, 2000).

227. ICC R. P. & Evid. 63(1) (emphasis added).

228. CASSESE, *supra* note 182, at 414.

229. *Id.*

230. ICC R. P. & EVID. 64(2).

evidence is admissible. According to Richard Lillich and Hurts Hannum, "treaties may impose limitations on the kind of evidence that may be considered, for example, by prohibiting the use of information submitted anonymously, but otherwise international bodies enjoy an unfettered right to consider any evidence they consider relevant."[231] Of the different rules and guidelines that aimed to standardize the procedure of human rights fact-finding, only the Draft Model Rules contained a provision on the admissibility of evidence.[232] Rule 20 declares that all evidence is admissible, but that it is up to the commission to decide whether it will actually use this evidence.[233] Generally speaking, the mission reports do not include a description of the evidentiary decisions taken.

In conclusion, while in human rights fact-finding all evidence is admissible, in international criminal proceedings, evidence is admissible only when it is relevant and has probative value. The question of the admissibility of evidence is especially relevant for the trial stage and other proceedings before any of the chambers. Preliminary investigations, therefore, seem free from the bounds of evidentiary rules.

### D. *Witnesses*

The evidence that is produced before the contemporary international courts is to a large extent based on witness testimony.[234] Witness testimony should in principle be given in person at trial, but when it does not infringe with the rights of the accused, testimonies may also be given or previously recorded through audio, video, or written statement in accordance with the RPE.[235] Under any circumstance, witnesses must

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231. RICHARD B. LILLICH ET AL., INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 475 (4th ed. 2006) (contributing this lack of evidentiary rules to the fact that the purpose of fact-finding is not to use the evidence in court per se). Often the purpose is to "disseminate the findings as widely as possible, with a view to rousing public opinion." *Id.*

232. As follows from a comparison of the different guidelines discussed in this Article. *See* Rule 20 of the Draft Model Rules, *supra* note 131 and accompanying text.

233. Weissbrodt & McCarthy, *supra* note 32.

234. NANCY ARMOURY COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS 12 (2010). The IMT in Nuremberg was largely based on documents because the Nazis had recorded every action and decision meticulously. *Id.* at 6, 11-12. However, this is not the case in most current day situations of mass atrocity, where hardly anything is recorded. *Id.*

235. Rome Statute, *supra* note 15, art. 69, para. 2; ICC R. P. & EVID. 67 (providing for the possibility to have live testimony through audio or video technology under certain conditions); ICC R. P. & EVID. 68 (allowing for previously recorded testimony under certain conditions). The RPE of the ICTY are less explicit and merely state that "[a] Chamber may receive the evidence of a witness orally or, where the interests of justice allows, in written form[.]" ICTY R. P. & EVID. 89. However, according to the RPE of the ICTR, "[w]itnesses shall, in principle, be heard

make a solemn declaration before they testify.[236] In addition, it is punishable to give a false statement.[237] Lastly, the rule *unus testis, nullus testis* (one witness is no witness) does not apply in international criminal proceedings; the testimony of a single witness is sufficient, and it does not need to be corroborated by other evidence.[238]

According to Knoops, the notion exists that "witness testimony will contribute to fact finding and truth."[239] An important aspect of witness testimony is therefore the credibility and reliability of the witness. The ICTs are quite lenient when it comes to accepting that a witness is credible. For example, when a court finds inconsistencies in the testimony, that testimony can still be taken into account.[240] This is partly due to the fact that the witness testimony will be assessed in light of all the evidence of the case. As a result, the court can decide that it will use only certain portions of the testimony.[241]

In the case of *Prosecutor v. Bagilishema,* the ICTR analyzed the credibility of the witnesses.[242] It explained that a lack of detail in the testimony would raise doubts.[243] However, the court accepted corroborative evidence to support that testimony, to the extent that even "two sketchy accounts" could corroborate each other.[244] In addition, the ICTR accepted language difficulties, possible trauma, flaws in interpretation, and translation as sufficient explanations for discrepancies.[245] In other cases, the ICTR has also taken into account the culture of a witness to justify discrepancies.[246]

On the basis of her research, for which she analyzed numerous transcripts of testimonies given before ICTs, Nancy Combs argues that "much eyewitness testimony at the international tribunals is of highly

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directly by the Chambers, unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71[.]" ICTY R.P. & EVID. 90(A). Rule 71(A) explains that such a deposition will only be ordered under "exceptional circumstances[.]" *Id.*

236. ICTY R.P. & EVID. 90(a); ICC R.P. & EVID. 66. *See also* MAY & WIERDA, *supra* note 185, at 165.

237. *See, e.g.*, ICTY R.P. & EVID. 91. *See also* MAY & WIERDA, *supra* note 185, at 174.

238. *See* ICC R.P. & EVID. 63(4); *see also* KNOOPS, *supra* note 183, at 196; MAY & WIERDA, *supra* note 185, at 120.

239. KNOOPS, *supra* note 183, at 186.

240. MAY & WIERDA, *supra* note 185, at 167.

241. *Id.*

242. Prosecutor v. Bagilishema, Case No. ICTR-95-1A, Judgment (June 7, 2001), *available at* http://www.unhcr.org/refworld/ docid/48abd5170.html (last visited June 30, 2012).

243. *Id.* ¶ 532.

244. *Id.* ¶ 656.

245. *Id.* ¶ 411. *See* MAY & WIERDA, *supra* note 185, at 167-68.

246. MAY & WIERDA, *supra* note 185, at 168. In the case of Prosecutor v. Bagilishema, trauma was accepted as an explanation for discrepancies. *Bagilishema*, Case No. ICTR-95-1A, ¶ 411.

questionable reliability."[247] For example, some of the problems relate to differences in understanding measurements and distance, or different ideas of time and dates.[248] Such misunderstandings or imprecise testimony could be overcome through the use of *in situ* investigations, in which the missing or unclear information could be clarified by verifying the description of the scene as testified to.[249]

However, thus far, such on-site investigations have not commonly been carried out as part of international criminal proceedings.[250] For fact-finding missions, in contrast, the actual investigation in a country or region, provided that the mandate-holders are allowed access to the territory, is probably the most important element of the exercise.[251] Even so, it should be noted that some of the discrepancies in *Bagilishema* came to light only after the witness had been cross-examined,[252] a mechanism that is not typically used in fact-finding missions.

The use of anonymous witnesses in the criminal tribunals is quite extensive. To testify anonymously, the witness need only show a genuine fear that he or his family would be put at risk by his testifying in court.[253] Such anonymous testimony is permitted during the pre-trial stage. However, during the trial stage, it is believed that the rights of the suspect prevail, and that the witnesses cannot retain their anonymity without specific reason.[254] In contrast to anonymous testimony, little use is made of expert witnesses.[255] The most important rules for expert witnesses are that he must be independent, have the necessary qualifications, and use the right methods.[256]

Regarding the use and treatment of witnesses by U.N. fact-finding missions, very few general rules can be identified. The Draft Model Rules allow states to question witnesses, and hold that the witnesses must take an oath before they testify.[257] The *Training Manual on Human Rights Monitoring* contains a chapter providing guidance (*i.e.*, no binding standards) to fact-finders on how to prepare for, conduct, and evaluate a witness interview, including the need for verification of

247. COMBS, *supra* note 234, at 4.

248. *Id.* at 24-33.

249. *Id.* at 281.

250. COMBS, *supra* note 234, at 281-82.

251. *See supra* Part I.A (discussing how human rights fact-finding can take place within the domestic sphere of a country. In order to do so, the mandate-holder must receive the permission of the government to enter and investigate in the country.).

252. *See Bagilishema*, Case No. ICTR-95-1A, ¶ 749.

253. MAY & WIERDA, *supra* note 185, at 180.

254. *Id.*

255. COMBS, *supra* note 234, at 12.

256. *Id.* at 199.

257. LILLICH & HANNUM, *supra* note 132, at 475.

the information obtained through it.[258] *The Training Manual* also deals with the possible need for the protection of witnesses, but not specifically with the use and evaluation of anonymous or expert testimony.[259] *The Manual of Operations of the Special Procedures of the Human Rights Council* generally states that information should be crosschecked "to the best extent possible."[260] However, none of the other rules, guidelines, or manuals addresses the treatment of witnesses and use of witness testimony explicitly.

In practice, maintaining the anonymity of witnesses seems to be the rule rather than exception. In fact-finding reports, the identity of witnesses is usually not revealed. The mission will keep records of the information and the witnesses, but that information is usually not open to the public. In the case of the DRC, the mission submitted a database with all relevant information to the OHCHR in Geneva,[261] which included information on over 1000 witnesses.[262] In order to verify or invalidate information, the interviewers of the Mapping Exercise had to make sure that "each reported incident [was] corroborated by at least one independent source in addition to the primary source in order to confirm its authenticity."[263] In addition, the Mapping Team tested the credibility and reliability of sources and witnesses with the assistance of the admiralty scale mentioned in Part II.C.[264]

In contrast, both Rwandan reports give very little information in this respect. The Special Rapporteur merely states that he met with officials; representatives of U.N. agencies, the International Committee of the Red Cross and other international NGOs; and individual witnesses of different nationalities, including Rwandans.[265] The Special Rapporteur does not provide any information on the evaluation of the information obtained, the identity of the individual witnesses, the manner in which the information was recorded, or the standards for evaluating the credibility of witnesses. The Commission of Experts describes in like manner how it gathered information; it merely lists the type of information that was collected (mainly consisting of reports), and does not give any details on how this information was treated, assessed or evaluated.[266]

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258. Training Manual, *supra* note 161, ch. VII.

259. *Id.* at 110-11.

260. Special Procedures Mandate-Holders, *Manual of Operations of the Special Procedures of the Human Rights Council*, ¶ 23 (2008), http://www2.ohchr.org/english/bodies/chr/special/annual_meetings/docs/ManualSpecialProceduresDraft0608.pdf.

261. *DRC Report*, *supra* note 106, ¶ 119.

262. *Id.* ¶ 118.

263. *Id.* ¶ 117.

264. *Id.* ¶ 120.

265. Comm'n on Human Rights, *supra* note 78, ¶¶ 14-17.

266. *Letter from the Secretary-General*, *supra* note 89, ¶¶ 19-40.

The mission to Darfur adopted an approach that lies somewhere in the middle of the previous two cases. It describes in more detail the activities it undertook, the kind of material selected, the places visited, the number of witnesses interviewed, and the location of its interviews.[267] However, it does not go into detail on the identity of witnesses, the evaluation of their credibility and reliability, or the corroboration of their testimonies.

The rule that witnesses must make a declaration or oath is thus present in both international criminal procedural law and fact-finding rules. It is, however, not clear whether in practice mandate-holders ensure that witnesses make a declaration before they testify. In contrast to international criminal proceedings, there are no rules that permit witnesses to be punished for giving a false statement in the context of a fact-finding mission.[268] In addition, while the use of anonymous witnesses in fact-finding seems to be rule rather than exception, only the ICTs' trial stage permits a witness to remain anonymous if he provides specific reasons why he wishes to stay anonymous.[269] Finally, the use of cross-examination as a means to strengthen the rights of the accused is not a common tool in fact-finding missions.

On the other hand, ICTs are quite generous with admitting vague and inconsistent witness testimony. In that respect, the DRC mission seemed to employ even higher standards than those in the ICTs by making sure that every reported incident was corroborated by another source, and by applying the admiralty scale in assessing the credibility and reliability of evidence (including witness testimony).[270]

Even though not all fact-finding reports set the standards at the DRC mission's level, the missions do conduct at least part of the investigation in the territory in question, which allows the missions-members to

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267. *Darfur Report*, *supra* note 96, ¶¶ 12-17, 20-25. *See also id.* ¶¶ 19-124 (listing the meetings with Sudanese government officials, the places the Commission visited, and the public reports that the Commission consulted).

268. As follows from the different guidelines referred to in this Article, particularly the tone of the Training Manual which stresses that witness testimony is voluntary and often at the initiative of the witness. Training Manual, *supra* note 161, ch. VIII, at 110. It also stipulates that the fact-finder should ensure to create an ambiance of "acceptance and trust" during the interview. *Id.* at 116. *See generally id.* ch. VIII.

269. MAY & WIERDA, *supra* note 185, at 180.

270. This is apparent from the mandates and Terms of Reference of the different missions, in which the phrasing might vary, but in which elements of information gathering, reporting, and providing conclusions and recommendations are usually included. *See, e.g.*, *Darfur Report*, *supra* note 96, ¶ 2, including the duty "to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties; to determine also whether or not acts of genocide ha[d] occurred; and to identify the perpetrators," while the Special Rapporteur to Rwanda was assigned such tasks as investigation, reporting, providing information, and "identify[ing] priorities in terms of investigations." Comm'n on Human Rights, *supra* note 78, ¶¶ 8-10.

verify and cross-check at the scene. On-site investigations are not as frequently conducted as part of international criminal proceedings.[271]

### E. *The Role of the Fact-Finder Versus the Role of the Prosecutor and Judge*

The role of the fact-finder is very different from that of the prosecutor and the judges of an ICT. In human rights fact-finding, it is usually the mandate-holder's task to gather the evidence, evaluate the evidence, present the evidence in a report, draw (legal) conclusions, and provide recommendations for further action.[272] In international criminal proceedings, by contrast, the prosecutor collects and presents the evidence, while the judges evaluate it and draw legal conclusions.

The mandate-holder does not have the same investigative powers as the prosecutor. Both the prosecutor and the fact-finder depend largely on the cooperation of states to successfully carry out their investigations. However, the prosecutor has been given stronger powers to summon witnesses and to arrest suspects (although these powers are subject to review of the Chambers).[273] The prosecutor can also undertake any measure that is necessary to complete the investigation.[274]

Finally, the prosecutor is obliged to release all exculpatory evidence "as soon as practicable."[275] The mandate of most missions to find the facts and collect information could imply that mandate-holders include both incriminating and exculpatory evidence in their reports and use both before drawing conclusions. However, no such requirements can be identified in the various rules and guidelines. In practice, most reports go no further than to include a description of what the mandate-holder has concluded the facts to be, based on the underlying evidence.[276]

### F. *Rights of the Suspect*

When a person becomes a suspect in a criminal investigation, he obtains certain rights. The Rome Statute explicitly sets out these rights in Article 55.[277] Section 1 of this Article applies to any investigation and any person subject to investigation, which includes a suspect or a

271. *See supra* note 250 and accompanying text.

272. As follows from the report read in preparation of the research for this Article.

273. *See, e.g.*, ICTY R.P. & EVID. 39(i), 40(i).

274. *E.g.*, ICTY R.P. & EVID. 39(ii).

275. ICTY R.P. & EVID. 68(i). *See also* MAY & WIERDA, *supra* note 185, at 33, 76 (discussing the prosecution's duty to disclose exculpatory evidence).

276. As follows from the reports read in preparation of the research for this Article.

277. Rome Statute, *supra* note 15, art. 55.

witness.[278] This section holds that

> a person: [s]hall not be compelled to incriminate himself or herself or to confess guilt; [s]hall not be subjected to . . . torture . . . or . . . [mistreatment] . . . ; shall . . . have, free of any cost, the assistance of a competent interpreter . . . ; [and] shall not be subjected to arbitrary arrest or detention.[279]

The second section of Article 55 adds rights for persons who are suspected of committing a crime within the ICC's jurisdiction, and who are about to be questioned. These rights include the right to be informed (prior to questioning) that there are grounds to believe the person has committed such a crime, the right to free access to legal counsel, and the right to remain silent.[280]

In the context of U.N. fact-finding, the alleged perpetrator usually only learns that he is a suspect once the report is published or once the findings of the report are communicated to the government.[281] The rules, guidelines, and manuals on the conduct of fact-finding do not in any way address this issue. From the fact-finding reports here discussed (but also generally), it is difficult to discern how mandate-holders approach the issue of guaranteeing the rights of suspects (or other actors). One can imagine that an alleged perpetrator, who might already be a suspect in the eyes of the mandate-holder, may unknowingly provide self-incriminating information. However, the reports I studied did not indicate that such incrimination actually occurred.

### G. *Conclusion*

On some very important matters, significant discrepancies are observable between the rules and practices of fact-finding methods and international criminal procedures. These matters relate to the standard of proof, the absence of cross-examination in fact-finding, the reasoning for evidentiary decisions and evaluation of evidence, the role of the actors (fact-finders versus prosecutors and judges), and the rights of suspects. Bearing in mind the non-judicial nature of U.N. fact-finding missions, I conclude that the norms and practices of these missions do not meet the standards of international criminal law.[282]

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278. CASSESE, *supra* note 182, at 403

279. Rome Statute, *supra* note 15, art. 55(1).

280. *Id. See also* CASSESE, *supra* note 182, at 403-04 (explaining that, in addition to being "laid down" in Article 55, these rights are recognized as part of international customary and treaty law).

281. *See generally* Alston, *supra* note 56, at 573.

282. *See supra* note 150-51 and accompanying text.

On the other hand, certain weaknesses also exist in the international criminal trials. For example, the heavy reliance on witness testimony and the relatively lenient way in which discrepant, vague and even sketchy testimonies are accepted as evidence. These weaknesses justify the question whether information gathered in fact-finding missions can add value as corroborative evidence.

## IV. ANALYZING THE SCOPE OF FACT-FINDING: ESTABLISHING INDIVIDUAL CRIMINAL RESPONSIBILITY?

### A. *Introduction*

In the introduction to this Article, I highlighted three views on the interplay between human rights fact-finding and individual criminal prosecution. Bassiouni believes that establishing accountability of the perpetrators is one of the goals of fact-finding, even if it has not yet been accepted as such.[283] Knoops argues that legal conclusions on criminal responsibility in fact-finding reports could lead to a polarization of the parties involved.[284] Sunga asserts that there should be closer coordination between the United Nations and the ICC, when it comes to information gathering.[285] According to Sunga, fact-finding reports could be used for general background information in criminal prosecutions, but also "in some instances, for identifying cases ripe for prosecution."[286] He maintains that "UN human rights fact-finding mechanisms should focus more on the eventuality of international or domestic criminal prosecutions and adjust their working methods accordingly."[287]

In practice, the mandates of fact-finding missions have included a wide range of criminal implications: from identifying the crimes perpetrated, to identifying the perpetrators (whether they are states, groups, or individuals), to gathering evidence with a view to criminal prosecutions. Similarly, the international responses to such missions vary from no response at all (as in the case of Guinea), to increasing political and economic pressure (as in the Southern African case), to establishing international criminal tribunals and referring cases to the ICC. Neither the standard practices followed, nor the existing manuals, rules, or guidelines on fact-finding sufficiently define what the desired criminal implications of human rights fact-finding missions are.

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283. *See* Bassiouni, *supra* note 18, at 45.
284. *See* KNOOPS, *supra* note 22, at 94-95.
285. *See* Sunga, *supra* note 25, at 188.
286. *Id.*
287. *Id.*

In this Part, I analyze both the scope of fact-finding within the current legal framework, and its (possibly) desired scope. In doing so, I address the content of the mandates, the working methods, the responses to conclusions in fact-finding reports, and the positions of the actors involved. Most importantly I raise legal and political (or normative), as well as practical questions, that I believe should be taken into account when discussing the scope of human rights fact-finding.

### B. *The Scope of Fact-Finding Given the Current Legal Framework*

Clearly, the scope of fact-finding missions does not and should not have the same legal implications as a conviction in international criminal proceedings. Due to its non-judicial character,[288] the mechanism of fact-finding simply cannot meet some of the most important elements and safeguards of a judicial process—those that aim to guarantee the rights of suspects and other persons involved in the investigation.

In addition, fact-finders are not judges,[289] and sometimes not even lawyers or legal experts in the field of international human rights, humanitarian, or criminal law.[290] Moreover, the fact-finding reports cannot be compared to a judgment by a court, especially in the sense that they do not contain a legal or factual reasoning, including on evidentiary decisions.

It is less obvious whether fact-finding reports could serve as the (sole) basis for indictments or arrest warrants, or have the same legal implications. Key obstacles in that respect are the rights guaranteed to the suspect during the indictment and arrest warrant procedures—particularly, the rights as laid down in Article 55, section 2 of the Rome Statute.[291] For example, during a fact-finding mission, it might be more challenging to guarantee that the suspect is informed of any allegations and assisted by legal counsel. Also, there is little possibility to verify that a person has been informed of the right to remain silent. Another challenge is that the stages of indictment and arrest warrants are already subject to judicial review, which is absent in fact-finding missions. Even if the fact-finding missions can be restructured in such a way that these procedural safeguards can be guaranteed, the question remains whether this is the scope to which the international community should wish to extend the ambit of fact-finding missions.

There are, however, no legal obstacles for fact-finding missions or reports to serve as or form the basis for preliminary investigations—that

288. *See* H.R.C. Res 5/2, *supra* note 141, art. 8(c).

289. *See* KNOOPS, *supra* note 22, at 95.

290. *See generally* Alston, *supra* note 127, at 370.

291. Rome Statute art. 55 § 2.

is, for the preliminary research a prosecutor conducts—in order to request authorization from a judge to proceed with the official investigation, or as the basis for referral by a state or the Security Council. The main difference in guarantees that apply in fact-finding and international criminal proceedings at the preliminary investigation stage is the applicability of Article 55(1) of the Rome Statute. Those safeguards include the right not to incriminate oneself, the right to an interpreter and to translation, and the right not to be arbitrarily arrested or detained.[292] It is highly unlikely that these rights cannot be or are not guaranteed in a fact-finding mission. For example, fact-finders generally already make use of an interpreter, simply because it would render their work impossible if they could not speak to witnesses as a result of language differences.

On another note, based on the above preliminary analysis of the use of fact-finding documentation as evidence in international criminal trials, it is difficult to imagine that such documentation could be used as direct evidence. For example, any witnesses interviewed by the mandate-holder would again need to be questioned and cross-examined in court. Certain information could, however, be used to corroborate the evidence in trial. Sunga explains, while referencing Bassiouni, that this was also the case before the ICTY, where many of the documents that were gathered by the Commission of Experts to the Former Yugoslavia and handed to the Prosecutor of the ICTY "could not be used directly as evidence in prosecutions but were useful more to help establish the location, character and scale of violations."[293] The more general use of fact-finding documentation could be especially beneficial in the case of vague and inconsistent witness testimony as described in Nancy Combs' research.[294] Finally, fact-finding reports can form the basis for non-criminal responses, such as increasing political pressure and implementing economic sanctions.

### C. *Improving the Standards to Meet the Needs Within the Current Legal Framework*

In short, in my opinion there are three situations in which it is legally justified to use the results of a human rights fact-finding mission: for preliminary investigations as part of an international criminal procedure, to serve as corroborative evidence in an international criminal trial, and as the basis for decisions on non-criminal responses. I argue that in each

292. *Id.* art. 55(1).

293. Sunga, *supra* note 26, at 193 (describing Commission Member M. Cherif Bassiouni's opinion of the information it gleaned during its mission).

294. *See supra* text accompanying notes 247-49.

of these situations, the working methods need to be improved and standardized. Given the possibly far-reaching consequences of responses to fact-finding reports, the information on which these responses are based should be verifiable and obtained through methods of comparable quality. For example, in order for the Security Council to make a decision for referral, or for the prosecutor to request authorization for the start of an investigation, they should have access to information that is gathered using the same set of guarantees and applying the same standards of evidentiary credibility and reliability.

Therefore, it is recommendable that the United Nations adopts new procedural rules that include a number of minimum checks and balances. First, fact-finding reports ought to contain a chapter on methodology, containing at least some information on data collection, the storage of data, the treatment of witnesses, the evaluation and corroboration of evidence, and the standards of proof and credibility applied. Second, the fact-finding reports should include a reasoning that describes the evaluation of evidence and the evidentiary decisions taken. Third, it would be beneficial to have standard (computer and data collection) programs and formats to facilitate the process. Fourth, new rules of procedure should give guidance on how to weigh credibility and reliability, and to corroborate evidence. Finally, best would be for at least one of the experts in a mission to have knowledge of and experience in the field of international criminal law and international humanitarian law.

### D. *Reconsidering the Scope of Human Rights Fact-Finding*

Even though the aforementioned criminal implications of human rights fact-finding missions are legally justifiable, the question remains whether the international community should permit fact-finding missions to have (to a lesser or larger extent) criminal implications. Bearing in mind the purpose of fact-finding—to maintain international peace, to develop friendly relations, and to promote human rights—one can imagine that fact-finding missions refrain altogether from drawing conclusions with criminal implications.[295] As previously stated, Knoops argues that conclusions on criminal responsibility could have a polarizing effect.[296] In similar fashion, the Rwandan government has argued that the DRC report would disrupt the peace efforts in the region.[297] Possibly, the Rwandan government would have been less offended and less critical of the report had it merely stated events and named the actors involved, without drawing the conclusions on

295. *See supra* note 46 and accompanying text.

296. KNOOPS, *supra* note 22, at 95.

297. Government of Rwanda Report, *supra* note 116, ¶ 58.

responsibility (including the responsibility of the Rwandan government for the crime of genocide on the Hutu). It is worth exploring whether fact-finding reports would be of more or less value if they refrained from offering conclusions on actual criminal responsibility and instead recommended that criminal justice mechanisms examine the question of culpability.

A further question is to what extent conclusions in fact-finding reports imply an obligation for the international community to act. As mentioned, despite similar conclusions that comparable crimes had been committed, international responses varied by case—from inaction, to the establishment of the ICTR, and to the referral of cases to the ICC Prosecutor. Bassiouni opines that for such crimes as genocide, war crimes, and crimes against humanity, there exists a duty to prosecute.[298] Arguably, in all cases in which a mission concludes that one or more of these crimes have been committed an obligation of the international community to make sure these crimes do not go unpunished emerges. Surely, crimes against humanity committed in Darfur are no worse than those committed in Guinea, even though the Security Council referred cases to the ICC Prosecutor regarding the former but not the latter. On the other hand, one can imagine that in certain situations where crimes against humanity have been committed, it would be more opportune to, for example, create mechanisms of truth and reconciliation, rather than to strive for criminal prosecution. Either way, it could be argued that conclusions by fact-finding missions that *jus cogens* crimes have been committed should call to life an obligation for the international community to actively respond through either one of the previous options, or with the help of other imaginable justice mechanisms.

When reconsidering the scope of fact-finding missions, one must take into account what the mandate ought to look like. In current practice, mandates tend to be vaguely phrased to give the mandate-holder enough flexibility to interpret that mandate according to the situation. However, if conclusions on criminal responsibility are the aim, one could argue that the mandate should be more specifically phrased. Perhaps the mandate could make clear that it is a preliminary investigation that may lead to possible future criminal proceedings, which may encourage the mandate-holder to inform possible suspects of the nature of the exercise, so as to prevent them from incriminating themselves. Or, perhaps the mandate could specifically authorize the mission to investigate only certain individuals. Whether the mandate should specifically order the creation of a list of names of alleged perpetrators and whether that list should remain anonymous are other important questions.

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298. Bassiouni, *supra* note 18.

A further critical consideration in this context is whether criminal implications of human rights fact-finding should or could affect the position of the mandate-holder. For example, it is questionable whether human rights fact-finding with a view to establishing criminal responsibility should be conducted by a single, non legally-trained expert. Given the legal assessment that needs to be made, it seems prudent that there be at least one lawyer in the commission who has expertise in the field of international criminal law and international humanitarian law.[299] Sunga suggests this should even be an expert with prosecutorial experience.[300]

Finally, it should be taken into consideration whether criminal implications of human rights fact-finding will deter witnesses or put them at higher risk than when human rights fact-finding merely has political implications. Within the current system the protection of witnesses is primarily taken into account through preventive measures, rather than by means of actual protection.[301] If witnesses are put in jeopardy, the United Nations will need a proactive response assuming that the international community is willing to back its decision to protect witnesses for these purposes.

## V. CONCLUSION

Although U.N. human rights fact-finding missions have dealt with the question of individual responsibility ever since their early use, in the last two decades, the responses to conclusions on individual responsibility have more and more taken that of a criminal procedural nature. The interplay between human rights fact-finding and international criminal investigations has evolved in different ways; for example, some fact-finding missions were followed by the creation of an international criminal tribunal (such as the ICTY and the ICTR). And, since the establishment of the ICC, fact-finding missions have formed the basis for referral by the Security Council to the ICC Prosecutor, or formed the basis for the ICC Prosecutor to launch an investigation.

This development has taken place purely in practice; no procedures have been designed to standardize and customize human rights fact-finding for this purpose. As a result, there are significant discrepancies in the formulations of the mandates dealing with questions of individual

299. *See* Sunga, *supra* note 26, at 201.

300. *Id.*

301. Training Manual, *supra* note 161, at 111. The Training Manual even states: "In any case, it should be made clear that the HRO [Human Rights Officer] cannot assure the safety of the witness." *Id.*

criminal responsibility. Also, the standards applied to prove such responsibility vary greatly, and the methodology followed to gather and evaluate the evidence is reinvented by each mission.

The differences in mandates, as well as in how missions are carried out and how the international community has responded to the conclusions drawn in the reports, justify questioning what the proper scope of the fact-finding missions is and should be. Given the current legal framework, the practice of fact-finding missions cannot entail more than a preliminary investigation that may form the basis for a referral or the start of an investigation in international criminal proceedings. In addition, fact-finding reports can be used as indirect (corroborative) evidence in criminal trials, and can lead to non-criminal responses, such as imposing economic sanctions.

For these applications, the current working methods should be revised in order for the U.N. organs to solidly base decisions of referral or other responses on verifiable information, obtained with the use of methods of comparable quality. The United Nations needs to adopt rules for standardized procedures that address the working methods and the methodology of fact-finding missions. In addition, standardized computer programs need to be used to store and register data. Finally, experts with knowledge of and experience in international criminal law and international humanitarian law should be part of the mission.

However, the question remains whether this is also the scope that the United Nations intends (or should intend) human rights fact-finding to have. While reaching an answer to this question, it ought to be taken into account to what extent conclusions on individual responsibility contribute to the purpose of maintaining peace and promoting human rights, or whether they might have a polarizing and counter-productive effect. In addition, one must recognize that the possible consequences of conclusions on individual responsibility might deter witnesses from cooperating. Finally, it should be considered whether redefining the scope of fact-finding will affect the phrasing of the mandate or the position of the mandate-holder.

For credible continuity of the exercise of human rights fact-finding with the possibility of subsequent international criminal prosecutions, it is time that the United Nations reconsiders the practice of human rights fact-finding and makes normative, political, and legal decisions regarding its future use.