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The Interaction between Human Rights Fact-Finding and International Criminal Proceedings

Toward a (New) Typology

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I. Introduction

The interaction between human rights fact-finders and international criminal courts and tribunals (ICCTs) remains under-researched and under-theorized.[1] While some argue in favor of broad autonomy of human-rights fact-finders and ICCTS in light of their different mandates, working methods, and cultures, others advocate a division of labor or even "a supply" and "demand"-driven vision of interaction. Fact-finding is frequently regarded as a pathway toward effective investigations and prosecutions[2]. This logic contrasts with jurisprudential constraints set by ICCTs or reservations, such as the statement in the *Lubanga* judgment that "human rights and humanitarian organizations are lousy criminal investigators."[3]

This tension requires further attention. Existing writings have focused on specific elements of the interaction between human rights-fact finders and ICCTs. They have addressed particular issues, such as the relevance of "standards of proof,"[4] the role of investigative methodologies, the distinction between crime-based and "linkage evidence" or the quality of fact-fact-finding in ICCTs per se.[5] Typically, this is done from the perspective of a particular entity or constituency. This chapter takes a different starting point. It seeks to develop a differentiated typology relating to interaction, that is, a "polycentric model"[6]

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The Transformation of Human Rights Fact-Finding. Philip Alston and Sarah Knuckey.

that pays tribute to the autonomy and inherent features of human rights-fact finders and ICCTs, including their legitimate differences. It argues that the impact of human rights fact-finding on international criminal proceedings differs according to a number of internal and external parameters. It then formulates a number of propositions to assess the relevance of materials, documents, and testimony provided by fact-finding bodies and to improve interaction with ICCTs. The proposed matrix does not seek to provide definitive answers and solutions. Rather, it marks an attempt to bring further complexity into a somewhat polarized debate, by theorizing interaction through a pluralist lens.

II. The Status Quo

Existing research on the interplay between fact-finding bodies and ICCTS remains rudimentary. Findings and recommendations vary greatly among scholars and communities. Positions may be roughly divided in three camps: (1) "separatists," or defenders of the autonomy of the respective fields and their cultures; (2) "constructivists," who seek to build bridges among these communities; and (3) "pragmatists" who see merit in partial convergence and partial divergence.

Proponents of the first camp tend to focus on the inherent differences between human rights fact-finders and criminal institutions. It is typically argued that fact-finding bodies pursue goals that overlap only partially with ICCTs (e.g., deterrence, dispute resolution), that human rights bodies adopt different methods in the exercise of their mandate, and that they are rooted in different "professional cultures."[7] Human rights actors are particularly concerned with the ending of violence at the "earliest possible moment" and the improvement of the situations of individuals (e.g., humanitarian conditions).[8] These goals do not necessarily coincide with the objectives of investigation and prosecution, which are typically ex post facto and rarely immediate tools of prevention. Criminal proceedings are geared toward longer-term "accountability" and protection of due process and fair standards of defendants. This may explain why there is often equal suspicion toward use of fact-finding materials in criminal proceedings inside ICCTs,[9] or even skepticism toward greater interaction.

This position contrasts with the view of those who seek to foster greater synergies between international criminal justice and human rights communities, in order to reduce "loopholes" and "inefficiencies" in the existing architecture of international law, and to "foster compliance." For instance, in "Realizing Utopia," the late Antonio Cassese used these rationales to argue in favor of "a conspicuous multiplication of [. . .] fact-finding commissions and bodies,"[10] as they "are not dependent on the individual states involved in the matter at issue" and "in addition to establishing facts, [. . .] also assess them in light of the relevant international standards, thereby determining whether the facts amount to violations of those standards."[11] Similarly, Dapo Akande and Hannah Tomkin have argued that in "the absence of any court that has compulsory and universal jurisdiction with respect to the determination of violations of human rights, IHL and other rules of international law, international commissions of inquiry may be one of the best ways of obtaining authoritative pronouncements on these legal issues."[12] This view was taken

a step further by others, such as Micaela Frulli, who stressed the distinction between "human rights fact-finding" and "international humanitarian law fact-finding," but argued in favor of a greater "division of labor among the various bodies undertaking fact-finding activities."[13] Such authors recognize that it is neither "realistic" nor "suitable" that "each and every UN fact-finding commission leads to the creation of an *ad hoc* international or internationalized criminal tribunal."[14] But they support the creation of a system, which would allow greater interaction through use of "guidelines"[15] or enhanced cooperation.[16]

Others again seek a Hegelian symbiosis, based on pragmatism. They recognize that interaction may be feasible in some cases, based on specific "comparative advantages." But they are more cautious in translating this into a broader systemic model.[17] Several authors have drawn on particular case studies to highlight the virtues of case-by-case assessment. For instance, Philip Alston regarded the work of the International Commission of Inquiry on Darfur as a model case for future engagements. He noted that the establishment of a Commission of Inquiry may present a number of benefits, such as "provid[ing] an appropriate filtering mechanism before the [Security] Council takes a decision," "ensur[ing] a thorough and systematic preliminary review of the facts," "provid[ing] a fully reasoned legal analysis," or "giv[ing] Council members the opportunity to consider alternative approaches which might be better suited to ensure a just outcome."[18] Kevin Heller provides a more mixed assessment of the Libyan Commission of Inquiry. He notes that the Commission "followed the best practices of human-rights fact finding, explaining the law, privileging direct evidence, conducting hundreds of interviews with victims and witnesses, scrupulously corroborating testimony with physical evidence, and conservatively applying its chosen standard of proof."[19] But he argued that the conclusions of the Commission "[were] not without . . . flaws," and that "[d]espite its best efforts" the Commission "appears to have been unable to completely cleanse itself of the stain of its politicized birth."[20]

Each of these positions has merit. But it is necessary to go a step further. It is evident that some "fact finding missions" have supported international justice. This is most visible in cases such as the former Yugoslavia or Lebanon.[21] However, it is not always apparent whether or how these different mechanisms should relate to each other. This is why it is useful to develop a more nuanced set of criteria to analyze why, and under what conditions, interaction is helpful.

III. Toward a Polycentric Interaction Model

We would like to propose at least five parameters that may help explain whether and how human rights fact-finding influences international criminal proceedings. Types of interaction with ICCTs typically vary according to the (1) nature of fact-finding entities. But they also relate to a number of other factors inherent to ICCTs, which are often sidelined in discourse, namely (2) differentiation among entities and organs to which fact finding is relevant, (3) consideration of stages of proceedings, (4) types of decisions, and (5) distinction between types of evidence. We will briefly introduce each of them here.

A. Nature of the Fact-Finder

In contemporary scholarship, both ICCTs and fact-finding bodies are typically presented as unitary entities. This assumption can and should be challenged. There is a need to diversify this vision, by differentiating among the nature of fact-finding bodies.

A closer look at practice shows that greater distinction needs to be made in light of the nature of the respective fact-finding body.[22] The official names of commissions are often misleading. It thus makes sense to adopt a "functional" distinction. There appear to be at least two different general types of bodies that need to be distinguished, in terms of their nexus to criminal proceedings.

1. Investigative and "Scoping" Commissions

The first category is—what one might call *investigative commissions,* that is commissions with investigative powers and a focus on criminal responsibility. They may be distinguished from *scoping commissions*, that is missions with a focus on global situations and context rather than accountability.

Investigative commissions have most formal synergies with ICCTs, to the extent that they are charged with identifying potential "cases" for investigation and prosecution. They come in different variations. Some are focused on "incidents" or charged with identifying specific categories of crime. Others encompass a direct mandate to identify individual perpetrators. This creates a "functional synergy" with ICCTs. These missions have been increasingly used over past decades.

Prominent examples include:

(i) *The Commission of Experts established pursuant to resolution 780 (1992) concerning former Yugoslavia*.[23]
(ii) *The Commission of Experts established pursuant to resolution 935 (1994) concerning Rwanda*.[24]
(iii) *The United Nations International Independent Investigation Commission (UNIIIC, 2005)*[25]
(iv) *The Commission of Inquiry for Darfur*[26]
(v) *The United Nations Fact Finding Mission on the Gaza Conflict*[27]
(vi) *International Commission of Inquiry Mandated to Establish the Facts and Circumstances of the Events of 28 September 2009 in Guinea*[28]
(vii) *International Commission of Inquiry on Libya*[29]
(viii) *International commission of inquiry on Côte d'Ivoire*[30]
(ix) *UN Commission of Inquiry on the Syrian Arab Republic (2011)*[31]

Many, but not all (Gaza[32], Syria[33]), of these missions have been followed by more specific international justice initiatives. They have varied in content. In some cases, they have triggered international investigations and prosecutions (ICTY, Darfur, Lebanon). In other cases, they have supported international investigations (ICTR, Libya, Ivory Coast). In again other cases, they triggered or supported preliminary examinations (Guinea).

Investigative commissions may be distinguished from broader *scoping missions* that have a different focus. They are geared at tracing patterns of violence in "situations" and fact-finding per se. They do not necessarily conduct legal or quasi-legal investigations. Their powers of inquiry have a broader focus, that is, to signal or alert human rights violations or identify accountability strategies. They may precede, or follow, the establishment of more formal investigative bodies.

Examples include:

(i) *The Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste in 1999 (2005)*[34]
(ii) *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*[35]
(iii) *High-Level Mission on the Situation of Human Rights in Darfur*[36]

2. Nexus to International Criminal Proceedings

It is typically assumed that "investigative missions" have a greater nexus and impact on ICCTs, and that they might be conducive to the goals of international criminal justice. This finding deserves critical scrutiny. It is true that the work of investigative missions may support the activity of ICCTs. They may, in particular, provide "investigative links." There are synergies in goals. Investigative commissions may in particular contribute to broader goals of prevention, that is by providing "early-warning data that can alert actors to the risk of atrocity," collecting evidence that makes it harder to deny the commission of specific types of crimes, or supporting the emergence of a culture of accountability in conflict situations.[37] But it is misleading to frame the link between investigative fact-finding and international criminal justice in terms of a *continuum*, in which one element builds naturally on the other. There are differences and structural tensions that challenge the idea of a fluid "division of labor."

The existing record is "mixed."[38] In some cases, there has been useful interaction. For instance, the Commission under Resolution 780 had direct impact on international justice. It facilitated the establishment of the ICTY, and it influenced the early work of the tribunal. Investigators often relied on NGO reports and sources of the Commission to frame ICTY investigations.[39] Former ICC Prosecutor Luis Moreno Ocampo stated that Office of the Prosecutor (OTP) investigations into Darfur "greatly benefited from the work of the UN International Commission of Inquiry" and "[i]ts information allowed [the Office] to plan [its] investigation."[40]

Similarly, the Special Tribunal for Lebanon (STL) relied on results of the UNIIIC in its own investigations. The two entities are connected through a formal link[41] and overlap of personnel.[42] The UNIIIC collected numerous statements in support of Lebanese investigations. These statements form part of the evidentiary holdings of the STL.

But existing practice also provides some insights in the possible tensions between institutions. Information received by the STL from the UNIIIC was not compliant with a

practice direction on witness statements, issued by the late President Cassese.[43] As a result, the OTP had to return to a number of witnesses to gather the statements again.[44] Moreover, questions have been raised as to how the findings of UNIIIC might be used in the judicial process and how allegations of perjury before the commission could or should be dealt with by the STL, given that it did not formally take place before it.[45]

Institutional cross-fertilization is less clear in the context of the Commission under Resolution 935. The ICTR was created before the Commission finished its final report[46] on December 9, 1994. One may therefore question the extent to which the creation of the ICTR was causally linked to the work of the Commission, or whether it was simply a device to "gain time . . . to work out the logistics' of the ICTR."[47]

With a growing maturation and sophistication of criminal justice procedures, voices inside ICCTs are increasingly cautious about unrestrained enthusiasm toward investigative fact-finding bodies.[48] It is asserted that investigations inside ICCTs often have to restart from scratch, in order to meet the requirements of a criminal process.[49] Witness statements require refreshment, or need to be taken anew.[50] There are frequently differences in memory recollection. In the context of the STL, many of the witness statements taken by UNIIIC needed to be retaken due to a change in the STL's Rules of Procedure and Evidence.[51]

More fundamentally, the multiplication of investigative bodies entails risks. In some instances, such as Lebanon or the Flotilla incident (which the OTP eventually decided not to pursue[52]), multiple commissions have been established. They are guided by different interests and portray different narratives of a conflict or even conflicting qualification of facts. This leads to a certain fragmentation in "truth-telling."[53]

There are also risks arising from duplication of mandates. In several cases, ICCTs operate in tandem with parallel investigative activities by fact-finding bodies. The Libyan example is a compelling one. It required coordination between the ICC and the Commission of Inquiry in the context of ongoing hostilities.[54] Such tensions might be mitigated by certain institutional arrangements. For instance, fact-finding bodies typically operate with a broad focus in a limited period of time, while investigators of ICCTs use small teams, with a longer-term focus. But the sheer multiplication of investigative functions creates problems in relation to witnesses. There is a problem of "testimony fatigue." The same witnesses might be called to testify on multiple occasions. This might not only result in different statements and risks of "re-traumatization,"[55] but also reduce the willingness of witnesses to testify in criminal proceedings. This is why the ICC has, for instance, sought to facilitate greater cooperation with fact-finding missions to secure that witnesses testifying before such bodies consent to having their statement shared with the Court. This type of "witness consent" might mitigate some of these problems from a criminal justice perspective. But it does not always coincide with the interests of fact-finding missions.

Moreover, in some situations, there is what one might call a "band-wagon" effect through fact-finding initiatives. They cause a spin-off for concentration of international efforts on a particular crisis. The multiplication of investigative capacities on one particular situation may detract from resources in other contexts.

It is often underestimated that the output of "scoping missions" may have considerable relevance for ICCTs. Their conclusions are less relevant for questions of "guilt or innocence."

But they have considerable importance for other areas of litigation that are of fundamental practical importance. Many activities of criminal justice require "monitoring" functions that go beyond the traditional functions and skills of core organs in the criminal process. One typical example are proceedings on admissibility, such as complementarity discussions in the ICC context or decisions on referral of cases back to domestic jurisdictions under Rule 11bis of the ad hoc tribunals.[56] These decisions involve findings on the capability and quality of domestic jurisdiction to carry out fair and effective proceedings, which typically require input by human rights fact-finders.[57] Another compelling example are decisions on interim release of the defendant.[58] These decisions require analysis of the consequences of the release of a defendant from detention, such as considerations of security and impact on affected communities. For such types of assessments, context-relevant information, such as that provided by "scoping missions" may be extremely useful.

B. Organs/Actors inside ICCTs

This leads to a second parameter, namely the differentiation among organs inside ICCTs. Human rights fact-finding is relevant to different actors in criminal proceedings. It has most relevance for the prosecution, which serves as the entry point for investigations and prosecutions. But is also relevant to other actors such as the judges and the defense, or even the registry.

Documents and facts gathered by human rights fact-finders are relevant to the prosecution in different ways.

(i) First of all, they are of key importance for analysis and examination.[59] Prosecutors typically rely on a certain amount of documentary evidence to support their cases. Criminal examinations often start with consideration of open-source materials. Such materials provide a useful starting point for the orientation of preliminary examination or investigations. They provide guidance for selection of situation and cases, before the actual examination of victims and witnesses.
(ii) Later, documentary materials, such as reports by human rights fact-finding bodies, have a supportive function in proving the prosecution case. They are rarely used as stand-alone evidence, as they are often imprecise on facts relevant for the proceedings, or in need of follow-up. But they often serve to corroborate other types of evidence.
(iii) Moreover, in some cases, the prosecution may call on authors of reports by fact-finding bodies to serve as "witness" or "expert" in proceedings.

One of the most challenging issues is the interplay between the duty of the Prosecutor to investigate under the Rome Statute[60] and external human rights fact-finding. It is open to question to what extent the direct use of findings from various third parties can constitute an investigation within the meaning of Article 54. This problem was acknowledged on several occasions by the OTP itself. For example, in the request for summons to appear for *Harun* and *Kushayb* (eventually transformed into arrest warrants by the Pre-Trial Chamber), the Prosecutor relied on the findings of the Darfur Commission. [61] But he indicated that "[t]he Prosecution nonetheless has an obligation to conduct an independent investigation

which, inter alia, seeks and considers evidence which might either corroborate or impugn information collected by other entities"[62]. Several chambers have expressed doubts on the use of external sources by the Prosecutor. A notable example is that of Ivory Coast. In the decision to adjourn the Confirmation of Charges of *Gbagbo*, the Pre-Trial Chamber considered that the use of third-party material could not be deemed to be the result of a proper investigation.[63] The OTP took this criticism partially into account in its strategic policy for 2012–2015 where it acknowledged the need for more in-depth and independent OTP investigations, even in the earlier phases of the proceedings.[64]

Although the Prosecution is generally considered to be the "master of proceedings," there has been growing recognition of *proprio motu* and "managerial" powers of judges in international criminal proceedings.[65] Judges often operate at a considerable distance to facts and events on the ground. Open source information from fact-finding bodies is of considerable relevance for judicial scrutiny. For instance, it has played an important role for determination of (1) jurisdictional parameters, (2) gravity considerations, or (3) contextual elements of crimes, such as the determination of the nature of the armed conflict. One compelling example is the *Lubanga* case, where the qualification of the nature of the armed conflict was changed twice by judges, namely at pretrial from non-international to international, and then at trial back from international to non-international.[66]

The Defense is in a somewhat different position. Many of the reports of human rights fact-finding bodies will focus on incriminating, rather than exonerating elements regarding defendants. Sometimes, they stand in contrast to the "presumption of innocence" (e.g., public "naming" and "shaming").[67] The Defense typically challenges the evidentiary value of information and material gathered by fact-finding bodies. It seeks to create reasonable doubt concerning reliability, methods, or conclusions of reports.

But there are also cases in which such type is information is supportive to a Defense case. For instance, contextual information or findings on potential perpetrators might be used by the Defense to challenge position of responsibility, or linkage to crimes. The use of fact-finding material is thus not a "one-way street."

C. Stage of Proceedings

The relevance of fact-finding information and material varies according to the stage of proceedings. A rough sketch of criminal proceedings would suggest the relevance of fact-finding to ICCTs decreases with rising standards in the course of proceedings. For instance, fact-finding might ultimately be more relevant to preliminary examinations and investigative choices inside ICCTs than to "hard" judicial proceedings at pretrial or trial. This logic might provide a general "rule of thumb." But it does not capture the full picture: it requires some further differentiation. Impact seems to be shaped by a range of other intermediate factors that are frequently sidelined in analysis, such as prosecutorial discretion in relation to choice of situations and cases, the scope of defendants' rights, and the balance between judge-led and Prosecution-led inquiry.

The actual use of fact-finding sources inside ICCTs is significantly shaped by procedural features, such as the scope of prosecutorial discretion,[68] on the one hand, and the protection of the rights of the defendant, on the other hand, including the capacity of the

Defense to challenge evidence. The relevance and use of human rights fact-finding is largely linked to the level of judicial scrutiny at the different stages of the proceedings. For instance, with a higher degree of prosecutorial discretion, there is less possibility for the Defense to challenge the use of particular third-source material. In this sense, one has to distinguish two interrelated but distinct questions:

(i) the use of outside human rights fact finding sources as a matter of credible evidence; and
(ii) the use of outside human rights fact finding sources as a legal criteria.

In relation to the rights of the Defense, one needs to take into account (1) whether there is an identified accused at a particular stage of the proceedings, and (2) the minimal level of scrutiny granted in order to challenge evidence.[69]

It is well known that ICCTs differ in their procedural framework. But it is possible to identify at least three stages in the proceedings that justify a differentiated consideration of third-party fact-finding materials: (1) the pre-investigative phase, (2) the investigative phase, and (3) the trial phase.

1. Pre-investigative Phase

The pre-investigative phase, which precedes the formal opening of investigations (called "preliminary examination" at the ICC), is a natural moment to take into account third-party information. Indeed, this is explicitly provided for in Article 15 of the Rome Statute relating to the use of *proprio motu* powers by the Prosecutor, where "he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate."[70] In this phase, the balance between Prosecutorial discretion and the rights of the defense leans the most toward discretion, given that normally, at this point of time, there is no question yet of singling out any individual. The idea is to evaluate more generally if a situation deserves closer attention. Human rights fact-finding reports are useful in this context.

This is inter alia shown by the practice of the ICC and the ICTY. Human rights documentation provided an essential starting point for the planning of cases at the ICTY, including choices of cases and sequencing strategies. In the ICC context, it visibly influenced preliminary examinations.[71] In many situations, ICC engagement is related to situations that have been subject to fact-finding initiatives (e.g., Dafur, Libya, Ivory Coast, Guinea). These sources contain information that is relevant to both incriminating and sometimes exonerating circumstances.

The relevance depends on the practice of the OTP in defining the scope of preliminary investigations. General fact-finding reports obviously become less important, with the use of clearer analysis and detailed criteria. In the ICC context, the Statute left many of these questions unresolved. It did not specify in detail what the Prosecutor is meant to evaluate under Article 15,[72] and more particularly whether this should cover issues of gravity and complementarity. [73] The OTP included both considerations in its analysis. They are generally vague in nature. This might explain why the OTP relied significantly on human rights fact-finding sources in its practice.[74]

2. Investigative Phase

A second phase is the investigative one. In this context, a crucial distinction must be made between the investigations relating to a "situation" and those relating to a specific "case."[75] Fact-finding sources are relevant for both branches. The investigation into the situation typically covers a broad range of choices, including elaboration of the context, definition of the scope of the situations, and screening of the main actors involved. Many of these factors are subject to prosecutorial choice. For such context-related considerations, information by human rights fact-finders is a valuable source.

Considerations become more complex in relation to "case" related investigations. This makes it more challenging to rely on outside sources. Information and material gathered in this context require greater specificity. Once a specific person is identified, there is greater need to provide information that can be verified. The possibilities for the defense to challenge information increase in proceedings. This might imply for instance, that witness statements taken by fact-finding bodies need to be verified or retaken.

This shift in the use of human rights fact-finding from "situation" to "case" can be illustrated by the example of Darfur. Although the Commission Report was clearly influential in the OTP decision to fully investigate the situation,[76] and to assess the general context of the commission of the crimes,[77] it is well known that in the particular case of *Bashir*, the OTP went further than the commission's overall evaluation of whether there had been an genocide in Darfur and called specifically for genocide charges to be included in the arrest warrant.[78]

3. Trial

Once a case goes to trial, reliance on open source material becomes more difficult. Prosecutorial discretion is constrained by strict judicial scrutiny. The balance shifts more toward the protection of the rights of the defense. The burden of proof is on the Prosecutor, and it is fairly high: namely that of "proof beyond reasonable doubt."[79] One of the key questions is to determine whether the evidence that is put forward can be adequately challenged by the defense or not. In this context, the essential criteria for external sources are not that different than for any other evidence: Is it direct evidence or hearsay? Is the information corroborated? Is the information provided from a credible source/witness?

But it is not excluded that fact-finding information remains relevant at trial. It might retain relevance, within limits, in relation to (1) contextual elements of crimes, (2) admissibility considerations (which require continued scrutiny in proceedings), or decisions on interim release. This was evidenced by the ICC in the context of the *Lubanga* case, where trial proceedings were suspended twice by way of a "stay of proceedings,"[80] and in the *Katanga* case, where admissibility became an issue at the start of the trial.[81]

D. Use of Fact-Finding Sources for Specific Types of Judicial Decisions

The distinction between stages of proceedings is a useful starting point. But given the complexities of international criminal procedure, it is important to be even more specific. Insights from fact-finders are relevant to a variety of decisions inside ICCTs. Traditionally,

the focus is often on decisions on guilt or innocence of the accused. It is helpful to look as well at other types of decisions where the use of fact-finding information might be useful. In general, there may be more uses of fact-finding sources than one might anticipate at first glance. Following the sequencing of proceedings, it is useful to distinguish different types of decisions, including (1) the decision on the opening of an investigation, (2) arrest warrants and interim release, (3) the confirmation of charges, (4) admissibility, and (5) the judgment.

1. Decision on the Opening of an Investigation

The decision to open an investigation is a key moment in the proceedings. It marks the shift from general "situation"-related analysis to criminal proceedings. Formally, there is no identified suspect yet. The Prosecutor needs to identify a general context and the likelihood that certain crimes have been committed. In this context, third-party fact- finding material constitutes an important source, because it provides a broad overview of a situation and general indications on patterns of violations that might at this early stage be indicative of the existence, for example, of an "attack" as the contextual element of crimes against humanity.

In the ICC context, one needs to distinguish between referrals from the Security Council and state parties on the one hand, and the exercise of *proprio motu* powers by the Prosecutor[82]. In the first case, there is no formal decision authorizing the opening of an investigation, so there is no scrutiny of the exercise of prosecutorial discretion.[83] In the second case, the Prosecutor must obtain authorization from the Pre-Trial Chamber, as happened in the Kenya[84] and Ivory Coast[85] cases. Both these decisions confirm that third-source fact-finding material is accepted for most dimensions of the determination of the possible commission of crimes within the jurisdiction of the Court.

Indeed, all supporting documentation brought forward by the OTP for opening an investigation, whether in relation to the general context, or the commission of particular crimes, comes from third-party sources (NGOs, United Nations, press) and receives near to no level of scrutiny from the Pre-Trial Chamber.

This is explained by the fact that the proceedings do not yet concern a particular individual and remain for the most part within the discretionary power of the Prosecutor. The Chamber's choice to exercise only minimal judicial overview of OTP choices in these types of decisions is illustrated, for example, in the Ivory Coast decision where the Pre-Trial Chamber accepted that victim statements be vague and ambiguous on the nature and context of their mistreatment, in light of the lower evidential threshold, and therefore "considered the victims' submissions in a non-restrictive manner."[86] This statement evidently applies equally to human rights fact-finding.

2. Issuance of an Arrest Warrant (and Provisional Release)

In terms of the issuance of an arrest warrant, it should be noted that this is obviously done ex parte, as the accused cannot be present yet. The logic here is therefore broadly along the same lines as for the investigation phase. There is no expectation that evidence will be challenged by the defense. As a result, practice shows that there is only a low level of scrutiny in relation to third-party fact-finding material at this stage of the proceeding.

Beyond this general evaluation, a differentiation one might expect in theory would be between the two branches of Article 58(1) of the Rome Statute. Article 58(1)(a) provides that the arrest warrant can be delivered if "there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the court." On the other hand, Article 58(1)(b) relates to general risks that justify remand in custody: risk of flight, risk of obstruction to the investigation, and risk of further commission of crimes. The first criterion relates to the specific criminal conduct of an individual, which might make human rights fact-finding reports less relevant, depending on their mandate.[87] The second list of criteria is linked to broader contextual issues, such as security concerns, which would make human rights fact-finding more useful.

In practice, however, this distinction is not applied very clearly. For example, in the Darfur cases, both branches of Article 58(1) were supported by the Prosecutor with reference to the findings of the Darfur Commission and other public sources. The Pre-Trial Chamber simply followed this reasoning.[88]

More particularly, the evaluation of the particular criteria for issuing the arrest warrant (risk of flight, risk of obstruction of the investigation, and risk of further commission of crimes) has led to the acceptance of very general types of evidence. Often, the assessment related to requirement is not specifically linked to the defendant. As a result, general information on the security situation in the country, networks of supporters of the defendant, or risks to witnesses and victims has been extensively used without any requirement of specificity[89].

It should, however, be noted that the Prosecutor does make a distinction between sources used for obtaining an arrest warrant. In the *Harun* and *Kushayb* request for a summons to appear, the Prosecutor laid down three "types" of uses for human rights fact-finding, most notably the Darfur Commission Report: (1) the report itself, (2) documents collected by the commission and transmitted to the OTP, and (3) separate and autonomous investigations aimed at corroborating this information[90].

The presence of the accused in provisional release decisions has not modified this state of affairs. Most defense teams have challenged the absence of a link with the defendant. But the practice, confirmed by the Appeals Chamber, has remained the same.[91]

A striking example is the practice on provisional release in the *Gbagbo* case. In its decisions, the Pre-Trial Chamber relied nearly entirely on the interim and final reports of a UN group of experts on the existence of pro-Gbagbo armed supporters in neighboring countries and access to funds for absconding[92]. The Defense questioned the reliability of the findings of the report. However the Pre-Trial Chamber did not engage in the discussion, considering that 'bearing in mind the nature of the present exercise and the principles applicable to factual findings, [. . .] the Group of Experts Final Report provides sufficiently detailed information which can be relied upon for the purpose of determining, in line with article 58(l)(b) of the Statute, whether "[t]he arrest of the person appears necessary."'[93] This finding seems to suggest that given the lower threshold of the standard of proof, no challenge to credibility can be entertained.

3. Confirmation of the Charges

With the confirmation of charges, the threshold of scrutiny increases. This affects the potential use of external fact-finding, in particular in the context of the ICC, which has an extensive confirmation procedure as compared to the ad hoc tribunals, where there was little to

no scrutiny in the confirmation of the indictment.[94] At the ICC, there is a real adversarial confrontation, and the defense is given ample opportunity to challenge the evidence.[95] As a result, all Pre-Trial Chambers have rightly expressed a preference for direct evidence over possible uncorroborated and hearsay evidence, which indirectly might disqualify some external fact-finding practices.[96] In the *Mbarushimana* case, the judges declined to confirm charges, due to an overuse of indirect evidence such as NGO and UN reports.[97] Interestingly, the *Gbagbo* adjournment of the confirmation of charges decision seems to go a little further by linking the use of NGO/UN reports to the investigative duties of the Prosecutor under Article 54, claiming that such reports cannot be said to be the "fruits of a full and proper investigation by the Prosecutor."[98] This could pave the way for a more direct and principled exclusion of third-party fact-finding at the confirmation of charges level.

4. Admissibility

At first glance, admissibility decisions would not seem to be natural places where human rights fact-finding would play a role. Indeed, these decisions essentially revolve around the question of whether the accused is effectively being prosecuted for the same conduct. Evidence will therefore generally be adduced directly from official national documents or decisions.[99]

There are, however, two ways in which human rights fact-finding might be relevant. First of all, as mentioned previously, the admissibility evaluation might come quite early in the proceedings at the investigation phase. At that moment, there might not be any identified suspect/accused. The test accordingly revolves around determining if a certain category of possible accused is being investigated or prosecuted.[100] This kind of information is likely to be found in human rights reports, which may identify possible perpetrators in the higher structures of the state. This would make such reports relevant.

Second, the complementarity test can involve an evaluation of whether a national jurisdiction is engaging in proceedings, and/or willing and able to conduct such proceedings. This implies more general discussions on the state of a judicial system, its possible lack of partiality, and the general security situation. Such findings may require information from third-party sources.[101]

The use of such information depends on the exact scope of the admissibility test. For example, some argue that Article 17(3) should be read as requiring respect for fair trial requirements generally in order for the case to be inadmissible.[102] Others favor a more restrictive interpretation focusing on the state's lack of intent to bring the person to justice.[103] The need for such general types of information will thus vary depending on the interpretation adopted.

This issue was dealt with in the *Al Senussi* admissibility challenge by the Pre-Trial Chamber. Faced with evidence on the alleged "systemic lack of independence and impartiality of the Libyan judicial system," the Chamber clarified its standpoint. It noted that:

> while submissions of a general nature indicating significant defects of Libya's national judicial system may be relevant as "contextual information," information of this kind can be considered only to the extent that such systemic difficulties have a bearing on

> the domestic proceedings against Mr Al Senussi, such that it would warrant a finding of one of the scenarios envisaged under article 17(2) or (3) of the Statute.[104]

This conclusion seems to side with the narrower reading of Article 17. It might therefore limit the relevance of information by human rights fact-finders on systematic failures of the domestic judicial system.

5. Judgment

As mentioned previously, in the trial phase the balance leans more toward the rights of the defense, therefore requiring increased scrutiny of the Prosecutor's evidence, in particular from third-party sources. As a result, although there should not be a general rule on admission or exclusion of human rights fact-finding, strict rules on hearsay, anonymous testimony, or uncorroborated evidence could indirectly lead to limiting use of such evidence at the trial phase, and therefore in the judgment.

Beyond this general statement, the more specific question remains of whether one has to make a distinction, not only based on the phase of the proceedings or the particular type of evidence as the past two sections have discussed, but based on *what* the Prosecutor is trying to prove, which is the object of the following section.

E. Types of Evidence

Criminal proceedings involve different types of evidence. Typically, several categories are distinguished: (1) context-related evidence, (2) crime-based evidence, and (3) linkage-evidence.

1. Context-Related Evidence

This first type of evidence is crucial in international criminal proceedings, due to the collective nature of the violence that is at the heart of core crimes.[105] It involves different types of facts, including those related to the context of the situation subject to investigation and prosecution, and those related to the context of crimes.

It is typically acknowledged that open source information by fact-finders is useful for establishing facts relating to the situation, such as the context and scope of a conflict. For instance, reports by human rights fact-finders have been used to illustrate the movement of groups, which are relevant to jurisdictional issues (e.g., Uganda), or places of attacks and number of incidents of violence. They may, in particular, suffice for prima facie purposes.

However, from a legal point of view, context is not only useful as background information, it is crucial in proving the crimes themselves. Indeed, international crimes generally require some form of contextual element in order to be established. For example, crimes against humanity require an attack against a civilian population,[106] and war crimes require the existence of an armed conflict.[107] In light of this, the line becomes blurred between "context" in a broad sense and "context" as a component of a crime.

It is disputed to what extent fact-finding materials can be used as evidence to establish contextual elements of crimes. A prominent example is the *Gbagbo* case before the ICC. In that case, the Prosecutor relied heavily on third-party fact-finding in relation to

the contextual elements of crimes against humanity, that is, for determining the existence of an "attack against the civilian population." The defense argued during the confirmation of charges hearing that such evidence should not be accepted given that the contextual elements are part of the elements of the crimes to the same extent as the mens rea of the accused, and should require equally strong evidence, drawn from proper investigations, to support these contextual elements. The defense also raised an equality-of-arms argument according to which there would be a de facto shift in the burden of proof if third-party fact-finding information were exclusively relied on. Indeed, while the Prosecutor could effectively just download a report on his computer, it is the defense that would have to actually investigate the content of the report to challenge its reliability. As a result, although the defense did not oppose the use of outside sources, in particular human rights reports, it asked the Chamber to require that all information be corroborated by an independent investigation by the Prosecutor.[108]

The Pre-Trial Chamber partly followed the defense argument. It held that:[109]

> 22. Taking into consideration that contextual elements form part of the substantive merits of the case, the Chamber sees no reason to apply a more lenient standard in relation to the incidents purportedly constituting the contextual element of an "attack" for the purposes of establishing the existence of crimes against humanity than the standard applied in relation to other alleged facts and circumstances in the case.
>
> [. . .]
>
> 35. The Chamber notes with serious concern that in this case the Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity. Such pieces of evidence cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with article 54(l)(a) of the Statute. Even though NGO reports and press articles may be a useful introduction to the historical context of a conflict situation, they do not usually constitute a valid substitute for the type of evidence that is required to meet the evidentiary threshold for the confirmation of charges.

As a consequence the confirmation of charges was adjourned. On appeal, the Prosecution introduced a distinction between "material elements" and "subsidiary elements," which has broader consequences in legal and procedural terms. It would imply that "material elements" would have to be proven by the requisite standard of proof whereas "subsidiary elements" might not have to meet such a standard. This in turn would necessarily have consequences in relation to the use of third-party fact-finding. But the Appeals Chamber dismissed the Prosecutor's appeal. It rejected the distinction between material and subsidiary elements and confirmed that the contextual elements of the crimes need to be held to the same standard of proof. This jurisprudence validated the Pre-Trial Chamber's assessment of the Prosecutor's reliance on third-party materials.[110]

2. Crime-Based Evidence

Context-related evidence needs to be complemented by "crime-based" evidence. Fact-finding sources typically do not suffice per se to constitute a basis for this. They can contribute to examination, investigation, and analysis. But they need to undergo an additional process of transformation in order to be turned into evidence before ICCTs. This additional process is necessary, as fact-finding bodies usually deploy different modalities and standards than ICCTs in collecting information and physical evidence.

A good example is the ICC charge on genocide against Omar Al Bashir, which requires proof of "special intent," or *dolus specialis*. The Commission of Inquiry left the case open for a genocide charge. It noted that "it would be for a competent court" to make a determination on genocide "on a case by case basis" and that it does "not rule out the possibility that in some instances *single individuals*, including Government officials, may entertain a genocidal intent, or in other words, attack the victims with the specific intent of annihilating, in part, a group perceived as a hostile ethnic group."[111] The ICC Prosecutor did not only rely on documentary evidence, but provided witness testimony to secure a warrant of arrest for genocide.[112] This approach was successful, after the Appeal Chamber corrected the finding of the Pre-Trial Chamber on the standard of proof required.[113] In its second decision on the arrest warrant, the Pre-Trial Chamber relied on a mix of documentary evidence and witness testimony already used in the first decision to establish that "Omar Al Bashir acted with *dolus specialis*/specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups."[114]

3. Linkage-Evidence

The third general type of evidence is linkage-evidence. Linkage-evidence ties the defendant to a particular type of conduct and crime. These links take the form of different degrees of specificity. A general starting point is the establishment of the connection between the defendant and a state apparatus or a specific group. This nexus is followed by closer inquiry into the role of the defendant in conduct, and in particular the attribution of individual criminal responsibility in relation to specific modes of liability, such as perpetration, aiding or abetting, or responsibility as a superior.

This nexus is rarely explored with sufficient detail or reliability in reports of fact-finding bodies to stand as direct evidence in international criminal proceedings. Such reports have mostly an indirect function. ICCTs rely not so much on the specific content of findings or conclusions, but rather on sources identified in such documents. Evidence is typically gathered through follow-up action, such a contact with the authors of reports or other sources indicated.[115]

Typically, linkage-evidence also requires different witnesses than those used in relation to general human rights fact-finding. Linkage-evidence is often based on statements of persons who were associated with underlying groups or organizations, or who have in-depth or insider knowledge of structures inside organizations. Investigations by fact-finding bodies are generally more focused on crime-based witnesses. They are only of limited use in this context.

4. Drawing the Lines among the Three

Although this distinction provides a useful way to "map" the type of evidence that might allow for more or less recourse to external human rights fact-finding, it should be noted that the difficulty will often arise of knowing where to draw the lines among the three categories in practice.

As noted previously in the *Gbagbo* case, it is a contentious issue whether the contextual elements of crimes against humanity fall within the "context-based" evidence, or should in fact be considered as "crime-based" evidence. The question can even arise whether this could not be considered linkage-evidence, to the extent that the prosecution of a former head of state will usually lead to a confusion between the "plan or policy" dimension of crimes against humanity and the "common plan" aspect of the modes of liability. In the *Gbagbo* case for example, the Prosecutor relied heavily, if not exclusively, on the former to prove the latter.[116]

IV. Conclusions

The number of fact-finding bodies has considerably grown over the past decades. At the same time, institutions of international criminal justice have matured. This process requires a fine assessment of the comparative advantages of these two types of institutions.[117] Each of them needs to preserve its degree of independence. But practice seems to suggest that there are prospects for mutually supportive interaction.

The growth of international justice, and maturing of procedural standards, seems to suggest that fact-finding bodies pursue roles that are supplementary to international justice. They may support the cause of international proceedings. But they are by no means determinative for action of ICCTs.

Developments in jurisprudence show a level of reluctance toward evidentiary uses of open source material and reports by fact-finding bodies. The general trend appears to suggest that such types of materials and information have deficiencies that compromise their ability to be used in questions of "guilt or innocence" in criminal proceedings.

But this does in no way imply that that they are not relevant to ICCTs. On the contrary, they are an important source of information that ICCTs may draw on. It is more appropriate to conceptualize interaction in a way that takes into account the various elements of criminal proceedings, that is, the organs involved, the nature of the decisions, or the stage of the proceedings. This analysis leads to a number of propositions.

(i) First of all, findings of fact-finding bodies have undisputed relevance to "context-related evidence." In fact, prosecutorial practice seems to suggest that they are an "indispensable" part and parcel of pretrial activities. This is justified in light of the nature of proceedings (ex parte) where context is key (investigation, arrest warrant) and the applicable standard. Such findings are useful in relation to "context-related evidence." But the standards of proof required are in flux (*Gbagbo*).

(ii) It is more doubtful to what extent materials of fact-finding bodies are relevant to "crime-based evidence" and "linkage-evidence." These categories go more directly to

criminal conduct, including the "guilt" or "innocence" of the defendant. Ultimately, a litmus test might be to what extent the Defense can realistically challenge the evidence. This might require novel witness testimony or reliance on statements by authors of reports in proceedings, which are then subject to challenge.

(iii) This does not detract from the relevance of this type of information in the context of other decisions that are often sidelined in public scrutiny, such as decisions on admissibility or interim release. In these contexts, information by fact-finding bodies may remain of key importance, even at later stages of proceedings (e.g., trial).

(iv) There is also a need for greater clarity. It would be helpful to develop guidelines specifying the role for hearsay and uncorroborated evidence. Some clarity should be brought to what elements ("material") need to be established to a certain standard of proof, and which elements ("subsidiary") can be proven with more circumstantial evidence.

(v) However, formal guidelines cannot solve everything. In practice, Chambers should be more explicit in explaining the way in which they use different sources of evidence. It is often unclear how they weigh different elements in relation to each other, the elements to be proven, and more generally their probative value. Presentations of evidence are often followed by a sweeping conclusion on whether the burden of proof at a particular stage of the proceedings has been met. This results in a lack of clarity, and more importantly, lack of predictability for both parties, Prosecution and defense, on how to prepare their cases.

Ultimately, these proposals go beyond the ambition of procedural streamlining of international criminal proceedings. Indeed, they are vital to the overall legitimacy of ICCTs by helping them to realize what is arguably at the heart of their procedures: respect for the rights of the defense and how they can be balanced with external interests, such as those of the victims, or the requirements of peace and truth. In this sense, the preceding developments are not mere "technicalities," which would aim at detracting from the real perceived beneficiaries of international justice, namely the victims. The decision by a society to provide due process rights to criminal defendants is no less of a normative choice than the one to grant victims their rightful place in the broader post- conflict processes of justice and reconciliation. Denying this would undermine the whole rationale of international criminal justice, which ultimately convinced Winston Churchill to agree to the Nuremberg Trial: not affording due process to those accused of even the most heinous crimes would have the effect of bringing the accusers to the level of their accused. As Robert Jackson, the American Chief Prosecutor in Nuremberg famously proclaimed:

> that four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.[118]

The current chapter aims at continuing this tradition of conditioning the exercise of power on a tribute to law and reason.

Notes

1. For analysis, see generally Jacobs and Harwood, "International Criminal Law outside the Courtroom: The Impact of Focusing on International Crimes for the Quality of Fact-Finding by International Commissions of Inquiry," in Bergsmo (ed.), *Quality Control in Fact-Finding* (2013) 325; Boutruche, "Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice," 16 *J. Conflict & Sec. L.* (2011) 105; Bassiouni and Abraham, "Identification of Issues in Relation to UN Fact-Finding Mechanisms," in Bassiouni and Abraham (eds.), *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies* (2013) 1; Martin and Sosa, "An Empirical Analysis of United Nations Commissions of Inquiry: Towards the Development of a Standardized Methodology," in Bassiouni and Abraham (eds.), *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies* (2013) 53; Grace and Bruderlein, "Building Effective Monitoring, Reporting, and Fact-Finding Mechanisms" (April 12, 2012) (unpublished): http://ssrn.com/abstract=2038854.
2. See generally Frulli, "Fact-Finding or Paving the Road to Criminal Justice?," 10 *J. of Int. Crim. Just.* (2012) 1323; Sunga, "Can International Criminal Investigators and Prosecutors Afford to Ignore Information from United Nations Human Rights Sources?," in Bergsmo (ed.), *Quality Control in Fact-Finding* (2013) 359, at 401.
3. ICC, *Prosecutor v. Lubanga*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, Trial Chamber (14 March 2012), at para. 130.
4. See generally Wilkinson, "Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions," Geneva Academy of International Humanitarian Law and Human Rights (2011): http://www.geneva-academy.ch/docs/reports/Standards%20of%20proo%20report.pdf.
5. See Bergsmo and Wiley, "Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes," in Skåre, Burkey, and Mørk (eds.), *Manual on Human Rights Monitoring* (2008), at 13, 22: http://www.jus.uio.no/smr/english/about/programmes/nordem/publications/manual/current/kap10.pdf; Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (2010) 4.
6. Polycentricity is a concept of organization that involves multiple centers. In administrative law, it is associated with "consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties." See Supreme Court of Canada, *Pushpanathan v. Canada* (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982, at para. 36.
7. See Bergsmo and Wiley, *supra* note 5, at 3.
8. See generally Steinberg, Herzberg, and Berman, *Best Practices for Human Rights and Humanitarian Fact-Finding* (2012).
9. See ICC, *Prosecutor v. Ngudjolo*, Judgment Pursuant to Article 74, Trial Chamber (18 December 2012), at para. 294 ("the Chamber wishes to emphasise, that conducting an investigation into human rights violations is not subject to the same rules as those for a criminal investigation. Reports are prepared in a non-adversarial manner; they are essentially based on oral testimony, sometimes derived from hearsay, and the identity of sources is always redacted").
10. See Cassese, "Gathering Up the Main Threads," in Cassese (ed.), *Realizing Utopia* (2012) 645 at 675.
11. Ibid. at 671.
12. See Akande and Tomkin, "International Commissions of Inquiry: A New Form of Adjudication?," *EJIL: Talk!* (6 April 2012): http://www.ejiltalk.org/international-commissions-of-inquiry-a-new-form-of-adjudication/.
13. See Frulli, *supra* note 2, at 1338.
14. Ibid. at 1328.
15. See Bassiouni and Abraham (eds,), *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies* (2013).
16. See e.g. Saxon, "Purpose and Legitimacy in International Fact-Finding Bodies," in Bergsmo (ed.), *Quality Control in Fact-Finding* (2013) 211, at 224 ("Fact-Finding Missions that ignore or minimize the need for accountability for fundamental and systematic violations of human rights undermine one of the most significant benefits of fact-finding work"); Sunga, *supra* note 2, at 401 ("international criminal investigators and prosecutors cannot afford to ignore information from UN human rights sources").

17. See e.g. Re, "Fact-Finding in the Former Yugoslavia: What the Courts Did," in Bergsmo (ed.), *Quality Control in Fact-Finding* (2013) 279, at 323 (arguing that "[f]act-finding organisations . . . can and should learn from how criminal courts scrutinize the conclusions and information in their reports").
18. See Alston, "The Darfur Commission as a Model for Future Responses to Crisis Situations," 3 *J. of Int. Crim. Just.* (2005) 600, at 607.
19. See Heller, "The International Commission of Inquiry on Libya: A Critical Analysis" in Meierhenrich (ed.), *International Commissions: The Role of Commissions of Inquiry in the Investigation of International Crimes* (forthcoming), at 50: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2123782.
20. Ibid. at 51.
21. See "The Prevention Toolbox Systematizing Policy Tools for the Prevention of Mass Atrocities," Australian Civil-Military Centre (2013) 4: http://acmc.gov.au/wp-content/uploads/2013/09/6-The-Prevention-Toolbox-COI.pdf.
22. For a survey, see Martin and Sosa, *supra* note 1.
23. Its mandate was to "examine and analyse information gathered with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of [IHL] committed in the territory of the former Yugoslavia." See UN SC, "Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council," UN Doc. S/1994/674, (27 May 1994), at para. 24 (Final Report of the Yugoslavia Commission of Experts). The Commission received over 65,000 pages of documentation and conducted interviews with 223 victim-witnesses, which led to the identification "of close to 1,500 cases." See Bassiouni, "Appraising UN Justice-Related Fact-Finding Missions," 5 *Wash. U. J. L. & Pol'y* (2001) 35, at 46.
24. The Commission was established by the Security Council on July 1, 1994, that is prior to the establishment of the ICTR by Resolution 955, adopted on November 8, 1994. See UN SC, Final Report of the Commission of Experts established pursuant to Security Council Resolution 935 (1994), UN Doc. S/1994/1405 Annex, at para. 1. Its mandate was to "examine and analyse information submitted pursuant to resolution 935 (2004), together with such further information as the Commission of Experts may obtain through its own investigations . . . with a view to providing the Secretary-General with its conclusions on the evidence of grave violations of [IHL] committed in . . . Rwanda, including the evidence of possible acts of genocide" (para. 1). The Commission found "overwhelming evidence" that Hutus committed genocide against Tutsis. (para. 183). Due to a lack of time, it was unable to find evidence that Tutsi individuals committed genocide against Hutus (paras. 98 and 185).
25. The Commission was established by the Security Council on April 7, 2005, under SC Res 1595 (2005) to "assist the Lebanese authorities in their investigation of all aspects of this terrorist act, including to help identify its perpetrators, sponsors, organizers and accomplices." It involved 30 investigators from 17 states. It concluded that "there is converging evidence pointing at both Lebanese and Syrian involvement in this terrorist act" (para. 203) and recommended that the investigation should be continued by the Lebanese authorities, with international assistance and support (para. 206). See UN SC, "Report of the International Independent Investigation Commission established pursuant to Security Council Resolution 1595 (2005)," UN Doc. A/2005/662, (19 October 2005), at paras. 203, 206.
26. The Commission was established on September 18, 2004, by the Security Council under Resolution 1564 (2004) to investigate reports of violations of [IHL] and human rights law in Darfur, determine whether genocide occurred and "identify the perpetrators . . . with a view to ensuring that those responsible are held accountable." See UN SC, "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General," UN Doc. S/2005/60 (25 January 2005), at para. 2. The Commission concluded that the government of the Sudan and the Janjaweed are responsible for violations of international human rights and humanitarian law. Rebel movements were also considered responsible for violations that would amount to war crimes. In relation to genocide, the Commission found that the government of the Sudan did not pursue a policy of genocide, as "the crucial element of genocidal intent appears to be missing" (para. 640), but acknowledged that some individuals, may have committed acts with genocidal intent (para. 641). It identified the names of the persons who may be suspected to be responsible for international crimes in Darfur, but decided to keep the names out of the public domain in order to respect fair trial rights and protect witnesses (para. 645).
27. The mission was established by the Human Rights Council under Res S-9/1 to "investigate all violations of international human rights law and [IHL] 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." See HRC, "Report of the United Nations Fact-Finding Mission on the Gaza Conflict," UN Doc. A/HRC/12/48 (25 September 2009), at para. 1. The mission based its work on "international investigative standards developed by the United Nations." Ibid. at para. 17. It found that acts entailing individual criminal responsibility were committed but stated that its "findings do not attempt to identify the individuals responsible for the commission of offences nor do they pretend to reach the standard of proof applicable in criminal trials." Ibid. at para. 25.

28. The Commission was established by the Secretary-General on October 28, 2009. See UN SC, "Letter dated 28 October 2009 from the Secretary-General Addressed to the President of the Security Council," UN Doc. S/2009/556 (28 October 2009), at 1. It was mandated to "establish the facts and circumstances of the events of 28 September 2009 in Guinea and the related events in their immediate aftermath, qualify the crimes perpetrated, determine responsibilities, identify those responsible, where possible, and make recommendations." See UN SC, "Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea," UN Doc. S/2009/693 (18 December 2009), at para. 1. In its final report, the Commission assessed the individual criminal responsibility of perpetrators and listed them, in order to "guide any possible future criminal investigation of the presumed perpetrators of the human rights violations which took place at the stadium on 28 September 2009 and the days that followed." Ibid. at para. 212.
29. The International Commission of Inquiry on Libya was established by the Human Rights Council at its 15th session on 25 February 2011 by Resolution S-15/1. The Commission was mandated to "investigate all alleged violations of international human rights law in Libya, to establish the facts and circumstances of such violations and of the crimes perpetrated and, where possible, to identify those responsible, to make recommendations, in particular, on accountability measures, all with a view to ensuring that those individuals responsible are held accountable." See HRC Res. S-15/1, 25 February 2011, at para. 1. The Commission issued its final report on March 8, 2012. It concluded that international crimes, specifically crimes against humanity and war crimes, were committed by Qadhafi forces in Libya. It recommended further investigation regarding "civilian casualties" and targeting by NATO "that showed no evidence of military utility." See HRC, "Report of the International Commission of Inquiry," UN Doc. A/HRC/19/68 (8 March 2012), at paras. 3, 118, 122.
30. The Commission was created by Human Rights Council Resolution 16/25 to "investigate the facts and circumstances surrounding the allegations of serious abuses and violations of human rights committed in Côte d'Ivoire following the presidential election of 28 November 2010, in order to identify those responsible for such acts and to bring them to justice." See HRC, "Report of the Independent International Commission of Inquiry on Côte d'Ivoire," UN Doc. A/HRC/17/48 (Extract) (6 June 2011), at para 3. It concluded that many serious violations of human rights and IHL were perpetrated by different parties in Côte d'Ivoire. It attached a confidential appendix to its Report, which contained the names of individuals that it reasonably considered had committed crimes, which would be transmitted to relevant authorities undertaking criminal investigations. Ibid. at para. 118.
31. The Commission was established by the Human Rights Council to "investigate violations of international human rights law in [Syria] since July 2011, to establish the facts and circumstances that may amount to such violations and, where possible, to identify those responsible with a view of ensuring that perpetrators of violations are held accountable." See HRC Res. S-17/1, 23 August 2011, at para. 13. It found that "[g]overnment and pro-government forces have . . . conduct[ed] widespread attacks on the civilian population, committing murder, torture, rape and enforced disappearance as crimes against humanity." See HRC, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic," UN. Doc A/HRC/24/46 (16 August 2013), at 1. It mandated "accountability of those responsible for violations, including possible referral to international justice." Ibid. at para. 206.
32. On the ICC and Palestine, see Dugard, "Palestine and the International Criminal Court: Institutional Failure or Bias?," 11 *J. Int. Crim. Just.* (2013) 563; Meloni and Tognoni (eds.), *Is There a Court for Gaza? A Test Bench for International Justice* (2012).
33. On the ICC and the failed Syria referral, see Stahn, "Syria and the Semantics of Intervention, Punishment and Aggression: On 'Red Lines' and 'Blurred Lines,'" 11 *J. Int. Crim. Just.* (2013) 955, 973 et seq.
34. The Commission of Experts was established by the Secretary-General on January 11, 2005. It was mandated to review the Indonesian Ad Hoc Human Rights Court on East Timor in Jakarta, the Serious Crimes

Unit and the Special Panels; assess their effective functioning and the extent to which they achieved justice and accountability; "recommend legally sound and practically feasible measures so that those responsible are held accountable, justice is secured for the victims and people of Timor-Leste and reconciliation is promoted"; and consider how its analysis could assist the Commission of Truth and Friendship, which Indonesia and Timor-Leste agreed to establish. See UN SC, "Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999," UN Doc. S/2005/458 (15 July 2005), at para. 14.

35. The Mapping Exercise was tasked with assessing capacities within the national justice system to deal with human rights violations and formulate options to assist the DRC government to identify an appropriate transitional justice mechanisms to deal with these violations, in terms of truth, justice, reparation, and reform. See OHCHR, "Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003," (August 2010), at para. 2: http://www.ohchr.org/Documents/Countries/CD/DRC_MAPPING_REPORT_FINAL_EN.pdf [hereinafter "Report of the DRC Mapping Exercise"]. It did not aim to establish individual criminal responsibility, but rather to expose the seriousness of the violations, with the aim of encouraging an approach to break the cycle of impunity. The report recommended that a mixed judicial mechanism composed of national and international personnel would be the most appropriate way to provide justice for the victims of serious violations (para. 61 and fn. 52).
36. The mission was established by the Human Rights Council on December 13, 2006, to "assess the human rights situation in Darfur, and the needs of the Sudan in this regard." See HRC, "Report of the High-Level Mission on the situation of human rights in Darfur pursuant to Human Rights Council decision S-4/101," UN Doc. A/HRC/4/80 (9 March 2007), at para. 3. The mission issued its report on March 9, 2007. It found "grave violations of international human rights and humanitarian law" (para. 38) by government forces, militia and rebel movements. The mission noted a lack of justice and accountability within the Sudan and observed that action by the ICC "offered new hope that the protagonists in the Darfur conflict will begin to understand that gross violations of human rights and grave breaches of humanitarian law will be subject to direct consequences" (para. 73).
37. See Prevention Toolbox, *supra* note 21, at 2.
38. See also Re, *supra* note 17, at 280.
39. See Bergsmo and Wiley, *supra* note 5, at 9.
40. Moreno-Ocampo, "The International Criminal Court in Motion," in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009) 13, at 15.
41. See Statute of the Special Tribunal for Lebanon, UN Doc. S/RES/1757 (2007), Articles 4(2), 4(3).
42. Most notably, the last commissioner of UNIIIC, Daniel Bellemare, became the first Prosecutor of the STL.
43. See Special Tribunal for Lebanon, "Practice Direction on the Procedure for Taking Depositions under Rules 123 and 157 and for Taking Witness Statements for Admission in Court under Rule 155" (January 2010).
44. For the conditions of admissibility of evidence at trial, see STL, *Prosecutor v. Ayyash* et al., Decision on Compliance with the Practice Direction for the Admissibility of Witness Statements under Rule 155, STL-11-1/PT/TC, Trial Chamber (30 May 2013).
45. Jurdi, "Falling between the Cracks: The Special Tribunal for Lebanon's Jurisdictional Gaps as Obstacles to Achieving Justice and Public Legitimacy," 17 *U.C. Davis J. Int'l L. & Pol'y* (2010-2011) 253, at 263.
46. S/1994/1405.
47. Bassiouni, *supra* note 23, at 43.
48. Kaye, "Human Rights Prosecutors? The United Nations High Commissioner for Human Rights, International Justice, and the Example of Syria," UC Irvine School of Law Research Paper No. 2013-83 (January 4, 2013) (unpublished): http://ssrn.com/abstract=2196550.
49. See *supra* discussion surrounding note 9.
50. On the controversy on "witness proofing," see generally Ambos, "Witness Proofing before the ICC: Neither Legally Admissible nor Necessary," in Stahn and Sluiter, *The Emerging Practice of the International Criminal Court* (2009) 599.
51. See *supra* discussion surrounding note 44.
52. Office of the Prosecutor, Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report (2014), at http://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.

pdf (concluding that the "potential case(s) that would likely arise from an investigation of the flotilla incident would not be of sufficient gravity to justify further action by the Court". Para. 24).

53. See generally Stahn and Van den Herik, "Fragmentation, Diversification and 3D Legal Pluralism: International Criminal Law as Jack-in-the-Box?," in Van den Herik and Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law* (2012) 21.
54. For skepticism relation to the interplay between collective security and international justice, see Arbour, "Doctrines Derailed?: Internationalism's Uncertain Future," International Crisis Group (28 October 2013): http://www.crisisgroup.org/en/publication-type/speeches/2013/arbour-doctrines-derailed-internationalism-s-uncertain-future.aspx. For a discussion of Libya, see also Stahn, "Libya, the ICC and Complementarity: A Test for 'Shared Responsibility,"' 10 *J. Int. Crim. Just.* (2012) 325, at 326.
55. On problems of witness testimony, see Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (2005) 82, 89; International Bar Association, "Witnesses before the International Criminal Court," July 2013, at 43–48: http://www.ibanet.org/Article/Detail.aspx?ArticleUid=4470a96b-c4fa-457f-9854-ce8f6da005ed.
56. For a study, see Bekou, "Rule 11 BIS: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence," 33 *Fordham Int'l L. J.* (2009) 723.
57. See *infra* III.D.4.
58. See generally Doran, "Provisional Release in International Human Rights Law and International Criminal Law" 11 *Int. Crim. L. Rev.* (2011) 707; see also *infra* III .D.2.
59. See also *infra* III.D.3.
60. Rome Statute of the International Criminal Court (17 July 1998), 2187 UNTS 90 (Rome Statute), Art. 54(1)(a).
61. ICC, *Situation in Darfur*, Prosecutor's application under Article 58(7), ICC-02/05-56, Office of the Prosecutor (27 February 2007), at para.14.
62. Ibid.
63. ICC *Prosecutor v. Gbabo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11, Pre-Trial Chamber I (3 June 2013), at para. 35 (the Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity. Such pieces of evidence cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with article 54(l)(a) of the Statute).
64. See ICC, *OTP Strategic Plan June 2012–2015*, Office of the Prosecutor (11 October 2013), at para.23.
65. See generally Langer, "The Rise of Managerial Judging in International Criminal Law," 53 *Am. J. Comp. L.* (2005) 835.
66. See generally Merope, "Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC," 22 *Crim. L. Forum* (2011) 311; Jacobs, "A Shifting Scale of Power: Who Is in Charge of the Charges at the International Criminal Court?," in Schabas, McDermott, and Hayes (eds.), *The Ashgate Research Companion to International Criminal Law* (2013) 205.
67. But some caution is required. The idea that the "presumption of innocence" applies in a nonjudicial context such as a fact-finding commission can be challenged. Strictly speaking, it is related to the rights of the defense and the burden of proof, which are tied to the courtroom. See Jacobs and Harwood, *supra* note 1, at 355.
68. See generally Stahn, "Judicial Review of Prosecutorial Discretion: On Experiments and Imperfections," in Sluiter and Vasiliev (ed.), *International Criminal Procedure: Towards a Coherent Body of Law* (2008) 239.
69. This also possibly depends on what third-party fact-finding is being used to prove, as discussed below.
70. See Rome Statute, *supra* note 60, Art. 15(2),
71. For a survey of the type of information assessed, see ICC, "Policy Paper on Preliminary Examinations," Office of the Prosecutor (November 2013), at paras. 78–84.
72. Some might question whether a preliminary examination should indeed enter into such questions at such an early stage in the proceedings.
73. See ICC, *supra* note 71, at paras. 46-66.
74. See e.g. Situation in Colombia—Interim Report, Office of the Prosecutor, 14 November 2012.
75. See generally Rastan, "Situation and Case: Defining the Parameters" in Stahn and El Zeidy, *The International Criminal Court: From Theory to Practice* (2011) 421.

76. A link to the report is even provided in the OTP statement formally announcing the beginning of the investigation. See ICC, "The Prosecutor of the ICC opens investigation in Darfur," ICC-OTP-0606-104 (Press Release) (6 June 2005): http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2005/Pages/the%20prosecutor%20of%20the%20icc%20opens%20investigation%20in%20darfur.aspx.
77. See ICC, *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01-09, Pre-Trial Chamber I (4 March 2009), at para. 88, and references in notes 77, 85, 86, 93, 103.
78. See also ICC, *Prosecutor v. Al Bashir,* Second Decision on the Prosecution's Application for a Warrant of Arrest, ICC-02/05-01/09-94, Pre-Trial Chamber I (12 July 2010), at paras. 4-40.
79. See Jacobs, "The Burden and Standard of Proof," in Sluiter et al. (eds.), *International Criminal Procedure, Principles and Rules* (2013) 1128, at 1149.
80. See e.g. ICC, *Prosecutor v. Lubanga*, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, ICC-01/04-01/06-2517-Red, Trial Chamber (8 July 2010), at 22.
81. ICC, *Prosecutor v. Katanga and Chui*, Motifs de la decision orale relative al'exception d'irrecevabilite de l'affaire (article 19 du Statut), ICC-01/04-01/07-1213, Trial Chamber (16 June 2009), at 10.
82. See Rome Statute, *supra* note 60, Art. 13.
83. See above Section III.B for OTP decisions on Preliminary Investigations.
84. ICC, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya," ICC-01/09-19, Pre-Trial Chamber III (31 March 2010).
85. ICC, "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire," ICC-02/11-14, Pre-Trial Chamber III (3 October 2011).
86. Ibid. at para. 20.
87. *Supra* Section III.A.
88. See ICC, *Situation in Darfur*, Public Redacted Version of the Prosecutor's Application under Article 58, OTP, ICC-02/05-157-AnxA, Office of the Prosecutor (14 July 2008), at 20; ICC, *Situation in Darfur*, Prosecutor's application under Article 58(7), ICC-02/05-56, Office of the Prosecutor, (27 February 2007), at 40-42.
89. On one occurrence, a Single Judge in the *Bemba* case found that this lack of detail was a problem and pronounced the provisional release of the accused, stating that "In this regard, the Single Judge is of the opinion that the arguments provided by the Prosecutor and the OPCV reflect a general concern rather than an apprehension linked to any specific act or conduct of Mr Jean-Pierre Bemba himself. Admittedly, the submissions of the Prosecutor and the OPCV ought to be based on more concrete information." (ICC, *Prosecutor v. Bemba*, Decision on the Interim Release of Jean-Pierre Bemba Gombo, ICC-01/05-01/08-475, Pre-Trial Chamber II (14 August 2009), at para. 72). The decision was however overturned on appeal.
90. "13. The Prosecution has thoroughly evaluated the conclusions of the UNCOI and the NCOI, and the materials underlying the findings of those commissions. For example, on 5 April 2005, the Prosecution received more than 2,500 items, including documentation, video footage and interview transcripts which had been gathered by the UNCOI, together with a sealed envelope containing the conclusions reached by that commission as to persons potentially bearing criminal responsibility for the crimes in Darfur.

    14. As this application makes clear, the Prosecution has benefited greatly from the information furnished by the UNCOI and the NCOI. as well as other organisations and entities with knowledge regarding potential crimes. The Prosecution nonetheless has an obligation to conduct an independent investigation which, inter alia, seeks and considers evidence which might either corroborate or impugn information collected by other entities. The Prosecution labours under duties imposed by the Rome Statute to conduct an independent investigation, which includes an examination of incriminating and exculpatory information and which yields evidence capable of satisfying the relevant criminal burden of proof. Accordingly, since the investigation started, in June 2005, the Prosecution has collected statements and evidence, in conformity with the procedural requirements of this Court, during 70 missions conducted in 17 countries." ICC, *Situation in Darfur*, Prosecutor's application under Article 58(7), ICC-02/05-56, Office of the Prosecutor (27 February 2007), at paras. 13-14.

91. ICC, *Prosecutor v. Bemba,* Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre Trial Chamber III entitled "Decision on application for interim release," ICC-01/05-01/08-323, Appeals Chamber (16 December 2008), at paras. 41-68; ICC, *Prosecutor v. Gbagbo*, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled 'Decision on the "Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo"' ICC-02/11-01/11-278-Red, Appeals Chamber (26 October 2012), at paras 51-71.
92. UN SC, "Final report of the Group of Experts on Côte d'Ivoire Pursuant to Paragraph 16 of Security Council Resolution 2045 (2012)," UN Doc. S/2013/228 (17 April 2013), at para. 19.
93. ICC, *Prosecutor v. Gbagbo*, Third decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute, ICC-02/11-01/11-454, Pre-Trial Chamber I (11 July 2013), at para. 42.
94. On this, see Jacobs, "The Burden and Standard of Proof," in Sluiter et al. (eds.), *International Criminal Procedure, Principles and Rules* (2013), 1128, at 1149.
95. See Rome Statute, *supra* note 60, Art. 61(6), which provides for the right of the Defense to object to the charges, challenge the evidence of the Prosecutor, and present its own evidence.
96. ICC, *Prosecutor v. Katanga and Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, Pre-Trial Chamber I (30 September 2008), at paras. 138-140; ICC, *Prosecutor v. Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, Pre-Trial Chamber II (15 June 2009), at para. 51; ICC, *Prosecutor v. Ruto, Sang and Kosgey*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, Pre-Trial Chamber II (23 January 2012), at para. 74; ICC, *Prosecutor v. Kenyatta, Muthaura and Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, Pre-Trial Chamber II (23 January 2012), at para. 86.
97. See ICC, *Prosecutor v Mbarushimana*, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, Pre-Trial Chamber I (16 December 2011), at paras 113–239.
98. ICC, *Prosecutor v. Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, Pre-Trial Chamber I (3 June 2013), at para. 35. See *infra* Section III.E.1.
99. See e.g. ICC, *Prosecutor v. Bemba*, Decision on the admissibility and Abuse of Process Challenges, ICC-01/05-01/08-802, Trial Chamber III (24 June 2010), at para. 261 (where the Trial Chamber relied quasi exclusively on national decisions in relation to ongoing proceedings against the accused to declare that the Central African Republic was unable to prosecute and that therefore the case was admissible).
100. ICC, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya," ICC-01/09-19, Pre-Trial Chamber III (31 March 2010), at para. 182.
101. See ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Decision on the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-01/11-466-Red, Pre-Trial Chamber I (11 October 2013), at paras. 169-310.
102. Almqvist, "Complementarity and Human Rights: A Litmus Test for the International Criminal Court," 30 *Loy. Los Angeles Int. & Comp. L. Rev* (2008) 335, at 339; Ellis, "The International Criminal Court and Its Implication for Domestic Law and National Capacity Building," 15 *Fla. J. Int. L.* (2002) 215, at 241. For discussion, see also Stahn, *supra* note 54, at 345-346.
103. Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process," 17 *Crim. L. Forum* (2006) 225, at 233-234.
104. ICC, *Prosecutor v. Gaddafi and Al-Senussi*, Decision on the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-01/11-466-Red, Pre-Trial Chamber I (11 October 2013), at para. 245.
105. See generally Smeulers (ed.), *Collective Violence and International Criminal Justice* (2010).
106. See Rome Statute, *supra* note 60, Art. 7.
107. See ibid., Art. 8.
108. ICC, *Prosecutor v. Gbagbo*, soumissions écrites de la défense portant sur un certain nombre de questions discutées lors de l'audience de confirmation des charges, ICC-02/11-01/11-429-Conf, Equipe de Défense du Président Gbagbo (28 March 2013), at paras. 94-100.
109. ICC, *Prosecutor v. Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, Pre-Trial Chamber I (3 June 2013), at paras. 22 and 35.

110. ICC, *Prosecutor v. Gbagbo*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute," ICC-02/11-01/11-572, Appeals Chamber (16 December 2013), at paras. 37-38.
111. UN SC, "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General," UN Doc. S/2005/60 (25 January 2005), at para. 520.
112. See ICC, *Prosecutor v. Bashir,* Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Separate and Partly Dissenting Opinion of Judge Anita Usacka, ICC-02/05-01/09-3, Pre-Trial Chamber I (4 March 2009), at paras. 25-33.
113. See ICC, *Prosecutor v. Bashir*, Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir," 3 February 2010, ICC-02/05-01/09-73, Appeals Chamber (3 February 2010).
114. See ICC, *Prosecutor v. Bashir*, Second Decision on the Prosecution's Application for a Warrant of Arrest, ICC-02/05-01/09-94, Pre-Trial Chamber I (12 July 2010), at para. 4.
115. See also Bergsmo and Wiley, *supra* note 5, at 11.
116. See ICC, *Prosecutor v. Gbagbo*, Document amendé de notification des charges, ICC-02/11-01/11-357-Anx1-Red, Office of the Prosecutor (25 January 2013), at para. 59.
117. See generally also Jacobs and Harwood, *supra* note 1.
118. Jackson, "Opening Statement before the International Military Tribunal" (21 November 1945): http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/.