

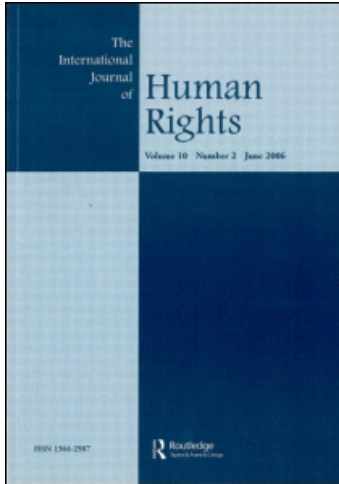
This article was downloaded by: [Sunga, Lyal S.]

On: 30 January 2011

Access details: Access Details: [subscription number 932654059]

Publisher Routledge

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## The International Journal of Human Rights

Publication details, including instructions for authors and subscription information:

<http://www.informaworld.com/smpp/title~content=t713635869>

### How can UN human rights special procedures sharpen ICC fact-finding?

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Online publication date: 22 January 2011

**To cite this Article** Sunga, Lyal S.(2011) 'How can UN human rights special procedures sharpen ICC fact-finding?', The International Journal of Human Rights, 15: 2, 187 – 205

**To link to this Article:** DOI: 10.1080/13642987.2011.537466

**URL:** <http://dx.doi.org/10.1080/13642987.2011.537466>

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## How can UN human rights special procedures sharpen ICC fact-finding?<sup>1</sup>

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This article explores how information gathered or received by the range of United Nations human rights special procedures investigative and monitoring mechanisms can help to improve International Criminal Court (ICC) fact-finding and sharpen the prosecutor's case. The author focuses on how the ICC could draw upon human rights fact-finding mechanisms (whether of the Human Rights Council or the Security Council), highlighting both limitations and potentialities of various fact-finding special procedures as well as those of the United Nations human rights treaty bodies, field presences deployed by the United Nations Office of the high commissioner for human rights and United Nations or regional peace-keeping operations and NGOs. It is argued that human rights fact-finding mechanisms should focus more on the eventuality of international or domestic criminal prosecutions and adjust their working methods accordingly. On the other hand, the ICC prosecutor should adopt a much more coherent, structured and balanced approach to the use of UN human rights fact-finding sources. The author concludes with a set of recommendations on the optimal relation between human rights and prosecutorial fact-finding.

**Keywords:** human rights; special procedures; fact-finding; International Criminal Court (ICC); information-gathering; criminal investigations; genocide; war crimes; crimes against humanity; International Criminal Tribunal for the Former Yugoslavia; International Criminal Tribunal for Rwanda; Darfur; UN Human Rights Council; UN Security Council; prosecutions

### Focus of the discussion

To fulfil its important mission to halt, prevent and deter individuals, whether they are private individuals or public officials, regardless of rank or official capacity, even heads of state, from committing or ordering to be committed the most egregious of crimes of international concern, the International Criminal Court (ICC) must gather and analyse pertinent, credible and reliable information that can be corroborated and adduced as evidence in court for the purposes of criminal prosecution. Since the Rome Statute of the ICC<sup>2</sup> entered into force on 1 July 2002, a major concern therefore has been how to enhance the ICC's fact-finding capabilities.

The ICC's need for information is especially acute for at least three reasons. First, an individual cannot be tried fairly, convicted, sentenced and punished, without a case that proves criminal responsibility beyond a reasonable doubt – a high burden for the prosecution.<sup>3</sup> Secondly, ICC cases can be particularly complex given that the crimes

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within its jurisdiction – aggression, genocide, war crimes and crimes against humanity – are usually committed in a systematic or widespread manner. They inevitably involve state officials and governmental organs, rebel groups or other organised entities which are capable of inflicting atrocities on a mass scale. Such entities often prove to be particularly adept at destroying evidence and concealing the identities of perpetrators. Thirdly, mass violations frequently are committed in a situation of armed conflict or severe social violence which complicates the documentation of violations. Much may be known about the suffering caused by serious violations, but far less about precisely who committed what, where, when, why and how. Fourthly, criminal prosecutions require intensive resources to be carried out properly and many situations around the world would have to be investigated simultaneously. The ICC simply does not have sufficient resources to conduct thorough monitoring and fact-finding of situations in many countries at once. For all these reasons, the ICC has to rely not only on first-hand testimonies and eye witness accounts, which of course are very important, but also on information that might become available through the UN and/or regional organisations, peace-keeping operations, non-governmental organisations (NGOs), media organisations and other reliable sources.

In many instances that have attracted the attention of the ICC prosecutor, various UN human rights special procedures may have already collected information or may be collecting information on an ongoing basis that could sharpen the prosecutor's case. These mechanisms can constitute reliable sources to help the ICC: understand the general background or situation; place discrete events or incidents such as massacres into wider perspective; and in some instances, to identify cases ripe for prosecution. The following discussion therefore focuses on how the ICC could draw upon human rights fact-finding mechanisms (whether of the Human Rights Council or the Security Council) with a greater appreciation of both limitations and potentialities of various fact-finding procedures.

With these concerns in mind, I first distinguish UN human rights fact-finding from international prosecution-related fact-finding. Secondly, I compare and contrast the experiences of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) in order to identify both key potentialities and limitations for optimising the role of UN human rights fact-finding in international criminal prosecutions. Thirdly, looking at the question from the opposite angle I ask 'how could the ICC better use UN human rights fact-finding?', referring to the ICC's response to the situation in Darfur before offering some concluding reflections. The discussion therefore focuses mainly on UN Human Rights Council special procedures as well as UN Security Council Commissions of Experts, but for the sake of sketching out human rights fact-finding in a somewhat more comprehensive context, it touches also upon the relevance of UN human rights treaty bodies, field presences deployed by the UN Office of the High Commissioner for Human Rights (OHCHR), UN or regional peace-keeping operations and the work of NGOs.

I argue that in situations involving the crimes of aggression, genocide, war crimes or crimes against humanity, closer coordination between UN human rights special procedures and the ICC's Office of the Prosecutor could do much to enhance ICC prosecutions. On the one hand, UN human rights fact-finding mechanisms should focus more on the eventuality of international or domestic criminal prosecutions and adjust their working methods accordingly. On the other hand, the ICC prosecutor should adopt a much more coherent, structured and balanced approach to the use of UN human rights fact-finding sources (chiefly that of UN Human Rights Council special procedures and UN Security Council investigative mechanisms) to establish more carefully key facts in their proper context, without compromising evidentiary integrity and admissibility. Although my argument focuses mainly on the potential role and limitations of UN human rights fact-finding in ICC prosecutions, it

applies broadly also to fact-finding in other fora involving the prosecution of individuals for genocide, war crimes or crimes against humanity.

### How do UN human rights and international criminal law fact-finding differ?

It is often said that: ‘the facts speak for themselves’, but strictly speaking, this is not true. A given set of facts is open to an indefinite number of interpretations about what it actually means and indeed, the relevance of a set of specific facts to a particular issue at hand must be assessed and understood in its proper context. Not only that, but great care must be taken to ensure that the particular facts put forward to support a particular hypothesis actually represent the real situation as a whole. Accurate reporting of ‘facts’ might be highly misleading, even prejudicial, if presented out of context. More fundamentally, preconceptions about what one is looking for conditions one’s view even about what counts as ‘a fact’ and what does not. People, including investigators, tend to recognise as ‘facts’ representations about reality that support rather than contradict their own background views, suppositions, presumptions and prejudices.

UN human rights fact-finding involves collection and analysis of information and reporting on violations mainly in relation to the responsibility of the state (and rebel movements which assume state responsibility if they succeed in forming a government) rather than in relation to individual criminal responsibility. It therefore focuses mainly on the human rights situation as a whole. References to individual cases more often are used to illustrate patterns and trends in violations rather than to follow up on individual cases themselves. Although UN human rights special rapporteurs and certain working groups do issue urgent action appeals and request governments for information on the human rights situation of specific individuals, historically, the main thrust of human rights special procedures has been and continues to be on human rights situations in a larger sense, whether on a thematic or country basis, and on state rather than individual responsibility.<sup>4</sup>

UN human rights fact-finding is therefore intended mainly to pressure governments to comply fully with their human rights and humanitarian law obligations, including to provide redress for victims of past wrongs.<sup>5</sup> As such, it relates primarily to ‘internationally wrongful acts’ of the state. In contrast, international prosecution-related fact-finding relates to the crimes set forth in the relevant instrument, such as the Statutes of the ICTY, ICTR or the ICC, with a view to halting, deterring and preventing crimes. International prosecutions therefore focus on individual criminal responsibility rather than state responsibility. Proving the position of the individual within the formal or actual hierarchy of the state as well as the existence of state policy and action implicating it in crimes under international law can be critical to a finding of guilt or innocence in individual cases.

Moreover, human rights fact-finding and international-prosecution related fact-finding differ as regards their respective burdens of proof, and in relation to special procedural requirements in criminal trials.<sup>6</sup> For example, in an ICC trial, the criminal guilt of the accused for an act of genocide has to be proven ‘beyond a reasonable doubt’ in line with all applicable international fair trial standards. The prosecution has to establish that the accused committed the *actus reus* specific to the particular act that qualifies as a crime within the tribunal or court’s competence and that he or she possessed the requisite *mens rea* at the time he or she committed the criminal act. In a non-criminal case on state responsibility for genocide, however, the International Court of Justice (ICJ) has required something less: ‘proof at a high level of certainty appropriate to the seriousness of the allegation’.<sup>7</sup> In a non-criminal case involving state responsibility for ordinary wrongs, the case has to be proven on a balance of probabilities as in civil trials – a

still lower standard used, for example, in the *Corfu Channel Case*, where the ICJ held that the victim state:

... of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.<sup>8</sup>

The *Corfu Channel Case* formula leans heavily towards the doctrine of objective responsibility for state acts in the sense that it is not necessary to prove a state's intention to have committed a particular act or omission.<sup>9</sup> Proving intention on the part of state agents to commit an act or omission, and then to attribute that intended act to the state, is notoriously difficult if not impossible in many instances. It has therefore become settled international law that the key questions in establishing whether an act or omission of the state gives rise to international responsibility concern proof that the act or omission was committed, that the act is attributable to the state, that it breaches the state's international legal obligations, and that the state did not have lawful excuse that excludes it from responsibility. Similarly, a state may be found responsible under international law for conduct of a state organ or of an entity or individual with governmental authority even if that entity exceeds its authority or breaks government instructions to the contrary.<sup>10</sup>

As regards special procedural requirements, the ICC is bound to apply higher admissibility standards to preserve the presumption of innocence of the accused and to ensure a fair trial in line with Article 21(3) of the Rome Statute which obliges the court to apply and interpret the law in a manner 'consistent with internationally recognized human rights'. Whereas human rights fact-finding relies primarily on information in the public domain, criminal prosecutions often must obtain specific evidence confidentially to avoid tampering, interference or other tainting of potential evidence, and to ensure an unbroken chain of custody from collection to analysis to court. In short, human rights fact-finding is usually more general and less rigorous than fact-finding required for criminal prosecutions.

That human rights fact-finding is more general, less precise and less burdened by strict procedural requirements than prosecution-related fact-finding, has sometimes misled international criminal prosecutors, especially those coming from adversarial common law jurisdictions featuring highly complex evidentiary procedures, to assume erroneously that UN human rights information is virtually worthless for criminal prosecutions. However, a look at the ICTY's and ICTR's experience, particularly in regard to the Security Council's Commissions of Experts investigative procedures, reveals limitations, but also potentialities in the role of UN human rights information sources in criminal prosecutions.

### **UN human rights fact-finding in relation to the ICTY and ICTR – background and similarities**

In both the former Yugoslavia and Rwanda, human rights special procedures fact-finding mechanisms acted first as precursors to the establishment of ad hoc international criminal tribunals namely, the ICTY and ICTR, and then as conduits of information to these bodies. However, the ICTR's use of UN human rights fact-finding information differed markedly from that of the ICTY, owing to a number of important dissimilarities between the tribunals themselves as well as the UN human rights fact-finding mechanisms associated with them.

For each instance, the UN Commission on Human Rights (the predecessor body of the UN Human Rights Council) appointed special rapporteurs to report on the scale and

character of violations in each territory. The reports of the special rapporteurs helped to establish that the violations should be considered as crimes under international law and should be prosecuted as such through international criminal tribunals, rather than to expect domestic courts, which were either unwilling (in some successor states of the former Yugoslavia) or unable (Rwanda) to carry out this responsibility.

With regard to both the former Yugoslavia and Rwanda, the UN Security Council invoked ‘the threat or breach of international peace and security’ under Chapter VII of the Charter of the United Nations as the legal ground to set up temporary ‘Commissions of Experts’ to investigate facts and responsibilities. These Commissions of Experts, which the secretary-general took measures to support with staff from the then UN Centre for Human Rights (the predecessor body that was integrated into OHCHR), led to the establishment of the ICTY and ICTR themselves. In both the former Yugoslavia and Rwanda, OHCHR deployed human rights field presences to continue investigations into past violations, monitor the ongoing human rights situation and provide technical cooperation in the field of human rights to the territorial government or governments.

### **UN human rights fact-finding in relation to the ICTY**

In the former Yugoslavia, Josip Broz Tito’s death on 4 May 1980 unleashed resurgent claims for greater autonomy from the Federal Government of Yugoslavia which eventually coalesced into secessionist movements. Slovenia’s declaration of independence on 8 May 1991 emboldened other Yugoslav Republics also to agitate for secession. The European Community’s premature recognition of both Slovenia and Croatia on 15 January 1992 arguably exacerbated the situation.<sup>11</sup> This chaotic situation paved the way for the disintegration of the former Yugoslavia,<sup>12</sup> the settling of old scores among various ethnic groups and the onset of full-scale and protracted armed conflict in which serious violations of human rights and humanitarian law were perpetrated on a widespread and systematic basis.<sup>13</sup>

Reacting to the violence, the UN Commission on Human Rights held its first ever special session outside the usual March–April annual timetable. The Commission adopted Resolution 1992/S-1/1 on 14 August 1992 requesting the Commission’s Chairman to appoint a special rapporteur ‘to investigate first hand the human rights situation in the territory of the former Yugoslavia, in particular within Bosnia and Herzegovina’. In his first report,<sup>14</sup> Special Rapporteur, Mr Tadeusz Mazowiecki, who had served as prime minister during Poland’s transition to democracy, underlined the need to prosecute perpetrators of severe violations and the importance of ‘the systematic collection of documentation on such crimes and of personal data concerning those responsible’.<sup>15</sup> The special rapporteur also recommended the establishment of a commission to identify and investigate specific cases with a view to eventual prosecution and to gather information which ‘should include data already collected by various entities within the United Nations system, by other intergovernmental organizations and by non-governmental organizations’.<sup>16</sup> Subsequent reports called for criminal investigation of war crimes and serious violations of humanitarian law and reiterated the importance of timely collection of information to support such investigations.<sup>17</sup> Various governments, international organisations and NGOs also urged international prosecutions to be carried out. This chorus of expert and public opinion calling for decisive UN action to hold individual perpetrators criminally responsible for the violations in the former Yugoslavia undoubtedly impelled the Security Council to establish the ICTY – a novel and remarkable development at the time – and it laid the groundwork for effective prosecution-related fact-finding.

The Security Council adopted Resolution 771 on 13 August 1992 requiring member states to submit reports on violations of humanitarian law perpetrated in the territory of the former Yugoslavia. Then, on 6 October 1992, the council adopted resolution 780<sup>18</sup> requesting the secretary-general to establish urgently a commission of experts on the former Yugoslavia. Resolution 780 tasked the Commission of Experts to examine and analyse information received from States in line with Resolution 771 (1992) and Resolution 780 itself 'together with such further information as the Commission of Experts may obtain through its own investigation or efforts, of other persons or bodies pursuant to Resolution 771 (1992), with a view to providing the secretary-general with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia'. The commission consisted of highly recognised experts of various nationalities in international humanitarian law, public international law, military law and international human rights law: Frits Kalshoven of The Netherlands to serve as Chairman; M. Cherif Bassiouni of Egypt; Mr William J. Fenrick of Canada; Mr Keba M'baye of Senegal; and Mr Torkel Opsahl of Norway.<sup>19</sup>

Significantly, the secretary-general stated in a report of 14 October 1992 that: 'I have naturally taken into account the mandate and work of the Special Rapporteur of the Commission on Human Rights with a view to minimising the duplication of effort, maximising the efficient use of scarce resources and reducing costs',<sup>20</sup> that he would 'expect that the Special Rapporteur of the Commission on Human Rights will cooperate closely with the Commission of Experts and provide it with all the information at his disposal'<sup>21</sup> and that the necessary administrative steps would be taken to ensure collaboration between the two entities.

The Commission of Experts held 12 sessions from November 1992 until April 1994, collected information from various sources, carried out a number of investigations, and submitted three reports to the Secretary-General on serious violations of international humanitarian law in the territory of former Yugoslavia. It referred to widespread patterns of 'wilful killing', 'ethnic cleansing', 'mass killings, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary arrests'.<sup>22</sup> Thus, the commission worked for 18 months to deal with the conflict in former Yugoslavia which was estimated to have cost some 200,000 lives by that time according to Cherif Bassiouni who became the commission's chairman and rapporteur.<sup>23</sup> Bassiouni reports that a number of governments contributed technical expertise, including forensic experts skilled in finding mass graves, conducting exhumations and investigations. Several governments also contributed the services of military lawyers. Many volunteers conducted interviews of victims of rape and other traumatic violations and to assist with mental health issues.<sup>24</sup> Although the Security Council adopted Resolution 827 deciding to establish the ICTY on 25 May 1993, the Commission of Experts continued to operate and gather information until April 1994. Bassiouni recounts that 'an archive of more than three hundred videotapes was compiled' from a wide variety of broadcast, print and electronic mass media concerning violations of international humanitarian law which he considers was useful for identifying relevant places and persons. A database was also turned over to the ICTY prosecutor.<sup>25</sup>

In short, from the outset, UN human rights fact-finding in the form of the special rapporteur's reports were instrumental in calling for criminal prosecutions and in building up political will to establish the ICTY. The Commission of Experts established by the Security Council was provided with a clear mandate to work closely with the special rapporteur, was adequately staffed with investigative personnel to work over a period of 18 months, and the information was provided to the ICTY prosecutor. One has to mention also that UNPROFOR,<sup>26</sup> as well as OHCHR's human rights field presences which were set up in various

successor states of the former Yugoslavia, also channeled information to the Commission of Experts and eventually to the ICTY prosecutor.

Even so, as Bassiouni concedes, most of the information gathered or received by the Commission of Experts could not be used directly as evidence in prosecutions but were useful more to help establish the location, character and scale of violations. He observes that UNPROFOR, the UN high commissioner for refugees and the ICRC considered that their mandates did not authorise them to provide information to the Commission of Experts. The parties to the conflict had limited resources and did not have trained personnel to collect such information. Governments were either unsure about the precise role of the Commission of Experts or had little political interest to provide information to it and NGOs were concerned to keep the identity of their sources confidential to avoid reprisals against victims, witnesses and their families.<sup>27</sup> An even more pervasive shortcoming was a lack of identification as to the source of information collected. Information that comes without a clear record of the source cannot be verified or falsified, corroborated or cross-examined. It therefore amounts to hearsay and has to be ruled inadmissible in criminal trials.

### **UN human rights fact-finding in relation to the ICTR**

Prior to the 1994 genocide in Rwanda, the population of Rwanda consisted of an estimated 85 per cent Hutu, 14 per cent Tutsi, and one per cent Twa and other.<sup>28</sup> Colonisation from Germany (1897 to 1916)<sup>29</sup> and Belgium (1916 until Rwanda's independence in 1962) employed a 'divide and rule' strategy of favouring the minority Tutsi monarchic elite over the Hutu majority through an elaborate patron-client system. The Belgian colonial administration formalised the ethnic distinction between Hutu and Tutsi in 1933–1934 with the introduction of a mandatory identity card for each Rwandan citizen that indicated ethnic origin. This highly divisive colonial rule intensified inter-ethnic rivalry and distrust which periodically exploded into massacres of Tutsi civilians. In 1973, Juvénal Habyarimana, a Hutu from northern Rwanda, seized control of the government, and although he promised to establish equitable power sharing between the Hutu and Tutsi groups, by 1978, he had banned all opposition parties and made Rwanda officially a one-party state. This, and increased marginalisation of Tutsis from political decision-making in Rwanda, impelled Tutsi paramilitary forces to join together in the 1990's to form the Rwandese Patriotic Front (RPF). Under the leadership of Paul Kagame, the RPF began to make small-scale incursions from neighbouring countries into Rwanda as a way to pressure Habyarimana into better treatment of the Tutsi minority. In reaction to these incursions, Hutus sporadically massacred Tutsis<sup>30</sup> which destabilised large parts of Rwanda and forced the internal displacement of more than 350,000 people to the northern part of the country by 1992. Negotiations between the government of Rwanda and the RPF to try to lead Rwanda to multi-party elections, power-sharing, peace and the rule of law, as well as an end to the RPF insurgency, were successfully concluded on 4 August 1993 with the adoption of the Arusha Accords. The Accords were signed by the government of Rwanda and the RPF and sponsored by the governments of Tanzania, Belgium and Germany, as well as the United Nations. The conclusion of the Arusha Accords however led many more extremist Hutus to regard President Habyarimana as a sell-out and they began organising militia to plan the extermination of the Tutsi minority in Rwanda.

The tenuous human rights situation was signalled loud and clear by Mr Bacre Waly Ndiaye, UN special rapporteur of the commission on human Rights on extrajudicial, summary or arbitrary executions. His 36-page report,<sup>31</sup> released on 11 August 1993, based on his 10-day mission to Rwanda in April 1993 – one year before the Rwandan



genocide – described massacres of civilian populations, death threats and political assassinations, and the widespread use of the death penalty. Presciently, he considered that these violations might already qualify as ‘genocide’:

The cases of intercommunal violence brought to the Special Rapporteur’s attention indicate very clearly that the victims of the attacks, Tutsis in the overwhelming majority of cases, have been targeted solely because of their membership of a certain ethnic group, and for no other objective reason. Article II, paragraphs (a) and (b) [of the UN Genocide Convention]<sup>32</sup> might therefore be considered to apply to these cases.<sup>33</sup>

The special rapporteur went on to attribute responsibility for the violations to the Rwandan armed forces, local and other government officials, political party militias, clandestine organisations, private individuals, and members of the RPF. He also analysed the factors which had led to the degraded human rights situation, pinpointing an absence of the rule of law, a lack of minority protection, and the spread of hate propaganda. Mr Ndiaye had sounded the alarm bell, but tragically, the Commission on Human Rights and the international community at large seemed deaf to the warnings of the Rwandan disaster looming on the horizon.

The genocide in Rwanda commenced on 6 April 1994 following the shooting down of the presidential aircraft on its approach to Kigali Airport, killing everyone aboard which included President Juvénal Habyarimana of Rwanda, President Cyprien Ntaryamira of Burundi as well as several ministers and their entourages. Roadblocks were set up in Kigali by Hutu militia within 30–40 minutes of the downing of the aircraft. Identity cards were checked, Tutsis singled out, and murdered on the spot. When the prime minister Agathe Uwilingiyimana and 10 Belgian peace-keeping soldiers protecting her were tortured and killed the next day, the UN sharply reduced the strength of the UNAMIR peace-keeping contingent.<sup>34</sup> The massacres, which were perpetrated mainly by extremist Hutu militia associated with Habyarimana’s political party, the Coalition for the Defense of the Republic, Presidential Guard members and government of Rwanda forces, took the lives of between 500,000 and one million mainly Tutsi civilians as well as politically moderate Hutu leaders and their families.<sup>35</sup>

Not to establish an international criminal tribunal for Rwanda, as the Security Council had done with regard to the crimes committed in the former Yugoslavia, would have been plainly unjust, particularly with the very high death toll Rwanda had suffered in only some 100 days. Moreover, as subsequently documented by the UN Independent Inquiry on the Genocide in Rwanda, UNAMIR’s insufficient mandate, as well as inaction on the part of the Security Council to revise it while a wholesale extermination policy was being executed throughout the territory of Rwanda, basically forced the UN presence to stand idly by during the horrendous violence.<sup>36</sup> At the very least, the UN had to do its utmost to prosecute the perpetrators and assist Rwanda to re-establish the rule of law and promote conditions that would enable recovery from the catastrophe.

Politically therefore, the Security Council had little choice but to establish the Commission of Experts on Rwanda.<sup>37</sup> The council vested it with a fact-finding role which echoed that of the Commission of Experts for the former Yugoslavia, namely:

... to examine and analyze information submitted pursuant to the present resolution, together with such further information as the Commission of Experts might obtain, through its own investigations or the efforts of other persons or bodies, including the information made available by the Special Rapporteur on Rwanda, with a view to providing the Secretary-General with its conclusions on the evidence of grave violations of international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide.

By Resolution 935, the Commission of Experts was requested to report to the secretary-general within four months of its establishment. To this end, it produced a preliminary report and a final report, which concluded that there was 'overwhelming evidence to prove that acts of genocide against the Tutsi group were perpetrated by Hutu elements in a concerted, planned, systematic and methodical way'.<sup>38</sup> The commission noted that it had received 'from the two parties to the conflict thousands of pages of documents, letters, written complaints, testimony and other items (sound and audio-visual recordings) instancing serious violations of international humanitarian law' the value of which varied widely but that '[s]ome of these documents contain non-exhaustive lists of the principal suspects'. The commission recommended international prosecution of the perpetrators of acts of genocide and associated violations, which led to the Security Council's adoption on 8 November 1994 of Resolution 955 to establish the ICTR.<sup>39</sup>

### **UN human rights fact-finding in relation to the ICTY and ICTR—differences**

The Commission of Experts and the special rapporteur on Rwanda were supposed to cooperate in the gathering of pertinent documents and testimonies that could be valuable for the ICTR prosecutor. A number of important differences in the UN response however reduced the potential contribution of UN human rights fact-finding to international prosecutions with regard to Rwanda.

First, rather than five experts well qualified in relevant fields of international law, drawn from various parts of the globe, such as those who had been appointed to address the situation in the former Yugoslavia, the Commission of Experts on Rwanda consisted of only three experts who claimed no specialist expertise in international criminal law, international humanitarian law or human rights. All were drawn from francophone West African countries (Togo, Mali and Guinea) rather than from a variety of regions in Africa, let alone the world, and they were far less known than the members of the Commission of Experts on the former Yugoslavia. A more international spectrum of experience and expertise could have lent greater credibility to this important fact-finding effort.

Secondly, the Commission of Experts for Rwanda was set up to last only four months during which it was expected to investigate massacre sites, interview witnesses, collect information from any other reliable source as well as to prepare two reports to the Security Council through the secretary-general. Practically speaking, it would have been very difficult for the three commission members to sift through the mass of documentary material, taped testimonies and other records it received in order to identify items of possible probative value to prosecutions.

Thirdly, effective fact-finding on the genocide, which had involved many thousands of victims and perpetrators, could not be dealt with effectively by the special rapporteur on Rwanda alone, but only in concert with the Commission of Experts and the UN Human Rights Field Operation in Rwanda (UNHRFOR) which was being set up in the latter half of 1994 under the auspices of the recently established OHCHR.<sup>40</sup> Certain coordination snags among these three entities at times hampered the effective channelling of information on investigations carried out by HRFOR's Special Investigative Unit (later renamed the 'Legal and Analysis Unit') however.

Fourthly, although a number of governments donated generously to support the cost of setting up and running UNHRFOR, the field presence's main purposes were: '(a) to carry out investigations into human rights violations; (b) to monitor the ongoing human rights situation and to help redress existing problems and to prevent future human rights violations from occurring; (c) to cooperate with other international agencies or programmes (including

UNAMIR, UNHCR, UNICEF, IOM, UNREO,<sup>41</sup> UNDP, and ICRC) and the NGO community in re-establishing confidence and thus facilitate the return of refugees and displaced persons and the rebuilding of civic society; and (d) to implement programmes of technical cooperation in the field of human rights, particularly in the area of the administration of justice'. These broad purposes not only stretched HRFOR's resources but they were to a certain extent contradictory. The investigation of the genocide was strongly supported by the RPF-dominated government of Rwanda, while monitoring of the ongoing situation was not, and so these disparate aims tended to complicate the UN's relationship with the government of Rwanda, reduce the level of cooperation between them and to a certain extent reduce the UN's fact-finding capabilities.

Fifthly, the plurality of UN human rights fact-finding mechanisms sometimes complicated and hindered the channelling of information to the ICTR prosecutor. HRFOR was mandated to provide information to: the secretary-general; the General Assembly; the high commissioner for human rights; the special rapporteur on Rwanda as well as that of other Commission on Human Rights rapporteurs and representatives; the Commission of Experts; the ICTR prosecutor; UN agencies, bodies and programmes operating in Rwanda such as UNHCR, UNDP and UNICEF; and UN member states represented in Kigali. Information had to be repackaged and presented in different ways to serve various institutional consumers. Practically speaking, this meant that human rights officers could not dedicate much time to collecting prosecution-related information for the ICTR or to ensure that it would meet the procedural requirements to be relevant, secure and admissible, or even to safeguard its confidentiality effectively. Early on, the Special Procedures Branch considered that in order to safeguard the identity of witnesses and not to risk causing prejudice to the eventual outcome of possible trials at the ICTR or through the Rwandan courts, it would turn over all information in its possession to the special rapporteur, Commission of Experts and ICTR on a confidential basis to be used in line with the particular mandate of the receiving entity as it saw fit and that only one copy would be made for each entity, with the original materials kept under lock and key in the UN archives.

In short, ICTY and ICTR experience shows clearly that it was unrealistic to expect fact-finding from either the UN human rights special procedures or the Security Council to furnish information of sufficient precision or reliability from which to construct a substantial part of the prosecution's case. Individual deponents who gave eyewitness accounts were often not identified at all or with insufficient precision which hindered verification at a later stage and rendered its adduction as evidence in court impossible. For the ICTY and ICTR, the multiplicity of information sources, UN human rights fact-finding bodies, and institutional information consumers, at a time when computers were just being introduced into the UN Centre for Human Rights (1994), further complicated consistent, coherent or systematic analysis of such information. However, it is also true that the information arising from Rwanda and the former Yugoslavia coming from the variety of UN sources discussed above, promoted support for the establishment of the ad hoc international criminal tribunals in the first place. Furthermore, broad-level information helped prosecutors to establish trends and patterns in violations. Such trends and patterns remain indicative of the possible existence of a systematic policy behind a series of attacks. This could prove critical to meeting the crimes against humanity threshold which requires that prohibited acts have to form 'part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds' as per Articles 3 and 7 of the ICTR and ICC Statutes respectively, and secondly to reveal the criminal responsibility of commanders or superiors in such crimes.

A look at the ICC prosecutor's approach to information gathering with respect to the situation in the Darfur region of the Sudan offers some additional lessons, as explored below.

### Lessons from the ICC's response to the situation in Darfur

The ICC prosecutor's heavy reliance on a variety of UN fact-finding sources to address crimes under international law perpetrated in the Darfur region of the Sudan again illustrates both potentialities and limitations in this approach.

In terms of potentialities, the ICC can and should rely on human rights fact-finding at various stages of the prosecutorial process. In this regard, it is valuable to recall Article 15 of the Statute of the ICC which authorises the prosecutor to initiate investigations *proprio motu* on the basis of information on crimes within the court's jurisdiction. Article 15(2) explicitly permits the prosecutor to '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'. Thus, the Statute of the ICC formally recognises the value of UN human rights fact-finding to ICC prosecutions, in particular with regard to: the prosecutor's decision to initiate (or not) an investigation into a 'situation'; the Pre-Trial Chamber's endorsement (or not) to proceed with an investigation; the Pre-Trial Chamber's determination as to whether domestic courts are unwilling or unable to prosecute (by virtue of Article 17 of the Rome Statute); as well as in prosecution and defense trial preparation in particular cases.

Prosecutor Luis Moreno-Ocampo cited reports of 'murders of civilians', 'rapes and outrages upon the personal dignity of women and girls', 'attacks intentionally directed against...civilian populations', 'destruction of property' and 'pillaging of towns' as grounds indicating that there was a reasonable basis upon which to open an investigation. Significantly, in a press release of February 2007, the Pre-Trial Chamber announced its endorsement of the prosecutor's application to proceed and the ICC prosecutor stated that:

We completed an investigation under very difficult circumstances, from outside Darfur, and without exposing any of our witnesses. We transformed their stories into evidence, and now the judges have confirmed the strength of that evidence...

One can imagine that in coming to this appreciation, UN human rights treaty body fact-finding may have been relevant. Sudan is a party to the International Covenant on Civil and Political Rights, 1966, the Convention on the Rights of the Child, 1989, the Convention on the Elimination of All Forms of Racial Discrimination, 1965, the Covenant on Economic, Social and Cultural Rights, 1966, as well as to the four Geneva Conventions of 12 August 1949. In August 2007, on the occasion of Sudan's third periodic report (submitted nine years late) to the UN Human Rights Committee responsible for monitoring the compliance of state-parties to the International Covenant on Civil and Political Rights, the Committee expressed its concern:

... particularly in the context of armed conflict, that widespread and systematic serious human rights violations, including murder, rape, forced displacement and attacks against the civil population, have been and continue to be committed with total impunity...<sup>42</sup>

In November 2006, the government of the Sudan submitted information to the UN Committee on the Rights of the Child, including that pursuant to its obligations under the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, to which it had acceded. In 2005, the UN Committee on the Elimination of All Forms of Racial Discrimination recommended that the Security Council take action to protect the civilian population against 'war crimes, crimes against humanity and the risk of

genocide'.<sup>43</sup> In short, some of the information that percolated up from NGO reports and the state's report to the UN human rights treaty bodies, together with the observations and recommendations of the treaty body itself, could assist the ICC prosecutor to understand the pattern of violations that might qualify as Rome Statute crimes, as well as the government's official attitude towards them.

As in the former Yugoslavia and Rwanda situations, more pertinent to international prosecutions were investigative procedures developed under the Human Rights Council and the Security Council. In contrast to treaty bodies, investigations carried out pursuant to Human Rights Council mandates do not depend on state consent (being extra conventional or Charter-based), and neither do Security Council investigations authorised under Chapter VII of the UN Charter in relation to a threat to or breach of international peace and security. Both can focus more directly on serious violations, respond flexibly to an unfolding and complicated situation such as that in Darfur, and draw information from intergovernmental organisations, governments, the ICRC, NGOs and other reliable sources. For this reason, special procedures are often much more effective than human rights treaty bodies at accessing sensitive information pertaining to international criminal prosecutions.

A range of UN investigative procedures paved the way for ICC indictments, namely:

- the Security Council's International Commission of Inquiry on Darfur<sup>44</sup> which looked into reports of violations of international humanitarian law and human rights law in Darfur by all parties, considered whether or not acts of genocide occurred, identified a number of perpetrators of such violations, and transmitted a list of likely suspects in a sealed file to the UN secretary-general and the UN high commissioner for human rights;
- the Human Rights Council's High Level Mission on the Human Rights Situation in Darfur which in its 2007 Report,<sup>45</sup> indicated that the 'justice system as a whole was unable or unwilling to pursue justice or prevent attacks'. This relates also to the Rome Statute Article 17 requirement that before the ICC can take up a case, it must determine that a state with jurisdiction to prosecute is 'unwilling or unable' to do so; and
- the UN Human Rights Council's Group of Experts on Darfur which was composed of the special rapporteur on the situation of human rights in the Sudan, the special rapporteur on extrajudicial, summary or arbitrary executions, the special representative of the secretary-general for children and armed conflict, the special rapporteur on violence against women, its causes and consequences, the special representative of the secretary-general on the situation of human rights defenders, the representative of the secretary-general on the human rights of internally displaced persons, and the special rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment.

The UN Human Rights Council's Group of Experts on Darfur documented ongoing serious violations of human rights and humanitarian law in its Final Report of 10 December 2007.<sup>46</sup> Because the security situation drove many NGOs out of Darfur, the Group of Experts had to rely more on information from the Government of the Sudan itself, human rights components of the African Union/UN Mission in Sudan peacekeeping forces, as well as UN agencies, bodies and programmes operating in Darfur.

Whereas some of the ICTY and ICTR prosecution staff did not trust the integrity and probative value of basic human rights information gathered by various other UN sources, even to establish important contextual, background information on the situation as a whole, the ICC prosecutor has seemed too willing to accept reports from UN fact-finding mechanisms, the

ICRC and NGOs without first-hand verification/falsification/corroboration, conducting *in situ* visits, or adequately exploring possibilities for cooperation with the government in Khartoum and the two main rebel movements in Darfur (JEM and SLM/A). Both Antonio Cassese (who led the Security Council's Commission of Inquiry into the Darfur situation, formerly president of the ICTY) and Louise Arbour (then high commissioner for human rights and former ICTY and ICTR prosecutor) strongly criticised ICC prosecutor Luis Moreno Ocampo in 2006 *amicus curiae* briefs<sup>47</sup> to the ICC for failing to:

- identify the chain of command even though the government had agreed to allow interviews with the armed forces;
- request government protection of victims and witnesses;
- request government assistance to allow the Pre-Trial Chamber to protect victims and witnesses;
- draw fully on OHCHR human rights monitors for detailed information;
- request the rebel movements to cease hostilities to allow for ICC interviews;
- make best efforts to obtain documentary evidence on the location of army and militia units at the time violations were committed; or
- provide a strong ICC presence in Darfur to help prevent further violations.

Omar Hassan Ahmad Al Bashir, current president of the Sudan has become the subject of an ICC warrant of arrest (issued by the Pre-Trial Chamber on 4 March 2009) in respect of: five counts of crimes against humanity including murder; extermination, forcible transfer of population, torture, rape; and two counts of war crimes, in particular, intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities, and pillaging.

Here again, the ICC prosecutor's strategy of issuing open (rather than sealed) indictments for President Bashir and two other individuals, telegraphed the ICC's intentions to the government which has helped Bashir to evade justice and frustrate the ICC's fact-finding process. Moreover, the prosecutor's choice to accuse a sitting head of state of genocide (which entails a relatively high evidentiary burden of proof to prove *mens rea*), and of not indicting other ministers or key personnel in the political and military chain of command, has complicated and weakened prospects for ICC fact-finding in Darfur. Bashir's immediate reaction following the prosecutor's announcement of the indictment was to expel human rights NGOs and humanitarian agencies from Darfur,<sup>48</sup> drying up information sources not to mention urgently needed humanitarian relief.

### **Some reflections on how the ICC could better use human rights fact-finding**

The ICTY, ICTR and ICC experiences to date reflect the potentialities of UN human rights fact-finding in international prosecutions.

First, the ICC regime in effect demands information from reliable sources because it does not have the resources itself to monitor and investigate situations simultaneously in several countries plagued by crimes under international law.

Secondly, Human Rights Council special procedures and Security Council investigative missions have a global reach in terms of fact-finding and investigation, monitoring and reporting. They have accumulated a half century of experience since the General Assembly's Special Committee on the Policies of Apartheid began to review individual communications in 1961 – a model that inspired the eventual adoption of ECOSOC Resolution 1235 in 1967 authorising the commission and the sub-commission on the Prevention of

Discrimination and Protection of Minorities ‘to examine information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of apartheid’. International criminal law fact-finding, in contrast, is still in its infancy, and it remains heavily reliant on national law enforcement procedure and personnel that are not necessarily suited to prosecute mass crimes. In the more than 15 years since the establishment of the ICTY and ICTR, UN human rights fact-finding has become more skilled at collecting, analysing and reporting on violations of international human rights and humanitarian law that qualify as crimes under international law, and to channel information that can be used to establish the context in which genocide, war crimes or crimes against humanity have been perpetrated, to the competent international prosecution authorities.

Thirdly, UN human rights fact-finding has become more precise because of refinement in the norms of international human rights law itself through case adjudication in the various UN human rights treaty bodies, regional human rights systems and through national courts applying international law. Also, the international human rights community has become more mature professionally with the development of more settled procedures and protocols for fact-finding.

Fourthly, the increased sophistication of computer processing, human rights databases and instantaneous communications through the internet, coupled with secure encryption protocols, vastly facilitate the organisation, secure storage, checking and corroboration of fact-related materials, as well as the development and sharing of best practices on these activities.<sup>49</sup> In this connection, the Case Matrix Network, developed by Morten Bergsmo (formerly legal advisor to the prosecutors of the ICTY and ICC), offers a highly logical, systematic and pertinent means by which to hone raw empirical data on mass violations into a sharp case against an accused.<sup>50</sup>

The international responses to the former Yugoslavia, Rwanda and Darfur crises also offer cautionary lessons on the optimal relation between human rights and ICC fact-finding. In the former Yugoslavia and Rwanda, on the one hand, human rights investigators may not have fully appreciated what kind of information would be useful for criminal investigators, how to obtain it or how to preserve its integrity by implementing a secure chain of evidence. On the other hand, ICTY and ICTR prosecutors may not have understood that information from established human rights sources was needed to prove the historical and political context in which crimes were perpetrated. Rather than tainting the prosecution’s case beyond repair, such information would strengthen it, if used properly and if full account of its limitations were taken. In the Darfur situation, the ICC prosecutor seems not to have diligently exhausted the normal fact-finding and criminal investigative avenues, relying too heavily on information from international human rights sources without recognising that such information:

- was not necessarily collected for the purpose of criminal investigations;
- might not have been properly corroborated; and
- might be insufficient to construct a case that would stand up at trial.

UN human rights fact-finding carried out regularly by the Human Rights Council’s special procedures, and from time-to-time by Security Council investigative mechanisms, on the one hand, should not be ignored by international criminal investigators and prosecutors. On the other hand, human rights information cannot substitute for diligent and careful international criminal investigation (as seemingly attempted by the ICC prosecutor in the Darfur cases) because human rights fact-finding serves a valuable, broader purpose that should not, and in any case cannot, be completely subsumed within criminal investigations.

In terms of concluding reflections, the foregoing arguments imply that:

1. *In situ ICC investigations remain vital.* First and foremost, the ICC should, wherever possible, negotiate with the territorial authorities to allow the installment of a robust and professional investigative presence *in situ* to send a clear signal of the ICC's resolve to prosecute individuals responsible for crimes under international law and to help deter further violations. This strategy would also give the government or territorial authority ample opportunity to demonstrate its good faith and willingness to cooperate with international prosecutions.
2. *International prosecutors should not consider criminal investigations to be somehow superior to human rights fact-finding.* They are different activities that use different methods for different purposes. Wholesale rejection of information coming from UN human rights sources for international prosecution purposes represents nothing short of unprofessional arrogance that ultimately ignores valuable information often coming from victims and NGOs who normally remain closer to the situation than could the ICC.
3. *Human rights fact-finding mechanisms should not be expected necessarily to collect evidence for international prosecutions in each and every situation.* They may not possess the necessary skills to do this, and in fact it may interfere with or detract from the main focus of their work which is usually to investigate, monitor and report on acts involving state responsibility. Nevertheless, such information could be helpful to establish the context in which crimes have been committed, background motives, the involvement of state agencies and to identify individual criminal suspects within a chain of command.
4. *Where a UN human rights fact-finding mission, whether under the auspices of the Human Rights Council, Security Council or for that matter under the General Assembly or other UN organ, is to be deployed to investigate a situation in which serious violations of human rights or humanitarian law have been committed, it is critical to ensure the appointment to the investigative team of one or more expert members with solid prosecution credentials and experience, preferably at the international level.*
5. *UN human rights fact-finders should be trained in international humanitarian law and international criminal law in addition to international human rights law.* It is no longer tenable that fact-finders who work in conflict or post-conflict zones or in other situations involving mass, systematic or widespread violations, work in splendid isolation from the other two fields of specialisation. Human rights fact-finders should understand the basics of international criminal law and keep aware as to when it might become advisable to call in specialist expertise to examine scenes for possible prosecutions. International prosecution personnel should become better informed about the UN human rights architecture, how it functions, and the relevance of its fact-finding capabilities and products as a means by which better to orient investigative perspective and to construct a sharp case against individual suspects. Humanitarian personnel should remain vigilant of human rights violations and particularly those that may qualify as crimes coming within the ICC's jurisdiction and alert the competent authorities of their occurrence.
6. *Investigative missions serving either international prosecutions or human rights fact-finding should employ up-to-date technical means by which to collect, organize and analyze information to meet critical international criminal law requirements to secure convictions, such as identifying specific individuals for prosecution and*



documenting their position in a chain of command as well as detection of relevant trends and patterns. Such missions could draw, for example upon the Case Matrix Network (first and foremost for genocide, war crimes or crimes against humanity), CrimeLink software (used by many domestic law enforcement, military intelligence agencies and INTERPOL)<sup>51</sup> and HURIDOCS resources including OpenEvsys for recording and managing NGO information on human rights violations.

7. *The ICC prosecutor; and at the relevant stage in proceedings, the Pre-Trial Chamber; should review systematically information available from the full range of UN human rights fact-finding mechanisms, including human rights treaty bodies, special procedures, human rights field presences, special investigative missions, human rights units in peacekeeping missions and intelligence from cooperating transnational, regional and domestic agencies.*

### Acknowledgements

I am grateful to Dr Morten Bergsmo (former legal advisor to the UN Security Council's Commission of Experts on the Former Yugoslavia and to the prosecutors of the ICTY and ICC) for our stimulating conversation on some of the issues raised in the present article, and to Dr Ilaria Bottiglierio (senior researcher, International Development Law Organization) for her very helpful comments on a penultimate draft of this article.

### Notes

1. This article is based on my presentations to: the HURIDOCS conference on 'Human Rights Council and International Criminal Court: The New Challenges for Human Rights Communications' held in Geneva from 25–27 February 2009; the International Association of Prosecutors' Ancillary Meeting to the 12th UN Crime Congress held in Salvador, Brazil, on 16 April 2010; and the University of Leeds Centre for International Governance workshop on 'The Role of the Special Rapporteurs of the Human Rights Council in the Development and Promotion of International Human Rights Norms'.
2. Statute of the International Criminal Court, adopted on 17 July 1998, entered into force on 1 July 2002, as of 17 October 2010 signed by 139 states and ratified by 114 states; (A/CONF. 183/9).
3. Article 66 of the ICC Statute, *ibid.* entitled 'Presumption of Innocence' provides that: '1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law. 2. The onus is on the Prosecutor to prove the guilt of the accused. 3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.'
4. See generally Lyal S. Sunga, 'What Effect If Any Will the UN Human Rights Council Have on Special Procedures?', in *International Human Rights Monitoring Mechanisms*, ed. Jonas Grimheden Gudmundur Alfredsson, Bertrand G. Ramcharan and Alfred de Zayas, 2nd ed. (Leiden: 2009) 169–83.
5. See generally, Ilaria Bottiglierio, *Redress for Victims of Crimes under International Law* (Leiden: Martinus Nijhoff, 2004).
6. See Morten Bergsmo and William H. Wiley, 'Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes', *Manual on Human Rights Monitoring: An Introduction for Human Rights Field Officers*, 3rd revised ed. (Oslo: University of Oslo Norwegian Center for Human Rights, 2008), 1–30, for a very thorough and comprehensive treatment of international criminal investigations and analysis that explores in depth the elements of building an international case for genocide, war crimes or crimes against humanity.
7. See Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), International Court of Justice Judgement of 26 February 2007, ICJ Reports 2007, at para. 210.
8. *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgement (Merits) of 9 April 1949; ICJ Reports 1949, at 18.
9. In this sense, Article 12 of the International Law Commission's Draft Articles on State Responsibility says that: 'There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or

- character.’; see Annex to General Assembly Resolution 56/83 of 12 December 2001, corrected by Document A/56/49(Vol. I)/Corr.4.
10. See *ibid.* Article 7 entitled: ‘Excess of Authority or Contravention of Instructions’.
  11. See e.g. Ben Fowkes, *Ethnicity and Ethnic Conflict in the Post-Communist World* (Basingstoke: Palgrave-MacMillan, 2002), 104; or Malcolm N. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003), 383.
  12. Serb inhabitants of the Republic of Croatia declared their independence from the rump Federation of Yugoslavia on 16 March 1991. Bosnia-Herzegovina declared itself independent in April 1992. A few days later, Serb nationalist militia, including Yugoslav National Army soldiers, marched into parts of Bosnia-Herzegovina. Under Radovan Karadzic, Serb militia occupied 70 per cent of Bosnian territory at some points in time, and perpetrated an aggressive ‘ethnic cleansing’ policy to drive Bosnian Muslims out of the territories it had occupied, comprising systematic and widespread massacres and mass deportations of civilian Muslims.
  13. See George Aldrich, ‘Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia’, *American Journal of International Law* 90, no. 64 (1996): 64–9; Karine Lescure and Florence Trintignac, *International Justice for Former Yugoslavia: The Working of the International Criminal Tribunal of The Hague* (The Hague: Martinus Nijhoff, 1996); Virginia Morris and Michael P. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol. 1 (Irvington-on-Hudson: Transnational Publishers, 1995); Paul Parin, ‘Open Wounds: Ethnopschoanalytic Reflections on the Wars in the Former Yugoslavia’, in Alexandra Stiglmeier, ed. *Mass Rape: The War against Women in Bosnia-Herzegovina* (Lincoln: University of Nebraska Press, 1994), 35–53; Bruce Zagaris, ‘War Crimes Tribunal in Former Yugoslavia’, in *The Alleged Transnational Criminal: The Second Biennial International Criminal Law Seminar*, ed. R.D. Atkins (The Hague: Martinus Nijhoff, 1995), 9–50.
  14. See Report on the Situation of Human Rights in the Territory of the Former Yugoslavia submitted by Mr Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 14 of Commission Resolution 1992/S-1/1 of 14 August 1992, E/CN.4/1992/S-1/9, 28 August 1992.
  15. *Ibid.*, para. 69.
  16. *Ibid.*, para. 70.
  17. See e.g. E/CN.4/1992/S-1/10 of 27 October 1992, para. 18, as well as Annex II (Statement by Dr Clyde Snow). See also Report of the Special Rapporteur (transmitted by the Secretary-General to the Security Council and General Assembly) A/47/666; S/24809 of 17 November 1992, para. 140, where Mr Mazowiecki stated: ‘There is growing evidence that war crimes have been committed. Further investigation is needed to determine the extent of such acts and the identity of those responsible, with a view to their prosecution by an international tribunal, if appropriate.’
  18. See S/RES/780 (1992) adopted by the Security Council at its 3119th meeting, 6 October 1992. Reprinted in *International Legal Materials* 31 (1992): 1476.
  19. Almost a year later, owing to the resignation of Mr Kalshoven for medical reasons, and the death of Mr Opsahl, Mr Bassiouni was appointed as Chairman. Ms Christine Cleiren of The Netherlands and Ms Hanne Sophie Greve of Norway were appointed as new members.
  20. See Report of the Secretary-General on the Establishment of the Commission of Experts Pursuant to Paragraph 2 of Security Council Resolution 780(1992), S/24657, para. 7.
  21. *Ibid.*, para. 10.
  22. See UN Doc. S/25274 of 9 February 1993.
  23. See Cherif Bassiouni, ‘The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia’, *Criminal Law Forum* 5, nos 2–3 (1994): 279–340, at footnote 28.
  24. *Ibid.*, footnote 26.
  25. *Ibid.*, 291–3.
  26. UNPROFOR is the abbreviation for the UN Protection Force, deployed from February 1992 to March 1995 in Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia (Serbia and Montenegro) and the former Yugoslav Republic of Macedonia, headquartered in Zagreb, Croatia, staffed with almost 40,000 military personnel, around 2000 international civilian personnel and more than 2500 staff recruited locally.
  27. Bassiouni, ‘The Commission of Experts Established Pursuant to Security Council Resolution 780’, 300 *et. seq.* Further, Bassiouni observes that: ‘Governments did not provide any intelligence information in their possession – such as satellite and aerial photographs; intercepted

- telephone, radio, and cable communications; and other materials that could have revealed the disposition and movement of troops and supplies, particularly important where national borders were crossed. Such information would help to establish the role of different governments in these multiple conflicts, the international character of the conflict, the chain of command, and the apex of command and control.’
28. The indigenous Twa minority was the first people to populate the area of Rwanda as far back as 2000 BC. Around 3000 years later, a migration of Hutu to the area began. People of Tutsi extraction began to migrate to the area around 1500 AD. Traditionally the Hutu have been agrarian and sedentary whereas the Tutsi have been cattle-owners and nomadic.
  29. See generally Alain Destexhe, *Rwanda and Genocide* (London: Pluto Press, 1995).
  30. See generally François Misser, *Vers un nouveau Rwanda?* (Bruxelles/Paris: Editions Luo Pire et Karthala, 1995) for a series of interviews conducted with the Vice-President and Minister of Defense of the Government of Rwanda, Major-General Paul Kagame.
  31. The Report of Mr Bacre Waly Ndiaye on his Mission to Rwanda from 8–17 April 1993, E/CN.4/1994/7/Add.1 of 11 August 1993.
  32. Convention on the Prevention and Punishment of the Crime of Genocide, adopted unanimously 9 December 1948, entered into force 12 January 1951; 78 UNTS 277.
  33. The Report of Mr Bacre Waly Ndiaye on his Mission to Rwanda from 8–17 April 1993, para. 79.
  34. UNAMIR is the abbreviation for the UN Assistance Mission in Rwanda which was vested with authority only to monitor the Arusha Accords with a UN Charter VI mandate. UNAMIR was reduced from 2500 to 270 on 21 April 1994 with the adoption of Security Council Resolution 912.
  35. See Report on the Situation of Human Rights in Rwanda submitted by R. Dégni-Ségui, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 20 of Commission Resolution E/CN.4/S-3/1 of 25 May 1994, UN Doc. E/CN.4/1995/7 of 28 June 1994, para. 24.
  36. Ingvar Carlsson, ‘The UN Inadequacies’, *International Journal of Criminal Justice* 3 (2005): 837–46.
  37. UN Security Council Resolution 935 adopted unanimously on 1 July 1994; S/RES/1994.
  38. Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994); UN Doc. S/1994/1405 of 9 December 1994, para. 54
  39. See generally Lyal S. Sunga, ‘The Commission of Experts on Rwanda and the Creation of the International Criminal Tribunal for Rwanda/A Note’, *Human Rights Law Journal* 16, nos 1–3 (1995): 121–4.
  40. José Ayala-Lasso, the first UN High Commissioner for Human Rights, took up office on 5 April 1994, just one day before the genocide was launched in Rwanda.
  41. The UN Rwanda Emergency Office (UNREO) was set up to coordinate information management in the aftermath of the Rwandan genocide.
  42. Consideration of Reports submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee on the Third Periodic Report of the Sudan; UN Doc. CCPR/C/SDN/CO/3 of 29 August 2007 at para. 9.
  43. Decision 2(66) of the UN Committee on the Elimination of Racial Discrimination on the Situation in Darfur; UN Doc. CERD/C/66/DAR/Dec.2 of 11 March 2005.
  44. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004 (2005).
  45. Report of the High-Level Mission on the Situation of Human Rights in Darfur Pursuant to Human Rights Council Decision S-4/101; A/HRC/4/80 of 9 March 2007, para. 46.
  46. Final Report on the Situation of Human Rights in Darfur Prepared by the Group of Experts Mandated by the Human Rights Council in its Resolution 4/8; A/HRC/6/19 of 28 November 2007.
  47. *Amicus Curiae Brief of Antonio Cassese before ICC Pre-Trial Chamber I on Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC*; ICC-02/05-14 01-09-2006 1/11 EO PT; and *Amicus Curiae Brief of Louise Arbour before ICC Pre-Trial Chamber I on Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC*; ICC-02/05-19 10-10-2006 1/25 CB PT.
  48. See e.g., Louis Charbonneau, ‘Sudan Says to Never Reverse Decision to Expel NGOs’, *Reuters*, March 20, 2009, <http://www.reuters.com/article/idUSN20521830> (accessed October 16, 2010) reporting that: ‘Sudan ordered the aid agencies out of Darfur after the International Criminal Court (ICC) issued an arrest warrant for Sudanese President Omar Hassan al-Bashir earlier

this month over alleged war crimes in the western region. Sudan, which does not recognize the ICC, rejects the charge.'

49. See e.g. the website of the HURIDOCs – Human Rights Information and Documentation Systems, International, <http://www.huridocs.org/>.
50. See the Case Matrix Network, <http://www.casematrixnetwork.org/>; and O. Bekou, A. Jones and M. Bergsmo, 'Preserving the Overview of Law and Facts: the Case Matrix', in *Collective Violence and International Criminal Justice*, ed. Alette Smeulers (2010), 413–35.
51. See CrimeLink, <http://www.pciusa.us/Crimelink.aspx>.

### Notes on contributor

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