



# New Challenges for the UN Human Rights Machinery

**What Future for the UN Treaty Body System  
and the Human Rights Council Procedures?**

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The situation now is very different. It is likely that the Commission, in its future work and in cooperation with UNSMIL of which it is the primary mandate, will seek to encourage reforms by the new Libyan Government that would improve the human rights situations in the long term, in the form of new institutions, revised legal system, proper administration and accountability generally. The current situation is too unstable to predict what can be achieved. However, at the time of writing, there seems to be openness on the part of the new Libyan authorities to achieve such changes, and the goal is well worth pursuing.

## CHAPTER 4

### WHAT SHOULD BE THE UN HUMAN RIGHTS COUNCIL'S ROLE IN INVESTIGATING GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY?

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#### I. AIM OF THE PRESENT INQUIRY

UN Human Rights Council investigations into situations involving serious human rights violations that could qualify as genocide, war crimes or crimes against humanity, are currently at a critical point in their development. Recent Human Rights Council investigations into the situations in Darfur, the Israeli occupied Palestinian territories, Côte d'Ivoire, Libya and Syria, differ significantly from investigations that its predecessor – the Commission on Human Rights – had conducted into situations of similar gravity, mainly as regards the issue of individual criminal responsibility. UN human rights investigations into massive and severe violations perpetrated in Cambodia during the Khmer Rouge, the El Salvador Civil War in the 1980s, the Iraq-Kuwait conflict in the early 1990s, Mozambican civil war (1977–1992), East Timor in 1999, and many others, generally have been confined to: identifying and cataloguing human rights violations, analyzing root causes, monitoring and reporting on the ongoing situation, and carrying out technical cooperation projects to assist the Government or territorial authority to strengthen its human rights related capacity.

Even where classical UN human rights investigation went so far as to call upon the territorial authorities to prosecute perpetrators of crimes involving human

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rights violations, or to recommend enforcement of individual criminal responsibility for genocide, war crimes or crimes against humanity, the results were disappointing for one reason or another. Enforcement of individual criminal responsibility took a long time to be implemented even on a most unsatisfactory, minimal or partial basis, such as in Cambodia,<sup>1</sup> and East Timor (now Timor Leste).<sup>2</sup> In other cases, blanket amnesties were adopted, as in El Salvador, which nullified individual responsibility for heinous crimes in practice,<sup>3</sup> or crimes were simply left unprosecuted, as in Mozambique. In other instances, crimes were prosecuted in ways that manifestly fell short of international fair trial standards, as in the trial of Saddam Hussein for genocide, war crimes and crimes against humanity, by an Iraqi Special Tribunal set up by the Coalition Provisional Authority which the Government of the United States created in occupied Iraq.<sup>4</sup>

<sup>1</sup> By the time of writing, only Kaing Guek Eav, also known as "Comrade Duch", former head of the Khmer Rouge's 'Santebal' internal security operations and the prison camps used to torture and kill hundreds of thousands of Cambodians, including 'S-21' prison in Phnom Penh, had been found guilty and sentenced to imprisonment for 35 years for war crimes. Only four other individuals, Ieng Thirith, Kaing Guek Eav, Khieu Samphan, and Nuon Chea stood accused of genocide, war crimes or crimes against humanity in relation to the several million who died at the hands of the Khmer Rouge regime (1975-1979). In 1996, King Norodom Sihanouk granted Ieng Sary an official pardon. See Nicole Barrett, *Holding Individual Leaders Responsible for Violations of Customary International Law: the U.S. Bombardment of Cambodia and Laos*, 32 (Spring) Columbia Human Rights Law Review (2001) 429; Scott Luftglass, *Crossroads in Cambodia: The United Nations Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge*, 90 (May) Virginia Law Review (2004) 893-964; Steven R. Ratner, *The United Nations Group of Experts for Cambodia*, 93 (October) American Journal of International Law (1999) 948; and Carol Umhoefer, *Towards a UN-Sponsored Cambodian Solution*, 32 (Winter) Harvard International Law Journal (1991) 275-285.

<sup>2</sup> See 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; Annex II to the Letter dated 24 June 2005 from the Secretary-General addressed to the President of the Security Council; S/2005/458 of 15 July 2005 at paras. 525 and 526.

<sup>3</sup> See "From Madness to Hope: The 12-Year War in El Salvador", Report of the Commission on the Truth for El Salvador, annex to a Letter dated 29 March 1993 from the UN Secretary-General to the President of the Security Council, UN Doc. S/25500 of 1 April 1993. Less than a week after the publication of the truth commission's report, El Salvador enacted the Law of General Amnesty and the Consolidation of Peace to shield perpetrators of 'political crimes' as well as certain common crimes against prosecution. See further, Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27(3) Vanderbilt Journal of Transnational Law (1994) 497-544.

<sup>4</sup> Law No. 10 of 10 December 2005 entitled "Law of the Iraqi Higher Criminal Court", promulgated in the Official Gazette of the Republic of Iraq on 18 October 2005, entered into force on 10 December 2005 confers jurisdiction on the Court over Iraqi or non-Iraqi resident of Iraq accused of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws committed during the period from 17 July 1968 until 1 May 2003, in the Republic of Iraq or elsewhere (Article 1). See Amnesty International's denunciation of the trial as unfair: "Iraq: Amnesty International condemns Iraqi Appeal Court verdict against Saddam Hussein and co-accused"; Amnesty International Public Statement AI Index: MDE 14/044/2006 (Public) of 28 December 2006 at <https://www.amnesty.org/en/library/asset/>

Qualitative change in how Human Rights Council investigations into situations involving genocide, war crimes and crimes against humanity are being carried out, the results they are expected to produce, and their present and future role in relation to Security Council and International Criminal Court (ICC) investigations, is currently being propelled by:

- the effects of the dramatic renaissance of international criminal law brought about by the establishment and operation of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), the ICC, and the proliferation of transitional justice mechanisms, including national truth and reconciliation commissions and special, hybrid or mixed courts that combine or incorporate international criminal law into the domestic law framework;
- a significant measure of interplay in the implementation of international human rights law, international humanitarian law and international criminal law; and
- increasing complementarity between Security Council and Human Rights Council action with regard to situations involving genocide, war crimes and crimes against humanity.

The current changes in the role and *modus operandi* of UN Human Rights Council investigative missions could greatly strengthen the international community's response to situations involving genocide, war crimes or crimes against humanity, but they also raise a number of difficult practical questions. Should the Council's investigations maintain a strictly 'traditional human rights approach' which focuses almost exclusively on the more general human rights situation and on the responsibility of the State or territorial authority where the violations were committed, or should it rather go further to identify individual criminal suspects and help pave the way for international or domestic criminal prosecutions? When should a Security Council investigative mission be preferred over the deployment of a Human Rights Council investigative mission or vice-versa? Should Security Council and Human Rights Council investigations into situations involving genocide, war crimes or crimes against humanity be complementary with one another, or would that risk producing duplication or contradiction in fact-finding, analysis and recommendations? Would it make more sense to concentrate all human rights fact-finding in a single organ, rather than to have different avenues for investigation? When, if ever, should the Human Rights Council lead the way in investigating situations involving genocide, war

MDE14/044/2006/en/a85375ab-d34c-11dd-a329-2f46302a8cc6/mde140442006en.html, last accessed on 1 October 2011; and Human Rights Watch's position in "Iraq: Saddam Hussein Put to Death: Hanging After Flawed Trial Undermines Rule of Law" of 29 December 2006, at [www.hrw.org/en/news/2006/12/29/iraq-saddam-hussein-put-death](http://www.hrw.org/en/news/2006/12/29/iraq-saddam-hussein-put-death), last accessed on 1 October 2011.

crimes or crimes against humanity? Do the Security Council and Human Rights Council enjoy different levels of legitimacy and authority when it comes to investigations into genocide, war crimes or crimes against humanity and if so, why? Are Human Rights Council reports of any possible use to the International Criminal Court, and if so, what use exactly?

To consider what should be the role of Human Rights Council investigations into situations involving genocide, war crimes or crimes against humanity, the present inquiry:

- first, reviews the historical background relating to human rights investigative missions into these kinds of situations;
- second, considers the ways in which Security Council and Human Rights Council investigations may be complementary to each other, bearing in mind key similarities and differences between them;
- third, explores the work of Human Rights Council commissions of inquiry into the situations in the Darfur region of the Sudan, the Israeli occupied Palestinian territories, Côte d'Ivoire, Libya and Syria; and
- finally, offers some practical recommendations for improving the Human Rights Council's investigative role.

Other kinds of UN human rights investigative, monitoring or reporting activities, such as those regularly carried out by Human Rights Council human rights special procedures mandate-holders, diplomatic missions, or assessment missions of the Secretariat of the UN Office of the High Commissioner for Human Rights (OHCHR) are not the main focus of the present discussion.

## II. HOW THE INTERNATIONAL COMMUNITY'S RESPONSES TO THE CRISES IN THE FORMER YUGOSLAVIA AND RWANDA HAVE REORIENTED UN HUMAN RIGHTS INVESTIGATIONS

It is valuable next to revisit how UN human rights fact-finding and investigations developed in order to appreciate how they have reached a critical stage of development in the Human Rights Council.

### A. UN HUMAN RIGHTS INVESTIGATIONS PRIOR TO THE FORMER YUGOSLAVIA AND RWANDA SITUATIONS

The capacity of the Commission on Human Rights to conduct any sort of investigations, was basically non-existent to begin with, and developed only

incrementally in a rather intermittent and spasmodic manner over many years. Like the Human Rights Council, the Commission on Human Rights was a political body with States as members, rather than individual experts. At the time it was dissolved in June 2006, the Commission had 53 member States, whereas the Human Rights Council has 47 member States. The Human Rights Council was established under the General Assembly rather than the Economic and Social Council (ECOSOC), a member can be suspended from the Human Rights Council where it commits 'gross and systematic violations of human rights', and unlike the Commission on Human Rights, the Human Rights Council features the Universal Periodic Review process.<sup>1</sup>

The thoroughly political character of the Commission on Human Rights largely determined both the strengths and weakness of its investigative capacity. Governments did not consider that they could vest the Commission on Human Rights with any investigative capacity at all before there had emerged broad international consensus as to the content and status of international human rights norms. ECOSOC resolution 5(I) which established the Commission in 1946 on the basis of Article 68 of the UN Charter did not bestow the Commission with capacity even to receive or examine communications from individuals alleging human rights violations, much less any capacity to investigate violations in any active sense.<sup>2</sup> While the adoption of ECOSOC resolution 75(V) in 1947 slightly varied the Commission's procedures so that it could at least receive communications, the resolution stipulated that the Commission had "no power to take any action in regard to any complaints concerning human rights". ECOSOC resolution 76(V) reiterated this lack of authority specifically as regards violations concerning the rights of women. The metropolitan powers that dominated the General Assembly's agenda membership did not wish to open up a flood of human rights complaints from their colonial subjects, nor did other States wish to risk coming under eventual Commission scrutiny, so the situation did not change much throughout the late 1950's and early 1960's.

Despite the clear limitations that ECOSOC imposed on the Commission, the Commission gradually started to undertake fact-finding investigations into particularly serious human rights situations. International fact-finding missions

<sup>1</sup> See General Assembly resolution 60/251 of 3 April 2006; A/RES/251 (2006). See further Lyal S. Sunga, *What Effect If Any Will the UN Human Rights Council Have on Special Procedures?*, International Human Rights Monitoring Mechanisms (2<sup>nd</sup> ed.) (eds. Jonas Grimheden Gudmundur Alfredsson, Bertrand G. Ramcharan and Alfred de Zayas) (2009) 169-183.

<sup>2</sup> ECOSOC resolution 5(I), adopted 16 February 1946, established the Commission on Human Rights and requests the Commission to work on: "(a) an 'international bill of rights'; (b) international declarations or conventions on civil liberties, the status of women, freedom of information and similar matters; (c) the protection of minorities; (d) the prevention of discrimination on grounds of race, sex, language or religion."

in general have been carried out by the UN since its founding, and prior to that, by the League of Nations, into a range of issues of legal concern, and some of those involved human rights indirectly.<sup>3</sup> The first UN fact-finding mission deployed specifically to investigate an urgent human rights situation however, concerned the plight of Buddhists in the early 1960s in South Vietnam under the repressive regime of President Ngo Dinh Diem, a Catholic who was initially supported by the Government of the United States. In September 1963, 14 UN member States requested that the General Assembly's agenda include an item to discuss "The Violation of Human Rights in Vietnam". Once this was done, on 4 October 1963, the Government of South Vietnam invited UN representatives to visit the country and to determine the facts at first hand. In response, the President of the General Assembly requested the Governments of Afghanistan, Brazil, Ceylon, Costa Rica, Dahomey, Morocco and Nepal, to propose representatives for the fact-finding mission. The mission was chaired by the Afghanistan representative, Mr. Abdul Rahman Pazwak<sup>4</sup> who was accompanied by John P. Humphrey, Director of the Division of Human Rights, Ilhan Lutem, a UN press officer, and an official from the Office of the Secretary-General. The mission interviewed Ngo Diem himself as well as other Government officials, conducted confidential interviews of witnesses to violations, including Buddhist monks, nuns, persons in detention, members of opposition political parties, students and others,<sup>5</sup> conducted *in situ* investigations, and received petitions. The Government of South Vietnam was eager to show its cooperation, even reimbursing the UN a total of 28,000 USD to cover the cost of deploying the 7 representatives and 6 staff members for its three-week mission.<sup>6</sup> The mission produced a detailed report<sup>7</sup> which however did not receive much attention because, a few days after the end of the mission, Ngo Diem was deposed in a military coup and assassinated (on 2 November). The General Assembly then concluded that the issue had become moot and that no further action was necessary.

While the General Assembly's mission to South Vietnam did not ultimately require further follow up, it paved the way for similar human rights fact-finding missions to be deployed in future through the General Assembly, the Commission

<sup>3</sup> See generally, Thomas M. Franck and Laurence D. Cherkis, *The Problem of Fact-Finding in International Disputes*, 18 *Western Reserve Law Review* (1966-1967) 1483-1524.

<sup>4</sup> *Ibid.* at 1503.

<sup>5</sup> See Press Release GA/2846 of 11 October 1963, and UN Cables in "Items-in-Peacekeeping operations - Vietnam - South Vietnam - special mission (re: investigation into alleged persecution of Buddhists by the Ngo Dinh Diem Administration of Viet-Nam - Cable)"; S-0871-0006-09-00001, UN Archives.

<sup>6</sup> See UN Cables, *ibid.* of 11 October 1963 relating to the mission's logistics and terms of reference.

<sup>7</sup> Report of the UN Fact-Finding Mission to South Viet-Nam; 18 UNGAOR, Annexes; A/5630 (1963).

on Human Rights or conceivably, the Security Council. If the General Assembly could dispatch a fact-finding mission to look into an urgent human rights situation, should not the Commission on Human Rights be recognized as having the same authority? Between 1967 and 1980, the Commission on Human Rights established mandates only in respect of apartheid in southern Africa, Israeli practices in the occupied Palestinian territories, and Pinochet's military regime in Chile.<sup>8</sup> In 1980 however, the UN Working Group on Enforced or Involuntary Disappearances<sup>9</sup> - the first thematic special procedures mandate - was established to look into the phenomenon of disappearances in any country. Over the next quarter of a century, Commission on Human Rights special procedures mandates proliferated to cover a wide range of civil and political rights and economic, social and cultural rights, as well as human rights related to structural debt, the right to development, extreme poverty and many other challenges. As a political body, the Commission could react quickly and flexibly to urgent situations, regardless of the consent of the Government or territorial authority. On the other hand, the Commission's inescapably political character contributed to a sharp decline in its legitimacy as Governments increasingly sought membership not to promote human rights, but to protect themselves and their allies from scrutiny - a key reason behind Secretary-General Kofi Annan's recommendation to replace the Commission with a new 'Human Rights Council'.<sup>10</sup> At the time of its dissolution and replacement by the Human Rights Council in June 2006, the Commission had 13 country mandates and 28 thematic mandates.

Prior to the 1990s, UN human rights investigative missions were carried out mainly by Commission on Human Rights special rapporteurs, working groups, independent experts and other mandate-holders, but this changed radically with the innovative responses to the former Yugoslavia and Rwanda crises, as discussed next.

<sup>8</sup> The Commission's move beyond human rights standard setting, into public debate on particular human rights country situations, stems from ECOSOC resolutions 1235 and 1503. Although not legally binding, these resolutions provided the Commission with its political authority to conduct public debate on particular human rights violations, and to carry out monitoring, investigation and reporting on human rights situations.

<sup>9</sup> The Working Group was established by the Commission on Human Rights in resolution 20 (XXXVI) of 29 February 1980.

<sup>10</sup> In March 2005, the Secretary-General expressed his concern that: "... States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. As a result, a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole." Secretary General's Report on UN Reform: In Larger Freedom; A/59/2005 of 21 March 2005 at para. 182. See further Lyal S. Sunga, *op. cit.* at note 5.

## B. INVESTIGATIONS IN THE FORMER YUGOSLAVIA AND RWANDA

As discussed above, UN human rights special procedures could develop only as fast as member States were willing to accept and support them. Their incremental development, particularly in the early phases of the life of the Commission on Human Rights, attests to the apprehensiveness with which most, if not all Governments viewed international human rights scrutiny, lest it one day be turned on themselves. This anxiety was to a large degree attributable to the fact that human rights rhetoric throughout the Cold War was used as an instrument of ideological warfare between the United States and its allies on the one side, and the Soviet Union and its allies on the other.<sup>11</sup>

The international relations context began to offer greater space for global cooperation once the Berlin Wall fell in November 1989, the Soviet Union was dissolved between March 1990 and December 1991, and the Cold War dissipated rapidly over the ensuing months. This was evidenced strikingly in the Security Council's responses to the crises in the former Yugoslavia and in Rwanda. Up until the 1990s, the Security Council had avoided even the merest mention of 'humanitarian law', 'human rights' or 'international criminal law',<sup>12</sup> but in the post-Cold War climate, the UN seemed more open to addressing the serious violations of human rights and humanitarian law on Europe's Balkan doorstep.

The Commission on Human Rights took what had become its standard response, by appointing special rapporteurs to report on the scale and character of violations. However, the Commission Special Rapporteur on the human rights situation in the former Yugoslavia, Mr. Tadeusz Mazowiecki, went several steps further than might ordinarily have been expected. Rather than confining himself to describing the more general human rights situation, Mazowiecki placed special emphasis on the need to prosecute perpetrators of severe violations. In this regard, he stressed the importance of "the systematic collection of documen-

tation on such crimes and of personal data concerning those responsible".<sup>13</sup> He also recommended that a commission be established actually to identify specific persons and investigate cases with a view to eventual criminal prosecution.<sup>14</sup> In his subsequent reports, the Special Rapporteur further urged the expeditious collection of information to support criminal investigation of war crimes and serious violations of humanitarian law.<sup>15</sup>

On 6 October 1992, the Security Council adopted resolution 780<sup>16</sup> which requested the Secretary-General to establish urgently a commission of experts on the former Yugoslavia. Resolution 780 tasked the Commission of Experts to examine and analyze information received from States, to conduct investigations, and gather information from other persons or bodies in order to provide the Secretary-General with its findings as to whether grave breaches of the Geneva Conventions of 12 August 1949 were committed in the territory of the former Yugoslavia. The Secretary-General made clear that he expected the Commission of Experts on the former Yugoslavia and the Commission of Human Rights Special Rapporteur on the former Yugoslavia to coordinate with each other and that administrative arrangements would be put in place to facilitate this coordination.<sup>17</sup> The Commission of Experts carried out investigations from November 1992 until April 1994 and in its three reports to the Secretary-General, it documented 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>18</sup>

Public outrage following news media reports of torture and starvation in detention camps in Bosnia-Herzegovina and elsewhere in the former Yugoslavia that reminded people of World War II Nazi concentration camps, demanded a more vigorous international response to the horrific violations being perpetrated

<sup>13</sup> 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 at para. 69.

<sup>14</sup> *Ibid.* at para. 70.

<sup>15</sup> See e.g. E/CN.4/1992/S-1/10 of 27 October 1992 at 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 at 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".

<sup>16</sup> See S/RES/780 (1992) adopted by the Security Council at its 3119<sup>th</sup> meeting, 6 October 1992. Reprinted in 31 International Legal Materials (1992) 1476.

<sup>17</sup> 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 at paras. 7 and 10.

<sup>18</sup> See UN Doc. S/25274 of 9 February 1993.

<sup>11</sup> See generally Kirsten Sellars, *The Rise and Rise of Human Rights* (Sutton Publishing: Gloucestershire) (2002).

<sup>12</sup> As Steiner, Alston and Goodman commented: "Until the mid-1990s, the *Security Council* was extremely reluctant to become involved in human rights matters." They further noted that for decades, Secretaries-General steered clear of human rights to avoid alienating member States and undermining peace and security efforts: "Two examples illustrate this reluctance. In the 1950s Dag Hammarskjöld of Sweden was said to have kept the UN human rights programme cruising at no more than 'minimum flying speed'. In 1993, the proposal that led to the creation of the post of High Commissioner for Human Rights in December 1993 was strongly opposed by then Secretary-General Boutros Boutros-Ghali (of Egypt)." Henry J. Steiner, Philip Alston, and Ryan Goodman, (eds.), *International Human Rights in Context: Law, Politics, Morals* (Third ed.) (2007) 1492 at 737-738. Boutros-Ghali's successor, Kofi Annan, on the other hand, took major steps to mainstream human rights throughout the UN system.

and helped to pressure the Security Council to establish the International Criminal Tribunal for the former Yugoslavia. On 25 May 1993, the Security Council adopted resolution 827 deciding to establish the ICTY, but the Commission of Experts continued to operate and gather information until April 1994. The Chair of the Commission of Experts stated that a large amount of materials was sent to the ICTY Prosecutor including some three hundred videotapes, documents and interview transcripts.<sup>19</sup>

From the outset, UN human rights fact-finding in the form of the Special Rapporteur's reports, was 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. It had investigative personnel sufficient to work over a period of 18 months, and it provided information to the ICTY Prosecutor.

The ICTY's operation helped to pave the way for the establishment of the ICTR, and later, the ICC. With regard to Rwanda, Commission on Human Rights fact-finding played a role similar to that relating to the former Yugoslavia, in spurring on the establishment of investigations more focused on criminal responsibility of individual perpetrators with respect to the 1994 Rwandan genocide, rather than analyzing only the human rights situation more generally, even if some of the early warnings were not at all heeded. In his August 1993 report,<sup>20</sup> Mr. Bacre Waly Ndiaye, UN Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions – on the basis of his 10-day mission to Rwanda in April 1993 conducted one year before the Rwandan genocide – warned that massacres of civilians, death threats, political assassinations, widespread use of the death penalty and other serious human rights violations, might already qualify as 'genocide'.<sup>21</sup>

On 1 July 1994, the day after Rwanda Patriotic Forces under the command of General Paul Kagame succeeded in stopping the genocide in Rwanda and establishing effective control over the country, the Security Council established the Commission of Experts on Rwanda.<sup>22</sup> The Security Council requested the Commission of Experts on Rwanda to provide to the Secretary-General "its conclusions on the evidence of grave violations of international humanitarian

<sup>19</sup> See M. Cherif Bassiouni, *The Commission of Experts established pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 (Nos. 2–3) *Criminal Law Forum* (1994) 279–340 at 291–293.

<sup>20</sup> The report of Mr. Bacre Waly Ndiaye on his mission to Rwanda from 8 to 17 April 1993, E/CN.4/1994/7/Add.1 of 11 August 1993.

<sup>21</sup> *Ibid.* at para. 79.

<sup>22</sup> UN Security Council resolution 935 adopted unanimously on 1 July 1994; S/RES/1994.

law committed in the territory of Rwanda, including the evidence of possible acts of genocide."<sup>23</sup> The Commission of Experts on Rwanda explained in its final report for the Secretary-General 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."<sup>24</sup> The final report recommended prosecution of the perpetrators of genocide and associated violations by an international criminal tribunal. The Security Council accepted this proposal on 8 November 1994 and adopted resolution 955 establishing the ICTR.<sup>25</sup>

The UN responses to the crises in the former Yugoslavia and Rwanda reoriented UN human rights investigation by:

- qualifying the serious violations of human rights and humanitarian law perpetrated in each territory explicitly as international criminal law violations in relation to which the individual perpetrators should be prosecuted;
- recognizing the human rights situation in each country as a threat to or breach of international peace and security which authorized the Security Council to take binding measures on all UN member States under Chapter VII of the Charter of the United Nations;
- establishing Commissions of Experts under Security Council authority to investigate the violations as crimes under international law, specifically with a view towards international criminal prosecution; and
- setting up *ad hoc* international criminal tribunals to prosecute individuals for serious violations of human rights and humanitarian law.

The Security Council's action to establish the ICTY and ICTR suddenly reawakened the long dormant UN project to establish a permanent international criminal code and court<sup>26</sup> and it catapulted forward the process to establish the ICC. These major developments in turn have strengthened UN human rights investigations. The appointment of the former Prosecutor of the ICTY and ICTR, Ms. Louise Arbour, in 2004, to the post of UN High Commissioner for Human

<sup>23</sup> *Ibid.*

<sup>24</sup> Final Report of the Commission of Experts established pursuant to Security Council resolution 935 (1994); UN Doc. S/1994/1405 of 9 December 1994 at para. 54.

<sup>25</sup> See generally Lyal S. Sunga, *The Commission of Experts on Rwanda and the Creation of the International Criminal Tribunal for Rwanda / A Note*, 16 (1–3) *Human Rights Law Journal* (1995) 121–124.

<sup>26</sup> The UN General Assembly requested the International Law Commission in 1947 to formulate the Nuremberg Principles and to prepare a draft international criminal code so that the lessons of the Judgements from the International Military Tribunals at Nuremberg and Tokyo would not be forgotten. See General Assembly resolution 177 (II) of 21 November 1947.

Rights, followed by the appointment of the former President of the ICTR, Ms. Navanethem Pillay as Arbour's successor in 2008, further helped the UN recognize serious violations of human rights and humanitarian law as crimes under international law to be prosecuted as such, rather than as matters relating only to State responsibility for violations. Before considering the current advances in UN human rights investigation, it is valuable to reflect upon key similarities and differences between classical human rights investigation and criminal investigation.

### III. POST-YUGOSLAVIA AND RWANDA UN HUMAN RIGHTS INVESTIGATIONS INTO SITUATIONS POSSIBLY INVOLVING GENOCIDE, WAR CRIMES OR CRIMES AGAINST HUMANITY

Thanks to enhanced possibilities for reaching agreement among Security Council permanent members in the post-Cold War world, the UN could investigate situations involving serious violations more effectively with regard to the former Yugoslavia and Rwanda. Yet discord among the Great Powers had never dissipated completely with the end of the Cold War and new tensions surfaced as well. The non-use of the veto by Security Council permanent members cannot be taken for granted, even with regard to situations involving genocide, war crimes and crimes against humanity, particularly where such atrocities are being perpetrated in a country closely allied with a Council permanent member. Equally, the Security Council's institutional authority to deploy commissions of inquiry to determine facts and responsibilities relating to genocide, war crimes or crimes against humanity, cannot be counted on either, because the establishment of such commissions remains subject to *realpolitik*. Consequently, the Human Rights Council's investigative role has become all the more important since no State wields a veto there and decisions are taken on the basis of majority vote among the 47 member States. Thus, the role of Human Rights Council investigative missions is discussed next in order to illustrate important issues of principle and practice.

#### A. DARFUR

A range of different kinds of investigative mechanisms were used to document serious violations of human rights and humanitarian law, perpetrated mainly by the Government of the Sudan and its associated militia including the Janjaweed, in Darfur. In March 2005, the Security Council referred the situation to the

ICC.<sup>27</sup> Certain high level officials, including President Omar Al Bashir, were indicted for war crimes and crimes against humanity – the first time a sitting Head of State was indicted for international criminal prosecution. As the Darfur experience shows however, the totality of UN human rights investigations into the situation seem to have yielded results that remain far from satisfactory.

On 18 September 2004, the Security Council adopted resolution 1564 under Chapter VII of the UN Charter, reminding the Government of the Sudan of its primary responsibility to abide by its international human rights and humanitarian law obligations. More concretely, it also established the International Commission of Inquiry on Darfur to determine whether or not acts of genocide were committed and to identify the responsible individuals. The Security Council's International Commission of Inquiry on Darfur<sup>28</sup> received and gathered information concerning serious violations of international human rights and humanitarian law in Darfur, committed by all parties to the conflict, and it considered whether or not genocide had been committed. The Commission of Inquiry also identified specific individual suspects and submitted a list of names in a sealed file to the Secretary-General and the High Commissioner for Human Rights.

In December 2006, the Human Rights Council adopted resolution S-4/101 establishing a High Level Mission on the Human Rights Situation in Darfur to assess the situation and the needs of the Sudan in overcoming the problems. In its final report of March 2007,<sup>29</sup> the Mission indicated that the "justice system as a whole was unable or unwilling to pursue justice or prevent attacks", in other words, that a climate of impunity prevailed and international criminal prosecutions were called for. The report analyzed the grave human rights situation in Darfur and the Government's lack of constructive response in terms of the international responsibility to protect civilians.

In March 2007, upon the dissolution of the High Level Mission, the Human Rights Council established the 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,

<sup>27</sup> Security Council 1593 (2005), adopted by a vote of 11 in favour, none against and 4 abstentions (Algeria, Brazil, China, United States) on 31 March 2005.

<sup>28</sup> 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).

<sup>29</sup> 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 at para. 46.



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.<sup>30</sup> The Human Rights Council's Group of Experts on Darfur reviewed all previous UN recommendations to the Government of the Sudan and other parties to the conflict. It undertook a comprehensive evaluation of the degree to which the Government had implemented these recommendations in its final report of 10 December 2007 and made clear and simple recommendations to the Government, with a time-line, including indicators to assist the Government concretely to fulfill the recommendations.<sup>31</sup>

The Darfur situation displays a range of options at the disposal of the Security Council and the Human Rights Council to address the situation, but it also shows ultimately how ineffective they were when confronted with the highly recalcitrant Government of the Sudan. The Government consistently either refused human rights investigators access to the territory of Darfur, as it did with the High Level Mission, it engaged in partial or reluctant cooperation as it did with the Security Council's Commission of Inquiry and the Human Rights Council's Group of Experts, or it actively fought and hindered investigations as it did with the ICC.

From the other side, the ICC Prosecutor faced sharp criticism for failing to capitalize on the information gathered by earlier human rights investigations, neglecting to conduct *in situ* visits, and for not pursuing possible avenues for cooperation with the Government in Khartoum and the two main rebel movements in Darfur (JEM and SLM/A). Such investigations perhaps could have elucidated the operational chain of command in the Sudanese armed forces, the responsibility of individuals in various military operations in which serious violations were suspected to have occurred, and diligently corroborated other key facts, events and incidents.<sup>32</sup>

<sup>30</sup> Human Rights Council resolution 4/8, adopted on 30 March 2007 without a vote, is entitled "Follow-up to decision S-4/101 of 13 December 2006 adopted by the Human Rights Council at its fourth special session entitled 'Situation of human rights in Darfur'".

<sup>31</sup> 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.

<sup>32</sup> Antonio Cassese (former head of the Security Council's Commission of Inquiry into the Darfur situation) and Louise Arbour (then High Commissioner for Human Rights) expressed their views before the ICC Pre-Trial Chamber conducting the Darfur proceedings that the Prosecutor should have drawn more fully on OHCHR human rights monitors for detailed information as well as situated an ICC presence in Darfur to prevent further violations. See *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*

## B. ISRAELI OCCUPIED PALESTINIAN TERRITORIES

The Government of the United States' consistent use of the veto has weakened the Security Council's ability to take effective human rights investigative action in the Israeli occupied Palestinian territories.<sup>33</sup> The establishment of a Security Council commission of inquiry into war crimes or crimes against humanity in the occupied territories seemed out of the question without Israeli cooperation and the staunch support of the United States for its ally.

With regard to Israeli military operations in Beit Hanoun, Gaza, on 8 November 2006, in resolution S-3/1 of 15 November 2006, the Human Rights Council considered that the operations constituted a form of "collective punishment of the civilians therein and exacerbate[d] the severe humanitarian crisis in the Occupied Palestinian Territory". The Council called "for immediate protection of the Palestinian civilians in the Occupied Palestinian Territory in compliance with human rights law and international humanitarian law". It also went further and sent a high-level fact-finding mission to Beit Hanoun to assess the situation.<sup>34</sup> Israel refused cooperation however, until May 2008 when the mission was finally permitted to visit Beit Hanoun. A few months later however, on 27 December 2008, Israel carried out large-scale air and sea military operations in the Gaza Strip which it code-named 'Operation Cast Lead', followed by a major ground offensive on 3 January 2009. Israeli ground forces penetrated Beit Hanoun in the early hours of 4 January 2009 and did not retreat until 20 January 2010, on grounds that it had to stem rocket attacks from Palestinian militants.

The President of the Human Rights Council established the Fact Finding Mission on the Gaza Conflict on 3 April 2009 "to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after."<sup>35</sup> The fact-finding mission emphasized the

*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.

<sup>33</sup> For the long list of Security Council draft resolutions critical of Israel where the US has cast a veto, often the only dissenting vote, see "U.S. Vetoes of UN Resolutions Critical of Israel: (1972-2011)" at [www.jewishvirtuallibrary.org/jsource/UN/usvetoes.html](http://www.jewishvirtuallibrary.org/jsource/UN/usvetoes.html), last accessed on 1 October 2011.

<sup>34</sup> Human Rights Council resolution on human rights violations emanating from Israeli military incursions in the Occupied Palestinian Territory, including the recent one in northern Gaza and the assault on Beit Hanoun; A/HRC/S-3/1, preamble, paras. 5 and 7.

<sup>35</sup> *Ibid.* at para. 1.

responsibility of the State of Israel, the Palestinian National Authority and the international community to protect victims of violations.<sup>36</sup>

Following the Israeli attack of 31 May 2010 on a flotilla of aid ships on the way to Gaza with humanitarian supplies, which resulted in the death of 9 activists and the wounding of 55 others on the *Mavi Marmara*, the most the Security Council could agree upon was a statement calling for an impartial inquiry, rather than to conduct one itself.<sup>37</sup> On 2 June 2010, the Human Rights Council adopted resolution 14/1 to investigate violations of international law implicated in the incident with the dispatch of a fact-finding mission. In its report to the Human Rights Council, the fact-finding mission found that: the Israeli naval blockade of the Gaza strip in the first place was illegal; the conduct of the Israeli military and other personnel towards the flotilla passengers was not only disproportionate but also totally unnecessary, incredibly violent and unacceptably brutal. The report documented violations of the Fourth Geneva Convention of 12 August 1949, including wilful killing; torture or inhuman treatment; wilfully causing great suffering or serious injury to body or health. It also listed violations of Israel's international human rights obligations, including the right to life, the right not to be tortured, the right to liberty and security of the person and freedom from arbitrary arrest or detention, the right of detainees to be treated with humanity and respect for the inherent dignity of the human person, as well as freedom of expression. As for individual criminal responsibility, the report considered that there was "clear evidence to support prosecutions" of violations of the Fourth Geneva Convention.<sup>38</sup> On 2 August 2010, the Secretary-General also appointed a Panel of Inquiry to conduct fact-finding on the incident. In its report of September 2011, the Panel concluded that while the level of force deployed in the Israeli operation was excessive and unreasonably violent, the naval blockade itself had been imposed "as a legitimate security measure in order to prevent weapons from entering Gaza by sea and its implementation complied with the requirements of international law,"<sup>39</sup> thus contradicting the Human Rights Council's International Fact-Finding Mission's conclusion on this key point.

<sup>36</sup> Report of the United Nations Fact Finding Mission on the Gaza Conflict; A/HRC/12/48 of 15 September 2009 at para. 1672.

<sup>37</sup> See Security Council Presidential Statement S/PRST/2010/9 of 1 June 2010 which says that: "The Security Council takes note of the statement of the UN Secretary-General on the need to have a full investigation into the matter and it calls for a prompt, impartial, credible and transparent investigation conforming to international standards."

<sup>38</sup> See Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance; A/HRC/15/21 of 27 September 2010 at paras. 260–278.

<sup>39</sup> Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, September 2011 at para. 83.

The effect of the Human Rights Council's investigations into the situation in the Israeli occupied Palestinian territories is difficult to gauge since the Government of Israel has shown little cooperation with the Human Rights Council, its mandate-holders or its fact-finding missions. Nor had it cooperated with the Commission on Human Rights, or for that matter, with the General Assembly's Special Committee on Israeli Practices which was established in 1968.<sup>40</sup> The lack of Israel's cooperation with UN investigations is an argument not to abandon such human rights scrutiny, but rather to maintain a diversified approach. The lack of Security Council investigative action with respect to Israeli violations in the occupied territories has meant that the Human Rights Council has an important role to play if sufficient consensus to field fact-finding missions could be achieved. With regard to the Israeli occupied Palestinian territories, Human Rights Council investigations documented the violations in an independent, objective and impartial manner and they recommended balanced, ameliorative measures to be taken, not only by the Government of Israel, but also by the Palestinian National Authority and the international community at large.

### C. CÔTE D'IVOIRE

Long before the November 2010 elections, the Security Council had been concerned about the situation in Côte d'Ivoire. In February 2004, the Council considered that the situation continued to pose a threat to international peace and security. In resolution 1528, the Security Council acted under Chapter VII of the UN Charter to establish the UN Operation in Côte d'Ivoire (UNOCI) to replace the UN Mission in Côte d'Ivoire (MINUCI), which had functioned as a political mission since May 2003, in order to assist Ivorian parties to abide by a peace agreement they had signed in January 2003.<sup>41</sup> The Security Council was still seized of the situation at the time of writing.

In November 2010, Côte d'Ivoire held its first elections in ten years. Côte d'Ivoire's Electoral Commission on 2 December 2010 proclaimed that opposition leader Alassane Dramane Ouattara had defeated incumbent President Laurent Gbagbo, a finding supported by the UN Secretary-General, the European Union High Representative of the Union for Foreign Affairs and Security Policy, as well as several governments. On 20 December 2010, the Security Council urged all Ivorians to respect the outcome of the election "in view of ECOWAS and African Union's recognition of Alassane Dramane Ouattara as President-elect of Côte

<sup>40</sup> The UN Special Committee to Investigate Israeli Practices affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories was established by General Assembly resolution 2443 (XXIII) of 19 December 1968 to monitor: "respect for and implementation of human rights in occupied territories".

<sup>41</sup> Security Council resolution 1528 of 27 February 2004; S/RES/1528 (2004).

d'Ivoire and representative of the freely expressed voice of the Ivorian people as proclaimed by the Independent Electoral Commission".<sup>42</sup> President Gbagbo however refused to recognize his rival's electoral victory, and on 3 December, the Constitutional Court declared that Gbagbo had won the election.<sup>43</sup> Post-election violence began to involve massacres between the rival political groups and took on an ethnic dimension when a number of tribal groups lined up against each other along political lines. The violence further escalated throughout the first months of 2011 as various factions carried out systematic murder, torture, rape, summary executions and other serious violations.<sup>44</sup> By the end of February 2011, UNHCR estimated that around 40,000 refugees had crossed into Liberia and another some 38,500 were internally displaced in the western part of Côte d'Ivoire.<sup>45</sup>

On 28 December 2010, the Human Rights Council adopted resolution S-14/1 urging Ivorian defence and security forces to refrain from violence, respect human rights and 'assume their responsibilities for the protection of the civilian population'.<sup>46</sup> It also emphasized that: "the legitimate Government of Côte d'Ivoire has the primary responsibility to make every effort to strengthen the protection of the civilian population and to investigate and bring to justice perpetrators of violations of human rights and of international humanitarian law". The Council also requested the High Commissioner for Human Rights to report to it on the ongoing violations.<sup>47</sup> In this regard, in her report of February 2011, the High Commissioner reminded Gbagbo that he had an ongoing responsibility to ensure that his military, security and law enforcement officials protected civilians and prevented human rights violations and that perpetrators of violations were to be prosecuted.<sup>48</sup>

On 25 March 2011, the Human Rights Council adopted resolution 16/25 by which it decided to dispatch an independent, international commission of

<sup>42</sup> Security Council resolution 1962 of 20 December 2010; S/RES/1962 (2010) at para. 1.

<sup>43</sup> "Ivory Coast poll overturned: Gbagbo declared winner", *BBC News*, 3 December 2011 at [www.bbc.co.uk/news/world-africa-11913832](http://www.bbc.co.uk/news/world-africa-11913832), last accessed on 1 October 2011.

<sup>44</sup> See e.g. "Côte d'Ivoire: Warning of 'human rights catastrophe' as forces reach Abidjan", Amnesty International, 31 March 2011 at [www.amnesty.org/en/news-and-updates/c%CC%80%B4te-d%E2%80%99ivoire-warning-%E2%80%98human-rights-catastrophe%E2%80%99-forces-reach-abidjan-2011-03-31](http://www.amnesty.org/en/news-and-updates/c%CC%80%B4te-d%E2%80%99ivoire-warning-%E2%80%98human-rights-catastrophe%E2%80%99-forces-reach-abidjan-2011-03-31), last accessed on 1 October 2011.

<sup>45</sup> Mamadou Dian Balde, Jeff Crisp, Ewen Macleod and Vicky Tennant, "Shelter from the storm: A real-time evaluation of UNHCR's response to the emergency in Côte d'Ivoire and Liberia", UNHCR, PDES/2011/07 of June 2011.

<sup>46</sup> Human Rights Council resolution S-14/1 on the situation of human rights in Côte d'Ivoire in relation to the conclusion of the 2010 Presidential Election; A/HRC/S-14/1, *adopted without a vote* on 23 December 2010 at para. 3.

<sup>47</sup> *Ibid.* at para. 12.

<sup>48</sup> Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Côte d'Ivoire; A/HRC/16/79 of 25 February 2011 at para. 42.

inquiry to investigate serious human rights violations committed in Côte d'Ivoire following the election, to identify individuals responsible for such acts with a view to bringing them to justice, and to report back to the Council at its next session.<sup>49</sup> Resolution 16/25 also reaffirmed the "responsibility of Côte d'Ivoire to promote and protect all human rights and fundamental freedoms, to investigate alleged violations of human rights and international law and to bring to justice the perpetrators of such acts, who are answerable for their deeds before the judicial process". On 30 March 2011, the Security Council condemned the serious violations of human rights and humanitarian law in Côte d'Ivoire and referred to the responsibility of parties to armed conflicts "to take all feasible steps to ensure the protection of civilians and facilitate the rapid and unimpeded passage of humanitarian assistance and the safety of humanitarian personnel".<sup>50</sup>

In its report of June 2011, the Commission of Inquiry laid the blame for the serious violations of human rights and humanitarian law squarely on Gbagbo's rejection of the election results, and it indicated that some of the violations might amount to war crimes and crimes against humanity.<sup>51</sup> Notwithstanding that Côte d'Ivoire was not a party to the Rome Statute of the ICC, on 3 May 2011, President Ouattara requested ICC Prosecutor Luis Moreno-Ocampo to open an investigation.<sup>52</sup> On 3 October 2011, ICC Pre-Trial Chamber III authorized the Prosecutor to commence an investigation in Côte d'Ivoire with respect to crimes committed since 28 November 2010.<sup>53</sup>

With regard to the situation in Côte d'Ivoire, why was a Human Rights Council commission of inquiry fielded to investigate possible war crimes and crimes against humanity rather than one established under Security Council auspices? Several possible reasons come to mind. First, the Security Council had already pronounced itself on the election results to declare Ouattara the victor over Gbagbo and its peacekeeping mission had been actively involved in protecting

<sup>49</sup> Human Rights Council resolution 16/25 on the situation of human rights in Côte d'Ivoire; A/HRC/16/25 of 25 March 2011.

<sup>50</sup> Security Council resolution 1975 of 30 March 2011; S/RES/1975 (2011) at preambular para. 10.

<sup>51</sup> Rapport de la Commission d'enquête internationale indépendante sur la Côte d'Ivoire; A/HRC/17/48 of 14 June 2011 at para. 91.

<sup>52</sup> On 23 June, the Prosecutor then requested ICC judges for authorization to initiate a criminal investigation into war crimes and crimes against humanity committed in Côte d'Ivoire since 28 November 2010. In his request for authorization, the Prosecutor cited reports that more than 3000 individuals had been killed, 72 disappeared, and 520 people subjected to arbitrary arrest and detention in Côte d'Ivoire following the November 2010 election. More than 100 cases of rape were reported, but the Prosecutor indicated that the number of unreported incidents of rape was believed to be much higher. See "Situation of Côte d'Ivoire: Request for authorization of an investigation pursuant to Article 15"; ICC-02/11-3 of 23 June 2011.

<sup>53</sup> Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Côte d'Ivoire; ICC-02/11 of 3 October 2011 at para. 212.

Ouattara himself at the Golf Hotel in Abidjan and had come under attack from Gbagbo forces.<sup>54</sup> Second, the Security Council's long involvement in Côte d'Ivoire, and its peacekeeping mission's implication in the hostilities themselves made it second choice to deployment of an investigation mission from the Human Rights Council which was relatively new to the conflict and could proceed with a stronger image of independence, objectivity and impartiality. Third, there may have been a sense early on in the crisis that Gbagbo's forces would not be in a position to resist international and domestic pressure for long, both from a military and political point of view, in which case a commission of inquiry fielded from the Human Rights Council, despite its non-mandatory legal basis in contrast to the Security Council's Chapter VII authority, would still be sufficient for the purpose at hand. Fourth, ECOWAS and the African Union seemed to have exhausted efforts at the regional and subregional levels to mediate the crisis and were unequivocal in their condemnation of Gbagbo's refusal to cede power.<sup>55</sup> All these developments indicated that there was a strong likelihood of achieving sufficient consensus in the Human Rights Council to deploy a commission of inquiry, and therefore that this approach should be used.

#### D. LIBYA

On 15 February 2011, a number of peaceful protests against the regime of Colonel Muammar Qadhafi,<sup>56</sup> who had ruled Libya for almost 42 years, took place in Tripoli and quickly spread throughout the country, inspired by popular demands for democratic reforms in neighbouring Tunisia, Egypt, and certain other Arab countries. The Qadhafi regime responded with military force and harsh crackdowns on protestors and civilians. This in turn impelled opposition leaders to form a provisional government in Benghazi called the National Transitional Council whose stated purpose was to overthrow the Government of Libya and pave the way for democratic elections.

On 25 February 2011, the Human Rights Council condemned the gross and systematic human rights violations that were being committed in Libya. These violations involved extrajudicial killings, arbitrary arrest and detention, systematic torture as well as indiscriminate armed attacks on civilians. The

<sup>54</sup> "Mortars fired at Ouattara's hotel in Abidjan: UN official says the fire appeared to be coming from the presidential palace area where Gbagbo stays", *Aljazeera*, 9 April 2011, at <http://english.aljazeera.net/news/africa/2011/04/20114919178202395.html>, last accessed on 1 October 2011.

<sup>55</sup> See Press Statement of the African Union Peace and Security Council on its 270<sup>th</sup> Meeting; PSC/PR/BR.1(CCLXX) of 5 April 2011.

<sup>56</sup> For the purposes of this paper, the transliteration of the Colonel's name from Arabic employs that used in the reports of the UN Secretary-General.

Council stated that these violations could amount to crimes against humanity and it called "upon the Government of Libya to meet its responsibility to protect its population, to immediately put an end to all human rights violations, to stop any attacks against civilians, and to fully respect all human rights and fundamental freedoms, including freedom of expression and freedom of assembly".<sup>57</sup> The Human Rights Council decided to establish an international commission of inquiry to investigate the violations and to make recommendations on measures to further ensure the accountability of perpetrators.<sup>58</sup>

The Security Council then took a series of strong measures by way of resolution 1970 which it adopted on 26 February. It referred the situation to the ICC,<sup>59</sup> enforced an arms embargo upon all UN member States on direct or indirect supply of arms to Libya,<sup>60</sup> put in place a travel ban on 16 members of the Qadhafi family and persons close to the regime<sup>61</sup> as well as an assets freeze on six Qadhafi family members.<sup>62</sup> It also established a Sanctions Committee as well as criteria for designating individuals involved or complicit in ordering, controlling, or otherwise directing, the commission of serious human rights abuses.<sup>63</sup> It called upon all UN member States to facilitate humanitarian assistance and indicated the Council's decision to remain seized of the matter. On 17 March, in resolution 1973, the Security Council deplored the Government's failure to comply with resolution 1970 and condemned "the gross and systematic violation of human rights, including arbitrary detentions, enforced disappearances, torture and summary executions" and urged it to comply with its humanitarian law obligations.<sup>64</sup> In addition to other measures, the Security Council then authorized member States:

"to take all necessary measures... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory, and requests the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization conferred by this paragraph which shall be immediately reported to the Security Council".<sup>65</sup>

<sup>57</sup> Human Rights Council resolution on the situation of human rights in the Libyan Arab Jamahiriya; A/HRC/S-15/1 of 3 March 2011, *adopted* on 25 February 2011, at paras. 1 and 2.

<sup>58</sup> *Ibid.* at para. 11.

<sup>59</sup> *Ibid.* at paras. 4–8.

<sup>60</sup> *Ibid.* at paras. 9–14.

<sup>61</sup> *Ibid.* at paras. 15 and 16 and see Annex I to the resolution.

<sup>62</sup> *Ibid.* at paras. 17 – 21 and see Annex II to the resolution.

<sup>63</sup> *Ibid.* at paras. 22–25.

<sup>64</sup> Security Council resolution 1973 of 17 March 2011; S/RES/1973 (2011).

<sup>65</sup> *Ibid.* at para. 4.



In the same resolution, the Council also imposed a no-fly zone, took measures to ban flights inside and out of Libya, freeze assets, and named the specific individuals subject to these restrictions. By the time of writing, a coalition of governments headed by a North Atlantic Treaty Organization command had helped revolutionary forces in Libya to wrest control of almost all main city centres and strategic zones of Libya. On 20 October 2011, Colonel Qadhafi seemed to have been captured alive and then killed by rebel forces in Sirte.<sup>66</sup>

In its June 2011 report, the Human Rights Council's Commission of Inquiry indicated that it had made direct contact with the Government as well as with the National Transitional Council, representatives of civil society and individuals throughout Libya. It met with more than 350 people during its field missions, including doctors, medical staff, patients and members of their families in 10 hospitals. It also met with 30 detainees in Tripoli and Benghazi as well as with internally displaced persons and refugees.<sup>67</sup> The Commission indicated that, based on Government and National Transitional Council estimates, between 10,000 to 15,000 people may have been killed by the time of the writing of the June 2011 report. In Part IV of the report, it documented a range of serious human rights violations relating to the excessive use of force against demonstrators, arbitrary detention and enforced disappearances, torture and other forms of ill-treatment, denial of access to medical treatment, suppression of the freedom of expression, attacks on civilians, civilian objects, protected persons and objects, use of prohibited weapons, use of mercenaries, abuse of the human rights of migrant workers, sexual violence, and children in the armed conflict. The report also considered the human rights consequences of NATO's use of force.

Similar to the Côte d'Ivoire situation, it was the Human Rights Council rather than the Security Council which established a human rights investigative commission, but this choice was made perhaps for somewhat different motives. In the instance of Côte d'Ivoire, the Human Rights Council's role probably strengthened the image of independence, objectivity and impartiality of investigation, particularly since UN peacekeeping forces under Security Council authority had been subjected to military attack from Gbagbo's forces. As regards Libya, resolution 1973 authorizing States 'to take all necessary measures' to protect civilians occasioned considerable disquiet at the time among Security

Council members. Five Security Council members abstained in the vote and explained that they had made their abstention mainly on the grounds that the resolution was insufficiently unclear as to who should carry out military operations to protect civilians and how far military intervention could go in targeting Muammar Qadhafi and other military commander of Libya forces.<sup>68</sup> While the issue of the Human Rights Council's image of relative independence from the parties intervening militarily on the basis of Security Council resolution 1973 might also have been at play, to ask the Security Council to deploy a commission of inquiry to investigate human rights and humanitarian law violations in Libya might have proved too difficult given the relatively weak support resolution 1973 garnered in the first place.

## E. SYRIA

By 1 October 2011, the Human Rights Council had held a second special session on the human rights situation in Syria. In late August, the Human Rights Council decided to dispatch an international commission of inquiry to look into serious human rights violations being perpetrated in Syria.<sup>69</sup> In her address to the opening of the 18<sup>th</sup> regular session of the Human Rights Council on 12 September 2011, Navi Pillay, the High Commissioner for Human Rights, stated that more than 2,600 people had been killed in Syria since the outbreak of violence in mid-March of 2011.<sup>70</sup> The High Commissioner revised the number to 3,000 in a 14 October 2011 press statement,<sup>71</sup> and referred to the 'remorseless toll of human lives'. She also stated that: "Since the start of the uprising in Syria, the Government has consistently used excessive force to crush peaceful protests", and she drew attention to 'sniping from rooftops', 'indiscriminate use of force

<sup>68</sup> The representatives of China and Russia explained that they had abstained because the resolution was too vague about who would enforce it and how. China indicated that it had decided not to veto the resolution because of the wishes of the Arab League and African Union. India, Germany and Brazil also abstained on the grounds that the conflict in Libya should be solved peacefully and they expressed their concerns over unintended consequences of the use of military force. See "Security Council Approves 'No-fly Zone' over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, adopted by vote of 10 in favour, and 5 abstentions", DPI Press Statement SC/10200 of 17 March 2011.

<sup>69</sup> See OHCHR Press Statement on "Human Rights Council decides to dispatch a commission of inquiry to investigate human rights violations in the Syrian Arab Republic" of 23 August 2011 at [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11326&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11326&LangID=E), last accessed on 1 September 2011.

<sup>70</sup> See Opening Statement by Ms. Navi Pillay, UN High Commissioner for Human Rights at the 18<sup>th</sup> session of the Human Rights Council of 12 September 2011 in Geneva; [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11358&LangID=e](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11358&LangID=e) last accessed on 13 September 2011.

<sup>71</sup> See OHCHR, "Pillay urges united international action to protect Syrians", Press Statement of 14 October 2011; [www.ohchr.org/EN/NewsEvents/Pages/Media.aspx?IsMediaPage=true](http://www.ohchr.org/EN/NewsEvents/Pages/Media.aspx?IsMediaPage=true), last accessed on 14 October 2011.

<sup>66</sup> See "Muammar Gaddafi killed as Sirte falls: Former Libyan leader dies as last bastion falls, but questions remain about the circumstances of his death" *Aljazeera*, 20 October 2011 at <http://english.aljazeera.net/news/africa/2011/10/20111020111520869621.html>, last accessed on 20 October 2011.

<sup>67</sup> See Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya; A/HRC/17/44 of 1 June 2011 at *Summary*.

against peaceful protestors' and the 'use of live ammunition and the shelling of residential neighbourhoods' as the routine modus operandi in many Syrian cities. Some 187 children were estimated to have been killed since the start of the violence and more than 100 people killed in the period 4–14 October 2011 alone. She referred also to reports of thousands of arrests and detentions, forcible disappearances and torture, among other serious violations.

Political consensus in the Security Council to isolate the abusive regime of Bashar El Assad was weak and by the time of writing in October 2011, China and Russia had vetoed a draft Security Council resolution to place sanctions on Bashar El Assad's regime.<sup>72</sup> On 12 November 2011, the Arab League voted to suspend Syria from its membership unless it stopped firing on unarmed protestors and in the third week of November, the Arab League was negotiating with the Government to accept a presence of 500 monitors in its territory, while the violence continued unabated. It was too early to tell whether the Human Rights Council's Commission of Inquiry on Syria could carry out investigations effectively. As in the Libya scenario, the Human Rights Council with regard to Syria was more prepared than the Security Council to field an investigation into the atrocities. This might have been due partially to the fact that by August 2011 the Human Rights Council's practice of dispatching investigative missions into country situations where genocide, war crimes or crimes against humanity had become an issue, had already begun to consolidate.

#### IV. THE COMPLEMENTARY ROLES OF UN HUMAN RIGHTS INVESTIGATION AND INTERNATIONAL CRIMINAL INVESTIGATION

In choosing the optimal tool to investigate situations involving genocide, war crimes or crimes against humanity, UN decision makers should bear in mind the complementary roles of UN human rights investigation and international criminal investigation. That in turn requires an appreciation of key similarities and differences between the two.

In terms of legal responsibility, classical human rights investigation has focused mainly on 'internationally wrongful acts' of the State whereas international prosecution-related fact-finding has examined violations mainly to discover whether they might qualify as crimes under international law. Although international prosecutions hone in on individual criminal responsibility rather

<sup>72</sup> See Jonathan Marcus, "Why China and Russia rebuffed the West on Syria", *BBC News*, 5 October 2011 at [www.bbc.co.uk/news/world-middle-east-15180732](http://www.bbc.co.uk/news/world-middle-east-15180732), last accessed on 10 October 2011.

than State responsibility, the issue of a criminal suspect's position in a former actual State command structure could prove critical to establishing criminal guilt in cases of genocide, war crimes or crimes against humanity, which often involve the perversion of State power.

Traditionally, UN human rights investigation has focused less on individual criminal responsibility and more on the human rights situation as a whole, even where crimes under international law were clearly committed. An early and foreseeable and tragic instance of the use of general human rights investigation where the facts on the ground instead called for an international criminal investigation, can be seen in the UN human rights response to the serious violations perpetrated in East Timor in April and September 1999. It seems clear that dozens of Indonesian commanders, soldiers and militia deliberately committed systematic murder, torture, rape, summary or arbitrary execution and other grave violations, as part of a calculated attack to intimidate East Timor from gaining its independence from Indonesia. Despite the fact that the ICJ and ICTR had already illuminated a path as to how UN human rights investigations and international criminal prosecutions could be conducted in a complementary manner, the Commission on Human Rights managed only a very weak response to violations which qualified as crimes against humanity. The Commission on Human Rights dispatched the more traditional kind of human rights mission, rather than a 'commission of inquiry' or 'commission of experts' to investigate. The Commission of Inquiry's 39-page report recommended that the UN should establish 'an independent and international body' to conduct further investigations, ensure reparations, and prosecute 'the guilty of serious human rights violations within the framework of its function to ensure justice', but without referring specifically to crimes under international law or recommending clearly what form this body should take.<sup>73</sup> Predictably, to date, almost no one has been prosecuted for crimes against humanity in relation to the 1999 violence. Years later, in 2005, a 'UN Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999' was established. It recommended action that should have been undertaken in the first place: establishment either of an *ad hoc* international criminal tribunal for Timor-Leste or other credible means by which to enforce individual criminal responsibility under international law.<sup>74</sup>

<sup>73</sup> Report of the International Commission of Inquiry on East Timor to the Secretary-General, A/54/726; S/2000/59 of 31 January 2000 at para. 152.

<sup>74</sup> 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; Annex II to the Letter dated 24 June 2005 from the Secretary-General addressed to the President of the Security Council; S/2005/458 of 15 July 2005 at paras. 525 and 526. Less helpfully, the Commission of Experts also recommended that the situation be referred to the International

Another important difference between human rights and criminal investigation relates to their respective burdens of proof. Criminal trials require not only proof of criminal guilt beyond a reasonable doubt, but strict respect for the presumption of innocence and all international fair trial standards. Non-criminal trials relating to genocide, war crimes or crimes against humanity apply a lower threshold, as seen in the International Court of Justice case concerning genocide in Bosnia and Herzegovina where 'proof at a high level of certainty appropriate to the seriousness of the allegation' was sufficient.<sup>75</sup> The application of the differing burdens of proof between criminal and non-criminal trials raises the question as to whether UN human rights investigations can be helpful at all in ICC prosecutions. Could information received or gathered in the course of regular UN human rights investigation help the ICC Prosecutor, or would such information have to be considered in principle unreliable? Until recently, human rights investigators generally have not taken measures to ensure:

- the recording of all relevant information on times, dates, and circumstances concerning violations which might qualify as acts of genocide, war crimes or crimes against humanity;
- an unbroken and secure chain of evidence;
- consistent use of sophisticated encryption and transmission technology to secure information gleaned from interviews, documents or firsthand eye witness accounts, and get it to New York or Geneva without being intercepted; and
- clear and consistent notation of sources of information to allow for production of witnesses for cross-examination in eventual ICC or other criminal trials, and to assist the investigator himself or herself to recollect events in case he or she is called to testify in ICC proceedings.

The Chair of the Security Council's Commission of Experts on the former Yugoslavia, Cherif Bassiouni, indicated that most of the information that the Commission of Experts had received was useful only to establish the location, character and scale of violations, and not as direct evidence as part of the prosecution's case. There was also inadequate referencing of sources of information which stymied corroboration and cross-examination at a later stage such that information of potential evidentiary value would have to be ruled inadmissible as hearsay.<sup>76</sup>

Criminal Court notwithstanding the fact that the Rome Statute of the ICC does not authorize the ICC from exercising jurisdiction before its entry into force on 1 July 2002.

<sup>75</sup> 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.

<sup>76</sup> Op. cit. note 23 at 300 *et seq.* Bassiouni observed that: "Governments did not provide any intelligence information in their possession – such as satellite and aerial photographs;

Fortunately, gradual recognition on the part of the Human Rights Council, its mandate-holders as well as OHCHR staff, that the findings of UN human rights investigations could figure as evidence in international criminal prosecutions has encouraged a revision of fact-finding methodology more in line with criminal investigation. Equally important, the ICC has explicitly recognized the value of UN human rights fact-finding. This became clear in the important case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*. This ICC case involved two high-level Congolese militia leaders for war crimes and crimes against humanity, allegedly perpetrated in connection with a joint attack on a village in an eastern province of the Democratic Republic of the Congo (DRC) over the period January to March 2003.<sup>77</sup> In that case, Sonia Bakar, a highly experienced UN staff member in the position of Assistant Head of the Human Rights Section of the UN Organization Mission in the Democratic Republic of the Congo (MONUC), explained clearly in her 6 December 2010 testimony before the ICC<sup>78</sup> the methods she and her team members employed in gathering, receiving, safeguarding and transmitting securely, information during her field investigations in localities pertaining to crimes allegedly committed by the accused. The Defence sought to exclude Bakar's testimony on grounds of unreliability. Significantly however, Presiding Judge Bruno Cotte confirmed that Bakar and her team's procedures, reflected not her own personal approach, "but the traditional methods used by the United Nations services for missions of the kind" and that these methods were 'tried and tested'. The Chamber ruled that the reports were relevant to the court's mandate, that there was no question as to their authenticity, and that with the aid of the deponent's oral testimony, their probative value could be assessed.<sup>79</sup> Crucially, the ICC was careful to distinguish information received or collected through UN human rights methodology, from information collected specifically for the purposes of criminal prosecution:

"The Chamber is perfectly aware that the methods utilized were not the same as the methods employed by police investigators or legal investigators, and it is quite precisely because they are not police investigations or legal investigations that the Chamber, when the time comes, shall accord them the appropriate weight of probative value. In other words, they will – the probative value will be given to the appropriate excerpts and paragraphs from these reports. This probative value will be given bearing in mind that these are reports established by UN services in an impartial

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."

<sup>77</sup> The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui; ICC-01/04-01/07.

<sup>78</sup> See Sonia Bakar's testimony of 6 December 2010; ICC-01/04-01/07-T-228-ENG ET WT 06-12-2010 1/86 RM T.

<sup>79</sup> See the Ruling at DRC OTP P 0317 (Resumed) open session on 7 December 2010.

manner with a concern to understand the events in question. The Chamber recalls yet again that these are neither police reports or [Office of the Prosecutor] investigations.<sup>80</sup>

The Chamber then ruled that the UN human rights investigation information was admissible as evidence in the case before it.

The ICC Chamber's welcoming of information gathered by trained human rights investigators at the UN staff level, at least in this case, augurs well for greater complementarity of investigations into situations involving genocide, war crimes and crimes against humanity. Human Rights Council investigations have reached a critical point in their development. If used properly, they have much to contribute to international criminal law fact-finding and they could sharpen the international community's response to severe violations of human rights and humanitarian law. The importance of this challenge naturally causes one to reflect upon practical recommendations for best practices, as discussed next.

## V. PRACTICAL RECOMMENDATIONS

The international community should respond as quickly, consistently and objectively as possible through the UN or regional international peace and security framework to investigate situations that seem to involve genocide, war crimes or crimes against humanity. Aside from the obvious humanitarian imperative to halt and prevent serious violations of human rights and humanitarian law, such violations if left unaddressed, could easily undermine regional or international stability and constitute a threat to or breach of international peace and security. As such, they should be addressed by the Security Council pursuant to Chapter VII of the UN Charter. Security Council action taken under Chapter VII accords due weight to the seriousness of the problem to be addressed and binds all UN member States, which could be of critical importance in isolating an abusive regime such as that of Colonel Qadhafi, and of enforcing military sanctions, travel bans and freezing of assets more effectively. More difficult questions arise as to how to proceed where the Security Council has been unable to agree in fielding a fact-finding mission into a situation involving serious violations. The failure to stop systematic or widespread violence or even to find out the facts, could invite warring parties to ignore international human rights law, humanitarian law and international criminal law, and this could place thousands of lives in immediate jeopardy. These considerations invite the following recommendations:

<sup>80</sup> Ibid. at page 24 lines 8-18.

## A. PREVENTION AND EARLY WARNING

1. The Human Rights Council should stay attuned to emerging patterns of gross and systematic violations of human rights specifically with a view to considering whether there is a risk of genocide, war crimes or crimes against humanity breaking out and in order to explore what early preventive measures could be taken.
2. The Human Rights Council should make full use of the Universal Periodic Review process to bring to light worrying trends in countries under review, specifically with an eye to detection and prevention of serious human rights and humanitarian law violations.
3. Humanitarian personnel should report signs of serious violations of human rights and humanitarian law and notify competent international authorities of their possible occurrence.

## B. APPROPRIATE CHANNELS FOR INVESTIGATIVE RESPONSE

4. Where the Security Council remains deadlocked over sending a mission to investigate genocide, war crimes or crimes against humanity, similar action should instead be channeled through the Human Rights Council. While the Human Rights Council does not enjoy the kind of mandatory legal authority as that bestowed upon the Security Council by UN Charter Chapter VII, this does not mean that Human Rights Council investigative missions are any less valuable in terms of the substance and relevance of their findings to eventual criminal prosecution. Nothing prevents Human Rights Council investigations from using the same or similar methods that Security Council investigations, such as those relating to the former Yugoslavia, Rwanda or Darfur, have used in the past. Moreover, Human Rights Council investigations might in some instances be in a position to encourage greater cooperation from government officials because of the fact that the Human Rights Council membership encompasses a more representative cross section of the international community with 47 member States rather than the Security Council's 15.
5. OHCHR should work in closer cooperation with regional and subregional collective security frameworks to coordinate preventive, diplomatic and reactive action in case situations degrade, or appear likely to degrade, to the point of widespread, serious or systematic violations of human rights and humanitarian law.
6. Not every human rights fact-finding mission should expect to collect evidence for international prosecutions in each and every situation. Some



instances may involve violations that do not seem to qualify as genocide, war crimes or crimes against humanity, in which case it might be necessary to focus more on issues of State responsibility and the general human rights situation rather than on issues relating to individual criminal responsibility.

### C. TIGHTENING UP OF INQUIRY PROCEDURES

7. Human Rights Council investigations should continue to professionalize its methods in order to maximize their possible relevance to eventual criminal prosecutions. In this sense, OHCHR's Rapid Response Section should be supported in its efforts to collate and sharpen its best practices pertaining to investigation of human rights situations that seem to involve genocide, war crimes or crimes against humanity.
8. UN human rights fact-finding missions, whether conducted under the auspices of the Human Rights Council, Security Council, or for that matter under the General Assembly or other UN organ, that involve genocide, war crimes or crimes against humanity, should include one or more members with solid criminal investigative and / or prosecution experience, preferably at the international level.

### D. TRAINING IN FACT-FINDING AND INVESTIGATIONS

9. UN human rights fact-finders should be trained in international humanitarian law and international criminal law in addition to international human rights law. Human rights fact-finders should be thoroughly familiar with the basics of international criminal law. They should also be trained to understand when they should call in more specialized criminal investigation or forensic specialists.
10. 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. In this regard, OHCHR should draw more fully on ICC expertise and share information on situations meriting ICC investigation, through regular liaison between OHCHR desk officers and the ICC's Office of the Prosecutor.

### E. TRAINING OF CRIMINAL PROSECUTORS AND INVESTIGATORS

11. The ICC Prosecutor, and at the relevant stage in proceedings, the Pre-Trial Chamber, should exercise due diligence in reviewing information systematically from UN human rights fact-finding mechanisms, including human rights treaty bodies, special procedures, human rights field presences, special investigative missions, and human rights units in peacekeeping missions.
12. International criminal prosecutors and investigators should keep informed about the role and value of information coming from UN human rights investigators so that they can streamline the case-building effort.

### F. TRAINING OF PEACEKEEPERS

13. The UN Department of Peacekeeping Operations should train peacekeepers, peace operations officials, military observers, military police and UN civilian police to recognize serious violations of human rights and humanitarian law and to channel information on their occurrence to OHCHR.
14. A 'One UN' approach should be adopted in response to situations of potential or actual conflict, for example, through the placing of experienced human rights officers in peacekeeping operations who are knowledgeable about the fundamentals of human rights, humanitarian law and international criminal law.

### G. LESSONS LEARNED AND BEST PRACTICES

15. OHCHR should conduct an exercise to distill lessons learned from the Security Council and Human Rights Council investigative responses to the situations in Darfur, the Israeli occupied Palestinian territories, Côte d'Ivoire, Libya, Syria and others that might arise, with a view to strengthening further human rights investigative deployment and methodology.