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Can International Criminal Investigators and Prosecutors Afford to Ignore Information from United Nations Human Rights Sources?

Lyal S. Sunga*

13.1. Introduction

If and when criminal investigators show up in the aftermath of violent conflict to investigate genocide, war crimes or crimes against humanity, they can suffer sensory overload and emotional shock from the horrific scenes that confront them, an experience for which they might be quite unprepared. At the same time, from chaotic scenes of blood, broken bodies, busted buildings and shredded lives, they have to figure out the big picture quickly. Unless they acquire balanced and broad perspective on what transpired, international criminal investigators will be unable to identify planners, organisers and direct perpetrators of crimes that far exceed the ordinary in terms of intensity, scale and gravity. Nor will they be able to situate individual suspects in the relevant command structure and to connect that relationship to the crime. As the clock starts ticking and the international community, including victims, clamour for justice, prosecutors have to piece together the historical, political, social and military context in which the alleged crimes were perpetrated: by whom,

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against whom, when, where, why and how. Since facts in themselves mean little without context, prosecutors have to make their case as coherently and compellingly as possible, particularly since international criminal court and tribunal judges are not interested in vague charges, poorly substantiated allegations or weak evidence.

Yet even the Prosecutor of the International Criminal Court ('ICC') – the world's pre-eminent symbol of international criminal justice – has nowhere near enough resources to become expert in situations from Colombia to Côte d'Ivoire, Syria to Sudan, Mali to Kenya to Uganda to whichever other Rome Statute crime scenario crops up. International crimes are highly complex, often involving nuanced or normatively convoluted violations of human rights or humanitarian law in terms of the way they are defined and the circumstances surrounding their perpetration. Practically speaking, criminal investigators and prosecutors, whether from the ICC, international criminal tribunals, and even at domestic levels, have little choice but to draw upon the great wealth of information on human rights violations routinely collected by international, regional and sub-regional organisations, the strictly neutral ICRC, Governments, and human rights NGOs. Not only do these bodies carry out competent, regular and balanced human rights monitoring the world over and have been doing so for decades, but they often have extensive knowledge of the local situation, and have the capacity to identify and locate witnesses, victims and survivors, and in some instances, suspected perpetrators, even before the ICC could start planning its initial field mission to the crime scene.

At the same time, information on human rights situations may be as biased, politically slanted, vague, partial and prejudicial as its source. Controls on the collection, authentication, storage and analysis of information designed to ensure criminal prosecutions are accurate, fair and effective, do not apply in the realm of human rights investigation, monitoring and reporting. Investigative procedures for human rights violations differ from those for international criminal prosecutions and the dissimilarities between their respective purposes, formats and probative value, seem wide and even unbridgeable in particular instances. Further complicating the challenge for international criminal investigators and prosecutors is that many different kinds of actors collect, analyse and report on human rights matters including intergovernmental organisations, Governments, the ICRC, NGOs, journalists, academics, and research insti-

tutes. This bewildering array of sources feeds information into UN human rights reports.

For the international criminal investigator and prosecutor, many of whom may have had little or no international experience and have been drawn from domestic criminal practice to serve the ICTY, ICTR, ICC, Special Court for Sierra Leone, Special Court for Lebanon, Extraordinary Chamber in the Courts of Cambodia or other international, hybrid or mixed venue, UN human rights information might be somewhat mystifying because of the following paradoxes. On the one hand, UN human rights reports do not resemble evidence gathered in the course of ordinary criminal investigations, but on the other hand, such reports could contain information on mass violations or the events leading up to such violations that might assist the Prosecutor to prepare his or her case, not least because the crimes themselves are defined also as violations of international human rights law or grave breaches of humanitarian law. On the one hand, the UN is a political organisation that was set up by Governments, each of which has its own political agenda, yet on the other hand, UN reports are often cited as relatively independent and objective. On the one hand, UN human rights fact-finding bodies do not have a mandate to indict individuals or produce evidence for an eventual criminal trial, yet on the other hand, several UN human rights fact-finding bodies have been requested to identify violations including crimes under international law and to compile lists of the names of possible perpetrators for submission to the UN Secretary-General and the High Commissioner for Human Rights, as discussed below. On the one hand, UN human rights fact-finding exercises have frequently led the way for the establishment of international criminal tribunals themselves, such as the ICTY and ICTR, but those same tribunals then have often treated information from UN human rights sources with great skepticism, or dismissed it altogether as discussed in Chapter 11 above, perhaps because its value and potential role is not fully appreciated.

It is therefore worth considering first the information needs relating to international criminal prosecutions; second, whether UN human rights information in general can be trusted; third, the relationship between the UN and intelligence gathering; fourth, the pre-eminence of Government information gathering capacity; fifth, the value of information from UN human rights sources including the treaty bodies, special procedures and the Universal Periodic Review ('UPR'); sixth, whether information from

UN human rights sources could be admitted as direct evidence in international criminal proceedings and whether rules against hearsay exclude UN human rights reports; and finally, whether international criminal investigators and prosecutors can afford to ignore information from UN human rights sources.

13.2. What Kinds of Information Do International Criminal Prosecutions Need?

Very few, if any, situations that deteriorate to the point of genocide, war crimes or crimes against humanity, blow up overnight. Serious human rights and humanitarian law violations amounting to crimes under international law are almost always preceded by an *accelerando* of violations of lesser intensity, gravity and scale. It follows that understanding patterns and developments of precursor violations can shed light on the context in which genocide, war crimes or crimes against humanity have been perpetrated, or are about to be perpetrated. Consider Hitler's Final Solution to the Jewish Question – the Nazis' euphemism for the attempted annihilation of all Jews in Europe. Before it was fully implemented in 1942,³ hundreds of thousands of Jews, Roma, Sinti and others, had already been massacred, and these massacres were themselves preceded by years of persecution and violations of lesser gravity that were launched by the Nazi regime once Hitler was appointed Chancellor of Germany on 30 January 1933 and they had been ramped up over many years.⁴ Mass violations, such as those committed from 1966 to 1996 in Guatemala, during the 1971 Bangladesh War of Liberation, Burundi in 1972 and 1993, Equatorial Guinea (1968–1979), Argentina's Dirty War (1976–1983), the Cambodian Civil War (1976–1979), the 1994 Rwandan Civil War, the Yugoslav Wars (1991–1999), the Darfur Conflict (2003–present), the various armed conflicts in the Democratic Republic of the Congo (including the first and second Congo wars, the Ituri and Kivu conflicts and the still ongoing M23 Rebellion), and the Sri Lanka Civil

³ See the Minutes of the Wannsee Conference, held in Berlin, am Grossen Wannsee, No. 56/58 on 20 January 1942 concerning the Final Solution of the Jewish Question, translation in English in John Mendelsohn, 11 *The Holocaust: selected documents in eighteen volumes* (1982) at 18–32, available at <http://www.writing.upenn.edu/~afilreis/Holocaust/wannsee-transcript.html>, last accessed on 10 October 2013.

⁴ See for example, Robert A. Michael, *The Holocaust: a Chronology and Documentary*, 1998.

War (1983–1999), to mention only a few, seem all to have been perpetrated in the context of protracted armed conflict and severe political instability that sometimes took many years to get to the point of open, large-scale violence. Many of them were exacerbated by deep ethnic or religious hatred that lasted for many generations. By the time violations reach the gravity of genocide, war crimes or crimes against humanity, patterns of human rights violations, at least viewed in retrospect, indicate the pathways that led to such intense violence. Situating individual criminal suspects in these pathways and relating them to the *actus reus* and *mens rea* in crimes of genocide, war crimes and crimes against humanity could therefore be essential for international criminal investigators and prosecutors to develop their case.

13.3. Understanding the Constitutional, Legal and Political System

International criminal prosecutors also have to understand thoroughly the structure, function and operation of the legal system of countries where genocide, war crimes or crimes against humanity are alleged. In the situations of Nazi Germany, the period leading up to the 1994 Rwandan Civil War, and in Darfur, Sudan, the legal system itself, in one way or another, functioned as an instrument of discrimination, oppression and persecution. Examination of the constitutional framework could itself provide clear evidence of the differences in power among national, ethnic, racial or religious groups. Charting how constitutional arrangements came into being and the configuration of the role of the courts, legislative system, Executive, and the presence or absence of checks and balances, offers a blueprint of the distribution of legal and political power in a given country. Lack of civilian control over the military, non-functioning alternatives to Executive power, and frequent changes in constitutional arrangements could flag political under-representation, disenfranchisement of certain groups, and root causes of deep dissatisfaction, persistent unrest, and politically motivated violence. Equally, a lack of accessible legal avenues to redress human rights grievances, such as through national human rights commissions, ombudsmen, anti-corruption commissions, commissions on the human rights of women, and weak minority rights protection, could help show the details of a governmental structure that operated on a more authoritarian than democratic basis, which in turn

could help explain catalytic factors leading to genocide, war crimes or crimes against humanity.

Laws stigmatising certain groups or enforcing systematic discrimination against them could lend weight to a prosecutor's assertion that one or other group had long been targeted by the country's government or singled out for marginalisation or relegation to inferior status within society. Genocide, war crimes or crimes against humanity can be perpetrated as an extension of long practiced discriminatory government policy, as exemplified in Nazi Germany, Rwanda and Darfur, and arguably in Sri Lanka and East Timor.

Examining the administration of criminal justice in a country implicated in genocide, war crimes or crimes against humanity is important also because according to the Rome Statute, the ICC should only assert jurisdiction over a situation where the concerned country authorities themselves will not or cannot prosecute Rome Statute crimes. Documenting established patterns of governmental discrimination of certain groups and the politicisation of the justice system therefore becomes a crucial point because of the complementary nature of ICC jurisdiction. A related area for fruitful investigation could be electoral laws which might exclude members of certain national, ethnic, racial or religious groups from voting in or standing for election. Laws relating to elections and political representation might diminish or exclude certain constituencies altogether, which could form part of the historical, political and legal puzzle leading up to serious crimes. Laws, policies and practices relating to the treatment of women, children and sexual minorities could also shed light on existing patterns of persecution and discrimination, which might help explain why and how certain crimes were actually committed.

13.4. Meeting Evidentiary Requirements

In terms of evidentiary requirements, the Prosecutor must prove the guilt of the accused beyond a reasonable doubt. At the same time, the basic fair trial principle of the presumption of innocence prevents the Prosecutor's burden of proof from ever being shifted to the accused instead to prove his or her innocence. This principle, perhaps clear enough in the abstract, can be fraught with difficulty in its application. In the *Zigiranyirazo Case* for example, the ICTR Appeal Chamber strongly criticised the Trial Chamber for the way it treated alibi evidence which had been adduced to show that the accused could not possibly have committed the

crime because he was not physically present at the crime scene at the material time⁵; as well as the Prosecutor for adding charges as the trial proceeded, including one that had no foundation in the applicable law.

The evidentiary requirements for establishing criminal guilt depend on several factors, first and foremost on the definition and elements of the particular alleged crime. To prove the crime of genocide for example, as set out in Article 6 of the Rome Statute⁶ (found also in Articles 4 and 2 of the Statutes for the International Criminal Tribunals for the Former Yugoslavia and Rwanda, respectively), the prosecution has to prove that the *actus reus* was perpetrated with the specific intent “to destroy, in whole or in part, a national, ethnical, racial, or religious group” – a quite high evidentiary burden. To take another example, establishing that a crime against humanity was committed⁷ requires the prosecution to prove that it was “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. Article 7(2)(a) of the Rome Statute provides that: “Attack against any civilian population” means a course of conduct involving the multiple commission of acts referred to or against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such

⁵ The ICTR Appeal Chamber in the *Zigiranyirazo Case* faulted the Trial Chamber for requiring the defense to prove its alibi to a high level of certainty rather than merely to have to raise a reasonable doubt, which in effect shifted the burden of proof to the accused to prove his innocence. The ICTR Appeal Chamber ruled that: “An accused does not bear the burden of proving his alibi beyond reasonable doubt”. Rather, “[h]e must simply produce the evidence tending to show that he was not present at the time of the alleged crime” or, otherwise stated, he must present evidence “likely to raise a reasonable doubt in the Prosecution case”. If the alibi is reasonably possibly true, it must be accepted”. See Judgement, *Zigiranyirazo v. Prosecutor*, Case No. ICTR-01-73-A, Appeal Chamber, 16 November 2009, para. 17. See further Lyal S. Sunga, “Commentary on Judgement of the ICTR Case of *Prosecutor v. Zigiranyirazo*”, in *Annotated Leading Cases of International Criminal Tribunals*, 2011, vol. 32, pp. 240–258.

⁶ Statute of the International Criminal Court, adopted on 17 July 1998, entered into force on 1 July 2002, as of 17 October 2010 ratified by 122 States by 1 July 2013; (A/CONF. 183/9).

⁷ Article 7(1) of the Rome Statute defines a ‘crime against humanity’ to encompass one or more of the following: “murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, persecution, enforced disappearances, apartheid, and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”.

attack”, which the Prosecutor has to prove. For war crimes, the Prosecutor first has to prove that there was a situation of armed conflict within the sense of the four Geneva Conventions of 12 August 1949.⁸ Moreover, Article 8(1) of the Rome Statute establishes threshold criteria limiting the ICC’s exercise of jurisdiction to war crimes only where they were “committed as part of a plan or policy or as part of a large-scale commission of such crimes”.

Not only does the evidence have to satisfy the definition and threshold requirements of the crimes alleged, but those of basic admissibility rules as well, including that it must tend to prove or disprove a fact material to the allegation, be authentic rather than false, and brought from a reliable and credible source to court along an unbroken chain of custody to avoid contamination, tampering or fabrication. Moreover, even testimony that originates from a reliable and credible source, and is true, relevant and probative, could still be excluded on grounds that its introduction into evidence would be so overwhelmingly prejudicial to the accused’s right to be presumed innocent, that its admission would preclude a fair trial.

The Rome Statute expresses these conditions in a broad way. Article 69 on evidence requires each witness to give an undertaking as to the truthfulness of the evidence, provide testimony in person except where special measures are necessary to protect victims and witnesses pursuant to Article 68 or in relation to the Rules of Procedure and Evidence, or by recorded oral, video or audio means, and through documents or written transcripts as long as such evidence conforms to the Statute and its Rules of Procedure and Evidence and do not prejudice or infringe the rights of the accused. Significantly, Article 69(3) confers upon the ICC “the authority to request the submission of all evidence that it considers necessary for the determination of the truth”, favoring a more inclusive approach to the admissibility of evidence. Article 69(4) empowers the Court to exclude evidence on grounds that it would prevent a fair trial or fair evaluation of witness testimony. Articles 69(5) and (6) oblige the Court to respect confidentiality privileges and not to require proof of facts of common knowledge and that the Court should take judicial notice of

⁸ In *Tadić*, the ICTY Appeal Chamber held that: “an armed conflict exists whenever there is a resort to armed force between States”. See *The Prosecutor v. Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, IT-94-1-A, 2 October 1995, para. 70.

them instead. Crucially, Article 69(7) states that evidence shall not be admissible wherever it has been obtained in violation of the Rome Statute or “internationally recognized human rights”, in particular, where “the violation casts substantial doubt on the reliability of the evidence”, or for whatever reason the “admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings”. Finally, the ICC provides that: “When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State’s national law”, thereby preventing the ICC from mixing up and confusing international with domestic application of law.

In addition to the commonly accepted restrictions on admissibility of evidence found in Article 69 of the Rome Statute and its Rules of Procedure and Evidence, several practical aspects of information collection make the Prosecutor’s responsibility to prove genocide, war crimes or crimes against humanity a particularly difficult one. First, Governments often are sources of information on human rights, but in many instances, they refuse or limit their own co-operation with international criminal investigators, especially where individuals at higher echelons of power seem implicated in the crimes, for example, in the ICC’s indictment of the President of the Sudan, Omar al Bashir.⁹ In other cases, a rebel movement succeeds in taking over the Government and has every interest to prosecute individuals from the previous regime. This has been the case in Libya following the ouster of Colonel Muammar Qadhafi who, after ruling Libya for almost 42 years, was captured and killed on 20 October 2011 by rebel forces in Sirte.¹⁰ At the time of writing, it seemed doubtful that Qadhafi’s son, Saif Al-Islam who acted as Libyan *de facto* Prime Minister and whom the ICC indicted on two counts of crimes against humanity, would be fairly tried by the Libyan courts, but the Libyan Government had still refused to transfer the suspect from Libya to ICC

⁹ See Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Situation in Darfur, Sudan, in the case of the *Prosecutor v. Omar Hassan Ahmad Al Bashir* (*Omar Al Bashir*), issued by Pre-Trial Chamber I; ICC-02/05-01/09 of 12 July 2010.

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

jurisdiction,¹¹ and at one point, even detained ICC counsel for the defense in Libya.¹² Second, criminal investigators seconded by Governments to work with international courts and tribunals may be quite adept at collecting evidence at home, but they might be quite inexperienced working in conditions such as those present in affected regions of Uganda, the Democratic Republic of the Congo, Darfur (Sudan), Central African Republic, Kenya, Libya, Côte d'Ivoire or Mali, where the ICC was trying to conduct investigations at the time of writing. Disrupted infrastructure, weak information and transportation links and lack of physical security in some of these countries pose special obstacles in the way of efficient criminal investigation of mass scale crimes. Third, in many instances, the ICC might not be in a position to protect victims and witnesses, which could leave them exposed to retaliation, reprisal and bribery from alleged perpetrators. ICC Prosecutor Fatou Bensouda stated that this kind of scenario was behind her dropping of the indictment against Mr. Francis Muthaura, who was supposed to stand trial in July 2013 alongside Mr. Uhuru Kenyatta.¹³

I explained to the Judges the reasons for my decision, specifically, the severe challenges my Office has faced in our investigation of Mr. Muthaura;

- the fact that several people who may have provided important evidence regarding Mr Muthaura's actions, have died, while others are too afraid to testify for the Prosecution.
- the disappointing fact that the Government of Kenya failed to provide my Office with important evidence, and failed to facilitate our access to critical witnesses who may have shed light on the Muthaura case.

¹¹ See ICC Appeals Chamber rejects the Libyan authorities' request to suspend the surrender of Saif Al-Islam Gaddafi to the Court: ICC Press Release; ICC-CPI-20130718-PR934 of 18 July 2013.

¹² See Julian Borger, "ICC lawyer: Saif al-Islam Gaddafi will not get a fair trial in Libya: Melinda Taylor says her detention in Libya was unjustified and showed her client would not be tried impartially in the country", *The Guardian*, 6 July 2012, available at <http://www.theguardian.com/law/2012/jul/06/icc-lawyer-gaddafi-trial-libya>, last access-ed on 10 October 2013.

¹³ See Situation in the Republic of Kenya in the Case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali; ICC-01/09-02/11-382-Red of 23 January 2012.

- the fact that we have decided to drop the key witness against Mr. Muthaura after this witness recanted a crucial part of his evidence, and admitted to us that he had accepted bribes.¹⁴

Efforts to gather information and evidence *in situ* to prosecute genocide, war crimes or crimes against humanity have to be carried out often in the aftermath of armed conflict or serious social upheaval. These already difficult conditions, worsened by the non-co-operation of the territorial Government or authority, or even outright aggressive efforts to hinder investigations, combined with weak investigative capacity on the part of international criminal courts and tribunals, forces the Prosecutor to rely upon other sources, the merits and demerits of which are discussed next.

To be more precise, in many situations, the challenge is not a lack of information or evidence *per se*. Mass scale violations typically involve a large number of perpetrators, victims and witnesses, and are therefore ‘fact-rich’.¹⁵ The challenge is getting hold of the right information and evidence that will prove the connections between a specific criminal suspect, a particular victim or victims, and the position of that individual suspect in a command structure, or a *de facto* hierarchy, as well as his or her criminal intent and its direct relation to the *actus reus*. International criminal courts and tribunals must obtain as much first-hand information and eyewitness testimony as possible. Particularly where criminal investigators cannot get sufficient access to the territory in order to conduct interviews, collect physical and documentary evidence, and examine massacre sites or other *loci delicti*, official UN human rights reports could prove valuable, perhaps indispensable information to allow the Prosecutor to figure out the main players, historical, cultural and ethnic context, the proximate events that led to the commission of the crimes, and the relationship between perpetrator and victim.

¹⁴ See “Statement by ICC Prosecutor on the Notice to withdraw charges against Mr. Muthaura Statement”, 11 March 2013, available at http://icc-cpi.int/en_menus/icc/press_and_media/press_releases/Pages/OTP-statement-11-03-2013.aspx, last accessed on 10 October 2013.

¹⁵ See further Christian Ranheim, “Introducing modern technology in the search for war criminals”, in *Web Journal of Current Legal Issues*, vol. 1, 2009, available at <http://webjcli.ncl.ac.uk/2009/issue1/ranheim1.html>, last accessed on 10 October 2013.

The central issue has always been about what information can be trusted. Sorting out reliable from less reliable information requires background checking, getting as wide a picture as possible, corroboration from differing and hopefully opposing sources (in terms of political affiliation, ethnic, cultural, religious, ideological, social or other aspect), as well as multiple accounts so that what is known is clear and even more important, what is not known, ambiguous or unclear, is identified and marked as such.

13.5. Can UN Human Rights Information be Trusted?

Before discussing the specifics of UN human rights information, and their possible uses, it is important not to bypass a more general but critical issue: can UN human rights reports really be *trusted* for the purposes of international criminal prosecutions of genocide, war crimes and crimes against humanity? After all, as the world's pre-eminent intergovernmental organisation, the UN was set up, and is funded and supported by Governments, each one of which has its own set of political agendas. Key UN organs dealing with human rights issues, including the Security Council, General Assembly, and Human Rights Council, whose memberships are made up of States, are explicitly political in terms of agenda, focus and operation. Is the information these organs gather, receive and analyse irremediably tainted so that it becomes too political, too biased, too subjective and too unreliable to meet the demands of fair and effective international criminal justice?

The UN, and indeed the League of Nations that preceded it, have long track records in producing high quality analytical reports on the full range of human rights issues around the globe. The UN Office of the High Commissioner for Human Rights ('OHCHR'),¹⁶ by December 2012, had 573 professional staff responsible for servicing the UN human rights system.¹⁷ A cursory look at the OHCHR website turns up thou-

¹⁶ OHCHR claimed 2.8% (amounting to USD 142,743,800) of the UN regular biennial budget in 2010–2011, and that amount constituted one-third of OHCHR's funding, which was further supplemented by voluntary and project funding. See the OHCHR website page on funding at <http://www.ohchr.org/EN/AboutUs/Pages/FundingBudget.aspx>, last accessed on 10 October 2013.

¹⁷ See Composition of the staff of the Office of the United Nations High Commissioner for Human Rights, Report of the United Nations High Commissioner for Human Rights, A/HRC/22/69 of 25 January 2013.

sands of detailed UN, intergovernmental, Government and NGO reports on any country according to any one of dozens of themes and topics. Despite its faults, and its explicitly intergovernmental and political character, the UN is widely viewed as more independent and objective in human rights and humanitarian assistance fields because its priorities and actions represent the concerns of the international community as a whole, rather than only of one or few governments, even if some governments exercise considerably more influence than others. Significantly, public opinion in many countries holds that the UN should be strengthened, including its peacekeeping powers and capacity to prevent genocide.¹⁸

The UN's explicitly intergovernmental and political character counts as both strength and weakness in terms of the reliability of the information it collects and analyses, including on genocide, war crimes and crimes against humanity. To understand why and how, it is important to recall the UN's relationship to intelligence gathering and then to explore the relevance of information coming from UN human rights mechanisms for investigation, monitoring and reporting.

13.6. The UN and Intelligence

In criminal investigations, secrecy in information gathering for evidentiary purposes is standard operating procedure. Sources, information gathering techniques and investigation targets have to be kept confidential to avoid compromising the effectiveness and integrity, as well as the safety and security, of the Prosecution effort. This contrasts starkly with UN human rights fact-finding, mainly because of the peculiar status of intelligence gathering *vis-à-vis* the UN.

The UN itself does not have *intelligence* gathering capacity in the sense of covert information gathering, nor has it ever been nor will it ever likely function as an intelligence gathering body in future, unless member States so wish. The simple reason is that, until the present, no Government has shown any particular enthusiasm for conferring upon a supranational organisation beyond its own control the authority to collect infor-

¹⁸ See "World Publics Favor New Powers for the UN, Most Support Standing UN Peacekeeping Force, UN Regulation of International Arms Trade, Majorities Say UN Should Have Right to Authorize Military Force to Stop Terrorism, Nuclear Proliferation, Genocide", Report of the Chicago Council on Global Affairs, 2007, available at http://www.worldpublicopinion.org/pipa/pdf/may07/CCGA+_UN_article.pdf, last accessed on 10 October 2013.

mation that could eventually challenge the State's exercise of its sovereign power in unpredictable ways. A very narrow exception operates to the extent that the UN has been requested by its member States to assist them to improve multilateral co-operation with regard to specific transnational crimes, but even here, the emphasis is squarely on intelligence co-operation between and among States, rather than with the UN itself. With regard to human trafficking for example the UN Office of Drugs and Crime ('UNODC') acknowledges that:

Intelligence gathering and exchange between relevant authorities of States parties is crucial to the success of measures to attack transnational criminal networks.

The UNODC Toolkit on Intelligence Gathering and Exchange explains the difference between strategic and tactical intelligence and delves into the relationship between the two, but it carefully restricts its focus to open sources of information and mutual State co-operation in criminal matters and police enforcement.¹⁹

Contrary to the paranoid gibberish spouted by some conspiracy theorists,²⁰ the UN has always been easy prey, rather than predator, right from the time of its establishment, in terms of intelligence collection, as Simon Chesterman has pointed out:

During the 1945 conference in San Francisco that drafted the UN Charter, the US Army's Signal Security Agency, the

¹⁹ The UNODC Toolkit observes that tactical intelligence forms the basis for concrete criminal investigations that could lead enforcement agencies to intercept smuggling operations and it is therefore essential in the preparation and planning of such operation. It helps to identify specific opportunities to detect, disrupt and prevent further criminal activity. Strategic intelligence, on the other hand, produces accurate assessments of the nature and scale of smuggling at all levels, facilitates legislative amendment, international co-operation linkages, and strategies for education, awareness-raising and prevention, aids policymakers, and shares information with the media and the general public. Thus, the "overall picture of smuggling of migrants is formed by strategic intelligence, which is fed by tactical intelligence". UNODC, Toolkit to Combat: Smuggling of Migrants – Tool 1: Understanding the smuggling of migrants, United Nations Office of Drugs and Crime, 2010 at Chapter 7.15.

²⁰ See for example, Michael Benson, *The United Nations Conspiracy to Destroy America*, 2010; and Pedro A. Sanjuan, *The UN Gang: A Memoir of Incompetence, Corruption, Espionage, Anti-Semitism, and Islamic Extremism at the UN Secretariat*, 2005; and Robert W. Lee, *The United Nations Conspiracy*, 1981. These days, there are plenty of bloggers, radio talk show hosts and journalists in many countries who spout incendiary diatribes against the United Nations Organization, as a cursory internet check will confirm.

precursor of the NSA [National Security Agency],²¹ was obtaining intercepts on at least 43 of the original 45 nations in attendance.²²

Spying on the UN is old news, and during the Cold War, many countries seemed to treat the UN offices in New York, Geneva and Vienna as their covert operations playgrounds. Since the Berlin Wall fell, rather than disappearing, the antics have become more high tech.

In 2004, a UN spokeswoman indicated that the UN Headquarters in Geneva had been bugged, which was reported first by Television Suisse Romande.²³ Embarrassing for the United Kingdom's Prime Minister Tony Blair, was the revelation by his cabinet minister, Ms. Clare Short, that the confidential conversations of UN Secretary-General Kofi Annan in the period leading up to the Iraq War were listened to by British spies and that she had personally read the transcripts of these conversations.²⁴ In 2010, The Guardian reported that the leaked Wikileaks cables included a directive from Secretary of State Hillary Clinton, that was sent to United States missions at the UN in New York, Vienna and Rome as well as 33 embassies and consulates, "demanding forensic technical details about the communications systems used by top UN officials, including passwords and personal encryption keys used in private and commercial networks for official communications". The cable:

[...] called for detailed biometric information 'on key UN officials, to include undersecretaries, heads of specialised agencies and their chief advisers, top SYG [secretary gen-

²¹ Author's note.

²² See Simon Chesterman, "Does the UN Have Intelligence?", in *Survival*, 2006, vol. 48, no. 3, pp. 149–164. See also Ian Davis and David Isenberg, "The long history of UN espionage: Spying at the United Nations helped to shape the UN Charter itself. But if spying is an inevitable part of global diplomacy, it won't necessarily help the Bush administration to win friends and influence people at a time of global crisis", *The Observer*, 9 March 2003, available at <http://www.theguardian.com/world/2003/mar/09/iraq.united.nations>, last accessed 10 October 2013.

²³ See "Bugging device found in UN room: The United Nations says it has found a bugging device in a room at its European offices in Geneva", *BBC News*, 17 December 2004, available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/4103907.stm>, last accessed on 10 October 2013.

²⁴ See "UK 'spied on UN's Kofi Annan' British spies listened in to UN Secretary General Kofi Annan's office in the run up to the Iraq war, former UK cabinet minister Clare Short says", *BBC News*, 26 February 2004, available at http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/politics/3488548.stm, last accessed on 10 October 2013.

eral] aides, heads of peace operations and political field missions, including force commanders' as well as intelligence on Ban's 'management and decision-making style and his influence on the secretariat'.²⁵

This US intelligence gathering programme involved the coordinated efforts of the "CIA's clandestine service, the US Secret Service and the FBI".²⁶

Leaps in electronic surveillance capabilities enable Governments to conduct, filter and analyse content and communications patterns of massive volumes of e-mail, Skype and internet traffic of millions of people very efficiently and with scant judicial oversight. Edward Snowden, former NSA and CIA information specialist turned whistle-blower, stunned the world by revealing to *The Guardian* and *Washington Post* detailed accounts of the extent of US Government electronic surveillance of the daily internet use of millions of ordinary Americans, as well as people abroad, including even the political leaders of its closest European allies leading up to, during and following major summits.²⁷

In short, the UN has no intelligence gathering capacity of its own in the sense of clandestine operations and this implies at least three things. First, the UN must resort to collecting public information as well as information provided to it freely on an *ad hoc* basis by Governments, intergovernmental organisations, the ICRC, NGOs, individuals and other entities, relating to genocide, war crimes or crimes against humanity. Second, the UN can draw upon information it receives on a regular and systematic basis through UN human rights treaty bodies, UN Human

²⁵ See Robert Booth and Julian Borger, "US diplomats spied on UN leadership", *The Guardian*, 28 November 2010, available at <http://www.theguardian.com/world/2010/nov/28/us-embassy-cables-spying-un/print>.

²⁶ *Ibid.*

²⁷ See Michael Birnbaum, "Merkel, other European leaders raise concerns on U.S. surveillance", *Washington Post*, 10 June 2013; available at http://articles.washingtonpost.com/2013-06-10/world/39862553_1_u-s-citizens-surveillance-program-intelligence; and Veit Medick, Annett Meiritz and Philipp Wittrock, "No Longer in the Cold War: Merkel Infuriated by US Spying", *Der Spiegel Online International*, available at <http://www.spiegel.de/international/world/merkel-furious-at-us-spying-and-eu-to-check-offices-for-bugs-a-908859.html>. See also "Edward Snowden documents show NSA broke privacy rules: The US National Security Agency (NSA) broke privacy rules and overstepped its legal authority thousands of times in the past two years, according to documents leaked by Edward Snowden", *BBC News Online*, 15 August 2013, available at <http://www.bbc.co.uk/news/world-us-canada-23721818>.

Rights Council special procedures and the Universal Periodic Review, which are discussed below. Third, UN criminal investigative work, which from time-to-time requires information secretly acquired, or more precisely, information the sources and content of which must be kept confidential, takes us back to Government willingness to share the fruits of their prodigious intelligence gathering machines. Not addressed in the present chapter is a fourth consideration which relates to the increasing impact of whistle blowers, non-governmental computer hackers and leakers of official Government secrets, and whether the UN, given its inter-governmental character, is in any position to take even the slightest account of such information.

13.7. Back to Governments

Any information that the UN requires for its investigations leads right back to Governments because States continue to be the principal sources of official information on most human rights issues in their own sovereign territory. Many States collect substantial quantities of information on human rights practices in other countries, even if they do not always publish them, in order to keep informed of a vital aspect of inter-state relations. Some Governments, such as that of the United States, systematically collect, review and publish annual reports that include critical comments on the human rights situation of almost every country (except itself).²⁸ Long feeling itself to have been singled out by the US Government for especially sharp criticism, the Government of the Peoples' Republic of China has begun to respond by publishing an annual report of its own on human rights practices in the United States.²⁹ That Governments clearly have their own interests and particular historical, cultural, political and geostrategic lenses through which they view human rights situations inside and outside the country is an obvious red flag for international prosecutors to take account of these kinds of bias when reading government human rights reports, and reports of national human rights

²⁸ *See for example*, the annual country reports published by the US Department of State, at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>, last accessed on 10 October 2013.

²⁹ *See Full Text of Human Rights Record of the United States in 2012*, published by the State Council Information Office of the People's Republic of China, available at http://news.xinhuanet.com/english/world/2013-04/21/c_132327175.htm, last accessed on 10 October 2013.

institutions, depending on how independent or not they are from the Government.

Governments are also the main entities responsible for implementing international human rights law, including the UN human rights conventions they have ratified. Indeed, the main UN human rights conventions require State parties to collect information and report to UN human rights treaty bodies on the status of their implementation of their treaty obligations. Also, the UN Human Rights Council's Universal Periodic Review, which systematically covers human rights practices in every UN member State, is premised on the willingness of every State under review to collect, analyse and share information with the Human Rights Council to enable this process to work effectively. Furthermore, government statistics on a wide range of issues from crime, to health, education, labour, poverty, and just about any other field of economic, legal, social and political activity, usually relate to the State's human rights performance in some way or other. In short, Governments, being the legally authorised entities with criminal enforcement power to the extent of its sovereign jurisdiction, remain the first and in many cases the most credible sources of information on human rights issues.

While Government remains the most powerful information source, it is at the same time, the 'usual suspect' in terms of serious violations of human rights, humanitarian law and international criminal law, together with rebel movements or militia allied to an aspirant for government. For this reason, guarantees of human rights have been deliberately defined to restrain mainly the State from violations, and to oblige the State to promote and protect human rights, because it is the State and its agencies that have pre-eminent power both to protect and abuse the rights of individuals and groups under its jurisdiction. It also means that States have a fundamental conflict of interest: on the one hand, they must collect, analyse and make public information on human rights matters within their jurisdiction in order to meet their international and domestic obligations to promote and protect human rights; but on the other hand, the impulse of Governments to keep embarrassing information on human rights secret, not to share it, to minimise it and in some cases, even to falsify it, can be overwhelming despite freedom of information laws, and political rhetoric about the Government's commitment to democracy, transparency and accountability. Thus, coaxing Governments to disclose information that could implicate it in egregious human rights shortcomings, par-

ticularly where allegations concern genocide, war crimes or crimes against humanity, has remained a tough challenge. UN access to Government information depends mainly on co-operation and where this is lacking, the challenge naturally gets more difficult, but fortunately, there are very well-established diplomatic and multilaterally established information channels that are discussed next, which can help clarify factually and politically opaque situations involving serious crimes under international law.

13.8. Could UN Human Rights Treaty Body Reports Inform International Criminal Investigations?

It is important to recall the wealth of information that has built up over many years in respect of a country's compliance to its voluntarily assumed human rights treaty obligations. Currently, 10 UN human rights treaty bodies are in operation:

- The Committee on the Elimination of Racial Discrimination ('CERD') which monitors the International Convention on the Elimination of All Forms of Racial Discrimination;³⁰
- The Human Rights Committee which monitors the International Covenant on Civil and Political Rights;³¹
- The Committee on Economic, Social and Cultural Rights ('CESCR') which monitors the International Covenant on Economic, Social and Cultural Rights;³²

³⁰ International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* by General Assembly Resolution 2106 (XX) of 21 December 1965, *entered into force*, 4 January 1969. By January 2013, it had 175 State Parties, 64 of which had recognized the Committee's competence to receive individual complaints.

³¹ International Covenant on Civil and Political Rights, *adopted* 16 December 1966; *entered into force* 23 March 1976; UNTS No. 14668, 1976, vol 999, p. 171. As of January 2013, there were 167 States Parties to the ICCPR. There were 114 States Parties to the first Optional Protocol to the ICCPR which in Article 1 provides that:

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.

³² International Covenant on Economic, Social and Cultural Rights, *adopted* 16 December 1966; *entered into force* 3 January 1976; UNTS No. 14531, 1976, vol. 993, p. 3. As of January 2013, there were 160 States Parties to the ICESCR, eight of which had recognised the Committee's competence to receive individual complaints from their jurisdictions.

- The Committee on the Elimination of All Forms of Discrimination against Women (‘CEDAW’) which monitors the International Convention on the Elimination of All Forms of Discrimination against Women,³³
- The Committee against Torture (‘CAT’) which monitors the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;³⁴
- The Subcommittee on the Prevention of Torture;³⁵
- The Committee on the Rights of the Child (‘CRC’) which monitors the Convention on the Rights of the Child;³⁶
- The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families which monitors the In-

³³ The Convention on the Elimination of All Forms of Discrimination against Women, *adopted* by the General Assembly in Resolution 34/180 of 18 December 1979, *entered into force*, 3 September 1981. Article 17(1) of the Convention provides for a Committee of 18 independent experts to monitor compliance. In Resolution A/Res/54/4, the General Assembly *adopted* Optional Protocol 1 to the Convention on 6 October 1999, *opened for signature* on 10 December 1999 and *entered into force* on 22 December 2000, following the tenth instrument of ratification. As of January 2013, there were 174 States Parties to the Convention and 53 States Parties to Optional Protocol 1.

³⁴ UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted by consensus* by the General Assembly on 10 December 1984, *opened for signature* on 4 February 1985, *entered into force* on 26 June 1987. The Convention forms the Annex to General Assembly Resolution 39/46. As per Article 22, the Committee can receive allegations of torture from the individual where the State Party has so declared that it recognises the competence of the Committee to receive individual allegations. As of January 2013, there were 153 States Parties to the Convention, 56 of which had recognised the competence of the Committee to receive complaints from individuals under its jurisdiction.

³⁵ The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* by the General Assembly on 18 December 2002, *entered into force* on 22 June 2006, by January 2013, had 69 States Parties. The Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment which has 25 experts and began operation in February 2007 is mandated to prevent torture and ill treatment.

³⁶ The Convention on the Rights of the Child, *adopted* by the General Assembly in Resolution 44/25 of 20 November 1989, *entered into force*, 2 September 1990. Article 43 of the Convention provides that for “the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken” in the Convention, there shall be established a Committee of ten experts. As of January 2013, there were 193 States Parties to the Convention, and an Optional Protocol allowing for individual complaints adopted on 19 December 2011.

ternational Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;³⁷

- The Committee on the Rights of Persons with Disabilities which monitors the Convention on the Rights of Persons with Disabilities,³⁸ and
- The Committee on Enforced Disappearances which monitors the Convention on Enforced Disappearances.³⁹

These bodies consist of independent experts of recognised competence in human rights who serve in a personal capacity. Each of the conventions listed above obliges the State Party to submit to the UN Secretary-General for consideration by the corresponding Committee a report on the legislative, judicial, administrative or other measures the State Party has taken to implement the convention. State reports have to be submitted within one year following the Convention's entry into force and periodically thereafter and whenever the Committee requests a report. The treaty bodies examine the State reports, together with information from other sources and after a dialogue with the State's delegation, the committee adopts 'concluding observations' or 'comments' expressing positive and negative aspects of the substance of the State's report and recommends measures the State should take to bring its practice into closer conformity with its conventional obligations. In addition, the optional individual complaints procedure also sheds light on the kinds of allegations of violations of concern within the State's jurisdiction.

Information contained in State reports to the UN human rights treaty bodies, 'shadow reports' submitted by NGOs, and the recommen-

³⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *adopted* by General Assembly Resolution 45/158 of 18 December 1990, *entered into force* on 1 July 2003. The Committee consists of 14 experts serving in their personal capacity. As of January 2013, there were 46 States Parties to the Convention.

³⁸ Convention on the Rights of Persons with Disabilities, *adopted* by General Assembly Resolution 61/106 of 13 December 2006, *entered into force* on 3 May 2008. The Committee consists of 18 experts serving in their personal capacity. As of January 2013, there were 123 States Parties, 74 of which had recognised the competence of the Committee to receive complaints from individuals under its jurisdiction.

³⁹ International Convention for the Protection of All Persons from Enforced Disappearance, *adopted* by General Assembly Resolution 61/177 of 20 December 2006, *entered into force* on 23 December 2010. The Committee consists of 18 experts serving in their personal capacity. As of January 2013, there were 36 States Parties and 90 signatories to the Convention.

dations of the relevant treaty body itself, could help Prosecutors fill in the gaps in their understanding of the status and operation of a country's judicial system, its law, policies and practices. All of this information is public, available and easily accessed from OHCHR's website. It is important to remember that nothing forces a particular country to sign and ratify any of the multilateral human rights conventions, and a Government cannot be forced to submit its State report or provide information on the level of its compliance with its treaty obligations, much less to recognise the competence of the relevant Committee to receive individual complaints from its jurisdiction. All the same, the fact that every country is a party to at least one multilateral human rights convention and that most countries have ratified several human rights treaties means that a considerable quantity of information relating to human rights violations is easily accessible to international criminal investigators and prosecutors. This was the situation with regard to Darfur for example. The Government of the Sudan had ratified the International Covenant on Civil and Political Rights, 1966; the Convention on the Rights of the Child, 1989; the Convention on the Elimination of All Forms of Racial Discrimination, 1965; the Covenant on Economic, Social and Cultural Rights, 1966; as well as to the four Geneva Conventions of 12 August 1949. The Government was very late in submitting its periodic reports to the UN Human Rights Committee. Despite this shortcoming, in 2007, reviewing Sudan's Third Periodic Report, UN the Human Rights Committee felt that it was in a position to express that:

Despite the information provided by the State party about prosecutions of a number of perpetrators of human rights violations, the Committee notes with concern, particularly in the context of armed conflict, that widespread and systematic serious human rights violations, including murder, rape, forced displacement and attacks against the civil population, have been and continue to be committed with total impunity throughout Sudan and particularly in Darfur. It is particularly concerned at the immunity provided for in Sudanese law and untransparent procedure for waiving immunity in the event of criminal proceedings against State agents.⁴⁰

⁴⁰ Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee on Sudan; CCPR/C/SDN/CO/3/CRP.1 of 26 July 2007 at para. 9.

A few years earlier, in 2005, the UN Committee on the Elimination of All Forms of Racial Discrimination recalled its obligation, in line with its early warning and urgent action procedure to signal that a situation might further deteriorate, and recommended:

[...] to the Secretary-General, and through him, the Security Council, the deployment, without further delay, of a sufficiently enlarged African Union force in Darfur with a Security Council mandate to protect the civilian population, including those in camps, displaced persons and refugees returning to their homes in Darfur, against war crimes, crimes against humanity, and the risk of genocide.⁴¹

Thus, information from Government reports to the UN human rights treaty bodies often provides the most detailed explanation of the constitutional, political and legal system, and can shed light on root causes of conflict which in turn can help place crimes under international law in context and help international prosecutors make their case. The Government report, together with the observations and recommendations of the treaty body itself and NGO shadow reports, could help international investigators and prosecutors to trace pathways leading up to the commission of crimes under international law, as well as the Government's official attitude towards them.

13.9. Could UN Human Rights Council Special Procedures and Investigative Missions Inform International Criminal Prosecutions?

In situations of genocide, war crimes or crimes against humanity the implicated government or territorial authority might not have ratified the relevant multilateral convention, for example, on genocide, torture, racial discrimination or the International Covenant on Civil and Political Rights. Even where it has ratified the relevant convention, it might not have offered much information on the state of its human rights observance through the UN human rights treaty body system. In other instances, even with the full co-operation of the State with the UN human rights treaty bodies, the information might be too general to be of much use to an international criminal investigator or prosecutor searching for

⁴¹ UN Committee on the Elimination of All Forms of Racial Discrimination Decision 2 (66) on the Situation in Darfur; CERD/C/66/DAR/Dec.2, *adopted* on 11 March 2005.

evidence of a clear pattern of crimes or *modus operandi* of particular armed forces, paramilitary, police or militia units that might corroborate witness testimony in particular criminal instances. To fill these kinds of gaps in a prosecutor's understanding of the law enforcement structure and the operating standards of particular entities that might be implicated in genocide, war crimes or crimes against humanity, UN Human Rights Council special procedures could be especially valuable.

Whereas UN human rights treaty bodies monitor a State Party's observance of the specific human rights set forth in the relevant convention it ratified, 'special procedures' monitor and report on human rights issues regardless of the consent of the particular State or territorial authority concerned. Special procedures operate either through 'country mandates' to examine human rights situations in particular countries or territories, or through 'thematic mandates' which cover the situation in any country with regard to enjoyment of a particular human right or cluster of rights. As mentioned above, genocide, war crimes or crimes against humanity do not normally arise from peaceful or stable situations, but rather from situations where human rights, democracy and the rule of law are weak. These are the same situations, which are likely to have become subject to a Human Rights Council country or one or more thematic mandates.

Reports of special rapporteurs have led or contributed to the establishment of commissions of enquiry to investigate facts and responsibilities concerning criminal violations of human rights and humanitarian law in the former Yugoslavia⁴², Rwanda, East Timor⁴³ and Darfur,⁴⁴ to name just a few examples. Special procedures mechanisms have also coordinated visits and received information from UN human rights field presences deployed in particular countries.

⁴² 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 and E/CN.4/1992/S-1/9 of 28 August 1992.

⁴³ See the Report of the Special Rapporteur on Torture (E/CN.4/1997/7), the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (E/CN.4/1997/60), the Working Group on Arbitrary Detention (E/CN.4/1997/4 and Add.1) and the Working Group on Enforced or Involuntary Disappearances (E/CN.4/1997/34).

⁴⁴ See, for example, the Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions on Her mission to the Sudan (E/CN.4/2005/7/Add.2), the Special Rapporteur on Violence against Women, Its Causes and Consequences, on her mission to the Darfur region of the Sudan (E/CN.4/2005/72/Add.5), among numerous others.

In the former Yugoslavia for example, the Commission on Human Rights appointed a special rapporteur to report on the scale and character of violations. Commission Special Rapporteur on the human rights situation in the former Yugoslavia, Mr. Tadeusz Mazowiecki argued that the perpetrators of severe violations should be prosecuted, and in this connection, he underlined the importance of the “the systematic collection of documentation on such crimes and of personal data concerning those responsible”.⁴⁵ Mazowiecki also recommended that a commission should be established actually to identify specific persons and conduct investigations to prepare the way for eventual criminal prosecution.⁴⁶ In 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,⁴⁷ that there was growing evidence that war crimes had been committed and that further investigation was needed to determine their scale and the individual perpetrators for “prosecution by an international tribunal, if appropriate”.⁴⁸

The accumulation of credible and reliable information coming from the Commission of Experts, the Special Rapporteur and increasingly from UN human rights field presences set up in some of the territories of the former Yugoslavia, together with media and NGO reports and rising public pressure over the plight of civilians and detainees in the former Yugoslavia, pushed the Security Council to adopt resolution 780⁴⁹ on 6 October 1992, requesting the Secretary-General to establish urgently a commission of experts on the former Yugoslavia. Resolution 780 mandated the Commission of Experts to examine and analyse information received from States, conduct investigations and gather information from other persons or bodies and to inform the Secretary-General as to whether

⁴⁵ 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.

⁴⁶ *Ibid.*, at para. 70.

⁴⁷ See for example, E/CN.4/1992/S-1/10 of 27 October 1992 at para. 18 as well as Annex II (Statement by Dr. Clyde Snow).

⁴⁸ See 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.

⁴⁹ See S/RES/780 (1992) adopted by the Security Council at its 3119th meeting, 6 October 1992. Reprinted in 31 International Legal Materials (1992) 1476.

grave breaches of the Geneva Conventions of 12 August 1949 were committed in the former Yugoslavia. In fact, the Secretary-General indicated his expectation that the Commission of Experts and the Special Rapporteur on the former Yugoslavia should coordinate with one another to ensure that human rights information relevant to prosecutions would be channelled to the Commission of Experts, and that information the Commission of Experts collected that was relevant to the Special Rapporteur's mandate would reach him.⁵⁰ 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".⁵¹

The Security Council's establishment of the International Criminal Tribunal for the Former Yugoslavia ('ICTY') on 25 May 1993 by way of resolution 827 figures as a landmark advance in international criminal law implementation, but it is important to recall that the Commission of Experts for the Former Yugoslavia continued to operate and gather information until April 1994. The Chair of the Commission of Experts stated that a large amount of materials were sent to the ICTY Prosecutor, including some three hundred videotapes, documents and interview transcripts.⁵²

With regard to Rwanda, the August 1993 report⁵³ of the UN Commission on Human Rights Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre Waly Ndiaye, is particularly striking. On the basis of his 10-day mission to Rwanda in April 1993, a full year before the Rwandan genocide, he warned that massacres of civilians, death threats, political assassinations, widespread use of the death penalty

⁵⁰ 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.

⁵¹ See UN Doc. S/25274 of 9 February 1993.

⁵² See Cherif Bassiouni, "The Commission of Experts established pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia", *Criminal Law Forum*, 1994, vol. 5, no. 2-3, pp. 291-293.

⁵³ The report of Mr. Bacre Waly Ndiaye on his mission to Rwanda from 8-17 April 1993, E/CN.4/1994/7/Add.1 of 11 August 1993.

and other serious human rights violations, might already qualify as ‘genocide’.⁵⁴

On 1 July 1994, the day after the Rwandan Patriotic Front took effective control over the country after halting the genocide, the Security Council established the Commission of Experts on Rwanda⁵⁵ to provide the Secretary-General with “its conclusions on the evidence of grave violations of international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide”.⁵⁶ The Commission of Experts on Rwanda, which was serviced by OHCHR in Geneva, gathered information from the UN Human Rights Field Operation in Rwanda (which in late 1994 consisted of only a few human rights officers deployed in Rwanda), the UN Special Rapporteur on Rwanda (‘UNAMIR’), and “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. The Commission of Experts noted that “[s]ome of these documents contain non-exhaustive lists of the principal suspects”.⁵⁷ The interim report recommended prosecution of the perpetrators of genocide and associated violations by an international criminal tribunal, a recommendation that was acted on by the Security Council on 8 November 1994 by way of resolution 955 establishing the ICTR.⁵⁸ As in the former Yugoslavia, information from UN human rights sources provided an early indication of the scale and character of crimes under international law, the parties responsible for the genocide, the relationship between perpetrators and victims in terms of legally designated ethnicity, as well as the names of a certain number of criminal suspects, several months before the ICTR was set up and prosecutors could commence investigations.

It must be recalled that the Security Council investigations differ from investigations deployed under the auspices of the Commission on

⁵⁴ *Ibid.*, at para. 79.

⁵⁵ UN Security Council Resolution 935 *adopted unanimously* on 1 July 1994; S/RES/1994.

⁵⁶ *Ibid.*

⁵⁷ 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.

⁵⁸ *See generally* Lyal S. Sunga, “The Commission of Experts on Rwanda and the Creation of the International Criminal Tribunal for Rwanda / A Note, in *Human Rights Law Journal*”, 1995, vol. 16, no. 1–3, pp. 121–124.

Human Rights and its successor, the Human Rights Council. One of the important differences is that Security Council investigations mandated under Chapter VII of the Charter of the United Nations require a resolution conferring this authority, which is always dependent on a draft resolution being supported by 9 affirmative votes including the 5 concurring votes of the permanent members. Because one or more Security Council permanent members could oppose strong investigative action, as Russia and China did on Syria,⁵⁹ even in relation to situations involving genocide, war crimes and crimes against humanity, commissions of inquiry mandated under Human Rights Council authority have had to make up for this lost ground. No state has a veto in the Human Rights Council and decisions are reached on a majority basis among the 47 member States which means that UN human rights special procedures as a source for international criminal investigations and prosecutions have become commensurately more important, as demonstrated in Darfur, the Israeli Occupied Palestinian territories, Côte d'Ivoire, Libya and Syria.

With regard to the Darfur situation, where the Security Council referred the situation to the ICC in March 2005,⁶⁰ sitting President Omar Al Bashir, as well as certain other high ranking officials, was indicted for war crimes and crimes against humanity. The Security Council set up the International Commission of Inquiry on Darfur on 18 September 2004 to determine whether or not acts of genocide were committed and to identify the responsible individuals. This Commission received and gathered information including from UN human rights sources and human rights and humanitarian NGOs, on serious violations of international human rights and humanitarian law in Darfur and submitted a list of names of persons suspected of having committed crimes under international law in a sealed file to the Secretary-General and UN High Commissioner for Human Rights.⁶¹ The International Commission of Inquiry however was only the first of several important steps in gathering information relevant for eventual international criminal investigations and prosecutions.

⁵⁹ Neil MacFarquhar and Anthony Shadid, "Russia and China Block UN Action on Crisis in Syria", *New York Times*, 4 February 2012, available at http://www.nytimes.com/2012/02/05/world/middleeast/syria-homs-death-toll-said-to-rise.html?pagewanted=all&_r=0, last accessed on 10 October 2013.

⁶⁰ 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.

⁶¹ 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).

A number of UN human rights mechanisms, with varying mandates, followed the Commission of Inquiry. The Human Rights Council's High Level Mission on the Human Rights Situation in Darfur in December 2006 established in its final report of March 2007,⁶² that the Sudanese "justice system as a whole was unable or unwilling to pursue justice or prevent attacks" and that impunity prevailed – a critical element given the complementary character of the ICC that called for international criminal prosecutions. Once the High Level Mission was dissolved in March 2007, the Human Rights Council established a Group of Experts on Darfur comprising the Special Rapporteur on the situation of human rights in the Sudan, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Representative of the Secretary-General for children and armed conflict, the Special Rapporteur on violence against women, its causes and consequences, the Special Representative of the Secretary-General on the situation of human rights defenders, the Representative of the Secretary-General on the human rights of internally displaced persons, and the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment.⁶³ While the Group of Experts on Darfur was not primarily a fact-finding body, it evaluated the extent to which the Government of Sudan had implemented the outstanding recommendations in its final report of 10 December 2007 by reviewing and updating information from a large number of credible and reliable sources, including the Government of the Sudan, the UN Mission in Sudan, other UN agencies, bodies and programmes operational in Darfur, and from humanitarian and human rights NGOs which had not yet been expelled from Sudan.⁶⁴

Another example where information from UN human rights sources has been an important part of determining whether or not crimes under international law have been committed has arisen with regard to the Israeli Occupied Palestinian territories. Security Council action to

⁶² 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.

⁶³ 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'".

⁶⁴ 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.

investigate the Government of Israel's violations of human rights and humanitarian law, some of which could qualify as crimes under international law, has been rendered impossible because of the Government of the United States' continual casting of a veto on all pertinent draft Security Council resolutions.⁶⁵ As in the case of Syria where, as discussed below, Russia and China have been responsible for blocking Security Council action, investigation into Israeli crimes under international law had to be taken up by the UN Human Rights Council because of the veto of the US in the Security Council. For example, the Human Rights Council expressed its concern over Israeli military operations in Beit Hanoun, Gaza, in November 2006,⁶⁶ as imposing 'collective punishment' on civilians and exacerbating the humanitarian crisis in the Occupied Palestinian Territory. In the same resolution, the Council established a high-level fact-finding mission to deploy to Beit Hanoun in order to assess violations of human rights and humanitarian law.⁶⁷ In April 2009, the President of the Human Rights Council established the Fact-Finding Mission on the Gaza Conflict

[...] 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.⁶⁸

On 31 May 2010, Israel attacked a flotilla of ships headed for Gaza with humanitarian supplies, resulting in the death of nine activists and the wounding of 55 others on the *Mavi Marmara*. As usual with respect to the Israeli Occupied Palestinian territories, the Security Council found itself unable to agree on establishing a commission of inquiry under its own auspices and merely called for an impartial investigation, which then

⁶⁵ 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)", available at <http://www.jewishvirtuallibrary.org/jsource/UN/usvetoes.html>, last accessed on 10 October 2011.

⁶⁶ See UN Human Rights Council Resolution S-3/1 of 15 November 2006; *adopted* by a recorded vote of 32 to 8, with 6 abstentions.

⁶⁷ 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.

⁶⁸ *Ibid.*, at para. 1.

fell to the Human Rights Council.⁶⁹ In June 2010, the Human Rights Council adopted resolution 14/1 establishing a fact-finding mission which determined that the Israeli naval blockade of the Gaza strip, the attack on the flotilla and certain other actions constituted serious violations of international humanitarian and human rights law.⁷⁰ In short, given both the Government of Israel's long history of non-co-operation with the international community, as well as the inability of the Security Council to agree to investigate Israeli action in the Occupied Territories, international criminal investigations and prosecutions into Israeli Government practices (itself admittedly a highly unlikely eventuality) would have to rely heavily on information coming from the array of UN human rights sources, including commissions of inquiry, that have been activated by the Human Rights Council from time-to-time. In this respect, one should not overlook the work of the General Assembly's Special Committee on Israeli Practices that has been in operation since 1968.⁷¹

The response of the international community through the UN to the 2010 election crisis in Côte d'Ivoire, where President Laurent Gbagbo tried to cling to power after the first elections in ten years, despite the Electoral Commission's declaration on 2 December 2010 that opposition leader Alassane Dramane Ouattara had won, is also instructive in terms of UN information gathering in the context of a situation involving crimes under international law. Following the election, rival political groups engaged in massacres, torture, mass rape, summary executions and other atrocities along ethnic lines which intensified during the first

⁶⁹ 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.

⁷⁰ 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.

⁷¹ 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".

months of 2011.⁷² In March 2011, the Human Rights Council decided to dispatch an independent, international commission of 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.⁷³ The Council 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”. In its June 2011 report, the Commission of Inquiry stated that Gbagbo’s rejection of the election results made him responsible for the serious violations of human rights and humanitarian law and that some of the violations might constitute war crimes or crimes against humanity.⁷⁴ On 3 May 2011, President Ouattara requested the ICC prosecutor to open an investigation,⁷⁵ and in October 2011, ICC Pre-Trial Chamber III endorsed the prosecutor’s request to commence an investigation in Côte d'Ivoire with respect to crimes committed since 28 November 2010.⁷⁶ In the Côte d'Ivoire situation, the UN Human Rights Council was the preferred forum for investigation rather than the Security Council and therefore any action taken by

⁷² See, for example, “Côte d'Ivoire: Warning of ‘human rights catastrophe’ as forces reach Abidjan”, Amnesty International, 31 March 2011, available at <http://www.amnesty.org/en/news-and-updates/c%C3%B4te-d%E2%80%99ivoire-warning-%E2%80%98human-rights-catastrophe%E2%80%99-forces-reach-abidjan-2011-03-31>, last accessed on 10 October 2011.

⁷³ Human Rights Council Resolution 16/25 on the situation of human rights in Côte d'Ivoire; A/HRC/16/25 of 25 March 2011.

⁷⁴ Rapport de la Commission d'enquête internationale indépendante sur la Côte d'Ivoire, A/HRC/17/48 of 14 June 2011 at para. 91.

⁷⁵ On 23 June, the prosecutor then requested ICC judges for authorisation 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 authorisation, 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 were 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.

⁷⁶ 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.

international criminal investigators and prosecutors had to be guided by the work of the Human Rights Council's Commission of Inquiry as well as by information that might have been collected by UN Special Rapporteurs, working groups or other human rights mechanisms.

Turning to the situation in Libya, both the Security Council and the Human Rights Council entered the fray early on, with the Security Council discharging its UN Charter responsibilities to restore and maintain peace and security, while the Human Rights Council established a mechanism to investigate possible crimes under international law. The crisis began with peaceful protests in February 2011 against Colonel Muammar Qadhafi's rule that had endured for almost 42 years, and escalated into mass Arab Spring demonstrations that were met with severe military crackdowns on protestors and civilians. In February 2011, the Human Rights Council established an international commission of inquiry to investigate the violations and recommend measures to enforce criminal responsibility of the perpetrators.⁷⁷ By way of resolution 1970, adopted on 26 February, the Security Council referred the situation to the ICC,⁷⁸ enforced an arms embargo upon all UN member States on the direct or indirect supply of arms to Libya,⁷⁹ put in place a travel ban on 16 members of the Qadhafi family and persons close to the regime⁸⁰ as well as an assets freeze on six Qadhafi family members,⁸¹ established a Sanctions Committee and criteria for identifying individuals involved or complicit in ordering, controlling, or otherwise directing, the commission of serious human rights abuses.⁸² The Human Rights Council's Commission of Inquiry's June 2011 report states that it gathered information from the Government, the National Transitional Council, civil society representatives and other individuals throughout Libya, as well as doctors, medical staff, patients and members of their families in 10 hospitals, detainees, internally displaced persons and refugees.⁸³ As in the international com-

⁷⁷ 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 para. 11.

⁷⁸ *Ibid.* at paras. 4–8.

⁷⁹ *Ibid.* at paras. 9–14.

⁸⁰ *Ibid.* at paras. 15 and 16 and *see* Annex I to the resolution.

⁸¹ *Ibid.* at paras. 17–21 and *see* Annex II to the resolution.

⁸² *Ibid.* at paras. 22–25.

munity's response to Côte d'Ivoire, it was the Human Rights Council rather than the Security Council that established an investigative commission and it was therefore the UN human rights system to which international criminal investigators had to turn for information to prepare prosecution dossiers.

The Human Rights Council's investigative capacity again proved essential to possible future international criminal prosecutions with regard to Syria. In late August 2011, the Human Rights Council established an international commission of inquiry to investigate, monitor and report on human rights violations in Syria.⁸⁴ 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 which meant that any eventual international criminal prosecutions would have to draw substantially on the information collected under the auspices of the Human Rights Council.

In short, UN human rights thematic and country special procedures, and particularly investigations mandated to assess serious violations of human rights or humanitarian law that could qualify as Rome Statute crimes, offer a leading source of credible and reliable information for international criminal investigators and prosecutors. As discussed above, UN human rights special procedures are themselves broad ranging in that they sweep in information from the Government, national human rights institutions, intergovernmental organisations, other UN human rights agencies, bodies or programmes, the ICRC, NGOs, journalists, detainees, refugees and internally displaced persons, witnesses, victims and survivors and their family members, to analyse and chronicle events which might help to identify and implicate individual criminal suspects. As discussed above, in some instances, investigative missions deployed under the auspices of the Security Council or Human Rights Council have been mandated to submit lists of individuals suspected of having

⁸³ 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*.

⁸⁴ 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 <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11326&LangID=E>, last accessed on 10 October 2013.

perpetrated crimes under international law, which surely give international investigators and prosecutors a head start.

**13.10. Could Information from the Human Rights Council's
Universal Periodic Review Help to Broaden Out the Picture?**

The Universal Periodic Review provides another source of human rights information that could relate to international criminal investigations and prosecutions. The UPR, as per General Assembly resolution 60/251, is a co-operative process based on objective and reliable information concerning the State's fulfilment of its human rights obligations. It is based on a peer review of every State by three other randomly chosen States that takes place every four years. It is universal in coverage, thereby providing equal treatment to all countries. It is based on an interactive dialogue, with the full involvement of the country concerned and there is consideration to a State's capacity-building needs. The UPR complements rather than duplicates the work either of UN human rights treaty bodies or human rights special procedures, but builds on both, and the process also brings in information from intergovernmental organisations, national human rights institutions and NGOs. Although the UPR mechanism began operating only in 2008, it seems to hold promise as a source of reliable information in that it offers the State subject to review full opportunity to present its side of the picture, and after the first round of reviews, the focus has now shifted to implementation of recommendations. Information in the various reports, including the Outcome Document which summarises the results of the peer review process and takes into account the Government's response, could help international investigators and prosecutors to pinpoint historical and current issues, such as those relating to excessive use of force by law enforcement personnel and military, lack of independence of the judiciary, weak access of minorities to justice, patterns of marginalisation, exclusion or persecution relating to the eventual outbreak of genocide, war crimes or crimes against humanity.

13.11. Could Information from UN Human Rights Sources be Admitted as Direct Evidence in an International Criminal Trial? What about Hearsay?

The foregoing argument contends that information from UN human rights sources, which is often drawn from interviews of Government officials, rebel and militia personnel, parliamentarians, officials of intergovernmental organisations and NGOs present in the territory where crimes under international law were alleged to have been committed, journalists, key political party members, detainees, refugees and internally displaced persons, victims, witnesses, survivors or their family members, often prove to be essential in assembling the background picture and antecedent circumstances surrounding genocide, war crimes and crimes against humanity. Taking this point further, it is worth pondering whether such information could be admitted directly as evidence at an international criminal trial or would it have to be excluded on grounds that it constituted second hand information, that is, hearsay?

It is important to bear in mind that because their main aim is to establish facts surrounding human rights related incidents, events and situations in terms of the responsibility of the State or other entities exercising effective control over the territory, rather than to determine individual criminal responsibility, human rights investigators have, until recently, generally not taken systematic measures to:

- record carefully all relevant particulars of events witnessed by the investigator himself or herself, in order to aid accuracy of recollection in case he or she is called to testify at trial;
- record carefully all relevant particulars of events recounted by sources of information on violations which might qualify as acts of genocide, war crimes or crimes against humanity;
- grade and note the credibility and reliability of sources according to standard open source information gathering techniques, such as those outlined in the NATO Open Source Intelligence Handbook⁸⁵

⁸⁵ See NATO Open Source Intelligence Handbook (2001). See also William S. Brei, “Getting Intelligence Right: The Power of Logical Procedure”, in *Occasional Paper*, no. 2, Joint Military Intelligence College, Washington, D.C., 1996.

or with regard to interviews, the Admiralty Code (also known as the Admiralty Grading System);⁸⁶

- note clearly and consistently the identity, addresses, e-mail and mobile phone contact information of witnesses to allow for their eventual appearance at trial for cross-examination;
- ensure an unbroken and secure chain of evidence from source to trial; and
- consistently apply up-to-date encryption technology to keep information gleaned from interviews, documents or first hand eye witness accounts secret during storage at local field offices and field headquarters and during transmission to New York and Geneva, and to take adequate measures to guard against physical, fixed wire, wireless, satellite or other forms of hostile electronic surveillance, monitoring or interception.

Cherif Bassiouni, the last Chair of the Security Council's Commission of Experts for the former Yugoslavia, has commented that the major part of information collected by the Commission of Experts could be used only to establish the location, character and scale of violations, that is, to construct the case background and context, and not as evidence directly relevant to the Prosecution's case. Sources of information were not properly recorded which precluded corroboration and Defence cross-examination, thereby rendering it inadmissible at trial.⁸⁷

⁸⁶ See Coalition Operations Handbook, 4th ed., 14 April 2008, available at http://pksoi.army.mil/doctrine_concepts/documents/ABCA_Coalition_Opns_HB_2008.pdf. See also United Kingdom Ministry of Defense, Understanding and Intelligence Support to Joint Operations, Joint Doctrine Publication 2-00: Third ed., August 2011, available at <https://www.gov.uk/government/publications/jdp-2-00-understanding-and-intelligence-support-to-joint-operations>, last accessed on 10 October 2013.

⁸⁷ *Op. cit.* note at 300, *et seq.* Bassiouni observed that:

Governments did not provide any intelligence information in their possession – such as satellite and aerial photographs; intercepted telephone, radio, and cable communications; and other materials that could have revealed the disposition and movement of troops and supplies, particularly important where national borders were crossed. Such information would help to establish the role of different governments in these multiple conflicts, the international character of the conflict, the chain of command, and the apex of command and control.

Yet the adduction of information from UN human rights sources into evidence in international criminal proceedings is not *a priori* inadmissible, as demonstrated in at least one striking instance. In the ICC case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* where two high-level Congolese militia leaders were prosecuted for war crimes and crimes against humanity,⁸⁸ testimony from the Assistant Head of the Human Rights Section of the UN Organization Mission in the Democratic Republic of the Congo ('MONUC')⁸⁹ was admitted into evidence, despite Defence objections that the information was unreliable. Presiding Judge Bruno Cotte observed that UN human rights officer information gathering procedures reflected traditional UN practice and were 'tried and tested'. Moreover, the Chamber considered that the reports were relevant to the case, authentic, and that with the aid of the drafter of the relevant UN report testifying also in person orally, the Court could assess their probative value.⁹⁰ Furthermore, while the Chamber acknowledged that the UN human rights information was not collected specifically for the purposes of criminal prosecution, it underlined that:

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 manner with a concern to understand the events in question. The Chamber recalls yet again that these are neither police reports nor [Office of the Prosecutor] investigations.⁹¹

The Chamber thus ruled that the information was admissible as evidence, confirming that under certain conditions information from UN

⁸⁸ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*; ICC-01/04-01/07.

⁸⁹ 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.

⁹⁰ See the Ruling at DRC OTP P 0317 (Resumed) open session on 7 December 2010.

⁹¹ *Ibid.*, at p. 24, at lines 8–18.

human rights sources could be adduced directly in international criminal proceedings, and the Chamber also endorsed their impartiality.

What about the hearsay rule? Is there not a serious risk that UN human rights officers could be misled into recycling unfounded rumours, false accounts deliberately pressed on them by organised agents of Government or other parties, or factually incorrect and groundless allegations of genocide, war crimes or crimes against humanity? In other words, apart from the instance discussed above where the drafter of the UN report was brought before the ICC to testify in person, should UN human rights reports based on witness statements and interviews be ruled as hearsay and therefore inadmissible in international criminal proceedings?

Hearsay, is an oral, written or nonverbal assertion that was intended as an assertion and was made out of court, which the declarant offers in court as evidence to prove the truth of the matter asserted in the statement, and not merely that the statement was made.⁹² A substantial body of lawyerly and judicial opinion considers hearsay to be inherently unreliable because it “may range all the way from very reliable evidence to idle or malicious gossip, and may have been distorted or embroidered in retelling. [...] Our system relies very heavily on cross-examination as a means of exposing falsehood or error, and few other means of discrediting a witness are permitted”.⁹³ In the adversary system, the rule against hearsay ensures that a witness verifies a fact from his or her own observation instead of merely repeating statements heard from others.

Aside from the issue of unreliability, the hearsay rule, used more in common law jurisdictions, seeks to protect a very important principle:

This is the principle that a person may not offer testimony against a criminal defendant unless it is given under oath, face to face with the accused and subject to cross-examination. It is this principle – and not concerns about the reliability of hearsay evidence or the supposed inability of

⁹² See for example, United States Federal Rules of Evidence, Rule 801; Pub. L. 93–595, §1, 2 January 1975, 88 Stat. 1926.

⁹³ 29 New South Wales NSW Law Reform Commission Report (1978) – The Rule against Hearsay, p. 6, available at http://www.lawreform.lawlink.nsw.gov.au/agdbasev7/wr/lrc/documents/pdf/report_29_outline.pdf, last accessed on 10 October 2013.

the jury to deal with the weaknesses of evidence – that should drive the law concerning secondary evidence.⁹⁴

While the hearsay rule honours some key principles of fairness in criminal justice, it has proven to be of much less importance in international criminal proceedings than in domestic common law jurisdictions for two main reasons. First, the hearsay rule has less application in international criminal trials, which mix adversarial and inquisitorial procedure. In criminal law jurisdictions with an adversarial procedure and a jury, the judge is expected to act as a more passive and neutral arbiter between Prosecution and Defense and the jury is the main trier of fact, whereas in continental European systems, the judge participates more actively in questioning witnesses, even suggests lines of enquiry, and decides on law and fact.⁹⁵ The hearsay rule was developed partly to prevent jurors from being misled by second hand information – a rationale that applies less to judges experienced in assessing probative value and credibility of evidence. As D’Aoust has observed, the ICTY and ICTR have:

[...] opted for an extensive admission of evidence as long as it was ruled relevant, reliable and had a probative value that was not substantially outweighed by the need to ensure a fair trial, preferring to leave to the Trial Chamber, after the presentation of the whole of the evidence, the assessment and the determination of its proper weights.⁹⁶

⁹⁴ Richard D. Friedman, “Thoughts from across the Water on Hearsay and Confrontation”, in *Criminal Law Review*, October 1998, p. 697.

⁹⁵ As Christopher B. Mueller argues:

The conventional reason for excluding hearsay is mistrust of juries – a fear that lay fact finders cannot properly appraise remote statements and are too unsuspecting. [...] And in criminal cases especially, the serious limitations that hearsay doctrine puts on use of statements produced or gathered by government agents reflects multiple concerns: jury credulity and care in fact-finding are implicated. [...] [J]uries are unlikely to appreciate the pressures faced by prosecution witnesses and law enforcement agents, and probably no fact finder can reliably appraise statements by such people. Further, as a matter of intrinsic policy we discourage both police and prosecutors from generating the out-of-court statements to be used against people charged with crime.

Christopher B. Mueller, “Meta-Evidence: Do We Need It?”, in *Loyola of Los Angeles Law Review*, 1992, vol. 25, pp. 822–823.

⁹⁶ See Josee D’Aoust, “The Conduct of Trials”, in Jose Doria *et al.* (eds.), *The Legal Regime of the International Criminal Court*, 2009, pp. 779-80.

D'Aoust cites dicta from the ICTY *Delalic* and *Nikolić* Cases confirming this point.⁹⁷ In the *Thomas Lubanga Case*, the ICC cited dicta from the *Bemba Case* that: “The determination of admissibility is to be made in light of “the relevance, probative value and the potential prejudice of each item of evidence”.”⁹⁸ In the *Bemba Case*, Pre-Trial Chamber II indicated that with regard to deciding on the confirmation of charges (albeit a lower threshold proceeding than that of the trial itself), in reviewing hearsay evidence, UN, NGO and media reports, it generally assigned lower probative value to indirect evidence than to direct evidence,⁹⁹ and it adopted a two-stage approach with regard to indirect evidence:

[...] it assesses the relevance, probative value and admissibility of indirect evidence, as it would undertake with respect to direct evidence. Once this assessment is made, it then turns to the second step, namely whether there exists corroborating evidence, regardless of its type or source. Thus, the Chamber is able to verify whether the piece of evidence in question, considered together with other evidence, acquires high probative value as a whole.¹⁰⁰

The ICC has therefore adopted a broad, inclusive approach to evidence, including hearsay, but consciously applied a careful and discerning approach to its reliability, fully in line with the relevant provisions of the Rome Statute and its Rules of Procedure and Evidence.

Second, the hearsay rule itself has fallen into serious disrepute in many common law jurisdictions – its home turf. Already in 1979, the New South Wales Law Reform Commission opined that the hearsay rule:

[...] continues to annoy and bewilder witnesses, who are not allowed to tell the court what they know in a natural way. It continues to frustrate litigants, who cannot use obviously cogent evidence to prove their cases. It continues to add to the expense and delay of litigation. Parties who wish to embarrass their opponents can require strict first-hand proof of matters not really in dispute. In short, it lowers public re-

⁹⁷ *Ibid.*, p. 880.

⁹⁸ Situation in the Democratic Republic of the Congo in the Case of *the Prosecutor v. Thomas Lubanga Dyilo*; ICC-01/04-01/06 of 14 March 2012 (Trial Chamber 1) at para. 100.

⁹⁹ *The Prosecutor v. Jean-Pierre Bemba Gombo*; ICC-01/05-01/08 of 15 June 2009 at para. 51.

¹⁰⁰ *Ibid.*, at para. 52.

spect for the courts by making their operation less sure, less just, more expensive, less comprehensible, and at times simply ridiculous.¹⁰¹

Law reform efforts in other countries have considered abolishing the hearsay rule entirely¹⁰² and in recent years a body of empirical research has cast doubt on the presumption that jurors are unable to distinguish hearsay from direct evidence or to assess carefully its reliability.¹⁰³

In short, the rationale behind excluding hearsay from being admitted into evidence has less persuasive force for international criminal proceedings which mix continental and common law approaches, do not use jurors, and are presided over by judges who are presumably experienced in assessing evidentiary relevance, probative value, reliability, weight and risk of prejudice to fair trial. UN human rights reports based on interviews of witnesses and other individuals therefore should not be excluded *holus-bolus* as evidence in international criminal proceedings, even where the report drafter could not be brought into court to testify, but rather assessed individually in terms of relevance, probative value and potential prejudice – an approach the ICC and *ad hoc* tribunals have already endorsed, as discussed above.

¹⁰¹ NSW Law Reform Commission Report (1978), p. 3, *supra* note 93.

¹⁰² See Eleanor Swift, “Abolishing the Hearsay Rule”, in *California Law Review*, 1987, vol. 75, no. 1, pp. 495–519. See also David Crump, “The Case for Selective Abolition of the Rules of Evidence”, in *Hofstra Law Review*, 2006, vol. 35, p. 585. See further Adrian A.S. Zuckerman, “The futility of hearsay: Law Commission Consultation Paper No.138 on hearsay (Part 1)”, in *Criminal Law Review*, 1996.

¹⁰³ See for example, Richard F. Rakos and Stephan Landsman, “Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions”, in *Minnesota Law Review*, 1992, vol. 76, pp. 655–682; and Angela Paglia and Regina A. Schuller, “Jurors’ Use of Hearsay Evidence: The Effects of Type and Timing of Instructions”, in *Law and Human Behavior*, 1998, vol. 22, no. 5. On the question of hearsay introduced by way of expert testimony, see Ronald L. Carlson, “Experts, Judges, and Commentators: the Underlying Debate About an Expert’s Underlying Data”, in *Mercer Law Review*, 1996, vol. 47 (Winter), pp. 481–493. See also Regina A. Schuller and Angela Paglia, “An Empirical Study: Juror Sensitivity to Variations in Hearsay Conveyed via Expert Evidence”, in *Law and Psychology Review*, 1999, vol. 23, pp. 131–149.

13.12. Can International Criminal Investigators and Prosecutors Afford to Ignore Information from UN Human Rights Sources?

International criminal investigators and prosecutors are rarely, if ever, among the first persons to arrive at crime scenes of genocide, war crimes or crimes against humanity. Aside from perpetrators and victims, survivors, witnesses, journalists and eventually local NGO staff are usually the most physically proximate and knowledgeable about the various facets of the crimes in question that international criminal investigators and prosecutors have to piece together months or years after the fact. As discussed above, serious violations of human rights and humanitarian law often get picked up by the UN human rights system antennae which include the human rights treaty bodies, human rights special procedures including special investigative missions or commissions of inquiry deployed under Security Council authority, the Universal Periodic Review and a range of other UN human rights related agencies, bodies and programmes such as the OHCHR Secretariat, UN human rights field presences including human rights components of peacekeeping mission, the UN High Commissioner for Refugees, the UN Office for the Coordination of Humanitarian Affairs, UNICEF, UNESCO, the World Food Programme and the World Health Organization, the UN Development Program, and UNODC. The sheer vastness and complexity of the UN family of agencies, their mandates, differing *modus operandi* and distinct management and staff cultures pose formidable obstacles for anyone trying to identify, assess and relate information from these sources to proving guilt beyond a reasonable doubt of perpetrators of the worst crimes known to humanity. Yet the urgency of international criminal justice for victims, survivors, affected communities, societies seeking to transit from conflict, and the international community at large, demands that crimes, their victims and perpetrators are placed accurately in a large and detailed tableau. That requires a wide and high-resolution field of perception on the part of international criminal investigators and prosecutors. In order to discharge their solemn responsibility towards fair and effective international criminal justice, international criminal investigators and prosecutors cannot afford to ignore information from UN human rights sources.

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Quality Control in Fact-Finding

Morten Bergsmo (editor)

This book discusses how fact-finding mechanisms for alleged violations of international human rights, humanitarian and criminal law can be improved. There has been a significant increase in the use of international, internationalised and domestic fact-finding mechanisms since 1992, including by the United Nations human rights system, international commissions of inquiry, truth and reconciliation commissions, and NGOs. They are analysed and assessed in detail by 19 authors under the common theme 'Quality Control in Fact-Finding'. The authors include Richard J. Goldstone, Martin Scheinin, LIU Daqun, Charles Garraway, David Re, Simon De Smet, FAN Yuwen, Isabelle Lassée, WU Xiaodan, Dan Saxon, Chris Mahony, Dov Jacobs, Catherine Harwood, Lyal S. Sunga, Wolfgang Kaleck, Carolijn Terwindt, Ilia Utmelidze and Marina Aksenova. Serge Brammertz has written the Preface, and LING Yan a Foreword.

The book emphasises quality awareness and improvement in non-criminal justice fact-work. This quality control approach recognises, inter alia, the importance of leadership in fact-finding mechanisms, the responsibility of individual fact-finders to continuously professionalise, and the need for fact-finders to be mandate-centred. It is an approach that invites the consideration of how the quality of every functional aspect of fact-finding can be improved, including work processes to identify, locate, obtain, verify, analyse, corroborate, summarise, synthesise, structure, organise, present, and disseminate facts. The book also considers regulatory approaches to enhance quality and professionalisation.

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