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RESEARCH ARTICLE

# The Accountability Turn in Third Wave Human Rights Fact-Finding

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Whereas the characteristics of human rights fact-finding largely vary depending on the typology and scope of the entity that carries it out, consensus seems to be developing that a common set of challenges to human rights fact-finding exists. This is especially so when carried out under United Nations auspices. For example, it has long been acknowledged that the very nature of the institution, sitting as it does at the crossroads of international politics, as well as the seemingly irresolvable tension between calls for human rights protection on the one hand, and State sovereignty on the other, present some structural challenges to human rights fact-finding. Furthermore, issues of coordination between the United Nations and other institutions (such as international governmental and non-governmental organisations, or international tribunals), as well as what some have called a 'lack of institutional memory' arguably often feature as regular traits among fact-finding mechanisms. In recent years, a further set of challenges has been added to the mix by additional requirements, featuring increasingly often in mandates, that instruct fact-finding mechanisms to make further determinations of facts (concerning, e.g., the identity of those most responsible for the violations being documented, or the existence of an armed conflict) and even consider questions of law (e.g. the qualification of the violations as crimes under international law). Building on an expanding body of scholarship on the subject, as well as the author's own experience with fact-finding efforts sitting at the intersection between traditional international human rights law and international criminal justice, this article argues: (i) that human rights fact-finding has evolved in three waves; (ii) that the third wave of human rights fact-finding is characterised by an "accountability turn"; and that (iii) this turn has brought about an additional set of challenges to the already thin-stretched capacity of UN human rights inquiries. By virtue of the arguments advanced in this article, the author posits that updating and solidifying the human rights fact-finding methodology can assist United Nations inquiries and other human rights fact-finders in strengthening the credibility of their findings.

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## I. Introduction: Contextualising Human Rights Documentation

As widely recognised in transitional justice scholarship, since the late 1980s and early 1990s transitional justice has emerged as a new field of study, presenting the fields of democratisation and atrocity prevention with a new set of policy tools.<sup>1</sup> Against this background, the role of testimony and the documentation of human rights

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<sup>1</sup> Ruti G Teitel, *Transitional Justice* (OUP 2000); Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (WW Norton & Company 2011); Ruti G Teitel, *Globalizing Transitional Justice* (OUP 2014); M Cherif Bassiouni, 'Editorial' (2014) 8 *International Journal of Transitional Justice* 325; Laurel E Fletcher and Harvey M Weinstein, 'Writing Transitional Justice: An Empirical Evaluation of Transitional Justice Scholarship in Academic Journals' (2015) 7 *Journal of Human Rights Practice* 177; Scott Strauss, *Fundamentals of Genocide and Mass Atrocity Prevention* (US Holocaust Memorial Museum 2016). See also The White House Office of the Press Secretary, 'Presidential Study Directive on Mass Atrocities (PSD-10)' (4 August 2011)

abuses have come to be recognised as crucial in addressing instances of widespread violence. On the one hand, human rights documentation strengthens advocacy campaigns because it bears direct witness to people's suffering. The documentation of past human rights violations has in fact been traditionally seen as potentially:

(...) contribut[ing] to the embedding of a new human rights culture through the active dissemination of personal testimonies which can sensitise the public to past violations, assist[ing] in rewriting of school textbooks and other educational materials, and lead[ing] to recommendations for new forms of human rights practice.<sup>2</sup>

On the other hand, especially when conducted as fact-finding,<sup>3</sup> human rights documentation is seen as paving the way for "dealing with the past". Creating a record of past abuses is indeed 'helpful with the prosecution of perpetrators, identification of victims for reparations programs, and the planning of memorials'.<sup>4</sup>

The diversity of functions that human rights documentation can serve is emblematic of the often-burdensome level of expectations that coexists with documentation efforts. The proliferation of terms that indicate the very process of documenting human rights violations is but one indication of the fragmentation that often plagues this field, and of the set of challenges that it encounters: monitoring, reporting, documenting, probing, and investigating are all expressions that, to a large extent, indicate the same concept of factual information gathering. What distinguishes them is the adopted standard and methodology, both depending on the intended use of the information gathered, and the scope of the entity's mandate.

Information gathering exercises can in fact take place in a variety of contexts, from instances of humanitarian and relief assistance, to UN peacekeeping missions with human rights components, to criminal investigations, UN official inquiries, and local human rights advocacy groups. The diversity of actors and their mandate will influence the level of thoroughness, as well as the adoption of a certain methodology and standard. Each one of these groups will conduct its own fact-finding based on their own mandate and institutional requirements. These efforts will not always be compatible with one another. For example, humanitarian actors might collect information on victims of an airstrike, but might wish to keep this information confidential to maintain their effective or perceived neutrality. At the same time, judicial authorities might want to access that information to use it in the pursuit of perpetrators, should the incident have constituted an unlawful attack. The different needs and mandate of these two typologies of actors raises serious ethical and pragmatic challenges. Most often, however, these various groups interact with one another and contribute to one another's fact-finding.<sup>5</sup>

Of course, these efforts do not raise ethical and pragmatic challenges only in relation to one another. They also raise ethical, but especially pragmatic, challenges in their own right. Each fact-finding initiative will in fact inevitably be characterised by context-based dilemmas, but a common set of challenges might be identifiable that, to varying degrees, afflicts all UN actors performing human rights fact-finding, especially

<<https://www.whitehouse.gov/the-press-office/2011/08/04/presidential-study-directive-mass-atrocities>> accessed 27 February 2017; The White House Office of the Press Secretary, 'Fact Sheet: A Comprehensive Strategy and New Tools to Prevent and Respond to Atrocities' (23 April 2012) <<https://www.whitehouse.gov/the-press-office/2012/04/23/fact-sheet-comprehensive-strategy-and-new-tools-prevent-and-respond-atro>> accessed 27 February 2017; The White House Office of the Press Secretary, 'Executive Order – Comprehensive Approach to Atrocity Prevention and Response' (18 May 2016) <<https://www.whitehouse.gov/the-press-office/2016/05/18/executive-order-comprehensive-approach-atrocity-prevention-and-response>> accessed 27 February 2017; US Department of State Transitional Justice Initiative 'Transitional Justice Overview: What is Transitional Justice?' (2016) <<https://www.state.gov/documents/organization/257771.pdf>> accessed 27 February 2017.

<sup>2</sup> Elisabeth Baumgartner and others, 'Documentation, Human Rights and Transitional Justice' (2016) 8 *Journal of Human Rights Practice* 1, 1.

<sup>3</sup> In this article, the author uses fact-finding and documentation/documentation gathering interchangeably, unless otherwise specified. In this case, fact-finding is distinguished from documentation to highlight that only the documentation or collection of testimony that is carried out in a technical manner (ie fact-finding) is likely to find its way into mechanisms geared towards addressing past abuses. Whereas the author is not strictly speaking of mechanisms for criminal or other forms of accountability, the observation seems fair that the more precise the record, the higher the likelihood is that a certain testimony will hold value in a transitional justice mechanism, of whatever entity.

<sup>4</sup> Baumgartner and others (n 2) 1.

<sup>5</sup> See Stéphane Jeannot, 'Recognition of the ICRC's Long-Standing Rule of Confidentiality – An Important Decision by the International Criminal Tribunal for the Former Yugoslavia' (2000) 82 *International Review of the Red Cross* 403; Gabor Rona, 'The ICRC Privilege Not to Testify: Confidentiality in Action' (2002) 84 *International Review of the Red Cross* 207; Kate Mackintosh, 'Note for Humanitarian Organisations on Cooperation with International Tribunals' (2004) 86 *International Review of the Red Cross* 131; Anne-Marie La Rosa, 'Humanitarian Organisations and International Criminal Tribunals, or Trying to Square the Circle' (2006) 88 *International Review of the Red Cross* 169; Laura M Olson and Toni Pfanner, 'Cooperation between Truth Commissions and the International Committee of the Red Cross' (2006) 88 *International Review of the Red Cross* 292; Marc DuBois, 'Civilian Protection and Humanitarian Advocacy: Strategies and (False?) Dilemmas' (2008) 39 *Humanitarian Practice Network* 12; Steven Ratner, 'Should ICRC Reports on Detainee Visits be Turned over to Military Commission Defence Counsel?' (*Just Security*, 12 November 2013) <<https://www.justsecurity.org/3116/icrc-reports-military-commission/>> accessed 27 February 2017.

when they do so under UN auspices. What some have called a 'lack of institutional memory', for example, is said to have long afflicted UN fact-finding bodies.<sup>6</sup> Another recurrent problem has been considered the coordination between the United Nations and other institutions, such as international governmental and non-governmental organisations, or international tribunals. It might even be said that the very nature of the UN as an institution, operating at the intersection of international politics, together with the seemingly irresolvable tension that exists between calls for human rights protection on the one hand, and State sovereignty on the other, present serious structural challenges to genuine human rights fact-finding. In recent years, however, the bar might have further been raised by additional requirements in mandates that instruct fact-finding mechanisms to make further determinations of facts (concerning, for example, the identity of those most responsible for the violations being documented, or the existence of an armed conflict) and even consider questions of law (for example, the qualification of the violations as crimes under international law).

The appearance of requirements that exceed traditional human rights mandates has surely stretched the capacity of UN human rights inquiries. It might have been inevitable, however, as the appearance of these requirements might be the product of a broader push for an "accountability turn" in human rights fact-finding. UN inquiries, in fact, have not been alone in witnessing an "accountability turn". The desire for accountability among affected communities has contributed to more and more human rights groups documenting abuses in the hope that their work might increase demand for criminal trials. This has had the consequence of "popularising" justice; however, it has also increased confusion as to both the legal framework and procedural requirement to be followed in these instances of fact-finding. After analysing what this article defines as "three waves of human rights fact-finding" and "accountability turn", the discussion will turn to clarifying the important differences between criminally investigating and the more "neutral" act of fact-finding, as well as considering the peculiar challenges encountered by third wave human rights fact-finding, and by UN fact-finding as such. The article will conclude with a discussion of how some changes in the fact-finding methodology might constitute a way forward that could benefit third wave UN fact-finding entities, but also more generally third wave fact-finding bodies regardless of their scope and/or their official or unofficial capacity.

## II. The Three Waves of Human Rights Fact-finding

As stated in this article's introduction, the emergence of the transitional justice field was naturally accompanied by the emergence of human rights documentation and fact-finding. In the late '70s and early '80s, the bulk of human rights documentation was carried out by the civil society.<sup>7</sup> Realising the importance of testimony and documentation to 'buttress claims of human rights violations', the civil society started in fact reporting and collecting materials that, though largely utilised for domestic purposes, 'began to make tangible contributions to the project of international justice'.<sup>8</sup> These early movements were strongly prevalent in Latin America, where despite the installation of military dictatorships and a harsh crackdown on the civil society, human rights groups went underground, remaining vibrant.<sup>9</sup> The momentum created by nascent human rights norms and the proliferation of human rights treaties had a strong impact, empowering those human rights groups to believe in, hope for, and eventually demand accountability.<sup>10</sup>

<sup>6</sup> M Cherif Bassiouni, 'Appraising UN Justice-Related Fact-Finding Missions' (2001) 5 Washington University Journal of Law & Policy 35, 48. It is important to mention, in addition, that the author recognises the diversity of scope and nature of UN fact-finding bodies, and fully appreciates the difference in mandates, for example, between Panels of Experts that support Sanctions Committees and report to the UN Security Council, or human rights components of Peacekeeping Missions responding to the Office of the High Commissioner for Human Rights and Special Rapporteurs or other Special Mechanisms and Procedures of the Human Rights Council, and Special Representatives of the Secretary General on a number of thematics/countries. Whereas, to some extent, all UN fact-finding mechanisms have to grapple with how to document and report on serious violations of human rights, and as such can benefit from a solid and consistent methodology, the discussion as articulated in this contribution refers more strictly to the issues that confront Commissions of Inquiry and other UN fact-finding mechanisms that have seen their mandates characterised by an "accountability turn". See Section III below.

<sup>7</sup> To be sure, efforts led by the civil society have continued to feature prominently in the human rights documentation panorama, and have increasingly taken a more professional turn, see Federica D'Alessandra and others, *Handbook on Civil Society Documentation of Serious Human Rights Violations: Principles and Best Practices* (PILPG 2016).

<sup>8</sup> *ibid* 11.

<sup>9</sup> Ellen L Lutz and Kathryn Sikkink, 'International Human Rights Law and Practice in Latin America' (2000) 54 International Organization 633. On the proliferation of human rights treaties in this period, see Anup Shah, 'A Chronology of the Global Human Rights Struggle' (*Global Issues*, 2 July 2000) <<http://www.globalissues.org/article/154/a-chronology-of-the-global-human-rights-struggle>> accessed 27 February 2017.

<sup>10</sup> Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (CUP 1999).

Despite doubts that have been casted as to the coherence of their agenda,<sup>11</sup> these groups constituted the first set of monitors (and often denouncers) of contraventions of nascent norms enshrined in human rights treaties.<sup>12</sup> By virtue of their nature, in opposition as they were to the governments whose abuses they documented, these first human rights groups conducted their documentation activities entirely on their own initiative. They did so informally, without any official sanctioning and relying almost entirely on their domestic capacity.<sup>13</sup>

International attention for domestic enforcement of international norms had begun to emerge in the mid to late seventies, with the entry into force of the first international human rights treaties.<sup>14</sup> Yet, it was not until the crumbling of the first dictatorships that the international community began to pursue more vigorously serious violations of international human rights law.<sup>15</sup> The strength of the momentum built with the fall of the first dictatorships when civilian governments in Latin America established a series of Truth and Reconciliation Commissions with the support of the international community.<sup>16</sup> With the establishment of Truth Commissions in Bolivia and Argentina (1982),<sup>17</sup> post-conflict and transitional societies became the subject of inquiry for a new generation of fact-finding bodies. Born as a response to the fall of the regimes opposed by human rights groups throughout their rule, perhaps as a tribute to the work of these groups, and definitively to cater to the appetite for justice and redress that emerged from their activities,<sup>18</sup> Truth and Reconciliation Commissions began to be set up around the world to investigate and document abuses in the aftermath, or at the beginning, of many transitions to democracy.<sup>19</sup>

Unlike the first wave of human rights documenters, which were forced to coexist with the governments whose abuses they were to monitor and denounce, the institutions that made up this second wave of fact-finding were mostly *ex post facto* mechanisms.<sup>20</sup> Also, unlike their early predecessors, this new generation of fact-finding bodies was almost exclusively composed by officially appointed, though still mostly domestic, mechanisms.<sup>21</sup> Furthermore, unlike the organisations that began to be active within the first wave of human rights fact-finding, many of which are still active to this day, all Truth and Reconciliation Commissions were almost exclusively temporary bodies, whose mandate ended with the submission of a report.<sup>22</sup> Nevertheless, their “official” capacity gave second-wave mechanisms unparalleled leverage in investigating and

<sup>11</sup> Although prevalent in Latin America, these movements were not exclusive of that region. Simpson connects the emergence of these ‘local, national, and transnational movements for *individual* human rights in the postwar period and especially in the 1970s’ with the collapse of European colonialism and the emergence of self-determination. He argues that:

(...) a reexamination of the contested politics of self-determination in the late 1960s and 1970s suggests there was no single “human rights movement” with a clear set of goals or even a rough consensus on what constituted core human rights. Rather, like other contested human rights norms, the meaning of self-determination emerged from political, ideological, and sometimes even military conflict, with a multiplicity of actors seeking to enlarge or constrain it to suit their own purposes,

See Bradley R Simpson, ‘Self-Determination, Human Rights, and the End of Empire in the 1970s’ (2014) 4 *Humanity Journal* 239.

<sup>12</sup> Risse, Ropp and Sikink (n 10).

<sup>13</sup> *id.*

<sup>14</sup> Shah (n 9).

<sup>15</sup> The UN’s Human Rights Sub-Commission on the Promotion and Protection of Human Rights set up a Working Group on Disappearances, the first thematic human rights mechanism with a universal mandate, for example, was established in 1980. See Reed Brody, ‘Commentary on the Draft UN Declaration on the Protection of All Persons from Enforced or Involuntary Disappearances’ (1990) 8 *Netherlands Quarterly of Human Rights* 381. Since then, UN Human Rights Special Procedures have multiplied and become a staple of human rights law enforcement around the world, with 43 thematic and 14 country mandates, as of 30 September 2016. See UN Office of the High Commissioner for Human Rights, ‘Special Procedures of the Human Rights Council’ <<http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>> accessed 27 February 2017.

<sup>16</sup> The first Truth Commission ever established was actually established in Uganda in 1974 to investigate some instances of forced disappearances. However, given that Uganda dictator Idi Amin Dada had established the Commission, and that the four commissioners were targeted in reprisal for their work, this Commission cannot be characterised as a legitimate effort to pursue accountability. See US Institute of Peace, ‘Truth Commission: Uganda 74’ <<http://www.usip.org/publications/truth-commission-uganda-74>> accessed 27 February 2017.

<sup>17</sup> Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2001).

<sup>18</sup> See Risse, Ropp and Sikink (n 10).

<sup>19</sup> Hayner (n 17).

<sup>20</sup> *id.*

<sup>21</sup> *id.* This is true even when they featured international staffers and Commissioners.

<sup>22</sup> *ibid* 12. According to Hayner’s definition, a Truth Commission:

- (1) is focused on the past, rather than ongoing, events;
- (2) investigates a pattern of events that took place over a period of time;
- (3) engages directly and broadly with the affected population, gathering information on their experiences;
- (4) is a temporary body, with the aim of concluding with a final report; and
- (5) is officially authorized or empowered by the state under review.

documenting human rights abuses,<sup>23</sup> together with a much broader set of resources. The establishment of these mechanisms might as well have been welcomed as a turning point in history, signalling to governments around the world that the international community bore witness to their abuses. Whilst constituting a significant step forward towards accountability, this new typology of mechanism was focused more on sanctioning and recognising the need to redress the harm done to the victims than to bringing perpetrators to justice.<sup>24</sup>

In the 1990s, drawing from re-energised multilateralism following the fall of the Berlin Wall and the collapse of the Soviet Union, a new wave of human rights fact-finding mechanisms arose spearheaded by the United Nations.<sup>25</sup> In 1992, in reaction to the horrifying violence that for the first time since World War II engulfed the European continent, and moved by unprecedented public pressure to “do something” about the crisis,<sup>26</sup> the United Nations established a commission of experts to investigate the situation in the former Yugoslavia. The Yugoslavia Commission was established via United Nations Security Council Res. 780/1992, with the mandate to ‘examine and analyse the information submitted pursuant to resolution 771 (1992)’, ‘together with such further information (...) [it] might obtain through its own investigations or efforts’ ‘on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia’.<sup>27</sup>

In many ways, the Yugoslavia Commission was unprecedented. For the first time, a domestic or international fact-finding mechanism was mandated to inquire beyond traditional human rights law, with the inclusion of international humanitarian law amongst its competencies. It was also the first time that a United Nations established international commission of inquiry contributed directly to the establishment of an International Criminal Tribunal, and fed its report and findings to the Office of the Prosecutor.<sup>28</sup> The proliferation of mechanisms similar to the 1992 Yugoslavia Commission has been astonishing: since 1993, the United Nations Office of the High Commissioner for Human Rights was established, and tasked to support and deploy circa 50 commissions and fact-finding missions.<sup>29</sup>

This third wave of human rights fact-finding bodies is distinguished from its predecessors in that it is characterised by official United Nations mandates, has access to United Nations personnel and resources and, although not exclusively, has a largely international composition. Increasingly, some of these procedures are

<sup>23</sup> Despite the fact that obstacles remained to the timely delivery of their missions, see generally Hayner (n 17).

<sup>24</sup> Onur Bakiner, *Truth Commissions: Memory, Power, and Legitimacy* (Penn Press 2016).

<sup>25</sup> With few exceptions in earlier years, the 1990s truly were the years in which the United Nations began to see a proliferation of monitoring and fact-finding mechanisms. In its first forty years, in fact, the UN only set up five fact-finding commissions to Viet-Nam (1963), Mozambique (1973), Chile (1975), Israeli Occupied Territories (1979), and Cuba (1988) respectively. See UNGA ‘Report of the UN Fact-finding Mission to South Viet-Nam to Ascertain the Facts of the Situation in that Country as Regards Relations between the Government of the Republic of Viet-Nam and the Viet-Nameese Buddhist Community’ (7 December 1963) UN Doc A/5630; UNGA ‘Report of the Commission of Inquiry on the Reported Massacres in Mozambique’ Established by UNGA Res 3114 (XXVIII) UNGAOR 29th Session Supp No 21 (22 November 1974) UN Doc A/9621; UNCHR ‘Report of the Ad Hoc Working Group to Inquire into the Situation of Human Rights in Chile’ Established by UNCHR Res 8 (XXXI) (7 October 1975) UN Doc A/10285, (4 February 1976) UN Doc E/CN.4/1188, (8 October 1976) UN Doc A/31/253, (29 September 1977) UN Doc A/32/227, (25 October 1978) UN Doc A/33/331; UNSC ‘Report of the Security Council Commission Concerning Israeli Settlements in Arab Territories Occupied since 1967, Including Jerusalem’ Established by UNSC Res 446/1979, 452/1979, and 465/1980 (12 July 1979) UN Doc S/13450, (4 December 1979) UN Doc S/13679, (25 November 1980) UN Doc S/14268; UNCHR ‘Report of the Mission to Cuba to Observe the Human Rights Situation’ Established by UNCHR Dec 1998/106 at the invitation of the Government of Cuba (21 February 1989) UN Doc E/CN.4/1989/46.

<sup>26</sup> Samantha Power, *“A Problem from Hell”: America and the Age of Genocide* (Basic Books 2002).

<sup>27</sup> UNSC Res 780 (6 October 1992) UN Doc S/RES/780.

<sup>28</sup> The UNSC ‘Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council’ (27 May 1994) UN Doc S/1994/674 verifies the Yugoslavia Commission, as it reads:

I have examined the final report carefully, and I fully concur with the conclusions reached by the Commission. I, therefore, consider that the Commission has discharged its mandate entrusted to it by the Security Council in its resolution 780 (1992), and I am confident that the material collected and analysed by the Commission will greatly facilitate the task of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 in carrying out its mandate. Upon my instructions, the database and all of the information gathered by the Commission in the course of its work have been forwarded to the Office of the Prosecutor of the International Tribunal.

To be sure, the Commission was not without trouble. Fearing that ‘a thorough investigation might implicate one side over the other (which it in fact did) and so, again, cripple the peace negotiations’ political forces put an interminable series of obstacles, including a lack of funding, before the Commission. For a more detailed account, see John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (Chicago Press 2003).

<sup>29</sup> UN Office of the High Commissioner for Human Rights, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice* (UN 2015). For a chronological listing of UN-established fact-finding mechanisms, see United Nations Library and Archives, ‘*International Commissions of Inquiry, Fact-finding Missions: Chronological List*’ <<http://libraryresources.unog.ch/factfinding/chronolist>> accessed 27 February 2017.

deployed by the UN Security Council or the UN Human Rights Council in the midst of and in response to international crisis. As Stephen Rapp wrote recently:

At the same time that the United Nations Security Council in New York was blocked, the United Nations Human Rights Council in Geneva was able to establish commissions of inquiry or other fact-finding missions for Syria, Iraq, and South Sudan, and additionally in other situations where vetoes likely would have been cast— North Korea, Eritrea, Sri Lanka, and Gaza.<sup>30</sup>

Because of this monitoring and crisis-response function, third wave mechanisms resemble first wave mechanisms in their sequencing.<sup>31</sup> The most important feature of these Commissions, however, is that given the timing of their establishment, and thanks to both the mandates conferred upon them as well as their immunities and privileges,<sup>32</sup> they might be in a unique position to collect and preserve evidence that might ‘form the basis for any initial prosecutions’.<sup>33</sup>

### III. The “Accountability Turn” in Third Wave Human Rights Fact-finding

The protection and enforcement of international human rights is a core competence of the United Nations as an institution.<sup>34</sup> Although scholars entertain ‘fascinating but largely unresolvable debates’ surrounding the sources and nature of international human rights law,<sup>35</sup> the “practice” of human rights within the scope of the United Nations is generally intended to refer *primarily* to the rights enshrined in the Universal Declaration of Human Rights, subsequently codified and developed by the international community through a number of international treaties.<sup>36</sup> This is indeed the body of law that United Nations inquiries and fact-finding commissions have traditionally been tasked to monitor and report.

<sup>30</sup> As Rapp continues:

The UNHRC consists of 47 member-states elected for three years terms by the UN General Assembly. By tradition, its members prefer to operate by consensus, but when consensus is not possible, mandates for official inquiries can be approved when a majority of members vote yes, and [unlike the UNSC] none have the power of veto.

See Steven J Rapp, ‘Bridging The Hague-Geneva Divide: Harmonizing Multiple Investigations of International Crimes’ (2016) 7 *Intersections*, The Hague Institute for Global Justice 11, 11.

<sup>31</sup> Whereas second-wave mechanisms were mostly deployed in the aftermath of situations in which human rights violations on a massive scale had been perpetrated, and as part of the transition, both human rights documentation in the first and third wave have a monitoring function, and are mostly established as a means to *respond* to human rights abuses as they unfold. It should be noted that human rights fact-finding groups of the first wave have not at all disappeared. To the contrary, they still today constitute the backbone of the human rights and international crimes documenting community. See D’Alessandra and others (n 7).

<sup>32</sup> Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entered into force 17 September 1946) 1 UNTS 15; ‘Report of the UN Diplomatic Conference on Intercourse and Immunities’ (Vienna, 2 March – 14 April 1961) UN Doc A/CONF.20/C.1/SR.24, art 22.

<sup>33</sup> M Cherif Bassiouni, *Introduction to International Criminal Law* (2nd edn, Martinus Nijhoff Publishers 2013) 942. It should be added that while fact-finding mechanisms of the second wave are no longer as prevalent today as they were in the 1980s and early 1990s, both human rights groups and official UN mechanisms remain equally engaged in monitoring, reporting, and fact-finding of large-scale abuses. Many civil society groups feed information directly to officially appointed inquiries and fact-finding missions. Arguably, in fact, especially when abiding by standards of consistency and reliability, civil society groups are essential to monitoring and documentation. See D’Alessandra and others (n 7).

<sup>34</sup> See Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI; Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR). See also United Nations, ‘The Three Pillars of the United Nations’ <<http://www.un.org/un70/en/content/videos/three-pillars>> accessed 27 February 2017; United Nations, ‘Protect Human Rights’ <<http://www.un.org/en/sections/what-we-do/protect-human-rights/>> accessed 27 February 2017.

<sup>35</sup> The author uses *primarily* to indicate that the UN does not rely exclusively on UN treaties and standards, and that human rights treaties and mechanisms that have developed in the context of regional or other international bodies are, of course, relevant to the work of the UN. However, in the context of this article, the author takes a position similar to the ‘straightforward position’ taken in Philip Alston and Sarah Knuckey, ‘The Transformation of Human Rights Fact-Finding: Challenges and Opportunities’ in P Alston and S Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (OUP 2016) 7. For a sampling of the early positions taken by scholars on the sources and nature of human rights law, see Bruno Simma and Philip Alston, ‘The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles’ (1989) 5 *Australian Yearbook of International Law* 82.

<sup>36</sup> See UDHR; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195; Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

A first stretch of these mandates occurred around the early to mid-1990s when, besides international human rights law as understood within the UN system, fact-finding missions and commissions of the third wave started monitoring and assessing compliance with international humanitarian law, when these operated in relation to international or non-international armed conflicts.<sup>37</sup> Similarly, since the mid-2000s,<sup>38</sup> a second stretch to the applicable body of law seems to have occurred, reaching beyond international human rights law and international humanitarian law, to include international criminal law as a constituent element of the legal framework applicable to these monitoring bodies.<sup>39</sup> Although, in fact, human rights inquiries have largely explained that their understanding of accountability goes beyond that of criminal prosecutions,<sup>40</sup> scholars have highlighted a limited application of international criminal law as emphasised within their mandates, which 'can be inferred from the explicit reference in the mandate to, for example, "crimes" and "identifying those responsible"'.<sup>41</sup>

This preponderance of language is evident when surveying the mandates of UN commissions of inquiry and other investigative mechanisms set up since the mid-2000s. For example, the mandate of the UN Commission in Darfur (2004) included to 'identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable'; the mandate of the UN Commission on Timor-Leste (2006) requested the Commissioners to 'recommend measures to ensure accountability for crimes and serious violations of human rights'; in Libya (2011) to 'identify those responsible, to make recommendations, in particular, on accountability measures, all with a view to ensuring that those individuals responsible are held

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(adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3; International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3; Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3. See also Optional Protocol to the Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) UN Doc A/RES/63/117; Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414; Optional Protocol to the Convention on the Elimination of Discrimination against Women (adopted 10 December 1999, entered into force 22 December 2000) UN Doc A/RES/54/4; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 222; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25 May 2000, entered into force 18 January 2002) 2171 UNTS 227; Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (adopted 14 April 2002, entered into force 14 April 2014) UN Doc A/RES/66/138; Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) UN Doc A/RES/57/199; Optional Protocol to the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UN Doc A/RES/61/106, Annex II.

<sup>37</sup> Lewis offers a very accessible primer to the difference between international human rights law and humanitarian law:

At its core, international human rights law (IHRL) seeks to regulate the relationship of the government to its population in order to spur the government to do what is necessary to ensure the safety and well-being of its population while allowing the population to pursue their desires unencumbered by unwarranted government intrusion. International humanitarian law (IHL) – also known as the law of armed conflict – is more limited, applying only during armed conflict and seeking generally to inject a modicum of humanity into wartime by regulating the means and methods of warfare and protecting those not, or no longer, directly participating in hostilities. While IHRL has a fundamental mission of transforming the relationship between the government and the population, IHL aims primarily to limit the effects of hostilities on populations, whether civilians, detainees, the wounded, the sick, or those otherwise *hors de combat*.

See Dustin A Lewis, 'Understanding Core Differences between Human Rights and International Humanitarian Law in Armed Conflict' (*Harvard Policy and Conflict Research Blog*, 17 April 2012) <<http://www.hpcrresearch.org/blog/dustin-lewis/2012-04-17/understanding-core-differences-between-human-rights-and-international-h>> accessed 27 February 2017.

<sup>38</sup> The first Commission of Inquiry to be affected by the accountability turn was the United Nations Security Council Commission of Inquiry in Darfur established pursuant to UNSC Resolution 1564 (2004).

<sup>39</sup> International criminal law is a body of public international law designed to prohibit certain categories of conduct commonly viewed as atrocity crimes (meaning serious and systematic violations of international human rights law, or grave violations of the laws of war, including international humanitarian law and the law on the use of force) and to make perpetrators of such conduct criminally accountable. International criminal law, like international human rights law, is based on sources of international law (ie treaties, customary international law, and general principles of law). Differently from international human rights law, however, international criminal law deals with prohibitions addressed to individuals (as opposed to States) and imposes penal sanctions for violation of those prohibitions upon individuals. The crucial characteristic of criminal law is in fact that, for a finding to be made, three things must be established: (1) That the violation (ie *crime*) in question occurred (ie crime-base); (2) That the person in question committed the crime (ie linkage evidence); and (3) That the person in question is not exempt from criminal responsibility for the act. For a more sustained explanation of the nature, sources, and characteristics of international criminal law, see Bassiouni, *International Criminal Law* (n 33); Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (CUP 2014).

<sup>40</sup> UNOHCHR, *Commissions of Inquiry* (n 29) 12.

<sup>41</sup> Théo Boutruche, 'Selecting and Applying Legal Lenses in Monitoring, Reporting, and Fact finding Missions' (2013) HPCR Working Paper, 11 <<http://dx.doi.org/10.2139/ssrn.2337437>> accessed 27 February 2017.

accountable'; in the Syrian Arab Republic (2011) to 'identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable'; in the Occupied Palestinian Territory (2014) to 'make recommendations, in particular on accountability measures, all with a view to avoiding and ending impunity and ensuring that those responsible are held accountable'.<sup>42</sup>

Some have argued that this increased focus on accountability (and criminal accountability language in particular) should not be surprising given the proliferation of international courts and tribunals that the world witnessed since the mid-'90s, a proliferation which itself benefitted from a re-energised multilateralism following the fall of the Soviet Union.<sup>43</sup> Others might think that this focus is aligned with 'the birth of a new age of accountability' following the establishment of the first permanent International Criminal Court.<sup>44</sup> Care, however, is peremptory in avoiding conflation between two bodies of an essentially different nature and scope.

#### IV. The Important Differences between Investigating and Fact-finding

Criminal investigations are aimed at establishing the existence of a specific set of *crimes* and the responsibility of their *individual* perpetrators.<sup>45</sup> In that sense, their substantive and procedural requirements, as well as the standards adopted, are much stricter, and of an essentially different nature than those used by fact-finding mechanisms. Whereas reporting individual violation cases, especially when they are high profile or particularly useful to illustrate broader patterns, is in fact not inconsistent with the purpose of commissions of inquiry, the purpose of these bodies is often not to investigate the details of an individual's fate or action, or to seek accountability for a specific violation, but rather to paint the *big picture* of the character, scale, and entity of the *violations* documented.

This is an important difference because the bodies of international human rights and humanitarian law (to which the term *violation* refers) and the body of international criminal law (to which the term *crime* refers) do not overlap completely.<sup>46</sup> While it is possible that a violation of human rights law or international humanitarian law may also constitute a crime under international criminal law, not all human rights or humanitarian law violations will be accommodated easily under the international criminal law framework. Take for example the contrast visible between the freedom from torture and the right to marriage and a family. An absolute prohibition against torture exists under international human rights law,<sup>47</sup> with torture also characterised as a grave breach of international humanitarian law,<sup>48</sup> and as a crime under international

<sup>42</sup> See UNSC Res 1564 (18 September 2004) UN Doc S/RES/1564, para 12; UNHRC 'Report of the Independent Special Commission of Inquiry for Timor-Leste' Established by UNHRC Res S-4/1 (18 October 2006) UN Doc S/2006/822, Annex, para 4(c); UNHRC Res S-15/1 (25 February 2011) UN Doc A/HRC/RES/S-15/1, para 11; UNHRC Res S-17/1 (18 October 2011) UN Doc A/HRC/RES/S-17/1, para 13; UNHRC Res S-21/1 (23 July 2014) A/HRC/RES/S21/1, para 13; UNOHCHR, *Commissions of Inquiry* (n 29) 12.

<sup>43</sup> Recently, and conversely, human rights expert and former UN rapporteur Philip Alston wrote:

It is striking that while the emergence of the various international and mixed criminal courts and tribunals over the past two decades has generated a veritable industry and a vast literature, fact-finding has been so neglected as an area for sustained exploration, critique, and refinement. The explosion in the number and variety of international fact-finding bodies could reasonably be argued to be a development of comparable significance (...).

See Alston and Knuckey (n 35) 7.

<sup>44</sup> UN Secretary-General, 'Secretary-General's Remarks to the Media at ICC Review Conference' (31 May 2010) <<https://www.un.org/sg/en/content/sg/statement/2010-05-31/secretary-generals-remarks-media-icc-review-conference-includes>> accessed 27 February 2017. Some, however, have argued that this birth of a new age of accountability may be too 'slow in arriving', see eg Rapp (n 30); Anthony Kariuki, 'War Crimes and Punishment: Why Is The ICC Targeting Africa?' *Brown Political Review* (Providence, RI, 12 March 2015) <<http://www.brownpoliticalreview.org/2015/03/war-crimes-and-punishment-why-is-the-icc-targeting-africa/>> accessed 27 February 2017. For a more nuanced view, see Christine Schwobel, 'The Re-branding of the International Criminal Court (and Why African States Are Not Falling For It)' (*Opinio Juris*, 28 October 2016) <[http://opiniojuris.org/2016/10/28/the-re-branding-of-the-international-criminal-court-and-why-african-states-are-not-falling-for-it/?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29](http://opiniojuris.org/2016/10/28/the-re-branding-of-the-international-criminal-court-and-why-african-states-are-not-falling-for-it/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29)> accessed 27 February 2017; Dapo Akande, 'South African Withdrawal from the International Criminal Court – Does the ICC Statute Lead to Violations of Other International Obligations' (*EJIL Talk!*, 22 October 2017) <<http://www.ejiltalk.org/south-african-withdrawal-from-the-international-criminal-court/#more-14685>> accessed 27 February 2017.

<sup>45</sup> Bassiouni, *International Criminal Law* (n 33).

<sup>46</sup> id; Lewis (n 37).

<sup>47</sup> See CAT; UDHR, art 5; ICCPR, art 7.

<sup>48</sup> In non-international armed conflict, see eg Geneva Conventions, art 3 (Common); Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, arts 17, 87; Geneva Convention Relative to the Protection of Civilians in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 32; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, art 75(2)(a), (e); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, art 4(2)(a), (h).

criminal law.<sup>49</sup> However, whilst the right to marry and form a family exists under international human rights law,<sup>50</sup> there is no equivalent positive requirement under international humanitarian or international criminal law to which a breach or crime can be attributable.

Furthermore, when making determinations on “responsibility”, at least traditionally, fact-finding commissions look at the responsibility of States, not to that of individuals. This is because their primary goal is to bring about a policy change with regards to the situation exposed, not to bring the individual perpetrator to account. Finally, the very nature of these inquiries, which often report on situations in territories to which they have never even been granted access, and their composition (staffed, as they are, by human rights officers, not criminal investigators), largely support the idea that these mechanisms are and should remain separate, both in operation as well as in perception, and that fact-finding missions and commissions should not be considered, or turned into, vanguards for international criminal courts and tribunals.

At the same time, given that the world’s worst situations of ongoing atrocity crimes are often beyond the reach of international criminal justice,<sup>51</sup> and that commissions of inquiry and other United Nations fact-finding and investigative mechanisms are the only chance the international community might get to officially conduct testimony collection and documentation of serious abuses (*i.e. crimes*) in those countries,<sup>52</sup> it might be worthy to explore what these mechanisms can do to maximise their effectiveness and efficiency with the primary purpose of *preserving* evidence of international crimes. This is especially so when this evidence might be damaged or become unavailable at a later stage.<sup>53</sup>

## V. Challenges to United Nations Human Rights Fact-finding

Already at the beginning of implementation of third wave fact-finding mechanisms it was clear that the challenges they would face were considerable. Cherif Bassiouni, who served as the Chairman of the 1992 Yugoslavia Commission following to its first chairman’s resignation, wrote eloquently about some of the challenges the mechanism encountered. Recognising a sub-set of issues (institutional, budgetary, and those related to their mandate and the way commissioners interpreted and implemented it), his writing brought to light the serious consequences of operating within a fundamentally political institution. He postulated, for example, that the leverage, importance, and contribution of a given mechanism is dependent upon who appoints it, under what circumstances, and with what mandate and resources.<sup>54</sup> All of these factors depend, in turn, upon the outcome of political processes. The United Nations is indeed by nature an institution that on the one hand strives to achieve universality of certain values, while on the other is compelled to factor political compromises into these achievements.<sup>55</sup>

This tension between the United Nations nature and its ambitions is most clear in the human rights component of the system which ‘reflects the values of justice’, while systemically ‘it functions as a political

<sup>49</sup> In international criminal law, torture can be constituted as a crime against humanity, a war crime, and as an act of genocide. See eg Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, arts 7(1)(f), 8(2)(a)(ii)(1), 8(2)(c)(i)(4), and 6(b).

<sup>50</sup> ICCPR, art 23.

<sup>51</sup> Because of a lack of jurisdiction by the ICC and a gridlocked UNSC refusing to refer tragic situations to the Court. At the time of writing, see the situations in Syria, South Sudan, and the Democratic People’s Republic of Korea, to name just a few.

<sup>52</sup> Unofficial efforts spearheaded by local civil societies, on the other end, proliferate wherever atrocities are beyond the reach of officials, see D'Alessandra and others (n 7). For a mapping of the civil society documentation world, as well as a collection of resources they might use to conduct documentation broken down by language, typology of violation, and typology of challenge encountered, see HRDT, ‘Human Rights Documentation Toolkit’ <[www.hrdtoolkit.org](http://www.hrdtoolkit.org)> accessed 27 February 2017.

<sup>53</sup> This is, in fact, very common in situations of atrocity crimes. Access to international criminal investigators is rarely granted in a timely manner in situations of atrocity crimes. That is because the governing entity or party having effective control of a territory on which crimes are being committed, is both the party upon whose consent the international community relies to be granted access, and a likely subject of investigations for either having perpetrated or failed to prevent the crimes in question. See eg Bassiouni, *International Criminal Law* (n 33); Cryer and others (n 39).

<sup>54</sup> Bassiouni states that ‘[t]he establishment, methods, and goals of fact-finding missions (...) depend essentially on (...)’:

- (1) The organ, body, or agency that establishes determines its subject matter, scope, and political authority and influence over the bureaucracy;
- (2) The mandate given to it, which determines the scope of the mission and its duration, as well as its political authority; and
- (3) The degree of political support from the permanent five members and, more particularly, from the three Western ones, which determines its real authority and effectiveness.

See (n 6) 38. UN fact-finding mechanisms can in fact be part of UN peacekeeping missions when these have human rights components, or can be appointed by the Security Council, the Human Rights Council, and designated by the High Commissioner, or even by the Secretary General. See UNOHCHR, *Commissions of Inquiry* (n 29).

<sup>55</sup> Jared Gensen and Bruno Stagno Ugarte (eds), *The United Nations Security Council in the Age of Human Rights* (CUP 2014).

process, thus conditioning the upholding of these values to political oversight'.<sup>56</sup> This reality impacts both mandates and resources. The strength of the mandate conferred upon these investigative mechanisms, for example, (as well as the adequacy of the resources they will receive), largely depends upon whether the mandate is truly intended to be carried out, or whether the fact-finding mechanisms has been established as a gag-measure in response to a crisis.<sup>57</sup> Bassiouni offers an explanation of why this might be the case, 'because the values of truth and justice have become part of the tools of *realpolitik*'.<sup>58</sup> He observed:

(...) nothing can be done to overtly contradict these values. Consequently, less than obvious ways must be devised to ensure that these missions will, when politically convenient, give only the appearance of pursuing these values while at the same time not generating politically unwanted results.<sup>59</sup>

The best way to do this is to ensure that the mechanism is chronically understaffed and under-resourced. Most fact-finding missions have in fact very limited resources, sometimes none at all,<sup>60</sup> and are supported by staff often on a part-time basis.<sup>61</sup> This under-staffing and under-resourcing has to impact their *modus operandi*:

(...) these missions seldom have the resources or the ability to do effective field-work or empirical research. Consequently, they rely heavily on the NGOs, government reports, and the media. Many rapporteurs, or whatever their actual designation may be, produce reports even though they never set foot in the territory where their investigation takes place. (...) The Security Council may establish a Commission because it sees the need, at that time, for that issue to go through a particular process, (...) function (...) essentially window dressing [it].<sup>62</sup>

The mostly *ad hoc* issuance of the mandates, however, causes arbitrariness and unpredictability concerning decisions to issue, extend, amend or terminate mandates,<sup>63</sup> and infrequent continuity in follow-up to missions.<sup>64</sup>

## VI. The Challenges of Third Generation United Nations Human Rights Fact-finding

At first glance, it appears uncanny how little has changed since Bassiouni addressed these issues more than fifteen years ago. Whilst the lack of significant progress, at least institutionally, may speak at length as of the importance the international community of States places on human rights fact-finding and investigative missions, a closer look reveals that some things have begun in fact to change. While Bassiouni found that there was 'no standard operating procedure for fact-finding missions, [that] no manual existed to describe how an investigation should be conducted and, there [was] no standard, though adaptable, computer program to input collected data', in recent years (and to its credit) the Office of the High Commissioner for Human Rights has both standardised its data collection (especially insofar as computerised systems are concerned), and issued guidance in the form of guidelines to commissions of inquiries.<sup>65</sup> What is more, a

<sup>56</sup> Bassiouni, 'Justice-Related Fact-Finding' (n 6) 55.

<sup>57</sup> See eg Marina Aksenova and Morten Bergsmo, 'Non-Criminal Justice Fact-Work in the Age of Accountability' in M Bergsmo (ed), *Quality Control in Fact-Finding* (TOA ePublishing 2012) 9; Rob Grace, 'From Design to Implementation: The Interpretation of Fact-finding Mandates' (2015) 20 *Journal of Conflict Security Law* 27.

<sup>58</sup> Bassiouni, 'Justice-Related Fact-Finding' (n 6) 55.

<sup>59</sup> *id.*

<sup>60</sup> Like it was the case for the 1992 Yugoslavia Commission, see Hagan (n 28).

<sup>61</sup> See Rob Grace and Claude Bruderlein, 'On Monitoring, Reporting, and Fact-finding Mechanisms' (2012) 1 *ESIL Reflections* 1; Rob Grace and Claude Bruderlein, 'Building Effective Monitoring, Reporting, and Fact-Finding Mechanisms' (2012) HPCR Working Paper <<http://dx.doi.org/10.2139/ssrn.2038854>> accessed 27 February 2017; Bassiouni, *International Criminal Law* (n 33).

<sup>62</sup> *id.*

<sup>63</sup> Which seem 'essentially contingent upon political and extraneous circumstances', see Bassiouni, 'Justice-Related Fact-Finding' (n 6) 42.

<sup>64</sup> *id.* See also Rob Grace, 'Recommendations and Follow-Up Measures in Monitoring, Reporting, and Fact-Finding Missions' (2014) HPCR Working Paper <<https://ssrn.com/abstract=2480824>> accessed 27 February 2017.

<sup>65</sup> See Bassiouni, 'Justice-Related Fact-Finding' (n 6) 40. Even though already in 1991 the UN had included a Protocol for a Legal Investigation of Extra-legal, Arbitrary and Summary Executions (the 'Minnesota Protocol') in its *United Nations Manual on the Effective Prevention* (UN 1991); UNOHCHR, *Commissions of Inquiry* (n 29). The OHCHR has also launched a process to update the Minnesota Protocol, see UNOHCHR, 'Revision of the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (the Minnesota Protocol)' <<http://www.ohchr.org/EN/Issues/Executions/Pages/RevisionoftheUNManualPreventionExtraLegalArbitrary.aspx>> accessed 27 February 2017.

series of third party initiatives spearheading from academic institutions, law societies, and global think tanks have attempted to supply the Office of the High Commissioner's efforts with further guidance.<sup>66</sup> These civil society initiatives clarify questions such as:

When is an investigation rights-based, and where do other bodies of law, such as humanitarian law (...) fit into human rights fact-finding? And what practices are described by "fact-finding"? How is it distinguished from other forms of investigation?<sup>67</sup>

Furthermore, how do you interact with traumatised individuals? How do you standardise your testimony collection? And, what type of support and expertise is necessary to conduct human rights fact-finding?

In the words of the former United Nations Special Rapporteur and Commissioner Philip Alston, and his co-author Sarah Knuckey: 'what is clear from these different efforts is that human rights fact-finding as a field is evolving along two essential strands: how to advance investigative methods, and how to respond to critical insight'.<sup>68</sup> The former has become necessary by virtue of what this article has defined as the "accountability turn" in third wave mandates, and the new set of challenges this added to human rights fact-finding. The latter has become necessary both because of the accountability turn, and because of the politicisation of human rights fact-finding.

When the genesis of a process is indeed politicised, its outcome is equally viable to criticism (including at the hands of those who were on the receiving end of the scrutiny). Alston and Knuckey, in their recent work *The Transformation of Human Rights Fact-Finding*, collect quite a number of examples of this. Discussing the work of the 2009 *Goldstone Commission on Alleged Violations of Human Rights and International Humanitarian Law during the Gaza Conflict*, they write: '[t]he commission's report provoked immense controversy, generated an array of follow-up analyses, and brought to public attention many of the previously invisible issues relating to fact-finding methodologies and outcomes'.<sup>69</sup> The Commission's report was criticised harshly and the chairman of the commission himself retracted the claim that Israel had intentionally targeted Palestinian civilians after a few months.<sup>70</sup> Similarly, in August 2010, when the report of the *Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003* was published, the Rwandan government 'described the report as ahistorical, and "dangerous and irresponsible", and condemned the *methodology* used as "deeply flawed and one-sided"'.<sup>71</sup> It criticised the 'overreliance on the use of anonymous sources, hearsay assertions, unnamed, un-vetted and unidentified investigators and witnesses, who lack credibility; and allegation of the existence of victims with uncertain identity'.<sup>72</sup>

Whilst in the author's opinion the criticism, as formulated by the Rwandan government, is unfair, some grounds of truth do exist as regards the *methods* used by some fact-finding inquires. The normal *modus*

<sup>66</sup> Among the most notable efforts, the Siracusa Guidelines, the London-Lund Guidelines, and the various projects and manuals published by authoritative institutions to this end. See eg International Bar Association & Raul Wallenberg Institute, 'Human Rights Fact-Finding Guidelines' (IBA 2009); M Cherif Bassiouni and Christina Abraham, *Siracusa Guidelines for International, Regional and National Fact-finding Bodies* (Intersentia 2013); UK Foreign and Commonwealth Office, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (UKFCO 2014); Harvard Program on Humanitarian Policy and Conflict Research, *Advanced Practitioner's Handbook on Commissions of Inquiry: Monitoring, Reporting, and Fact-Finding* (HPRC 2015), among others. The fact that all these initiatives, except the FCO Protocol on Sexual Violence, emanate from the civil society also speaks at length as to the value States place upon human rights fact-finding.

<sup>67</sup> Alston and Knuckey (n 35) 8.

<sup>68</sup> id.

<sup>69</sup> id.

<sup>70</sup> On 1 April 2011, Goldstone noted that the subsequent investigations by Israel and recognised in the UN Committee's report 'indicate that civilians were not intentionally targeted as a matter of policy' while 'the crimes allegedly committed by Hamas were intentional goes without saying'. The other principal authors of the UN report, Jilani, Chinkin, and Travers, have rejected Goldstone's reassessment arguing that there is 'no justification for any demand or expectation for reconsideration of the report as nothing of substance has appeared that would in anyway change the context, findings or conclusions of that report with respect to any of the parties to the Gaza conflict'. See Richard Goldstone, 'Reconsidering the Goldstone Report on Israel and War Crimes' *The Washington Post* (Washington, DC, 1 April 2011) <[https://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC\\_story.html](https://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html)> accessed 27 February 2017. On other Commissioner's reactions', see Hina Jilani, Christine Chinkin and Desmond Travers, 'Goldstone Report: Statement Issued by Members of UN Mission on Gaza War' *The Guardian* (London, 14 April 2011) <<https://www.theguardian.com/commentisfree/2011/apr/14/goldstone-report-statement-un-gaza>> accessed 27 February 2017.

<sup>71</sup> Government of Rwanda on the Draft UN Mapping Report on the DRC (Geneva, 30 September 2010) cited in Alston and Knuckey (n 35) 6[1].

<sup>72</sup> id.

*operandi* of these mechanisms is already problematic on its own, as it often involved extensive interviews with victims, families, witnesses, experts, and government officials; assessments of reports from the civil society;<sup>73</sup> forensic and medical reports; as well as other documentary evidence that ‘constantly raise[s] both practical and ethical questions’.<sup>74</sup> Since the “accountability turn” in fact-finding mandates, the ethical and practical questions faced by fact-finding and human rights investigative mechanisms have multiplied. It is no coincidence that the harshest criticised reports have been the ones that featured questions of law and fact related to international *crimes* within the findings.<sup>75</sup> It is thus worthwhile asking whether the guidance issued by the High Commissioner’s office (and by other organisations along the same theme) goes far enough in term of assisting fact-finding mechanisms in facing some of these most recent challenges.

The work of fact-finding mechanisms requires the reviewing of photos and videos, as well as documentary evidence collected by third parties, including individual citizens and groups in the civil society, but *also*, and increasingly, conducting on-site visits to assess evidence requiring forensic expertise, often during hostilities. Alston clarifies that although:

(...) with each investigation, we sought to improve our methods—including around how informed consent was obtained from interviewees, information storage and security, interview technique, and incorporation of the insights of, or working with, experts in other areas such as ballistics, pathology, video analysis, the science of eyewitness testimony and memory, mental health, and environmental science. (...) improvements often seemed *ad hoc*, reactive, and particularised to specific investigations and incidents, and there was little written advice of sufficient detail, specificity, and nuance to provide adequate guidance.<sup>76</sup>

Wilkinson, Boutruche, Grace, and Coster van Voorthout provide in their work further examples of challenges imposed by the new mandates’ requirements which, following the accountability turn, confront inquiries and fact-finding commissions with new questions of law and of facts.<sup>77</sup> Examples of the former include, mandates’ requests to characterise violations as crimes under international law, or the necessity, following from mandates’ formulation, to articulate the co-applicability of human rights law, international humanitarian law, and international criminal law, as well as of the different standards of proof that may apply. Examples of the latter would be the necessity, again following mandates’ formulations, to make determinations or observations concerning the existence of an armed conflict, or merely demonstrating the existence of crimes and evidence linking their commission throughout the chain of command. These questions again derive from the mandates’ formulations, to make substantive determinations upon crimes and their patterns.

While more third parties’ initiatives have recognised the importance of further guidance on these challenges,<sup>78</sup> and the Office of the High Commissioner’s itself might have begun considerations in this direction, more sustained guidance is necessary. Because of the potential for uniformity this would generate,

<sup>73</sup> To be sure, in recent years, both civil society groups and media reporters have understood the importance of framing their documentation effort according to higher standards or precision and reliability. Whereas their reporting is not always successful on this end, more and more civil society groups have begun to comply with more stringent standard to strengthen the probative value of the information they collect and minimize harm to persons or information that might become subject relevant to subsequent criminal proceedings. See D’Alessandra and others (n 7).

<sup>74</sup> Alston and Knuckey (n 35) 5.

<sup>75</sup> *id.*

<sup>76</sup> *id.*

<sup>77</sup> Boutruche (n 41); Stephen Wilkinson, ‘Finding the Facts’ Standards of Proof and Information Handling in Monitoring, Reporting and Fact-Finding Missions’ (2014) HPCR Working Paper <<http://dx.doi.org/10.2139/ssrn.2400927>> accessed 27 February 2017; Rob Grace and Jill EB Coster van Voorthout, ‘From Isolation to Interoperability: The Interaction of Monitoring, Reporting, and Fact-finding Missions and International Criminal Courts and Tribunals’ (2014) The Hague Institute for Global Justice Working Paper 4 <<http://www.thehagueinstituteforglobaljustice.org/wp-content/uploads/2015/10/working-paper-4-fact-finding.pdf>> accessed 27 February 2017; Jill EB Coster van Voorthout, ‘Geneva Meets The Hague: The Study of the Analysis of Evidence and the Future of Evidence-Based Fact-Finding’ (Unpublished) The Hague Institute for Global Justice Working Paper Series.

<sup>78</sup> See eg the review being conducted by the UK FCO (n 66); Emanuela-Chiara Gillard and Dapo Akande, ‘Humanitarian Actors’ Engagement with Accountability Mechanisms in Situations of Armed Conflict’ (2016) Workshop Report <[https://iow.eui.eu/wp-content/uploads/sites/20/2016/06/Humanitarian-Actors-Engagement-with-Accountability-Mechanisms\\_Workshop-Report.pdf](https://iow.eui.eu/wp-content/uploads/sites/20/2016/06/Humanitarian-Actors-Engagement-with-Accountability-Mechanisms_Workshop-Report.pdf)> accessed 27 February 2017; ‘Human Rights Fact-Finding in the Twenty-first Century’ (NYU Conference, New York, NY, 2 November 2013); the Hague Institute for Global Justice’s project ‘From Fact-Finding to Evidence: Harmonizing Multiple Investigations of International Crimes’; or the joint initiative by the US Holocaust Memorial Museum’s Simon Skjoldt Center for the Prevention of Genocide and the Hague Institute (headed by Ambassador Stephen Rapp) convening an *Expert Group on Fact-Finding and Accountability* tasked with ‘Building the Hague-Geneva Divide’. See also Rapp (n 30); D’Alessandra and others (n 7).

this guidance would be most beneficial if it came from the Office of the High Commissioner, however, rather than from third parties.

## VII. Conclusions and Ways Forward

The panorama of human rights fact-finding has been in constant evolution since the first wave of human rights fact-finding appeared in the late '70s and early '80s. With first and second generations' mechanisms, the reach, capacity, and impact of fact-finding bodies grew progressively. Thanks to this growth, normative developments have turned calls for accountability for atrocity crimes into a staple of crisis-response mechanisms across the globe.<sup>79</sup> United Nations third wave fact-finding mechanisms, following their predecessors' examples, have an important role to play in addressing accountability for atrocity crimes. For this reason, a remarkable evolution in human rights fact-finding has seen the day of light. United Nations human rights inquiries and other fact-finding mechanisms' mandates have registered an "accountability turn" that has forced these entities to deal with both the expectations as well as the pragmatic and ethical challenges of having been invested with applying the law of international criminal justice. This has taken shape in mandates' increased calls for pronouncements, on part of United Nations mandated commissions of inquiry and other fact-finding entities, on matters of law or fact that bridge into other bodies of law than that regulating international human rights. Examples of such calls are mandates' requests to characterise violations as crimes under international law, or the necessity, following from mandates' formulation, to articulate the co-applicability of international human rights law, international humanitarian law, and international criminal law, as well as of the different standards of proof that may apply, or to identify perpetrators of international crimes.

Whereas it is this author's opinion that human rights fact-finding mechanisms and criminal justice mechanisms are, and should remain, conceptually and operationally separate entities, it is undeniable that the international community places 'seemingly ever-increasing reliance (...) on such investigations'.<sup>80</sup> This is because situations coming under the attention of said fact-finding mechanisms are often beyond the reach of international justice, and thus fact-finding entities might often be the only mechanisms able to collect evidence and testimonies of international crimes. This is true not only for officially appointed UN fact-finding bodies, but also for local rights groups in the civil society who have equally been affected by the accountability turn.

Whereas the environment in which United Nations human rights fact-finding operates is invariably political, and as a consequence of this, their mandates and operations will inevitably be —to some extent— politicised, it is necessary to recognise that issues originating in the inconsistent methodology and lack of institutional memory of fact-finding mechanisms pose real challenges. Noting the improvements already undergone by both the OHCHR (in support of these mechanisms), as well as the broader human rights fact-finding community at large, this article calls for the solidification of a human rights fact-finding methodology, particularly insofar as the standardisation of investigations best-practices and the incorporation of forensic and other expertise among mechanisms' staff is concerned.

While unclear and often unrealistic mandates, as well as the political forces behind them, will continue to submit the operability and achievements of human rights fact-finding to political and other (including budgetary) dynamics, a solid, sustained, and centralised guidance on operations, best practices, and standardised procedures for the collection, archival, and preservation of information relevant to international crimes is necessary, and can benefit both official and unofficial inquiries. A clear articulation of the standards adopted and best practices followed by human rights fact-finding will both diminish windows of opportunity for (inevitably politically-motivated) criticism, and bolster the credibility of findings. What is more, a clearly identified and centrally-mandated methodology will, paired with proper collection and preservation procedures, enable subsequent criminal accountability mechanisms to take in greater consideration of human rights fact-finding results, perhaps enhancing these mechanisms' ability to contribute more strongly and directly not only to the record of injustices, but also to the delivery of justice.

<sup>79</sup> See note 29. See also UN Office of the Special Adviser to the Secretary-General on Genocide Prevention, *Framework of Analysis for Atrocity Crimes – A Tool for Prevention* (UN 2014).

<sup>80</sup> Alston and Knuckey (n 35) 4.

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## Bibliography

### *Treaties and Instruments*

- Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI.
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
- Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.
- Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entered into force 17 September 1946) 1 UNTS 15.
- Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.
- Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
- Geneva Convention Relative to the Protection of Civilians in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.
- Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135.
- International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3.
- International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3.
- International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
- International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) UN Doc A/RES/57/199.
- Optional Protocol to the Convention on the Elimination of Discrimination against Women (adopted 10 December 1999, entered into force 22 December 2000) UN Doc A/RES/54/4.
- Optional Protocol to the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UN Doc A/RES/61/106.
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 222.
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25 May 2000, entered into force 18 January 2002) 2171 UNTS 227.
- Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (adopted 14 April 2002, entered into force 14 April 2014) UN Doc A/RES/66/138.
- Optional Protocol to the Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) UN Doc A/RES/63/117.

- Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.
- Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.
- Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414.
- Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

### ***UN Documents***

#### ***UN Security Council***

- UNSC Res 780 (6 October 1992) UN Doc S/RES/780.
- UNSC Res 1564 (18 September 2004) UN Doc S/RES/1564.
- UNSC 'Report of the Security Council Commission Concerning Israeli Settlements in Arab Territories Occupied since 1967, Including Jerusalem' Established by UNSC Res 446/1979, 452/1979, and 465/1980 (12 July 1979) UN Doc S/13450, (4 December 1979) UN Doc S/13679, (25 November 1980) UN Doc S/14268.
- UNSC 'Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council' (27 May 1994) UN Doc S/1994/674.

#### ***UN General Assembly***

- UNGA 'Report of the Commission of Inquiry on the Reported Massacres in Mozambique' Established by UNGA Res 3114 (XXVIII) UNGAOR 29th Session Supp No 21 (22 November 1974) UN Doc A/9621.
- UNGA 'Report of the UN Fact-finding Mission to South Viet-Nam to Ascertain the Facts of the Situation in that Country as Regards Relations between the Government of the Republic of Viet-Nam and the Viet-Namese Buddhist Community' (7 December 1963) UN Doc A/5630.

#### ***UN Commission on Human Rights***

- UNCHR 'Report of the Ad Hoc Working Group to Inquire into the Situation of Human Rights in Chile' Established by UNCHR Res 8 (XXXI) (7 October 1975) UN Doc A/10285, (4 February 1976) UN Doc E/CN.4/1188, (8 October 1976) UN Doc A/31/253, (29 September 1977) UN Doc A/32/227, (25 October 1978) UN Doc A/33/331.
- UNCHR 'Report of the Mission to Cuba to Observe the Human Rights Situation' Established by UNCHR Dec 1998/106 at the invitation of the Government of Cuba (21 February 1989) UN Doc E/CN.4/1989/46.

#### ***UN Human Rights Council***

- UNHRC Res S-15/1 (25 February 2011) UN Doc A/HRC/RES/S-15/1.
- UNHRC Res S-17/1 (18 October 2011) UN Doc A/HRC/RES/S-17/1.
- UNHRC Res S-21/1 (23 July 2014) A/HRC/RES/S21/1.
- UNHRC 'Report of the Independent Special Commission of Inquiry for Timor-Leste' Established by UNHRC Res S-4/1 (18 October 2006) UN Doc S/2006/822.

#### ***Other***

- 'Report of the UN Diplomatic Conference on Intercourse and Immunities' (Vienna, 2 March – 14 April 1961) UN Doc A/CONF.20/C.1/SR.24, art 22.

#### ***Literature***

- Aksenova M and Bergsmo M, 'Non-Criminal Justice Fact-Work in the Age of Accountability' In: Bergsmo, M (ed.), *Quality Control in Fact-Finding* (TOA ePublishing 2012).

- Alston P and Knuckey S, 'The Transformation of Human Rights Fact-Finding: Challenges and Opportunities' In: Alston P and Knuckey S, (eds.), *The Transformation of Human Rights Fact-Finding* (OUP 2016).
- Bakiner O, *Truth Commissions: Memory, Power, and Legitimacy* (Penn Press 2016).
- Bassiouni MC and Abraham C, *Siracusa Guidelines for International, Regional and National Fact-finding Bodies* (Intersentia 2013).
- Bassiouni MC, 'Appraising UN Justice-Related Fact-Finding Missions' (2001) 5 Washington University Journal of Law & Policy 35.
- Bassiouni MC, *Introduction to International Criminal Law* (2nd edn, Martinus Nijhoff Publishers 2013).
- Bassiouni MC, 'Editorial' (2014) 8 International Journal of Transitional Justice 325.
- Baumgartner E and others, 'Documentation, Human Rights and Transitional Justice' (2016) 8 Journal of Human Rights Practice 1.
- Boutruche T, 'Selecting and Applying Legal Lenses in Monitoring, Reporting, and Fact finding Missions' (2013) HPCR Working Paper <<http://dx.doi.org/10.2139/ssrn.2337437>>.
- Brody R, 'Commentary on the Draft UN Declaration on the Protection of All Persons from Enforced or Involuntary Disappearances' (1990) 8 Netherlands Quarterly of Human Rights 381.
- Coster van Voorhout JEB, 'Geneva Meets The Hague: The Study of the Analysis of Evidence and the Future of Evidence-Based Fact-Finding' (Unpublished) The Hague Institute for Global Justice Working Paper Series.
- Cryer R and others, *An Introduction to International Criminal Law and Procedure* (CUP 2014).
- D'Alessandra F and others, *Handbook on Civil Society Documentation of Serious Human Rights Violations: Principles and Best Practices* (PILPG 2016).
- DuBois M, 'Civilian Protection and Humanitarian Advocacy: Strategies and (False?) Dilemmas' (2008) 39 Humanitarian Practice Network 12.
- Fletcher LE and Weinstein HM, 'Writing Transitional Justice: An Empirical Evaluation of Transitional Justice Scholarship in Academic Journals' (2015) 7 Journal of Human Rights Practice 177.
- Gensen J and Stagno Ugarte B, (eds.), *The United Nations Security Council in the Age of Human Rights* (CUP 2014).
- Gillard EC and Akande D, 'Humanitarian Actors' Engagement with Accountability Mechanisms in Situations of Armed Conflict' (2016) Workshop Report <[https://iow.eu.eu/wp-content/uploads/sites/20/2016/06/Humanitarian-Actors-Engagement-with-Accountability-Mechanisms\\_Workshop-Report.pdf](https://iow.eu.eu/wp-content/uploads/sites/20/2016/06/Humanitarian-Actors-Engagement-with-Accountability-Mechanisms_Workshop-Report.pdf)>.
- Grace R, 'From Design to Implementation: The Interpretation of Fact-finding Mandates' (2015) 20 Journal of Conflict Security Law 27.
- Grace R, 'Recommendations and Follow-Up Measures in Monitoring, Reporting, and Fact-Finding Missions' (2014) HPCR Working Paper <<https://ssrn.com/abstract=2480824>>.
- Grace R and Bruderlein C, 'Building Effective Monitoring, Reporting, and Fact-Finding Mechanisms' (2012) HPCR Working Paper <<http://dx.doi.org/10.2139/ssrn.2038854>>.
- Grace R and Bruderlein C, 'On Monitoring, Reporting, and Fact-finding Mechanisms' (2012) 1 ESIL Reflections 1.
- Grace R and Coster van Voorhout JEB, 'From Isolation to Interoperability: The Interaction of Monitoring, Reporting, and Fact-finding Missions and International Criminal Courts and Tribunals' (2014) The Hague Institute for Global Justice Working Paper 4 <<http://www.thehagueinstituteforglobaljustice.org/wp-content/uploads/2015/10/working-paper-4-fact-finding.pdf>>.
- Hagan J, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (Chicago Press 2003).
- Harvard Program on Humanitarian Policy and Conflict Research, *Advanced Practitioner's Handbook on Commissions of Inquiry: Monitoring, Reporting, and Fact-Finding* (HPRC 2015).
- Hayner PB, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2001).
- International Bar Association & Raul Wallenberg Institute, 'Human Rights Fact-Finding Guidelines' (IBA 2009).
- Jeannot S, 'Recognition of the ICRC's Long-Standing Rule of Confidentiality – An Important Decision by the International Criminal Tribunal for the Former Yugoslavia' (2000) 82 International Review of the Red Cross 403.
- La Rosa AM, 'Humanitarian Organisations and International Criminal Tribunals, or Trying to Square the Circle' (2006) 88 International Review of the Red Cross 169.
- Lutz EL and Sikkink K, 'International Human Rights Law and Practice in Latin America' (2000) 54 International Organization 633.

- Mackintosh K, 'Note for Humanitarian Organisations on Cooperation with International Tribunals' (2004) 86 *International Review of the Red Cross* 131.
- Olson LM and Pfanner T, 'Cooperation between Truth Commissions and the International Committee of the Red Cross' (2006) 88 *International Review of the Red Cross* 292.
- Power S, *"A Problem from Hell": America and the Age of Genocide* (Basic Books 2002).
- Rapp SJ, 'Bridging The Hague-Geneva Divide: Harmonizing Multiple Investigations of International Crimes' (2016) 7 *Intersections*, The Hague Institute for Global Justice 11.
- Risse T, Ropp SC and Sikkink K, (eds.), *The Power of Human Rights: International Norms and Domestic Change* (CUP 1999).
- Rona G, 'The ICRC Privilege Not to Testify: Confidentiality in Action' (2002) 84 *International Review of the Red Cross* 207.
- Sikkink K, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (W.W. Norton & Company 2011).
- Simma B and Alston P, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1989) 5 *Australian Yearbook of International Law* 82.
- Simpson BR, 'Self-Determination, Human Rights, and the End of Empire in the 1970s' (2014) 4 *Humanity Journal* 239.
- Strauss S, *Fundamentals of Genocide and Mass Atrocity Prevention* (US Holocaust Memorial Museum 2016).
- Teitel RG, *Transitional Justice* (OUP 2000).
- Teitel RG, *Globalizing Transitional Justice* (OUP 2014).
- UK Foreign and Commonwealth Office, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (UKFCO 2014).
- UN, *United Nations Manual on the Effective Prevention* (UN 1991).
- UN Office of the High Commissioner for Human Rights, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice* (UN 2015).
- UN Office of the Special Adviser to the Secretary-General on Genocide Prevention, *Framework of Analysis for Atrocity Crimes – A Tool for Prevention* (UN 2014).
- Wilkinson S, 'Finding the Facts' Standards of Proof and Information Handling in Monitoring, Reporting and Fact-Finding Missions' (2014) HPCR Working Paper <<http://dx.doi.org/10.2139/ssrn.2400927>>.

### **Newspapers, Websites, and Blogs**

- Akande D, 'South African Withdrawal from the International Criminal Court – Does the ICC Statute Lead to Violations of Other International Obligations?' (*EJIL Talk!*, 22 October 2017) <<http://www.ejiltalk.org/south-african-withdrawal-from-the-international-criminal-court/#more-14685>>.
- Goldstone R, 'Reconsidering the Goldstone Report on Israel and War Crimes' *The Washington Post* (Washington, DC, 1 April 2011) <[https://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC\\_story.html](https://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html)>.
- HRDT, 'Human Rights Documentation Toolkit' <[www.hrtoolkit.org](http://www.hrtoolkit.org)>.
- Jilani H, Chinkin C and Travers D, 'Goldstone Report: Statement Issued by Members of UN Mission on Gaza War' *The Guardian* (London, 14 April 2011) <<https://www.theguardian.com/commentisfree/2011/apr/14/goldstone-report-statement-un-gaza>>.
- Kariuki A, 'War Crimes and Punishment: Why Is The ICC Targeting Africa?' *Brown Political Review* (Providence, RI, 12 March 2015) <<http://www.brownpoliticalreview.org/2015/03/war-crimes-and-punishment-why-is-the-icc-targeting-africa/>>.
- Lewis DA, 'Understanding Core Differences between Human Rights and International Humanitarian Law in Armed Conflict' (*Harvard Policy and Conflict Research Blog*, 17 April 2012) <<http://www.hpcrresearch.org/blog/dustin-lewis/2012-04-17/understanding-core-differences-between-human-rights-and-international-h>>.
- Nations Library and Archives, '*International Commissions of Inquiry, Fact-finding Missions: Chronological List*' <<http://libraryresources.unog.ch/factfinding/chronolist>>.
- Ratner S, 'Should ICRC Reports on Detainee Visits be Turned over to Military Commission Defence Counsel?' (*Just Security*, 12 November 2013) <<https://www.justsecurity.org/3116/icrc-reports-military-commission/>>.
- Schwobel C, 'The Re-branding of the International Criminal Court (and Why African States Are Not Falling For It)' (*Opinio Juris*, 28 October 2016) <<http://opiniojuris.org/2016/10/28/the-re-branding-of-the-inter>>.

- national-criminal-court-and-why-african-states-are-not-falling-for-it/?utm\_source=feedburner&utm\_medium=email&utm\_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29>.
- Shah A, 'A Chronology of the Global Human Rights Struggle' (*Global Issues*, 2 July 2000) <<http://www.globalissues.org/article/154/a-chronology-of-the-global-human-rights-struggle>>.
- The White House Office of the Press Secretary, 'Presidential Study Directive on Mass Atrocities (PSD-10)' (4 August 2011) <<https://www.whitehouse.gov/the-press-office/2011/08/04/presidential-study-directive-mass-atrocities>>.
- The White House Office of the Press Secretary, 'Fact Sheet: A Comprehensive Strategy and New Tools to Prevent and Respond to Atrocities' (23 April 2012) <<https://www.whitehouse.gov/the-press-office/2012/04/23/fact-sheet-comprehensive-strategy-and-new-tools-prevent-and-respond-atro>>.
- The White House Office of the Press Secretary, 'Executive Order – Comprehensive Approach to Atrocity Prevention and Response' (18 May 2016) <<https://www.whitehouse.gov/the-press-office/2016/05/18/executive-order-comprehensive-approach-atrocity-prevention-and-response>>.
- UN Office of the High Commissioner for Human Rights, 'Special Procedures of the Human Rights Council' <<http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcompage.aspx>>.
- UN Secretary-General, 'Secretary-General's Remarks to the Media at ICC Review Conference' (31 May 2010) <<https://www.un.org/sg/en/content/sg/statement/2010-05-31/secretary-generals-remarks-media-icc-review-conference-includes>>.
- United Nations, 'Protect Human Rights' <<http://www.un.org/en/sections/what-we-do/protect-human-rights/>>.
- United Nations, 'The Three Pillars of the United Nations' <<http://www.un.org/un70/en/content/videos/three-pillars>>.
- UNOHCHR, 'Revision of the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (the Minnesota Protocol)' <<http://www.ohchr.org/EN/Issues/Executions/Pages/RevisionoftheUNManualPreventionExtraLegalArbitrary.aspx>>.
- US Department of State Transitional Justice Initiative 'Transitional Justice Overview: What is Transitional Justice?' (2016) <<https://www.state.gov/documents/organization/257771.pdf>>.
- US Institute of Peace, 'Truth Commission: Uganda 74' <<http://www.usip.org/publications/truth-commission-uganda-74>>.

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