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# ANCHORING ACCOUNTABILITY FOR MASS ATROCITIES

## The Permanent Support Needed to Fulfil UN Investigative Mandates

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## **Anchoring Accountability for Mass Atrocities**

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# EXECUTIVE SUMMARY

This research paper examines the role of UN investigative mandates in probing serious violations of international human rights, humanitarian and, increasingly, international criminal law, as well as their role within the broader international justice ecosystem. More specifically, this paper addresses the case for building permanent investigative capacity to support UN investigations such that, while preserving their crucial human rights function where relevant, they are better able to fulfil the accountability-driven requirements with which they are increasingly tasked. These include, *inter alia*, determining whether the violations they document constitute crimes under international law, identifying those responsible and contributing to ‘accountability’, which often includes directly or indirectly assisting prosecutions and criminal case-building. As its **main recommendations**, this study presents **two chief options for building permanent support for UN mandated investigations** and their contributions to international justice: **Option 1**, the establishment of a standing, independent UN **investigative support mechanism (ISM)** empowered to provide a range of services to all UN investigative mandates concerned with accountability as a way to maximise efficiencies moving forward, as well as to receive from relevant UN bodies and itself fulfil investigative mandates focused on case-building, similar to the investigative mechanisms created for Syria, Myanmar and ISIL/Da’esh; and **Option 2**, the establishment of a permanent **investigative support division (ISD)** within the Office of the High Commissioner for Human Rights (OHCHR) to assist Human Rights Council-mandated investigations and to provide support where relevant to case-building mandates when these are conferred independently of OHCHR. We believe that the analysis contained within this report directly supports either course of action. In addition, based on our findings, this paper also advances a series of additional recommendations that should be adopted irrespective of which institutional model may prevail.

Today, a growing number of civil society actors are undertaking documentation efforts to an unprecedented scale and level of professionalism, indicating the ongoing commitment, particularly among victim groups, to the principle of accountability. However, atrocities continue to occur beyond the jurisdictional reach of the International Criminal Court and of other international justice institutions. **The international justice ecosystem is evolving** to overcome such challenges, proving the resilience of the global fight against impunity. For example, a growing number of jurisdictions are now pursuing international criminal cases domestically. Similarly, a growing number of judicial and non-judicial mechanisms, including international courts and tribunals like the International Court of Justice, are being seized of issues of State responsibility for mass atrocities.

Since 2011, the world has also witnessed a spur of UN mandated investigations – emanating chiefly, but not exclusively, from the Human Rights Council – tasking what have traditionally been human rights investigations with making contributions to such forms of accountability. In recent years, this has included the establishment of mandates in a range of situations charged, *inter alia*, with criminal case-building activities. Our data reveal that a **growing symbiosis is emerging among these various justice actors**, with prosecuting authorities now looking to both civil society actors and UN investigative mandates for collaboration. Similarly, evidence providing organisations in civil society increasingly leverage other investigative authorities, and perhaps most directly UN mandates, for cooperation. Our data indicate a landscape in which information emanating from civil society actors and intended for use in court is often fed into or received by UN investigative mandates, processed by the latter in some form, and then expected by an increasing number of relevant actors to reach justice authorities once jurisdiction is triggered.

The UN investigative mechanisms (UNITAD, IIM, and IIMM), in particular, are well-positioned to corroborate existing information obtained by civil society actors and build comprehensive databases. They

thereby increase the chance that the information and evidence obtained can be put to the best possible use and that documentation gaps (including in relation to communities of victims – such as women and children – who, historically, have been marginalised in both international human rights and criminal investigations) can be identified and filled. Investigative mechanisms are today tasked with supporting future accountability processes, whether local to the situation country, regional, in foreign/ third state jurisdictions, or at the international level. They are thus required to conduct preparatory work with a view to enhancing longer-term but yet undefined/unspecified accountability processes and to actively seek to increase the chances that jurisdictions will be duly seized. Linked to this, but currently generally outside the role of investigative mechanisms, is capacity building both within situation countries (with an eye on the importance of the rule of law in restoring stability and allowing fair local redress) and within evidence-providing organisations and international judicial actors. And, while the mechanisms are not the only conduit for cooperation with a domestic or international jurisdiction, they provide a more systematic and structured approach, which is desirable for both prosecuting authorities and evidence-providing organisations. As the mandates of most UN investigations now often propel them to not only pursue much-needed human rights investigations but also perpetrator-based investigations directed towards building a path towards criminal accountability, their importance to the criminal justice project has deepened. Given this, the approaches, resources, and lesson learned of the investigative mechanisms are undoubtedly relevant to all UN investigative mandates concerned with accountability.

**UN investigative mandates – comprising of both the investigative mechanisms and human rights investigations – may now be perceived as sitting at the heart of the ‘lifecycle’ of information** about atrocities and are increasingly expected to perform a **coordinating function in support of accountability processes**. In order to contribute to the lively, ongoing debate these developments have generated, we asked ourselves what could be done to better support *all* UN investigations, including those investigations mandated by the Human Rights Council, to improve their contributions to accountability without overhauling or unduly compromising their human rights function and in a way that strengthens rather than weakens the existing international justice architecture. We find that a lot can, and we believe should, be done.

In Section I of this report, we discuss in further detail the trends outlined above and contextualise what we see as the crucial role that UN investigations – including, more specifically, UN human rights investigations - play within the international justice system. We discuss both the imperative to preserve and protect the traditional human rights functions of many mandates, while also discussing what we refer to as the **‘accountability turn’** that has affected them since at least 2011, as a way to lay the foundation for this paper’s broader argument for centralising certain investigative functions and capacities to support both human rights and international justice objectives. The subsequent sections of this report detail more specifically the **operational needs** that arise for UN investigative mandates at their **creation and start-up** phase (Section II); **deployment and evidence collection** phase (Section III); and **evidence analysis and preservation** phase (Section IV). We leverage this analysis to highlight what **opportunities** and **lessons learned** can be drawn, in particular, from the experience and practice of a new generation of investigative mechanisms – while acknowledging the significant differences in mandates and the financial and operational realities with which they contend. Our analysis also acknowledges the range of **political, budgetary, and structural challenges** the international community – and the UN human rights system more specifically – face at this critical juncture. Based on these, we turn to discussing the needs and opportunities for reform and present our **conclusions and recommendations** (Section V). As already foreshadowed, we ultimately submit that the creation of some form of permanent investigative support capacity – pursuant to Options 1 or 2 set out above - is the only way to maximise efficiencies and improve outputs in the context of increasingly scarce resources and competing priorities. Indeed, we believe that most, if not all, the operational needs arising at the start-up, deployment and information collection, and analysis and preservation phases of mandates’ operations can best be addressed by centralising a range of

functions and personnel under a corporate structure to be led by a D-1 or ASG level position. Furthermore, based on our analyses in Sections II–IV, we also advance additional recommendations intended to support mandates at each phase of their operation, irrespective of which model the international community of States chooses to adopt.

We have endeavoured to carry out this research collaboratively in consultation with as many stakeholders as possible and with the utmost academic rigour that can be allowed by the limited information and data a developing situation will inevitably generate. We hope that our work will contribute to depoliticising this important conversation and acknowledge the crucial role that UN investigations can play in support of accountability. Most importantly, we hope that the insight and solutions generated by this research will bring about a real commitment to reform. The question, we believe, should no longer be whether but instead *how* such investigations should be best supported moving forward.

## Definitions and List of Abbreviations

**Accountability-turn** – a trend, markedly since 2011, to include international justice requirements in the mandates of UN investigations. I.e., expressly tasking investigations (chiefly mandated by human rights bodies) with, *inter alia*, determining whether the violations they document might constitute crimes under international law; identifying individuals who are suspected of responsibility; and recommending measures to promote accountability, including – in some recent cases – having criminal case-building responsibilities

**Evidence providing organisations** – the diverse grouping of civil society organisations documenting, with various degrees of professionalism, the occurrence of mass atrocities with the objective, *inter alia*, of supporting international justice and accountability proceedings.

**Justice / Prosecution authorities** – domestic and international authorities receiving or requesting information by UN mandated investigations in support of justice-related proceedings (justice authorities). When in reference to authorities receiving or requesting information in support of *criminal* proceedings, in particular, we utilise prosecution/prosecuting authorities.

**OHCHR supported investigations / investigative bodies** – within the broader category of UN mandated investigations above, we use this terminology to refer specifically to the Commissions of Inquiry, Fact-Finding Missions, Groups of Experts and other investigations generally supported by the Office of the High Commissioner for Human Rights Secretariat.

**UN investigations / investigative mandates** – we use this ‘catch-all’ term in reference to the broad spectrum of UN inquiry and investigative mandates tasked with making findings on violations of international law that might amount to mass atrocities and make contributions to accountability. These include both mandates with a primary human rights function but which have nonetheless been affected by the ‘accountability turn’ – i.e. those conferred by the UN Human Rights Council and supported by the Office of the High Commissioner for Human Rights, such as Commissions of Inquiry and Fact-Finding Missions - as well as accountability-focused independent investigative mandates such as the IIMM, UNITAD.

**UN investigative mechanisms** – within the broader category of UN investigative mandates above, we use this terminology to refer specifically to the independent, international investigative bodies with a specific focus on accountability and quasi- or pre-prosecutorial functions (ie. criminal case-building mandates), such as those established by the UN General Assembly, UN Security Council and UN Human Rights Council to investigate international crimes committed in Syria, by Da’esh/ISIL in Iraq, and in Myanmar respectively.

**ACABQ** – UN Advisory Committee on Administrative and Budgetary Questions

**CoHRSS** – Commission on Human Rights in South Sudan

**CoI** – Commissions of Inquiry

**ERS** – Emergency Response Section, OHCHR

**FFM** – Fact-Finding Missions

**HRC / UN HRC** – UN Human Rights Council

**ICL** – International Criminal Law

**IHL** – International Humanitarian Law

**IHRL** – International Human Rights Law

**IIM** – International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011

**IIMM** – Independent Investigative Mechanism for Myanmar

**INGO** – International nongovernmental organisation

**ISU** – Investigations Support Unit, OHCHR

**METS** – Methodology Education and Training Section, OHCHR

**NGO(s)** – Nongovernmental organisation(s)

**OHCHR** – Office of the High Commissioner for Human Rights

**PBIs** – Programme Budget Implications

**PISU** – Permanent Investigative Support Unit

**RB** – UN regular budget

**SGBV** – Sexual and gender-based violence

**ToRs** – Terms of Reference

**UNGA** – UN General Assembly

**UNITAD** – UN Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL

**UNODC** – UN Office on Drugs and Crime

**UNSC** – UN Security Council

**XB** – UN extrabudgetary contributions

# INTRODUCTION

UN investigations of serious violations of humanitarian law and human rights law play a crucial role in upholding internationally recognised standards and fighting impunity for the worst breaches of international norms. Over the past ten years, there has been a dramatic shift in the willingness of UN bodies – among them, the Human Rights Council, the General Assembly, and the Security Council – to direct and, increasingly, establish entities to investigate such violations and make findings that directly support accountability, including of the criminal nature, in situations of mass atrocity – i.e. where war crimes, crimes against humanity, and genocide are alleged to be taking place. This ‘accountability turn’ in UN human rights fact-finding<sup>1</sup> has manifested itself by means of an increased prominence of international justice requirements in mandates (generally, but not exclusively, emanating from the UN HRC and supported by the OHCHR) expressly tasking investigations with, *inter alia*, determining whether the violations they document might constitute crimes under international law; identifying individuals who are suspected of responsibility; and recommending measures to promote accountability,<sup>2</sup> including – increasingly since 2016 – having criminal case-building responsibilities.<sup>3</sup> This has required mandates to expand their framework of reference to include international criminal law considerations alongside international humanitarian law and international human rights law, while also prompting reflections as to how to maximise benefits and cooperation among various justice actors while minimising harm for human rights inquiries and criminally-oriented investigations concerned with the same scenes of mass violence.

Starting in December 2016, a new generation of UN independent investigative mechanisms was also set up to carry out international criminal investigations and build cases to prosecute violations committed by Da’esh/ISIL in Iraq, as well as by all parties to the conflicts in Syria and Myanmar, and this added momentum to the accountability turn. Notwithstanding significant differences in their respective mandates and operations, these investigative mechanisms share important key features akin to a quasi-prosecutor-at-large;<sup>4</sup> they have, in fact, been explicitly vested with ‘collecting, preserving, storing’ and ‘analysing’ information and evidence of atrocity crimes and ‘making it available to domestic and international prosecutors’<sup>5</sup> among other

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1 Federica D’Alessandra, ‘The Accountability Turn in Third Wave Human Rights Fact-Finding’, *Utrecht Journal of International and European Law*, 2017, 33(84), pp.59–76.

2 This trend is clearly discernible in the respective mandates of the Human Rights Council’s investigative missions on: Syria (A/HRC/RES/S-16/1, OP7, A/HRC/RES/S-17/1, OP13, A/HRC/RES/S-25/1, OP13, A/RES/71/248, OP4), North Korea (A/HRC/RES/22/13, OP5), South Sudan (A/HRC/RES/31/20, OP11), Myanmar (A/HRC/RES/34/22, OP11), Venezuela (A/HRC/RES/42/25, OP24), Belarus (A/HRC/RES/46/20, OP13(a)), Sri Lanka (A/HRC/RES/46/1, OP9), Occupied Palestinian Territory and Israel (A/HRC/RES/S-30/1, OP2), 2018 Protests in the Occupied Palestinian Territory (A/HRC/RES/S-28/1, OP5), 2014 Gaza Conflict (A/HRC/RES/S-21/1, OP13), Libya (A/HRC/RES/43/39, OP37, OP39, OP43), Burundi (A/HRC/RES/33/24, OP23(a), (b) and (c)), and most recently Ethiopia (A/HRC/S-33/L.1, OP9).

3 See, for example, the 2021 mandate for the Occupied Palestinian Territory, including East Jerusalem, and Israel (A/HRC/S-30/2) and for South Sudan (most recently extended with, A/HRC/RES/46/23).

4 Federica D’Alessandra and Kirsty Sutherland, ‘The Promise and Challenge of New Actors and New Technologies in International Justice’, *Journal of International Criminal Justice*, 19(1) March 2021, pp. 9–34.

5 IIIM, A/RES/71/248 (2017), OP4: *Decides to establish the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 under the auspices of the United Nations to closely cooperate with the Independent International Commission of Inquiry on the Syrian Arab Republic to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.*

UNITAD, S/RES/2379 (2017), OP2: *Requests the Secretary-General to establish an Investigative Team, headed by a Special Adviser, to support domestic efforts to hold ISIL (Da’esh) accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group ISIL (Da’esh) in Iraq, to the highest possible standards, which should be addressed by the Terms of Reference referred to in paragraph 4, to ensure the broadest possible use before national courts, and complementing investigations being carried out by the Iraqi authorities, or investigations carried out by authorities in third countries at their request.*

IIMM, A/HRC/RES/39/2 (2018), OP22: *Decides to establish an ongoing independent mechanism to collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011, and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.*

justice authorities. Although important differences – in their mandates, resources, and operational realities – also set these investigative mechanisms apart from more traditional UN human rights investigations, their existence suggests an appetite for more direct contributions to criminal accountability by UN entities, as well as improvements across a range of issues. These latter include enhanced evidence collection standards, increasingly secure and sophisticated archiving and storage practices, and the heightened professionalism of – and in interactions with – both those on the ground and national prosecuting authorities, prompting reflections on what can be learned from their work.

The further shift towards criminal accountability and case-building by UN mandates marked by the establishment of the independent investigative mechanisms mentioned above has neither extinguished the need for human rights-focused investigations, which remain crucial for the proper functioning of the international human rights regime, nor has it implied that all new accountability-focused investigative mandates would operate in the same manner as the investigative mechanisms. For example, the High Commissioner's Office examination of the human rights situation in Belarus, as well as OHCHR's Sri Lanka accountability project and the UN Commission of Inquiry on Ukraine – mandated by the Human Rights Council in 2020, 2021 and 2022 respectively – have been tasked with similar case-building responsibilities, alongside human rights reporting, albeit without the investigative mechanisms' independence from the High Commissioner's Office.<sup>6</sup>

Acknowledging the significant progress made by the independent investigative mechanisms, in particular, with respect to a range of issues mentioned above, this report considers the best practices and lessons emerging from the work of these mechanisms, while considering what is necessary to support all UN mandated investigations, including the need to preserve the crucial human rights function that many of them continue to fulfil. It maintains the objective to improve efficiencies and maximise outputs against a background of scarce resources and competing priorities. Notably, the establishment of the UN investigative mechanisms has prompted calls for increased collaboration and cooperation across various justice entities, with some even calling for the establishment of a permanent investigative mechanism.<sup>7</sup>

Even prior to the birth of UN investigative mechanisms, a **Group of Practitioners on Fact-Finding and Accountability** had been convened to make recommendations on how existing human rights inquiries could be improved to more fully support their novel international justice requirements.<sup>8</sup> The Group's recommendations ranged from the provision of administrative, budgetary, and human resources; the adoption of guidance for the resolution of legal issues; and the promotion of best practices for making findings on factual matters.<sup>9</sup> They were received by the UN High Commissioner for Human Rights in 2017 and, by virtue of their practical and technical orientation, some of the recommendations appear to be fulfilled in the Terms of References of the UN investigative mechanisms.<sup>10</sup> Another significant recommendation called for the establishment of a small, specialised Support Team within the High Commissioner's Office Secretariat to:

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6 Belarus, A/HRC/RES/46/20, OP13; Venezuela, A/HRC/RES/42/25, OP24; Israel/Palestine, A/HRC/RES/S-30/1, OP2; Ukraine, A/HRC/RES/49/1, OP11; Sri Lanka, A/HRC/RES/46/1, OP6.

7 See, for example: International Bar Association War Crimes Committee Conference, *The Next Big Questions for International Criminal Justice*, 13 April 2019; Kingsley Abbott and Saman Zia-Zarifi, 'Is it Time to Create a Standing Independent Investigative Mechanism (SIIM) ? Part I', *Opinio Juris*, 10 April 2019; UK Parliament, The Select Committee on Sexual Violence in Conflict, *Inquiry on Sexual Violence in Conflict*, 8 September 2015 (as regards sexual violence in conflict); High Level Panel of Legal Experts on Media Freedom, the International Bar Association's Human Rights Institute, *Advice on Promoting More Effective Investigations into Abuses Against Journalists*, 25 November 2020 (calling for the establishment of a deployment-ready investigative team for crimes against journalists).

8 The Group of Practitioners in Fact-Finding and Accountability was established with a view to making recommendations as to how the existing practices of OHCHR-supported inquiries could be improved, and how the criminal justice and other accountability features of their mandates could be better achieved. This Group was convened by the USHMM Simon-Skjodt Center for Genocide Prevention and The Hague Institute for Global Justice, and was chaired by Ambassador Stephen Rapp. See: Group of Practitioners in Fact-Finding and Accountability, *Practitioners in Human Rights Fact-Finding and International Criminal Prosecutions Propose Practical Steps to Bridge The Hague – Geneva Divide*, 6 January 2017.

9 Group of Practitioners in Fact-Finding and Accountability, *Bridging The Hague – Geneva Divide: Recommendations to Maximize Benefit and Minimize Harm for Human Rights Inquiries and Criminal Investigations at the Same Scenes of Mass Violence*, 6 January 2017.

10 Terms of Reference of the IIMM; Terms of Reference of UNITAD; Terms of Reference of the IIMM.

Assist in the prompt recruitment and deployment of effective and well-resourced teams as required for [human rights investigations]; [...] serve as a repository of institutional memory and achieve efficiencies by standardising the preparatory processes and drafting investigative plans for each [human rights investigation]; [...] support the human rights investigations in the following areas: budget preparation, administration, staff recruitment and training, identification of experts, and information management; [...] include capacity for the management of information and archives, including for human rights investigation that have completed their work, and for liaison between human rights investigation and UN bodies and other entities in order to make and respond to requests for information and other assistance.<sup>11</sup>

The High Commissioner expressed approval of this proposal, on the condition that the Support Team could be funded by extra-budgetary contributions of interested States. He additionally expressed his belief that in order to hold the sufficient authority within the UN apparatus, a Support Team would need to be led by an experienced individual recruited at the D-1 level. Such a position requires the approval of the UN's Advisory Committee on Administrative and Budgetary Questions, but a July 2018 request failed to achieve the necessary consensus support from the ACABQ in October 2018.<sup>12</sup> However, in May 2020, the OHCHR Secretariat – with the support of the Dutch government – provisionally established a small Investigations Support Unit (ISU) within the Field Operations and Technical Cooperation Division, with the goal of assisting with the 'start-up' phase of investigative mandates conferred by the Human Rights Council and supported by OHCHR.

Neither the establishment of the ISU nor of the *ad hoc* investigative mechanisms has, however, extinguished the need for a more comprehensive solution. Many mandates, including initially the investigative mechanisms, have continued to face similar challenges, such as a drawn-out recruitment processes (with full staffing generally taking several months and often longer to be achieved); budgetary issues; a disconnect between mandate lengths, UN budgetary cycles, and recruitment protocols, which creates challenges to recruiting external candidates with high-level expertise, particularly for shorter mandates; knock-on challenges due to early-phase recruitment of staff without international criminal investigative, analytical, and /or legal experience (particularly in the context of human rights mandated investigations); lack of retention of institutional knowledge; duplication of efforts; and gaps in substantive work envisaged by the entities.<sup>13</sup>

Political interest in achieving a more comprehensive solution will likely grow in the future. This is suggested by our data, which indicate both an increasing number of civil society organisations investigating human rights abuses with an eye on judicial accountability (and looking to UN mandates for cooperation) and a growing number of justice authorities hoping to obtain probative information from UN mandates. In many situations, the creation of a UN entity to collect, preserve, and analyse evidence may be a crucial interim step to avoid loss of important evidence while pathways to judicial accountability remain uncertain or are developed. Supporting accountability for mass atrocities against the backdrop of this evolving and sparingly resourced ecosystem has thus raised a need (i) to reflect on the role and challenges faced by UN mandates sitting at the crossroad between traditional human rights reporting and international justice; and (ii) to provide evidence-based, realistic, and cost-effective recommendations on the way forward that have a reasonable prospect to be accepted by States.

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11 Group of Practitioners in Fact-Finding and Accountability, *Bridging The Hague – Geneva Divide: Recommendations to Maximize Benefit and Minimize Harm for Human Rights Inquiries and Criminal Investigations at the Same Scenes of Mass Violence*, 6 January 2017, Recommendation 1.

12 The proposal for a D-1 to lead investigative support was part of a larger package of five new D-1s at the OHCHR sent to the ACABQ in mid-2018. The proposal and its consideration was not public but information about its purpose and its rejection by the ACABQ was received from multiple sources from within the UN system.

13 Federica D'Alessandra, Sareta Ashraph and Stephen Rapp, 'Accountability Mandates: Perspectives from Current and Former Staff (Part III)', *Opinio Juris*, 14 October 2020.

It is for this reason that, over the course of the past two and half years, the Oxford Programme on International Peace and Security at the Institute for Ethics, Law and Armed Conflict of the University of Oxford's Blavatnik School of Government, in partnership with the International Bar Association and the Simon-Skjoldt Center for the Prevention of Genocide at the US Holocaust Memorial Museum, has carried out significant research to provide solutions and generate new insight on these issues. This report sets out precisely our research process and analysis before laying out our conclusions and recommendations in detail.

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## Methodology

### i. Research objectives

The objectives of our research are threefold. First and foremost (i) we seek to understand the challenges, constraints, and opportunities faced by Human Rights Council-mandated and OHCHR-supported investigations as they are affected by the 'accountability turn', with a view to draw out best practices as relevant from their work. We wish to set out a blueprint for how *all* UN mandated investigations can play a crucial role as justice actors by supporting accountability and helping to fight impunity. Further, (ii) our research seeks to lay out ways to build permanent institutional support for such mandates, which can help the international community improve efficiencies and maximise outputs. We have explored a number of approaches to increasing the investigative capacity of relevant mandates, primarily Option 1 – the establishment of a standing, independent UN investigative support mechanism (ISM) empowered to provide a range of services to all UN investigative mandates concerned with accountability as a way of maximising efficiencies and to receive from relevant UN bodies and itself fulfil investigative mandates focused on case-building, similar to the investigative mechanisms created for Syria, Myanmar and ISIL/Da'esh; and Option 2 – the establishment of a permanent investigative support division (ISD) within the OHCHR Secretariat to assist mandates when conferred by relevant UN bodies. Finally, (iii) we endeavour to provide additional recommendations that should be pursued irrespective of whichever model is preferred, to better support the accountability requirements of UN investigative mandates. In doing so, we map out concrete steps that the international community can take to better support the investigation of mass atrocities – and, with them, the evolving ecosystem of actors seeking to uphold accountability – in a way that strengthens rather than weakens both the current human rights architecture and the evolving international justice ecosystem.

## ii. Research methods

Our research methodology involved:

- a. A total of 57 qualitative interviews, were carried out by Ambassador Stephen Rapp between 17 April and 28 August 2020 with stakeholders at the core stages of evidence collection, processing, and use in accountability proceedings. These included 23 investigators and prosecutors (representing prosecuting authorities at the International Criminal Court and in 14 national jurisdictions most active in trying alleged perpetrators of international crimes) and representatives of 34 evidence-providing organisations ranging from small civil society groups that operate at or near the crime scenes to digital open-source investigation experts, and major international human rights NGOs that have the resources to retain regional experts with networks of local contacts. Those who have agreed to be named in this study are listed in Annex 2. Interviews with prosecuting authorities covered topics such as their access to and use of material obtained from UN investigative mandates, including both human rights investigations and the investigative mechanisms, and from evidence providing organisations. Interviews with evidence providing organisations covered topics related to their gathering of evidentiary material and experiences in sharing this with UN mandate holders and justice authorities. Interviews with prosecuting authorities focused on levels of satisfaction with (and awareness of) the work of UN mandated investigations; issues with material gathered by both evidence-producing organisations and UN mandates, particularly at trial; as well as the professionalism and responsiveness of various UN mandates, and the types of functions and capacities that prosecuting authorities consider necessary that UN mandates hold to be able to support the fruitful pursuit of criminal accountability in the future. Interviews with evidence-providing organisations also covered topics such as their level of interest in criminal accountability measures; the nature of relationships of UN mandates in regions in which they work; the types of material sought by UN investigative mandates; and the tools and training considered necessary to enable evidence-producing organisations to optimise their abilities to function in challenging circumstances.
- b. In addition, our data gathering exercise involved an anonymised survey of over 103 staff members of relevant UN mandates, including human rights investigations and investigative mechanisms. It was conducted by Sareta Ashraph between 15 August to 8 October 2020. The survey was distributed through two channels: a list of former and current staff that was built by the research team specifically for this research project and a list of former and current staff provided through the OHCHR. As was indicated to those accessing the survey, OHCHR nor any party other than the research team had access to the resulting data, and data was fully anonymised at the point of collection. Informed consent was collected prior to initiating the survey. Both distribution channels targeted staff holding specific positions, including investigators, analysts, legal advisers, and coordinators (collectively referred to as 'respondents'). The survey asked respondents to indicate the strength of their agreement or disagreement with 43 statements built around five core topics: (i) recruitment; (ii) investigations; (iii) legal analysis and case identification; (iv) analysis, preservation, and storage of electronic and physical information and evidence collected; (v) commonly used policies procedures and forms. Finally, they were also asked their views on the efficacy/desirability of permanent investigative support capacity. Respondents could also avail themselves of free text boxes if they wanted to explain their responses or their perspectives in greater detail. A small proportion of those who completed the anonymous survey voluntarily identified themselves and indicated their willingness to provide further input. In December 2021 and January 2022, five of them were interviewed to see if their answers to the survey questions had changed in response to developments occurring between the close of the survey and the present day. An additional two people whose work with UN-mandated inquiries post-dated the anonymised survey elected to give anonymised inputs into this report.

- c. In addition, our methodology involved focused group discussions and ongoing consultations with a number of organisations and entities of relevance to this research, including: the OHCHR; the IIMM, IIMM, and UNITAD; the Office of the Prosecutor of the International Criminal Court; States and other supporters of international justice, including the UK Foreign, Commonwealth and Development Office (including the Preventing Sexual Violence Initiative); the Ministries of Foreign Affairs of The Netherlands, Switzerland, Liechtenstein, Germany, and the United States Department of State, among others; and with organisations such as the International Commission of Jurists, Justice Rapid Response, Universal Rights Group, the International Bar Association War Crimes Committee and Human Rights Institute, the High Level Panel on Media Freedom, and the European Genocide Network, among others.

To guide and support this research, we also convened an Advisory Group of Practitioners with experience in both UN human rights fact-finding and accountability, including current and former UN commission members and international prosecutors. The full list of experts can be found in Annex 1. In addition, together with our partners, we convened a series of stakeholder meetings to discuss and build upon our preliminary findings. Convenings were held on 18–19 September 2020, covering ‘upstream’ and ‘downstream’ challenges faced by relevant justice actors and UN investigative mandates in particular when receiving information by evidence providing organisations and sharing it with prosecution authorities; 14–15 October 2020, covering structural, budgetary, and institutional challenges faced by mandate holders; and 24–25 January 2022, during which our findings and preliminary recommendations were discussed and approved with the project’s Advisory Committee and a number of invited observers. Finally, on May 18–19 2022, additional substantive work sessions with our Advisory Committee and number of observers were convened alongside a high-level stakeholders meeting in Geneva, with the support of the University of Oxford, the US Holocaust Memorial Museum Simon Skjodt Center for the Prevention of Genocide and the International Commission of Jurists, with the objective to finalise and approve our recommendations, set out a strategic way forward, and disseminate the findings and analysis contained in this report to both States and additional UN and civil society stakeholders.

## Ethics Approval

This research project was considered by the Blavatnik School of Government’s Departmental Research Ethics Committee, in accordance with the procedures laid down by the University of Oxford for ethical approval of all research involving human participants. It received Research Ethics Approval on February 21, 2020 (Reference number: SSD/CUREC1A/BSG\_C1A-20-07).

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**SECTION I.** Permanent Investigative Support is Needed to Anchor Accountability within an Evolving International Justice Ecosystem

## Part A: The Crucial Role of UN Investigations

Recognition of the essential role that UN investigations play for the global rule of law and the UN human rights system – and, thus, the need to preserve their core human rights functions – is foundational to our work. Historically, UN fact-finding and other investigative mandates have played a crucial *procedural* role in the enforcement of international law and the maintenance of international peace and security by either acting as dispute settlement mechanisms (clarifying the facts and circumstances underpinning alleged international law violations), or by monitoring and reporting on ongoing violations. Since the 1990s, UN fact-finding missions and commissions of inquiry appointed by the Human Rights Council have played a crucial role in probing allegations of serious violations of international human rights law and international humanitarian law. Their public reporting has been important towards shining a light on the suffering of countless victims of abuse, putting perpetrators on notice, and reminding the international community of its responsibility to halt and remedy violence.<sup>14</sup> Their documentation, public reporting and advocacy has been and remains a cornerstone of the international rule of law system and of the global fight against impunity.

UN mandated investigations also fulfil an important function in support of *normative* commitments made by the international community. More concretely, they further the development and application of international human rights law and international humanitarian law, including by alerting the international community to anticipated or ongoing violence and furthering redress and structural change. UN mandated investigations have also historically made important contributions towards the advancement of transitional justice objectives by aligning themselves with the normative and philosophical vision that underpins this field,<sup>15</sup> and by suggesting in their recommendations specific measures associated with each of the transitional justice pillars.<sup>16</sup> In many cases, such mandates contributed to uncovering structural issues at the root of decades-old conflicts, highlighting competing rights,<sup>17</sup> and recommending strategies to overcome the legacy of past abuse, including by means of truth, justice, reconciliation, reparations, and guarantees of non-repetition.<sup>18</sup>

*Recognition of the essential role that UN investigations play for the global rule of law and the global fight against impunity is foundational to our work. The documentation, public reporting, and advocacy of UN human rights investigations, in particular, is a cornerstone of the international human rights regime. As such, we believe the human rights function of UN investigations must be protected, preserved and better supported moving forward irrespective of whatever developments might flow from the accountability turn.*

14 Larissa J. van den Herik, 'An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of International Law' (2014) 13 *Chinese Journal of International Law* (2014), 507–537, 509.

15 As put by Catherine Harwood, 'Contributions of International Commissions of Inquiry to Transitional Justice' in Cheryl Lawther et al (eds) *Research Handbook on Transitional Justice* (Cheltenham: Edward Elgar Publishing) 401–423, 409: 'Commissions' mandates have followed the general arc of transitional justice discourse in the UN system, [evolving] from mechanisms geared towards reconciliation, to 'rule of law' initiatives, with a focus on ensuring legal responsibility for violations.'

16 Ibid.

17 Christine Schwöbel-Patel, 'Commissions of Inquiry: Courting International Criminal Courts and Tribunals' in Christian Henderson (ed) *Commissions of Inquiry Problems and Prospects* (Oxford: Hart Publishing, 2017) 145–170, 146.

18 Protests in the Occupied Palestinian Territory (A/HRC/40/CRP.2, para. 800(b) and A/HRC/40/74, para. 125(b); Burundi (A/HRC/39/63, para. 86(g); Central African Republic (S/2014/928, Recommendations, 1(c)); Korea (A/HRC/25/63, para. 89(p)); 2014 Gaza Conflict (A/HRC/29/52, para. 83); Côte d'Ivoire (A/HRC/17/48, para. 127(e); Kasai Region of the Democratic Republic of the Congo (A/HRC/38/31, para. 111(a)); Eritrea (A/HRC/32/47, para. 128(a)); Libya (A/HRC/19/68, paras 127(h), (i) and (s) and A/HRC/17/44, paras 258(e) and 259(c)); Syria (A/HRC/40/70, paras 98(c) and (d), A/HRC/42/51, para. 100(k), A/HRC/43/57, para. 101(b) and A/HRC/45/31, para. 91(c)).

Finally, UN investigations have played a role vis-a-vis *political* goals set out by the international community, such as peacekeeping and peace-making, for example, by ‘forestalling more destabilising actions by giving parties a “cooling-off” period that can help to prevent decisions being taken in a fog of disputed facts or in the heat of the moment.’<sup>19</sup> UN investigative mandates may also attempt to facilitate agreements among disputing parties or assist in the implementation of political agreements.<sup>20</sup> In addition, the work of UN investigative mandates may have a legitimising or de-legitimising effect on parties on the ground, depending on their level of cooperation with the mandate.<sup>21</sup> Rooting all of these contributions to the global rule of law have been the political and factual determinations made by international inquiry mandates that have traditionally focused on uncovering facts and patterns underpinning allegations of international law violations and, increasingly (and sometimes controversially) attributing responsibility to those actions.<sup>22</sup>

Within the UN system, various organs have the power to mandate such investigations, including the UN Secretary General, the UN General Assembly, and the UN Security Council. Nevertheless, it is arguably the investigative mandates conferred by the UN Human Rights Council, and traditionally supported by OHCHR, that have historically made the greatest contributions to such goals by raising public awareness, documenting abuses, and generating high-level political will and diplomatic support for subsequent judicial and political processes. In addition, more so than their historical predecessors, UN human rights investigations have played a role in the application of international law by making determinations on both factual and legal matters arising from their inquiries, and by looking beyond mere facts and patterns before them to scrutinise who might be responsible for their commission. In doing so, they have provided a voice to those who were often voiceless, brought egregious human rights abuses to light, and sustained public advocacy and international attention to some of the world’s worst violations. Preserving this traditional human rights function is foundational to the health of the international human rights regime. Yet, as considered herein, over the past decade, human rights mandated investigations have also been subjected to a pronounced shift towards accountability. While firm in the imperative not to interfere with the proper functioning and resourcing of traditional human rights investigations, this report is concerned precisely with the implications and opportunities arising from this shift.

## Part B: The *Accountability Turn* in UN Investigations

Over the past decade, and markedly since 2011, UN investigations have pivoted towards making more direct contributions to international criminal justice. This ‘accountability turn’ is most visible in the increased prominence of international justice and accountability-related language in mandates’ establishing resolutions, requiring them to go beyond their traditional fact-finding focus to make determinations on whether violations ‘may constitute *crimes* under international law,’ ‘identify perpetrators’ and, in some cases, build criminal files.<sup>23</sup> The inclusion of these requirements has had important consequences for the mandates’ work. Significantly, while a human rights framework is focused on States and State actors as a consequence of State responsibility for protecting and upholding

19 Michael A Becker and Sarah M H Nouwen, ‘International Commissions of Inquiry: What Difference Do They Make? Taking an Empirical Approach,’ *European Journal of International Law* 30:3.

20 Mohamed S Helal, ‘Two Seas Apart: An Empirical Study of the Difference Made by the Bahrain Independent Commission of Inquiry’ (2019) 30(3) *European Journal of International Law* 903

21 Eliav Lieblich, ‘At Least Something: The UN Special Committee on the Problem of Hungary, 1957–1958’ (2019) 30(3) *European Journal of International Law* 843; Mohamed S Helal, ‘Two Seas Apart: An Empirical Study of the Difference Made by the Bahrain Independent Commission of Inquiry’ (2019) 30(3) *European Journal of International Law* 903.

22 The UN Security Council failed to renew the mandate of the Joint Investigative Mechanism of the UN and OPCW when Russia exercised its veto in the wake of findings that indicated involvement of Russian weaponry. See: UN press release, ‘Security Council Fails for Fourth Time to Renew Mandate of Joint Mechanism Investigating Chemical Weapons Attacks in Syria,’ 17 November 2017.

23 This language is present in all but six of the investigative mandates established by the HRC since 2011; it is absent only in the mandates set for Côte d’Ivoire (A/HRC/RES/16/25), Mali, (A/HRC/RES/22/18), Cameroon, Chad, Niger and Nigeria (Boko Haram) (A/HRC/RES/S-23/1), Eritrea (A/HRS/RES/29/18 and A/HRC/RES/26/24), Yemen (A/HRC/RES/36/31), and Implications of Israel Settlements on Occupied Palestinian Territory, including East Jerusalem (A/HRC/RES/19/17).

human rights, individual criminal accountability frameworks permit attention to a broader spectrum of perpetrators, including non-State armed groups and other non-State actors.

The emphasis on ‘crimes’ has required UN mandated investigations to expand their frames of reference, traditionally comprising of international human rights and often humanitarian law, to incorporate international *criminal* law considerations. However, establishing violations and abuses of international human rights is very different than establishing the perpetration of international crimes. For example, a pattern of gross human rights violations will amount to the commission of crimes against humanity under international law only if it can be demonstrated that the acts were committed as part of a ‘widespread or systematic attack against a civilian population’, ‘with knowledge of the attack’. In other words, this requires not only establishing the commission of the act itself of violence, but also that the act was committed within a certain *context* of violence that – by virtue of its scale or character – indicates the direction of an ‘attack’ against a civilian population with a certain level of knowledge and intentionality. Further, individual criminal accountability will depend in part on evidence of the mental state of key actors, placing an additional requirement on investigative mandates. For example, establishing the commission of certain international crimes, such as persecution, will require the establishment of a specific discriminatory intent or, in the case of genocide, an ‘intent to destroy [a protected group] in whole or in part’.

Similarly, the emphasis on ‘identifying perpetrators’ requires mandates to go beyond gathering information aimed to establish the commission of violations amounting to crimes (what in international criminal law is known as the ‘crime base’). It requires, at a minimum, the gathering of information that connects a specific individual to the commission of the crime (what is known as ‘linkage’) and that shows the perpetrator’s required state of mind and capacity to commit the crime. This, at a more practical level, requires an adjustment in the information-gathering methodology to account for more than just documenting ‘facts and patterns’ with which UN investigative mandates have traditionally been tasked.

By and large, with the support of OHCHR, mandates have strived to the best of their abilities to fulfil these additional requirements. For example, OHCHR has indicated that in recognition of the ‘shift’ brought about by the introduction of mandates that request the identification of individual perpetrators and the implications that has on the methodology to gather and analyse information used by COIs/FFMs, it has developed specific guidance that precisely focuses on this issue and sets out standards and approaches to guide the work of COIs/FFMs. Guidance development involved consultation with experts from different fields and institutions to identify good practices. Much of this guidance is publicly available in the 2018 publication *Who’s responsible* – although, as we will further discuss, both OHCHR and experts consulted for this study acknowledge that some room for improvement continues to exist.

*‘Accountability turn’ refers to a trend, markedly since 2011, to include international justice requirements in the mandates of UN investigations. I.e., expressly tasking investigations (chiefly mandated by human rights bodies, such as the Human Rights Council) with, inter alia, determining whether the violations they document might constitute crimes under international law; identifying individuals who are suspected of responsibility; and recommending measures to promote accountability, including – in some recent cases – having criminal case-building responsibilities. The inclusion of these requirements has had important consequences for the mandates’ work.*

OHCHR has also indicated that, according to the findings of one of its recent studies and review of practice on mandates to ‘collect, analyse and preserve evidence’, the ICC and other institutions (such as the International Court of Justice) have ‘used public and non-public information gathered by COIs/FFMs in a variety of ways, for example as context, lead information or corroboration’. According to OHCHR, information sharing to this end has been increasingly systematised both in the practice of OHCHR (as the custodian of COI/FFMs information after the end of their mandates) and by COIs/FFMs themselves during their operation, with practice not limited to the newer mandates explicitly calling for collection and preservation of evidence to support judicial proceedings. It is important to note that the sharing of sensitive information for accountability or other purposes is governed by UN policies and methodologies about informed consent, protection, and other standards.

While encouraged by OHCHR’s findings, publicly available sources appear to indicate however that the judicial response to COIs/FFMs reporting has been limited and mixed. For example, the Pre-Trial Chamber of the International Criminal Court in *Prosecutor v. Gbagbo* refused to credit UN reports, including that of the Côte d’Ivoire Commission of Inquiry, on the contextual element of the existence of ‘widespread or systematic attacks’ against civilians even at the indictment confirmation stage.<sup>24</sup> On the other hand, the International Court of Justice in *The Gambia v. Myanmar* cited favourably the findings of the Myanmar Fact-Finding Mission in holding that the burden for issuance of provisional measures had been met.<sup>25</sup> This suggests that outcomes still vary across UN mandates with respect to the strength of their analysis and findings. It is important to

note however that, almost without exception, the additional responsibilities laden upon UN investigative mandates (particularly, those mandated by the Human Rights Council and supported by OHCHR) have not been accompanied by additional resources or capacity. On the contrary, the UN and international funding crisis has threatened the efficient functioning if not the very establishment of UN investigative mandates. This clearly has implications for UN mandates who are now being asked to do more, often with less. In addition, in the absence of coordinating leadership, the threat of duplicated efforts (itself damaging to the integrity of potential evidence) and the loss of institutional knowledge are inherently detrimental to accountability efforts in complex situations, and not the sole responsibility of UN mandates.

Since 2016, the establishment of independent investigative mandates for Syria,<sup>26</sup> Da’esh/ISIL,<sup>27</sup> and Myanmar<sup>28</sup> has further entrenched the trend we have referred to as an accountability turn, marking a more pronounced shift towards international criminal law and standards. It is important to acknowledge that situations differ significantly from one another, and that in some cases the establishment of criminally focused mandates is preceded by more traditional human rights investigations, which both lay the foundations and help make the case for such mandates’ establishment. This was the case for all three of above-mentioned mandates, which were preceded by – and, in some cases existed concomitantly with – human rights mandates, such as those of the Syria Col (preceding and still co-existing with the IIIM);

*Almost without exception, the additional responsibilities laden upon UN investigative mandates (particularly, those mandated by the Human Rights Council and supported by OHCHR) have not been accompanied by additional resources or capacity. This raises important questions about what realistically can be asked of them, and how they can be best supported moving forward.*

24 See ICC Pre-Trial Chamber I, *Prosecutor v. Gbagbo*, *Decision Adjourning Confirmation Hearing*, ICC-02/11-01/11-432, 3 June 2013, p. 17.

25 International Court of Justice, *The Gambia v. Myanmar*, *Request for the indication of provisional measures*, 23 January 2020, paras 43-63.

26 IIIM, A/RES/71/248.

27 UNITAD, S/RES/2379.

28 IIMM, A/HRC/RES/39/2.

the 2015 Joint Investigation by OHCHR and UNAMI in Iraq (preceding UNITAD); and the Myanmar FFM (preceding and leading to the establishment of the IIMM).

However, unlike the mandates established by the Human Rights Council and supported by OHCHR, the investigative mechanisms' focus on case-building has been underpinned by: greater capacity (in terms of budget and infrastructure); independence; investment in information governance capacity, including information management, information security, and digital forensics (both in staffing, infrastructure, processes, and tools); greater investments in technology and use of digital tools, notably in the analysis of information collected; and a more deliberate effort to recruit personnel with relevant international criminal law expertise to carry out and drive investigations according to criminal justice standards.

It is crucial to reiterate that the further shift towards criminal accountability and case-building by UN mandates marked by the establishment of the independent investigative mechanisms mentioned above has neither extinguished the need for human rights-focused investigations, which remain crucial for the proper functioning of the international human rights regime, nor has it implied that all new accountability-focused investigative mandates would operate in the same manner as the investigative mechanisms.

Yet, as discussed in the following section, our data support the view that these investigative mechanisms' contributions to criminal accountability have been more profound and impactful than previous UN mandated investigations, although it is too early to come to resolute conclusions as to their performance and impact.

*Since 2016, the establishment of independent investigative mandates with criminal case building responsibilities for Syria, Da'esh/ISIL, and Myanmar has further entrenched the trend we have referred to as an accountability turn. The IIMM, UNITAD and IIMM's focus on case-building has been underpinned by greater capacity, independence and investment, resulting – as our data suggests – in more profound and impactful contributions to accountability.*

I have followed their development and know of the challenges presented in working with inquiries that did not have criminal justice mandates, orientation, or staffing. I know that the international investigative mechanisms were intended to be more helpful to law enforcement.<sup>29</sup>

Our satisfaction has improved over time, particularly as the IIMM has become operational. [...] We have developed good and trustful relations.<sup>30</sup>

This has been a positive experience. They are more collaborative and more prepared for interaction with a judicial body.<sup>31</sup>

The magistrates of the International Humanitarian Law section of the Federal Prosecutor's Office have already sent a request for information to the IIMM for Syria on three occasions. Each time, these requests were aimed at knowing whether the IIMM had information in its databases about a suspect being prosecuted in Belgium, or of places referred to in a Belgian case. Contacts with the Mechanism have always been flexible and clear, and acknowledgments and responses to requests prompt. From our point of view, the operation of the IIMM for Syria is very good. [Our translation, original in footnote].<sup>32</sup>

29 Interview with Prosecuting Authority.

30 Interview with Prosecuting Authority.

31 Interview with Prosecuting Authority.

32 Interview with Philip Meire, Prosecutor, Belgium. Original: *Les magistrats de la section DIH du parquet fédéral ont déjà adressé à trois reprises une demande d'informations au M3I pour la Syrie. A chaque fois, ces demandes visaient à savoir si le M3I disposait d'informations dans ses bases de données au sujet d'un suspect poursuivi en Belgique, ou de lieux visés dans un dossier belge. Les contacts avec le Mécanisme ont toujours été souples et clairs, et les accusés de réception et les réponses aux demandes rapides. De notre point de vue, le fonctionnement du M3I pour la Syrie est très bon.*

It is for this reason that, as a central question in this report, we ask what, if anything, can be learned from the set-up and operations of the three UN independent investigative mechanisms. We ask this question in full awareness of the differences that set these investigative mechanisms apart from one another and from more traditional UN human rights investigations. This includes the nature of their respective mandates, the strength of their mandates' international justice requirements, and their operational realities (such as being supported by 'state-of-the-art' technical infrastructures,<sup>33</sup> in addition to significantly greater budgetary capacity and independence).

It is not an objective of our work to overhaul or 'displace' the human rights nature of more traditional UN investigations. In fact, as we set out above, we firmly believe that the continued performance of such human rights functions – especially public reporting and advocacy – is essential for the global rule of law and for the functioning of the international human rights law regime. Yet, we believe the trends underpinning the accountability turn are unlikely to be reversed. For this reason, we wish to identify ways to preserve the integrity of the international human rights regime while advancing the cohesive development of an international justice ecosystem that can take into account the significant contributions that UN investigations make to the global fight against impunity. It is a chief objective of this report to set out a blueprint for how this can be achieved.

*This further shift towards criminal case-building has neither extinguished the need for human rights-focused investigations (which remain crucial for the proper functioning of the international human rights regime and ought to be seen as complementary to investigations focused on accountability) nor implied that all new accountability-focused mandates will operate like the independent investigative mechanisms. Nevertheless, the mechanisms' impact on the international justice ecosystem raises important questions on what can be learned from their work.*

## Part C: Acknowledging the Limits of the Accountability Turn

It is important to acknowledge that this 'courting' of international justice by UN investigative mandates has not been met with uniform enthusiasm, and that some continue to look with suspicion at the 'criminalisation' of UN mandated investigations.<sup>34</sup> Concerns include over-politicisation and the risk that the international community's excessive focus on inquiry mandates as a response to unfolding mass atrocity crises might constitute a poor substitute for more forceful action, and thus actually fuel, rather than counter, inaction and consequently embolden perpetrators. Likewise, there is a risk that over-emphasis on inquiry mandates as the *sole* response to unfolding atrocity scenarios might entrench a too narrow focus on judicial and quasi-judicial action to the detriment of preventive and protective frameworks, and to holistic approaches to transitional justice.

If a latent risk persists of 'divorcing' accountability from other transitional justice measures, it is the undisputed prerogative of affected communities to have a voice in which forms of accountability are most appropriate to their specific circumstances. Yet, the possibility of accountability for the most egregious violations of international law must remain fundamental to any political solutions, for it goes to the

33 Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, A/72/764, 28 February 2018, paras 35-36.

34 Christine Schwöbel-Patel, Commissions of Inquiry: Courting International Criminal Courts and Tribunals, in *Commissions of Inquiry: Problems and Prospects* (ed C. Henderson), 2017; Piergiuseppe Parisi, 'International Fact-Finding Missions', in *The Palgrave Encyclopedia of Global Security Studies* (ed S. Romanius, M. Thapa, and P. Marton), 2019.

very core of the international peace and security architecture. The failure to provide for a truth and justice process threatens the repetition of the crimes and undermines global norms, putting innocent men, women, and children at risk in other conflicts. In this sense, preserving the possibility that criminal accountability can someday take place where communities, so demand is not simply a critical need but a moral duty the international community owes to all victims of heinous crimes.

In fact, supporting the accountability turn might be – today more so than ever – vital to the international justice project given the likelihood that ‘traditional’ avenues for justice remains precluded in many cases. It also serves as a way to counter or at least resist normative backsliding. Accountability for the gravest violations of international law is and should remain a cornerstone of any approaches to international peace and security, which must keep the protection of human life and dignity at its heart.

In addition to these ‘macro’ level considerations, the accountability turn also entails a number of ‘meso’ level considerations. The first is that the proliferation of accountability focused (or accountability relevant) investigations may, without due collaborative action, lead to a fragmentation of the international justice architecture, even such that there is a risk – or a perceived risk – that existing institutions (both domestic and international) suffer a drop in necessary investment and support. To counter this risk, it is essential that deliberate strategies be implemented to standardise practices and foster cooperation among the various international justice actor – a subject to which this paper pays special attention. Rather than in *isolation*, or as *alternatives* to action at the ICC or other judicial processes, UN investigations should instead be seen as valuable pathways to encourage and support complementarity, accountability, and transitional justice efforts at the domestic level and before international courts and tribunals.

In addition, the deployment of UN investigative mandates in situations of mass atrocities remains today far too *ad hoc*. Inconsistencies in the creation of such mandates – and lukewarm states support once mandates are created – might fuel perceptions of politicisation of the international justice project. Most importantly, they alienate victimised communities in contexts where such mandates are not created or properly supported, for this might signal that their suffering is of ‘lesser’ concern to the international community than that of others. For these reasons, international guidelines are urgently needed to set out how and when the international community should create and support the operation of inquiry mandates in response to atrocity crimes situations. The recent International Commission of Jurists report, *The Future of Accountability Mechanisms: Twenty Recommendations*, is a welcome and valuable contribution to these efforts.<sup>35</sup> Likewise, it is important not only that mandates be established with greater consistency and be supported in their operations, but also that they themselves are proactive with articulating to victim groups the scope and limitations of the contributions to justice and redress that they can reasonably make.

The proactive and sustained support of States is ever more urgent in light of the heavier responsibilities that come with the accountability requirements now prevalent in UN investigative mandates. Without the proper financial, structural, technical and operational support by States, said mandates will have little

*The accountability turn certainly entails important challenges, including risks of inconsistencies, selectivity and politicisation over when and how mandates are conferred; the risk of over-reliance on such mandates as the sole response to ongoing crisis situations; a persistent risk of ‘divorcing’ accountability from other transitional justice measures; and the risk of fragmentation, even such that there is a risk (or a perceived risk) that existing institutions may suffer a drop in necessary investment and support. Focus must be given to overcoming such potential challenges.*

35 International Commission of Jurists report, *The Future of Accountability Mechanisms: Twenty Recommendations* (15 December 2021).

chance to succeed in making the contributions to justice and the global fight against impunity with which they are being tasked.

Finally, and at a more granular level, there is an impending need for guidance on how investigations mandated by the Human Rights Council and supported by OHCHR, in particular, *can* effectively implement their accountability requirements, as well as clarity as to what realistically can be asked of them in this context. Indeed, the greatest challenges posed by the accountability turn have been experienced at the operational level by the mandates with a more traditional human rights focus. Yet, as mentioned, some of the challenges they have encountered have also been shared with the independent investigative mechanisms, at least in their ‘start-up’ phase. For this reason, there are many lessons that, we believe, all UN mandated investigations with an accountability component can – and should – learn from the work of the investigative mechanisms. Laying out such lessons learned is a key objective of our work.

*Affected community should have ultimate agency over which form of accountability is best suitable to them. However, given pathways to justice remain narrow and are often precluded in the short term, there is a need to collect and preserve today the evidence that might be used in justice processes at some later day. Supporting the accountability turn seems indeed today more important than ever. The proactive and sustained support of States is ever more urgent in light of the heavier responsibilities that come with the accountability requirements now prevalent in UN investigative mandates.*

## Part D: An Evolving International Justice Ecosystem

These trends we have highlighted above in relation to UN investigative mandates have not been taking place in a vacuum. The past two decades have borne witness to an expansion of the field of international justice. This has involved an increased focus on the need to end impunity by punishing perpetrators for the commission of international crimes as a way of upholding international law and recognising victims of mass violence. Institutional growth in this field has been most visible in the establishment and operation of various international courts and tribunals, and particularly the International Criminal Court (ICC), which today counts 123 States Parties and is actively involved in the pursuit of justice in 16 ‘situations.’<sup>36</sup> However, since the ICC’s jurisdiction is not universal and in some circumstances reliant on UN Security Council referrals, the commission of atrocities in a number of significant situations continues to evade the international justice architecture. Furthermore, after a sustained period of growth, international criminal justice institutions (as with many other multilateral fora) have faced significant difficulties, including debilitating funding crises, normative backsliding, and loss of State support. Such observations, however, conceal a much more sophisticated picture: that of an evolving international justice ecosystem.

Although justified concerns persist with regard to the local involvement and ownership of international justice processes,<sup>37</sup> our data indicate that a growing number of civil society groups are now involved in efforts to document the commission of atrocity crimes,<sup>38</sup> and this is occurring alongside a shift towards survivor-centred justice methodologies and initiatives.<sup>39</sup> The civil society actors we interviewed

36 <https://www.icc-cpi.int/pages/situation.aspx>

37 See, for example: Lundy, Patricia, and Mark McGovern. ‘Whose Justice? Rethinking Transitional Justice from the Bottom Up.’ *Journal of Law and Society* 35, no. 2 (2008): 265–92; Friedman, Andrew B. (2013) ‘Transitional Justice and Local Ownership: A Framework for the Protection of Human Rights’, *Akron Law Review*: Vol. 46: Iss. 3, Article 4. Some states have also expressed concerns. On the issue of delegated investigative responsibilities, see ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, para. 482.

38 The increasing number of civil society groups, including organisation drawn from victim communities, has led the Simon-Skjoldt Center for the Prevention of Genocide to publish ‘Pursuing Justice for Mass Atrocities: A Handbook for Victim Groups.’

39 Payam Akhavan, Sareta Ashraph, Barzan Barzani, David Matyas, *What Justice for the Yazidi Genocide? Voices from Below*, Johns Hopkins University Press, Human Rights Quarterly, Volume 42, Number 1, February 2020, pp. 1-47.

consistently rated criminal accountability as either their 'top priority' or a 'very high priority', supporting the view that victims' groups are increasingly interested in documentation efforts aimed at accountability:

The creation of the IIM was very important. So many groups are involved in documentation, and it was so many places. It was very important that all of it be gathered, preserved, and protected.

The CSOs and the IIM have made it possible to prosecute cases in third countries while the conflict was ongoing. This has never happened before. It gives Syrians hope for justice, and it sends a message around the world to those who might think of acting like Assad, or following orders from an Assad, that they too will face justice.

Most importantly, the cases in Europe send a message to Syria that there must be justice there. That is my real goal, not cases in Europe against a few perpetrators, but a future Syria with a mixed court that would deliver more complete justice according to international standards. The cases in Europe bring pressure for it to happen, and the work of the civil society organisations, consolidated at the IIM will provide the evidence for these trials.

All of the training that we do for our team and others is to help with the third country cases, but it is also focused on building Syrian capacity to try these cases in country, with judges and lawyers who will be confident and transparent justice actors, who will be ready to serve all of the people of Syria and respond to everyone, including the global media, about the fairness of the process.<sup>40</sup>

Undoubtedly, considerable differences persist in the documentary capacities of the various civil society groups active in documentation efforts on the ground.<sup>41</sup> Yet, our data support the view that a growing 'professionalisation' of civil society documentation efforts has been taking place over the last decade. This is perhaps aided by a range of donor-driven capacity-building efforts,<sup>42</sup> and the proliferation of documentation tools and investigative manuals now available to most civil society actors.<sup>43</sup> Today, more and better-quality information concerning the commission of atrocity crimes is readily available. Armed with this information and prompted by their own commitment to seeing justice served, a growing number of victim groups have pursued justice and accountability beyond international criminal courts and tribunals.

This trend is mirrored at the inter-State level. The Gambia, for example, backed by the 57 members of the Organisation of Islamic Cooperation, initiated proceedings against Myanmar before the International

*The accountability turn in UN mandates has not been taking place in a vacuum. Our data indicate that a growing number of civil society groups are now involved in increasingly professionalised efforts to document the commission of atrocity crimes, although considerable differences persist in their capacity and standards. Nevertheless, civil society actors interviewed for this study consistently rated criminal accountability as either their 'top priority' or a 'very high priority'.*

40 Anwar Al-Bunni, Syrian Center for Legal Studies and Research.

41 These range from local CSOs to international human rights organisations to professional investigative networks, all of whom have different access to resources and training. See, for example: International Bar Association War Crimes Committee, Analysis of overcrowded and under-examined areas, cit.

42 See, for example, the IBA International Criminal Court and International Criminal Law Programme Report: 'Strengthening the International Criminal Court and the Rome Statute System: A Guide for States,' October 2021.

43 See, for example: UK Foreign and Commonwealth Office (Sara Ferro Ribeiro and Danaé van der Straten Ponthoz), International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law, Second Edition, March 2017; Public International Law and Policy Group (Federica D'Alessandra, Sander Couch, Iliana Georgieva, Marieke de Hoon, Brianne McGonigle Leyh, Jolien Quispel) *Handbook on Civil Society Documentation of Serious Human Rights Violations*, 2016; Global Rights Compliance, Basic Investigative Standards for International Crimes App.

Court of Justice in an effort to pursue State-level accountability for failure to comply with the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.<sup>44</sup> More recently, on 26 February 2022, Ukraine filed an application instituting proceedings against the Russian Federation before the International Court of Justice, concerning ‘a dispute . . . relating to the interpretation, application and fulfilment of the “Genocide Convention”’. Similarly, a growing number of other domestic, supranational, and international legal mechanisms are also being triggered to adjudicate individual and State responsibility for the commission of international crimes.<sup>45</sup>

At the same time, a growing number of jurisdictions have also been investing in building up their domestic capacity to investigate and try core international crimes, with at least 14 jurisdictions currently actively pursuing international crimes domestically.<sup>46</sup> Furthermore, our data reveal that a growing number of domestic jurisdictions rely on information and materials collected by groups in the civil society to support their domestic justice processes:

We have worked very closely with [hidden]. We trust them. They are very responsive and very prompt. We like the analysis they do and particularly the large briefs that they have written about criminality in various locations and by various organisations in [hidden]. These are of great value for our structural investigations. We would like to receive all of their briefs but need to make sure that we receive them in a way that the information in the briefs will be confidential unless specific parts are used in a case. We have worked with victims’ organisations. We push for them to have legal representation in cases that go to court. We also work with legal groups that advocate for victims like [hidden]. We have also worked with older human rights organisations, like [hidden]. In one case, we were able to put into evidence a key document that was obtained from [hidden]. We hold twice yearly meetings with a group of NGO representatives.<sup>47</sup>

This is particularly the case where justice authorities’ access to remote scenes of mass violence is precluded on some grounds, further increasing authorities’ reliance on documentary groups and encouraging a certain symbiosis between domestic authorities and civil society actors on the ground. This is understandably welcomed by prosecuting authorities:

*This trend is mirrored at the State level. A growing number of jurisdictions have been investing in building up their domestic capacity to investigate and try core international crimes, with at least 14 jurisdictions currently actively pursuing international crimes domestically. Similarly, in recent years, a growing number of domestic, supranational, and international legal mechanisms have been triggered to adjudicate individual and State responsibility for the commission of core international crimes.*

44 International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar).

45 Most notably, on 18 September 2020, The Netherlands announced its decision to hold Syria responsible for gross violations of international law, specifically invoking its responsibilities under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. On 4 March 2021, Canada did the same. Also, see, for example: Government of the Netherlands, The Netherlands Brings MH17 Case Against Russia before European Court of Human Rights, Ministry of Foreign Affairs, 10 July 2020, available online at <https://www.government.nl/latest/news/2020/07/10/the-netherlands-brings-mh17-case-against-russia-before-european-court-of-human-rights> (visited 28 November 2020); European Court of Human Rights, New Inter-State application brought by the Netherlands against Russia concerning downing of Malaysia Airlines flight MH17; 213 ECHR (2020), 15 July; *Wickrematunge v. Rajapaksa*, US District Court Central District of California, Case No. 2:19 CV02577-R-RAO.

46 The Netherlands, Germany, Sweden, Norway, United Kingdom, Finland, Canada, Belgium, Denmark, Switzerland, United States of America, Ukraine, France, Argentina.

47 Interview with Reena Devgun, Prosecutor, Sweden.

The newer NGOs like [hidden] are very oriented to assisting law enforcement, rather than putting out public reports. The trend is positive.<sup>48</sup>

Equally, the digital revolution is dramatically impacting the investigative landscape, placing investigative abilities and techniques directly into the hands of those on the ground, and changing the nature of rich sources of information and data patterns available to investigators. This enhances and enriches traditional investigative practices, facilitating some aspects of the investigation of complex crimes remotely. Dealing with new forms of investigative material demands new skills and technological solutions. As another respondent commented:

The [traditional human rights investigation] mechanisms need to organise their work to take advantage of the digital revolution that has occurred in recent years. Some still operate like [...] before there was social media and digital communications.<sup>49</sup>

Against this background, our data attest that principles of justice and accountability for international crimes remain supported, and the international justice ecosystem appears to be evolving accordingly. Our data further suggest that as competent legal systems gain willingness and confidence to pursue cases against individuals under their jurisdiction, and as other justice actors seek avenues to uphold states responsibility, UN investigations and investigative mechanisms can indeed perform important support functions. Our research reveals that UN investigative mandates often sit at the heart of this evolving international justice ecosystem. Information emanates ‘upstream’ from groups in the civil society, is processed by UN mandates, and then is used ‘downstream’ in international justice processes, by both domestic and international authorities, with varying degrees of success.

As these trends continue to evolve, and without prejudice to the meta-questions that they entail, it is likely that interest in the role of UN mandated investigations and mechanisms as ‘data processing’ entities will continue to grow. Alongside this will be a deepening consideration of how they can be best supported.

The creation of the new investigative mechanisms has raised questions concerning how and whether relevant best practices stemming from their work can and should be incorporated by other UN mandated investigations. Their creation has also spurred calls for the establishment of some form

*Equally, the digital revolution is dramatically impacting the investigative landscape, placing investigative abilities and techniques directly into the hands of those on the ground, and changing the nature of rich sources of information and data patterns available to investigators. Dealing with new forms of investigative material demands new skills and technological solutions.*

*The international justice ecosystem is evolving in response to these trends, proving the resilience of the global fight against impunity. UN investigative mandates often sit at the heart of this evolving international justice ecosystem and lifecycle of information and evidence concerning mass atrocities. Information emanates ‘upstream’ from groups in the civil society, is processed by UN mandates, and then is used ‘downstream’ in international justice processes, by both domestic and international authorities, with varying degrees of success.*

48 Interview with Reena Devgun, Prosecutor, Sweden.

49 Interview with EPO Respondent.

of UN permanent capacity as a means to ‘hardwire’ accountability and support for international justice efforts,<sup>50</sup> without compromising the crucial human rights function that many UN mandated investigations continue to play.

This report builds on such calls, asking how we can best support and improve human rights investigations. When looking to the future of international justice and the relationship between UN investigative mandates and accountability actors, how can we ensure that future developments strengthen the existing architecture of international justice while preserving the crucial human rights role that many UN investigations continue – and should continue – to play? Most importantly, how can we maximise efficiencies and improve outputs against a background of increasingly scarce resources and competing priorities?

The research contained in this report builds on previous efforts by members of our team focusing on collecting ‘do no harm’ best practices for various categories of international justice actors (such as civil society groups, UN Commissions of Inquiry, Fact-Finding Missions, and other mandates)<sup>51</sup> that traditionally have not been involved in pursuing justice for international crimes but have, nevertheless, found themselves gathering information on mass atrocities. This continues to occur in areas that fall outside of the reach of existing international justice institutions or where the international community is otherwise precluded from access and is thus reliant on actors already on the ground to document crimes. Similar to our previous efforts, this report asks what more can be done by and for UN investigative mandates sitting at the epicentre of the ‘lifecycle’ of information and evidence? How can their contribution to justice be sharpened without compromising or overhauling their human rights function?

## Part E: Preserving the Crucial Human Rights Role of UN Investigations While Serving the Interests of International Justice Actors

As mentioned, by virtue of the crucial role they play in the global rule of law system, preserving the human rights nature of inquiry mandates conferred by the UN Human Rights Council and supported by OHCHR is a key concern of our work. At the same time, we believe that it is both possible and beneficial to provide a blueprint for how mandates can maintain these functions while, at the same time, fulfilling their accountability requirements and strengthening their contributions to international justice. Indeed, our data show that many actors increasingly think of international justice as an ‘evolving landscape’ – a complex system of information where streams of data originate with civil society groups, are processed in some form by UN investigative mandates (both those with a more traditional human rights focus and the investigative mechanisms), and then arrive with judicial and non-judicial authorities, placing UN investigations at the heart of the lifecycle of critical information and evidence. This is unlikely to change.<sup>52</sup>

The increasing awareness of the existence of multiple avenues for accountability for core international crimes has resulted in growing expectations for justice among the affected populations. This, in turn, contributes to the growing number of UN mandates being created to monitor and report on the scale of atrocities committed in different parts of the world. As our data shows, higher expectations are being

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50 David Mandel-Anthony, ‘Hardwiring Accountability for Mass Atrocities’, 11 Drexel L. Rev. 903, 2019, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3435119](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3435119).

51 See: European University Institute, *Humanitarian Actors’ Engagement with Accountability Mechanisms in Situations of Armed Conflict*, 21 January 2016; Public International Law and Policy Group, *Handbook on Civil Society Documentation of Serious Human Rights Violations*, 2016; Group of Practitioners in Fact-Finding and Accountability, *Bridging the Hague-Geneva Divide: Recommendations to Maximise Benefit and Minimise Harm for Human Rights Inquiries and Criminal Investigations at the Same Scenes of Mass Violence*, 6 January 2017.

52 For example, the most recent mandates conferred by the Human Rights Council with respect to the situations in South Sudan and the Occupied Palestinian Territories, including East Jerusalem, and Israel present similar criminal case-building requirements as the novel investigative mechanisms do

placed upon them in terms of contributions to the delivery of justice. These expectations have grown with the establishment of accountability-focused investigative mandates:

We focus on prosecutions because the lack of justice aggravates and prolongs survivors' trauma.<sup>53</sup>

[UN investigations] need to be proactive and strategic in facilitating national prosecutions in the most coordinated and effective way.<sup>54</sup>

What we need is a consistent policy by UN bodies to listen to and respect [victims]. These mechanisms should push for Universal Jurisdiction prosecutions for crimes over which international courts do not have jurisdiction. They should press and then facilitate truth commissions in the country where the violations were committed, and that meet international standards so that victims have access to the process (and protection).<sup>55</sup>

It is important that the IIMM press for action on accountability or it will become harder to engage the victims and civil society organisations in finding the evidence. The IIMM could provide vital assistance in building files for sanctioning individuals and companies. Witnesses (particularly insiders) will also need protection and the IIMM should work with various countries to negotiate relocations.<sup>56</sup>

Well-supported findings in commission of inquiry reports about these elements could be helpful. It would be most useful if a commission of inquiry would make a witness available as an expert (but this would probably be difficult given UN privileges and immunities). As for IIMMs, we must recognise that 'they cannot be magicians' in making cases happen if there is not the will and capacity (including jurisdiction) on the part of national authorities or the existence of an international court. However, IIMM leadership should take the initiative in pushing cases forward. To succeed, 'they must be more integrated into the prosecutorial landscape.'<sup>57</sup>

A primary function of the UN human rights system is to raise awareness and openly advocate for political objectives, including by denouncing wrongful conduct, most notably through its public reporting. Performing this function remains of the utmost urgency and importance. For example, regular public reporting lines allow accountability actors to advance seemingly contradictory objectives – namely preparatory work for judicial processes and public awareness raising regarding violations of international law simultaneously. Such reporting also bolsters human rights advocacy within and outside of the UN system and form part of the data used for humanitarian programming, for example, by the UN Office for the Coordination of Humanitarian Affairs. Yet, while preserving this function remains key – and acknowledging that it is unrealistic to expect UN investigations supported by OHCHR to perform complex, full-fledged criminal investigations – we believe that a lot more can and should be done to support accountability. Data from our interviews indicate strongly that UN investigations can perform important functions in support of international justice, including in its judicial form.

For example, UN mandates are optimally placed to assist the coordination of documentation efforts with a view to minimising duplication and helping civil society groups navigate the complex international justice landscape. The case of Myanmar, where the activities of the International Criminal Court, the UN Fact-Finding Mission, the IIMM, the International Court of Justice, and many civil society groups have intersected, might be the most illustrative example of the potential role that UN mandates can play in this sense. This would be a natural fit for UN mandates operating in situations with a multiplicity of justice

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53 Interview with Pari Ibrahim, Free Yezidi Foundation.

54 Interview with EPO Respondent.

55 Interview with EPO Respondent.

56 Interview with Kyaw Win.

57 Interview with EPO Respondent.

actors, as also demonstrated by the coordinating role being performed by the Syria IIM pursuant to its general Protocol of Cooperation between the International, Independent and Impartial Mechanism and Syrian Civil Society Organisations participating in the Lausanne Platform.<sup>58</sup>

UN investigative mandates can also play a crucial role in supporting the development and sharing of documentation best practices to the civil society. Indeed, based on our data, civil society organisations appear universally keen for the investigative mechanisms, in particular, to be more than a depository of information. They want them to proactively pursue the support of cases and engage with authorities to use their evidence and provide investigative guidance where appropriate. In addition, our data reveals a certain appetite for all mandates to proactively support justice authorities by providing contextual analyses with regard to broader political and case circumstances; assisting with gathering both crime-base and linkage evidence; helping to collect, verify, and collate information; and closing evidential/information gaps. In Sections III and IV of this paper, we scrutinise more closely challenges and opportunities in these areas and set out what we consider the ideal blueprint to achieve these objectives.

At the same time, the challenges faced by UN investigations are far-ranging. Examples include differing standards of operation between evidence-providing organisations on the ground; differing political and legal expectations, capacities, and legal requirements; and inconsistencies in data management and analysis processes even between UN bodies.

Another theme emerging from our data is the important role UN investigative mandates can play in conducting open-source investigations and leveraging other forms of digital and documentary technologies to support the work of those on the ground, although, as we will discuss in Sections III and IV, verifying material of this nature does require cutting-edge technology and specific expertise with which mandates should be equipped. Indeed, a recurrent refrain from those interviewed for this study concerned the modernisation of UN investigations supported by OHCHR such that they are truly able to handle the challenges and opportunities offered by the digital revolution. The predominant issues identified with regard to providing evidence to mandates centre around witness security and the security of transmitting material. Focus must be given to overcoming these concerns.

The view was also expressed that UN investigations could provide straight-forward training in best practices to ensure that the probative value of the evidence collected is maximised (with respect, *inter alia*, to witness identification; consent to be interviewed; consent to share data with judicial authorities; metadata storage), and with respect to coordination and joint strategies for case prioritisation, material and expert support being provided where possible and necessary. Perhaps most clearly, many

*UN mandates are optimally placed to assist the coordination of documentation efforts with a view to minimising duplication and helping civil society groups navigate the complex international justice landscape. They can also play a crucial role in supporting the development and sharing of documentation best practices to the civil society. Indeed, based on our data, civil society organisations appear universally keen for the investigative mechanisms, in particular, to be more than a depository of information. They want them to proactively pursue the support of cases and engage with authorities to use their evidence and provide investigative guidance where appropriate.*

<sup>58</sup> IIM, *Protocol of Cooperation between the International, Independent and Impartial Mechanism and Syrian Civil Society Organisations participating in the Lausanne Platform*.

organisations emphasised the role UN mandates could play in building capacity on the ground through training, constructive feedback, logistical support, and funding. Respondents to our study suggested that focusing on legal capacity building would promote post-conflict resolution and rule of law while allowing local justice sectors to handle legal processes as and when circumstances permit. However, in our view, it remains an open question whether this particular form of training can and should be provided by UN investigative mandates directly, given the considerable resources it would require, as well as the implications for the relationship with and safety of those in receipt of such training. Alternative organisations providing suitable training and material include, for example, the Institute for International Criminal Investigations, Justice Rapid Response, the International Bar Association, and the International Commission of Jurists, among many others. Yet, finding ways for UN investigative mandates to better and more consistently cooperate with these organisations remains key to the overall performance of accountability actors.

In addition, respondents to our study highlighted that UN mandated investigations, with OHCHR support, could play a greater role in fostering exchanges among justice authorities (including various forms of UN investigations, and international and domestic prosecution authorities), including by creating opportunities for the sharing of best practices and by utilising secondments and field visits to institutions that collect, analyse, process, and present the evidence in courts. Such exchanges would strengthen not only collaborative relationships among justice authorities themselves (and the qualifications of their staff) but also improve relationships with the civil society organisations on which they rely.

In addition, our data analysis reveals that many of these functions would significantly benefit of some form of centralisation under a standing investigative support structure that could act as a service provider to accountability mandates (and all UN investigations as relevant), by assisting mandates in their deployment and start-up phase (including by achieving efficiencies in recruitment, standardising best practices and drafting budgets and pre-deployment guidance); playing a coordinating role and providing strategic advice to maximise mandates' interface with other justice actors (and the most effective use of the information they gather); providing the technical infrastructure and state of the art technology to better support the verification, analysis and preservation of the information mandates collect; acting as a repository of institutional memory (including maintaining archives once mandates cease to operate); and generally 'anchoring' and supporting mandates so that they are best positioned to fulfil the important contributions to accountability with which they are now tasked – all while maximising efficiencies in the future.

It is our view that, with due resources and support by States, all of the above-mentioned contributions to accountability (as well as more, detailed in following sections) could be delivered without compromising the core human rights function that many UN mandated investigations continue to perform. We see all of these contributions as compatible with *both* human rights reporting and documentation as well as with international justice. Having set out our vision for the role that UN investigations could play at the juncture between human rights and international justice, we turn to discussing in more detail *how* such vision can be achieved.

*In addition, respondents to our study highlighted that UN mandated investigations, with OHCHR support, could play a greater role in fostering exchanges among justice authorities, including by creating opportunities for the sharing of best practices and by utilising secondments and field visits to institutions that collect, analyse, process, and present the evidence in courts. Such exchanges would strengthen not only collaborative relationships among justice authorities themselves, but also improve relationships with the UN mandates and civil society organisations on which they rely.*

## Part F: Our Case for Permanent Investigative Support

This paper presents two potential permanent institutional designs to provide support, centralise resources, foster collaboration, ensure consistency, and maximise outputs across UN mandated investigations while also achieving efficiency of resources. As discussed, there is a great unrealised potential for these investigations to provide both human rights documentation and evidence for criminal justice processes. With greater capacity, independence, information governance capacity, and highly competent personnel, investigations can achieve this dual purpose.

However, the lack of permanence and centralisation of proper institutional channels serves as an impediment to more consistent and dependable success in UN accountability mandates. Outside of the three independent investigative mandates for Syria, Da'esh/ISIL, and Myanmar, most accountability mandates will continue to be conferred by the UN Human Rights Council. OHCHR is currently charged with orchestrating and staffing such investigations. Despite many challenges, the Office of the High Commissioner has tried its best to raise to the new realities of the accountability turn. This is without a doubt commendable. However, as we will further discuss, supporting responsibility for accountability mandates are currently split across sections within OHCHR, which also remains profoundly under-resourced and often hamstrung by UN budgetary cycles and procedures. On the other end, the investigative mechanisms' independence, access to extrabudgetary contributions, and investment in state-of-the-art infrastructure and expertise have demonstrated that more can be done within the UN to support accountability.

Current shortcomings, we believe, can be solved through a permanent centralised institution that coordinates the existing infrastructure, seizes on the significant investment and progress already achieved and – by achieving an economy of scale, particularly around the provision of tech services and other standing infrastructural support – can avoid a future crisis of otherwise ballooning demands against increasingly scares resources.

A permanent institution could also serve the interest of multiple justice actors beyond the UN, by meeting the increasing demands of civil society groups, assisting UN mandates interfacing with justice authorities, and providing strategic advice to these various constituencies to identify pathways to justice and maximise the impact of the evidence they collect in support of affective accountability.

A permanent centralised institution would also have the effect of providing dependability with what a UN investigation entails and what can be expected at its conclusion. This is critical to persuading governments of the value of undertaking and funding such investigations and to ensure that such mandates are shielded from the politicisation and selectivity that can otherwise be detrimental to their proper functioning and impact. This paper presents two options for such a permanent institution:

**Option 1. Establish an Investigative Support Mechanism (ISM)**, independent of OHCHR in the same manner as the three investigative mechanisms. The ISM would act both as a **service provider to other mandates** concerned with accountability – including Commissions of Inquiry and Fact-Finding Missions when these are conferred by the Human Rights Council – and, **when triggered by a competent UN body, as an investigative mechanism of its own**, under provisions like those contained in the establishing resolutions and Terms of Reference of the investigative mechanisms for Syria, Myanmar, and Da'esh/ISIL. In addition, when given a case-building mandate the ISM would also fulfil a **coordinating role and provide strategic advice** wherever multiple actors are pursuing investigations on the same situation, thus maximising the potential for making effective use of gathered materials. Like the mechanisms, it would be headed by an individual recruited at the Assistant-Secretary General level with prior experience

in judicial accountability processes. While the ISM could provide services as to multiple situations, at the request of competent mandates including human rights investigations established by the Human Rights Council, it would be strictly limited to carrying out case-building investigations for those situations to which it is mandated by a relevant UN body. Various potential triggers could be considered for such criminal-case building mandates, including by a UN Security Council resolution. Where the UNSC failed to take appropriate measures, the UN General Assembly could do so through resolution offered by State(s) or the High Commissioner for Human Rights, with the latter having first submitted the question of whether a case-building investigation was warranted to a panel of independent experts. For the authorisation of case-building mandates by the UN General Assembly, approval by more than a simple majority vote could be required. The ISM and the existing investigative mechanisms would be encouraged to share best practices and develop arrangements for common services, particularly in maintaining state-of-the-art expertise and capacity in the use of digital tools in investigations and analysis. Once the work of each of the present investigative mechanisms reaches the completion phase, mandating bodies could also bring the remaining work of a mechanism into the ISM, with staffing and budgets adjusted accordingly.

**Option 2: Establish an Investigative Support Division (ISD) within OHCHR.** The ISD would assist in the prompt recruitment and deployment of effective and well-resourced teams as required for each UN mandated investigation. It would serve as a repository of institutional memory and achieve efficiencies by standardising the preparatory processes and the drafting of investigative plans for each Fact-Finding Mission or Commission of Inquiry that is established by the Human Rights Council and would provide direct support towards the fulfilment of mandates' accountability requirements, as well as supporting mandates' case-building functions, wherever such investigative mechanisms are not established as independent from OHCHR. The ISD would also assist each mandated investigation with budget preparation, administration, methodology, staff recruitment and training, identification of experts, collaboration with standing rosters such as Justice Rapid Response, and information storage and analysis. It would manage information for current investigations and the archives of UN investigations that have completed their work, as well as outreach with evidence-providing organisations and liaison with UN bodies and national authorities to make and respond to requests for information and other assistance. To function effectively, the ISD would need to be headed by an individual recruited at the D-1 level with the requirement of prior experience in criminal investigations and prosecutions and other transitional justice processes.

We believe that either course of action would be a viable and realistic way to achieve more efficient and consistent investigations. Whichever institutional model might prevail, our analysis also reveals that – in order to be successful – such standing entity will need to be conferred a number of budgetary, personnel, and structural features which this paper will present in Section V, alongside additional recommendations for States. Sections II-IV of this paper will instead be dedicated to more fully addressing the challenges and opportunities faced by UN accountability mandates at various phases of their operations, with a view to identify bottlenecks in the existing support infrastructure, and especially lessons learned and solutions which, we submit, will enable UN investigations to continue to support – as they should – the international human rights regime while also contributing more organically and effectively to the global fight against impunity.



**SECTION II.** Challenges  
Relating to the Creation of Mandates  
and Start-Up Phase of Operations

**Summary:** The initial phase of a UN mandated investigation can be determinative to its success. The *ad hoc* and urgent origins of UN mandates have, in the past, generated problems with the specifications of the mandate, the investigation's time frame, the stability of financing, and the adequacy of staffing. A permanent centralised institution would provide critical early advising in the establishment of mandates and their investigations. It also could develop standard operating procedures, investigations policies, and operational guidance to investigations once underway.

Supporting UN mandated investigations is a multifaceted process that demands early attention in order to improve their contributions to justice and accountability. Our data reveal that the manner in which UN investigations are created and conferred – i.e. their sources, budgets, and regulatory frameworks – have enormous implications not only on these inquiries' subject-matter competence, but also on their operational realities and thus their ability to deliver their mandates. The mere establishment of a mandate cannot itself ensure functionality or success; without the political will to enable proper access or provide the necessary infrastructure, mandates will be severely hamstrung. An example comes from Yasmin Sooka, Chair of the Commission on Human Rights for South Sudan (CoHRSS), which was mandated by the Human Rights Council in March 2016 to collect and analyse evidence for use in transitional justice processes in South Sudan: one of the biggest limitations in its work stemmed from not being provided with the appropriate digital tools to analyse tens of thousands of pages of documents until over three years after recovery.<sup>59</sup>

Similarly, without the provision of secure, adequate, and consistent funding, mandates will be unable to provide for staffing and resources, which will have ripple effects on their deployment and investigative capacity. An example of the potentially severe and adverse impacts of funding gaps can be seen in the second phase of the 2011-2012 Commission of Inquiry for Libya. First established by the Human Rights Council in February 2011, its mandate was extended in June 2011.<sup>60</sup> However, as a budget was not immediately in place for the second mandate, it was not possible to extend the contracts of existing staff. Arranging funding took several months, requiring recruitment of an entirely new team, most of whom had not worked on Libya before. The team was fully in place only in November 2011 – six months after the mandate had been extended – leaving little time to investigate and analyse the violations of international law being committed ahead of the deadline to file the Commission's report in time for the March 2012 Human Rights Council session.<sup>61</sup>

Thus, as we discuss below, supporting UN mandated investigations primarily requires early and better attention to a range of factors, including the provisions contained in mandates' establishing resolutions (and, where relevant, their terms of reference), the Programme Budget Implications (PBIs), as well as how mandates are institutionally set up. All these elements will determine the conditions under which UN investigations will be able to operate and what they will be able to accomplish.

## Part A: Source of Mandates

When it comes to the sources of mandates, it is important to acknowledge at the outset that *ad hoc* UN investigations are generally set up on an urgent basis in response to unfolding violence. In most cases, they are directed to complete their investigations and report back to the mandating body within a relatively short period of time (ie six to twelve months from establishment). Consequently, the timeframe to set up, deploy to conduct field operations, analyse the collected data, and write and edit a report is

59 Interview with Yasmin Sooka, 15 October 2020.

60 UNHRC, A/HRC/RES/S-15/1; Report of the International Commission of Inquiry on Libya, A/HRC/19/68, paras 1 to 4.

61 Interview with expert SA.

generally extremely limited.<sup>62</sup> For this reason, paying attention to adequate establishing resolutions must be the first step in ensuring mandates' effectiveness.

There are various ways in which establishing resolutions impact mandates. The first is that **establishing resolutions will determine whether mandates are, in fact, invested with making contributions to accountability, and specifically to criminal or judicial accountability.** As mentioned in the previous section, the trends observed in the last decade suggest that accountability requirements in mandates are here to stay, as can be seen in the retention and strengthening of the language in the six successive mandates of the CoHRSS between 2016 and 2021,<sup>63</sup> and in the recent mandates conferred for Belarus, Venezuela, Israel/Palestine, and Ukraine, as well as OHCHR's Sri Lanka accountability project.<sup>64</sup>

The second way in which establishing-resolutions affect mandates' operations is by **setting out the powers with which they are invested, including whether or not they are tasked with impartiality (ie investigating violations by all sides, or some sides only), and what levels of autonomy, independence, and impartiality they might enjoy,** including whether or not they must rely on the consent and cooperation of the interested State. As foreshadowed above, the differences can be keenly seen by comparing the mandates of the IIIM and UNITAD. The mandate of the IIIM, established by the UNGA, is 'to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011'.<sup>65</sup> UNITAD's UNSC-established mandate, on the other hand, is solely directed to support 'domestic efforts to hold ISIL/Da'esh accountable by collecting, preserving and storing evidence in Iraq of acts that might amount to war crimes, crimes against humanity and genocide committed in Iraq'.<sup>66</sup> Whereas the Syrian Government refuses to acknowledge the work of the IIIM and does not permit investigators access to its territory,

*UN investigations are generally set up on an urgent basis in response to unfolding violence. In most cases, they are directed to complete their investigations and report back within 12 months. Adequate language in establishing resolutions is crucial with respect to mandates' subject matter competence; their independence and impartiality; the resources and expertise they will be provided; and the forms of assistance they can seek from other UN entities, States, and other justice actors.*

62 OHCHR, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law- Guidance and Practice*, p. 30.

63 UNHRC, A/HRC/RES/31/20, adopted 23 March 2016, OP18: 'Decides to establish a Commission on Human Rights in South Sudan [...] with the following mandate: (d) To engage with other international and regional mechanisms, including the United Nations, the United Nations Mission in South Sudan, the African Union and its African Commission on Human and People's Rights, the Joint Monitoring and Evaluation Commission Chair and civil society, with a view to providing support to national, regional and international efforts to promote accountability for human rights violations and abuses;'

A/HRC/RES/34/25, adopted 24 March 2017, OP16 and A/HRC/RES/37/31, adopted 23 March 2018, OP16: 'Decides to extend the mandate of the Commission on Human Rights in South Sudan [...] with the following mandate: (b) To determine and report the facts and circumstances of, collect and preserve evidence of, and to clarify responsibility for alleged gross violations and abuses of human rights and related crimes, including sexual and gender-based violence and ethnic violence, with a view to ending impunity and improving accountability, and to make such information available also to all transitional justice mechanisms [...];'

A/HRC/RES/40/19, adopted 22 March 2019, OP16, A/HRC/RES/43/27, adopted 22 June 2020, OP21, and A/HRC/RES/46/23, adopted 24 March 2021, OP25: 'Decides to extend the mandate of the Commission on Human Rights in South Sudan [...] with the following mandate: (b) To determine and report the facts and circumstances of, collect and preserve evidence of, and to clarify responsibility for alleged gross violations and abuses of human rights and related crimes, including sexual and gender-based violence and ethnic violence, with a view to ending impunity and improving accountability, and to make such information available also to all transitional justice mechanisms [...]; (e) To engage with the Government of South Sudan, international and regional mechanisms, including the United Nations, the United Nations Mission in South Sudan and the African Union [...] with a view to promoting accountability for human rights violations and abuses committed by all parties;'

64 Belarus, A/HRC/RES/46/20, OP13; Venezuela, A/HRC/RES/42/25, OP24; Israel/Palestine, A/HRC/RES/S-30/1, OP2; Ukraine, A/HRC/RES/49/1, OP11; Sri Lanka, A/HRC/RES/46/1, OP6.

65 IIIM, A/RES/71/248.

66 UNITAD, S/RES/2379.

UNITAD was established at the request of the Government of Iraq, which called upon the international community to assist in ensuring that ISIL members are held accountable for their crimes within its borders.<sup>67</sup> Consequently, UNITAD's offices are based primarily in Iraq, and they undertake to conduct their work 'in a manner complementing investigations carried out by the national authorities, and in full respect for national sovereignty'. Still, the Iraqi authorities cannot intervene in the substance of UNITAD's investigations, and information-sharing remains limited – both because Iraq does not yet have laws upon which to found prosecutions for core international crimes and because UNITAD, like all UN entities, cannot support judicial processes that may result in the death penalty.

Third, establishing resolutions will often also **set out how mandates should cooperate with other justice actors, including the International Criminal Court, civil society groups, and domestic authorities**. Commissions of Inquiry and Fact-Finding Missions often hold public reporting mandates and may have political imperatives to identify perpetrators. The central purpose of mandates of this nature may be to ascertain and publicise an impartial and independent narrative relating to a given situation, with clear value to advocacy and humanitarian programming. This has obvious ramifications for the ability and willingness of criminal accountability actors to interact with UN mandate holders of this nature: legal and practical confidentiality strictures may mean that evidence-providing organisations, insider witnesses, and prosecuting authorities are hesitant or unable to provide information to mandates with public reporting imperatives (though mitigating measures relating to collection, storage, and reporting might overcome such concerns).

Moreover, the reporting requirements (and deadlines) for Human Rights Council mandated investigations, in particular, may mean they have significantly less time and opportunity to conduct outreach activities than do longer-term mandates, such as the UN investigative mechanisms. In contrast, the pre-prosecutorial nature of the investigative mechanisms – working confidentially to support criminal cases – means there is synergy with other case-building entities and prosecuting authorities. Even with confidentiality requirements, the independent investigative mechanisms are able to make substantial contributions to the rule of law and capacity building that will enable situations to develop sustainable institutions. For example, UNITAD is mandated to support domestic prosecutions, with Iraq as the primary jurisdiction. While legal impediments to the prosecution of international crimes in Iraq remain, UNITAD is providing material support to the Iraqi judiciary through the digitisation of judicial records and the provision of training to judges and prosecutors in international criminal law. UNITAD has also established a supportive relationship with the Iraqi authorities, who take the lead in mass grave excavations and identification of remains.

*The longer time frame of the independent investigative mandates means, inter alia, that even with the confidentiality requirements of their criminal investigations, they are able to make substantial contributions to the rule of law and capacity building initiatives that will enable situations to develop sustainable institutions.*

Fourth, **the language included in establishing resolutions can 'make or break' mandates' ability to request specific forms of support from the international community, including technically advanced infrastructure and specific tools**. Notably, the IIIM includes in its establishing resolution explicit reference to 'state-of-the-art criminal investigative and prosecutorial software' as requisite to enable it to fulfil its mandate.<sup>68</sup> In another example, the failure to provide the CoHRSS with suitable

67 UNSC, 'Letter dated 14 August 2017 for the Chargé d'affaires a.i. of the Permanent Mission of Iraq to the United Nations addressed to the President of the Security Council', S/2017/710.

68 Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, Report of the Secretary General, A/71/755, para. 15.

technology led the Human Rights Council to include specific language in the CoHRSS' fourth mandate in March 2019 that directs OHCHR to provide 'computer software to support the Commission's evidence collection function'.<sup>69</sup> The inclusion of such language must not be merely aspirational; mandates should be sufficiently precise in identifying the necessary types and standards of information and evidence management systems. It also should be ensured that the resources are provided both for these and for the required information technology staff.

Finally, **establishing resolutions determine the timeframes of mandates' operations**. Clearly, these will be most effective the more swiftly they are deployed, both as a political statement and for the optimal collection of information. Of course, political imperatives might require that a balance be struck between rapid deployment and the strength of the terms of the mandate. At the same time, timeframes also clearly need to be sufficient to enable the mandate to do its work. For instance, proposed resolutions providing for a robust investigation of violations in the civil war in Yemen did not gather the necessary support until language was softened to establish a Group of Eminent Experts (GEE) rather than a Commission of Inquiry. Pursuant to the successful resolution adopted in September 2017, the GEE was to 'monitor and report on the situation of human rights and... establish the facts and circumstances surrounding the alleged violations and abuses and, where possible, to identify those responsible'.<sup>70</sup> This mandate was nonetheless strong enough for the GEE to do a very credible job. However, it would have been better if had been established earlier in the conflict, which began in 2014. Moreover, even with the relatively weaker mandate and despite the continuation of the conflict and of related human rights violations, politics cost the GEE its non-renewal in September 2021 by a close vote in the Human Rights Council.<sup>71</sup>

As is perhaps most explicitly demonstrated by the successive refinement of various UN investigative mandates, including the CoHRSS, the language of establishing documents is essential to setting mandates up for success. Inadequacy of powers, resources, and expertise leads to inefficiencies, undermines efficacy, and fails to serve the victims of atrocities or the goals of the international community. As such, close attention must be paid to such language and how mandates' sources can be leveraged to appropriately empower them.

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## Part B: Funding and Institutional Set-Up

Mandates' sources, including their conferring bodies, will also affect their funding and institutional set-up. Mandates' origins often reflect the level of political and diplomatic commitment to their aims, amidst competing priorities at both the international and national levels. As these priorities shift constantly, mandates are not funded consistently. The UN system foresees two main funding avenues for mandates: the UN's regular budget (RB) and extra-budgetary contributions (XB). Based on how mandates are constituted and set up, they will have access to either or both. Each funding method, however, presents different drawbacks and advantages. Understanding and successfully navigating this landscape is crucial to any discussion on building support and capacity for UN mandated investigations.

69 UN HRC, Resolution adopted by the Human Rights Council on 22 March 2019: Situation of human rights in South Sudan, A/HRC/RES/40/19, 8 April 2019, OP18.

70 UNGA, A/HRC/RES/36/31, OP12(a).

71 UN HRC, Statement by Group of Experts on Yemen on HRC rejection of resolution to renew their mandate, 8 October 2021.

Generally speaking, mandates established by the Human Rights Council and supported by OHCHR will be funded through the UN's regular budget. **Receiving – and preserving – funding from the RB is crucial to ensure mandates' operations, independence, and institutional backing.** As we will further discuss below, however, the requirements and process of RB allocation can make this funding stream both cumbersome to navigate and unable fully to satisfy mandates' operational needs (especially – although not exclusively – in the 'start-up' phase of their operations).

The funding structures for the UN investigative mechanisms also reflect the political support for each entity. The IIMM was established via a General Assembly resolution (as it was unlikely that such a resolution would be passed in the Security Council, where Russia – a party to the Syrian conflict from 2015 onwards and a supporter of the Syrian government – holds veto power). It was initially funded through voluntary contributions from States, a distinctly fragile funding source (as discussed *infra*). As of 2020, however, the IIMM is mainly funded through the UN regular budget.

UNITAD's mandate, which focused on crimes committed by ISIL in Iraq, meant it enjoyed significant political support at its inception. As a result, UNITAD has been funded from the regular budget from the outset. While this meant UNITAD benefitted from a core of consistent funding, most of its staff were recruited on temporary contracts, which allows for a faster recruitment process, albeit one which grants the incoming staff with few entitlements and employment protections.

The IIMM is also funded from the UN regular budget, but, like the IIMM and UNITAD, seeks voluntary contributions 'for discrete projects and highly specialised expertise'.<sup>72</sup>

At the time of writing, all three investigative mechanisms thus benefit from regular budget funding (and significantly larger operational budgets than those afforded to investigations supported by OHCHR). Crucially, the investigative mechanisms may *also* apply for XB funding in the alternative forms of grants or donations, including in the form of State-granted personnel, who are generally not available or suited to OHCHR-supported mandates. It must be acknowledged that the management of XB funding entails additional monitoring, oversight, and reporting responsibilities, as well as supplementary staffing to accommodate the administrative burden. **Access to XB funding is, however, advantageous both because it can provide more flexible funding (which can help increase the size of an entity and diversify its staffing) and because it provides funding for special projects not covered by the regular budget.** Examples of this include: UNITAD's digitisation project and its capacity building training for the Iraqi judiciary, as well as Germany's backing of UNITAD's investigations into ISIL's financial structures and Finland and The Netherlands' donations to support witness protection programmes.<sup>73</sup> XB funding also constitutes a concrete demonstration of donating

*Investigations supported by OHCHR do not have access to extrabudgetary contributions and are generally funded by the UN regular budget, thus subject to UN budgetary cycles that are often at odds with the time frame of mandates' establishment and operation. This means that external recruitment cannot often take place until 6-9 months after a mandate is established, leaving little time for their investigation. Positions funded through the UN regular budget are also dependant on decision-making dynamics at the ACABQ, and vulnerable to broader trends in UN finances, for example being subject to the hiring freeze under the UN 'zero nominal growth' policy.*

72 IIMM, Funding. In this sense, for example, the IIMM has noted the support it has received from Justice Rapid Response since 2019.

73 UNITAD, Germany renews its support to UNITAD with a new €1 million contribution to investigate financing of ISIL crimes, 26 October 2021. UN Press Releases: The Netherlands Commits New Funding to UNITAD in Support of Witness Protection in Iraq, 5 September 2021; Finland Commits New Funding to UNITAD in Support of Witness Protection in Iraq, 17 November 2021.

States' commitment to accountability processes. At the time of writing, for example, the IIM lists 42 State contributors, illustrating the level and diversity of international support for its mandate.<sup>74</sup>

Furthermore, under their mandates and Terms of References, the Heads of the three investigative mechanisms are appointed by the UN Secretary General and report to their respective mandating bodies (IIM to UNGA, UNITAD to UNSC, and IIMM to the HRC). Their **independence from the OHCHR Secretariat affords some latitude to develop their own visions and eventually craft their own budgets and staffing plans**. However, the required approval of the ACABQ, Committee for Programme and Coordination, and the Fifth Committee makes adjusting staffing profiles very difficult. Latitude to develop according to need and on the basis of experience is important because – when it comes to the budgetary needs deriving from their complex and demanding investigations – the investigative mechanisms have been ‘learning on the job’. **Initial budgets (including organisational diagrams and details of functional staff positions** that were initially conceived by OHCHR and approved by the Office of Legal Affairs) **should thus be adjustable based on operational requirements**. Such adaptability is generally not afforded to mandates supported by OHCHR.

*Access to extrabudgetary contributions provides mandate holders with much needed flexibility and independence, that can be advantageous for fast and efficient recruitment, and to enable a range of special projects and functions. However, it is not a sustainable source of funding and risks affecting mandates' perceived isolation from political realities.*

It must be acknowledged, however, that the process of changing organigrams (including abolishing old positions and establishing new ones) is burdensomely bureaucratic and often requires significant advance-approval. For example, the identified changes desired and identified by UNITAD in 2021 would, if they make it through the process, be reflected only in the 2023 budget. However, the **need (and possibility for) a certain degree of flexibility in budgetary streams and designs, alongside the drawbacks presented by RB and XB funding respectively, are important factors supporting the case for a mixed approach to funding** all UN investigations.

## i. Regular v. Extra-Budgetary Funding

While, as mentioned *supra*, receiving funding from the UN regular budget is crucial for mandates' operations, independence, and institutional backing, this can be a lengthy and cumbersome process presenting a number of drawbacks. First and foremost, receiving RB funding requires review and approval of the UN ACABQ, which calls for a justification of every staffing position and each procurement of goods and services. It retains discretion to strike down or refuse to approve. Further, since States represented in the ACABQ process are able to limit or promote funding flows to a particular entity, the process is **susceptible to political intervention**. Even when promptly allocated, UN RB funding is affected by whether a certain issue (or country) is considered a priority at any given time. This carries the risk that ‘low priority’ or unpopular situations may be further denied investments, and that certain biases (including the perceptible bias towards funding ‘newer’ situations, particularly those which dominate headlines) may affect budgetary allocation. Additionally, the **budgetary submission and approval process itself limits the flexible use of funds**, though in practice there can be some flexibility following written justifications.

RB funding is also **affected by the overall health of UN finances**. The recent protracted funding crisis and ‘budgetary freeze’ impacted the entirety of the UN Secretariat, forcing all UN entities receiving RB funding

<sup>74</sup> IIM, Funding.

– including OHCHR – to reconsider priorities and compromise expenditures.<sup>75</sup> The consequent hiring freeze caused a number of problems for those positions that would have to be funded through the UN regular budget. For example, anticipating that many of the recruitment positions in support of human rights investigations would remain unfilled, the ACABQ approved funding for only half of the necessary positions sought.<sup>76</sup>

XB contributions, on the other hand, come from **States’ voluntary donations. Positions funded in such way avoid the pitfalls threatened by UN hiring freezes. This form of funding permits the fast and flexible hiring of staff** and affords the receiving entity a certain level of flexibility in deciding, for example, whether consultants can be hired instead of staff or whether authorising shifts in the seniority level of the staff is required to fulfil the mandate. At the same time, XB contributions do have drawbacks. Because voluntary contributions can be provided by States with conditions or for specific purposes, this **can introduce (real or perceived) susceptibility to political influence** affecting the independence of mandates. Another issue might arise where mandates receive funds from States with a poor human rights record, or which are themselves involved in alleged violations of international law. While there must be trust in the integrity of UN investigations to allow them to do their work, integrity and independence can and should be verified through auditing. At the same time, budgetary design should be sufficiently secure to insulate mandates from having to pander to the political demands of particular States in order to function. There should be built-in flexibility on how expenditures are made. This is necessary to avoid issues such as donor-driven overconcentration on certain facets of investigations.

States providing direct funding (whether *proprio motu* or in response to grant applications) may also require detailed reporting and may expect to be included in processes highlighting various deliverables. Given the significant time and effort required to secure XB contributions, reliance on such financial support would benefit from hiring grants officers to concentrate on procuring funding, managing the spending, and handling reporting.

**Funding through XB contributions, however, does raise issues of sustainability.** The budgetary insecurity caused by over-reliance on XB funding has been emphasised by the COVID pandemic, which has demonstrated the fragility of voluntary contributions as States diverted resources to manage internal crises. The consequences for mandates’ ability to make longer-term staffing decisions are obvious. The confidence in their mandates’ renewal enjoyed by the investigative mechanisms has generally been advantageous when applying for extrabudgetary funds, whereas insecurity over renewal would be a significant obstacle for shorter mandates, such as those supported by OHCHR, even if they had access to XB contributions.

*As we learn from the experience of the three independent investigative mechanisms, a mixed approach to funding is ideal, with necessary funding for core positions committed from the UN general budget, and additional flexibility and discretion being afforded by extrabudgetary funding, thanks to which mandate holders can adjust to new investigative demands and realities as they arise. To avoid the over-influence of donor-driven priorities, the creation of a pool of ‘unearmarked’ funds to be drawn from as needs arise might also be valuable.*

Donations in the form of personnel – essentially payment for staff with requested expertise – also constitutes a form of XB contribution.<sup>77</sup> The provision of experts (for example through the UN-Women JRR

75 UNGA Press Releases, ‘Secretary-General Unveils \$2.99 Billion Budget Proposal to Fifth Committee for 2021, Stressing United Nations Functioning Effectively amid COVID-19 Pandemic’, GA/AB/4357, and ‘Concerned that United Nations Cash Flow Problems Are Hampering Programme Delivery, Delegates in Fifth Committee Criticize Non-Payment of Dues by One Member State’, GA/AB/4358.

76 Interview with expert.

77 UNSC, Sixth report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/Islamic State in Iraq and the Levant, S/2021/419, 3 May 2021, paras 44 and 45.

partnership), Government-Provided Personnel (GPPs), or Non-Reimbursable Personnel Loans (NRPL) are all examples of this. As States grapple with domestic budgetary crises in today's economic landscape, they may be more willing to donate expertise. UNITAD, for example, is increasingly reliant on GPPs, as it makes requests for specific types of expertise and selects individuals nominated by various States. However, such forms of State personnel loan or direct roster hires are not available to human rights investigations supported by OHCHR.<sup>78</sup> Thus, their success and availability (particularly with the investigative mechanisms) cannot be considered substitutive of RB funding.

The insecurity of reliance on XB funding has given rise to a significant push within the UN to have even the three investigative mechanisms funded through the regular budget, although public records confirm that these mechanisms do continue to receive XB funding.<sup>79</sup> The mixed funding approach enabled UNITAD, for example, to shore up staffing shortfalls when subject to the general UN hiring freeze.<sup>80</sup>

Faced with both an environment in which both accurate predictions concerning longer-term funding circumstances or the next crisis are hard to make and the sudden conferral of mandates with timeframes that are often too tight and out of sync with UN budgetary cycles, OHCHR has also had to think creatively about how to staff HRC-mandated human rights investigations. This has included seeking emergency funds (sometimes only for these to be cut by the ACABQ), as well as temporarily assigning personnel in order to get mandates promptly off the ground.

In short, where sufficient funding exclusively through the UN regular budget seems increasingly difficult to obtain, particularly in light of the UN's *de facto* operation under a global zero nominal growth budget, the international community must consider how to ensure stable and flexible funding for all investigative mandates, including human rights investigations supported by OHCHR. We argue that this could be achieved by adopting a **mixed approach to funding: specific RB commitments from the UN general budget to support the core staffing table and the needs to implement each mandate, as well as the simultaneous provision of flexible XB contributions – complementing, not substituting RB funding – to meet any additional needs as they arise.**

To avoid the over-influence of donor-driven priorities, the **creation of a pool of 'unearmarked' funds specifically and solely for HRC-mandated investigations as needs arise – to be drawn from and administered by dedicated standing Section or Division within OHCHR - might also be valuable.** This could address emergency shortfalls and avoid (expensive) inefficiencies, such as those suffered by the 2011-2012 Commission of Inquiry for Libya. It would also allow OHCHR to address imbalances in financial support for different mandates where necessary. Notably, OHCHR already developed blueprints for the staffing profiles for its mandates, enabling the possibility of deployment at a short notice. Clarity as to the required budget for a core team of investigators, information analysts, legal officers, security personnel, and administrative staff, in addition to infrastructure, likely assists the mandating body in ensuring adequate resourcing and enabling swift budgetary approval. At the same time, due to the differing political and operational realities intrinsic to all UN investigations, consideration also needs to be given to whether and how these can receive flexible forms of funding, including how to expand OHCHR's expedited access to a discretionary pool of XB funds.

To conclude, while the increase in the number of UN mandated investigations may be seen as a heartening reflection of a re-energised commitment to the UN's core functions, the number of situations in which such investigative mandates could be deployed will always outstrip the already strained resources of the

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78 For example, the acceptance of personnel loans or donations would require OHCHR to issue a *note verbale* to all UN Member States, await candidacies, and then justify its decision with respect to each. This is a lengthy and time-consuming process, defeating the aim of fast hiring.

79 See, for example, IJMM, Funding, at the time of writing, this stood at 42 State Contributors, and IJMM, Funding.

80 UNSC, Sixth report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant, S/2021/419, 3 May 2021, para. 42: 'The Team now benefits from a total of 216 personnel, including 176 staff members.'

organisation. This widening gulf between ‘demand’ and the UN’s ability to ‘supply; (and to do so effectively and rapidly) further emphasises the need for all UN investigative mandates, including those supported by OHCHR, to be afforded access to more and better – meaning mixed and flexible – forms of funding.

## ii. Institutional Set-Up

In addition to addressing challenges relating to the funding structures for various mandates, another consideration is mandates’ institutional set-up. As noted, *ad hoc* mandates conferred by the Human Rights Council are regularly supported by OHCHR. OHCHR states that, since 1992, it has provided support to and deployed close to 50 commissions and missions.<sup>81</sup> OHCHR support to investigative bodies and mandates involves different work units in line with their respective functions and expertise.

The Rule of Law and Democracy Section provides advice on the international legal framework for investigative mandates and serves as a resource on matters of law, including human rights law, humanitarian law and – increasingly – international criminal law, in order to support consistent application of legal approaches and norms. The Section also provides expertise and advises on accountability models and structures. The Women’s Human Rights and Gender Section provides guidance and support on gender integration in investigations and on investigating sexual violence and applying a victim-centred approach. It facilitates the deployment of gender specialists to COIs/FFMs, and provides training and capacity building. It develops guidance for COIs/FFM, both as publications and internal guidance notes.

*The independence afforded to the investigative mechanisms for Syria, Myanmar and ISIL/Daesh has been advantageous to their operation, for it has enabled its respective leadership to centralise and optimise a range of functions crucial to their work. Mandates conferred by the Human Rights Council are instead supported by OHCHR, with supporting responsibilities distributed across multiple work units based on their function and expertise.*

The Methodology Education and Training Section (METS) develops methodological standards, policy and guidance for human rights investigations, for use both by OHCHR and COIs/FFMs. Some of the guidance is published in the form of publications, other is internal and accessible to staff. METS also conducts training and provides advice on the implementation of these standards. The Section is responsible for documenting and disseminating good practices and lessons learned to support the effectiveness of COIs/FFMs and OHCHR work and consolidate institutional knowledge. As stated by OHCHR, it keeps under review new issues emerging from mandates and practice with a view to updating guidance and tools. METS also identifies, tests and deploys new technologies and tools to support investigations, for example in accessing and analysing open sources. Other parts of OHCHR also support COI/FFMs, including the Senior Legal Policy Advisor.

In addition, OHCHR’s Emergency Response Section (ERS) now includes an Investigative Support Unit (ISU), which manages what it describes as an ‘internal roster of experienced staff ready to deploy on short notice and provide logistical and security support staff who can rapidly deploy in human rights and humanitarian emergencies, providing surge capacity to UN Human Rights field offices.’<sup>82</sup> Working-level staff who are working or who have worked in COIs and FFMs have emphasised the need to ensure the rosters contain staff with expertise in international criminal law investigation and analytical skills and who have experience in operational setting, including conflict settings, which make them particularly

81 OHCHR, *OHCHR in the World: making human rights a reality on the ground*, 2021.

82 OHCHR, *OHCHR in the World: making human rights a reality on the ground*, 2021.

suitable for short-term deployments into HRC-mandated investigative bodies. The ERS also manages OHCHR's Contingency Fund, and reports that in 2020 was used to deploy staff to Angola (re: Kasai, DRC), Bangladesh (re: Myanmar), Qatar, Guatemala, Honduras, Mauritania, and (remotely) Venezuela.<sup>83</sup> OHCHR's Methodology Education and Training Section (METS) develops policy, methodological tools, manuals, guidelines, training materials, and other resources in key areas of human rights work and applicable international law, and also provides training.<sup>84</sup>

However, **setting up each investigative mandate anew remains a time-consuming and expensive endeavour**. Recruitment, procurement and establishment of administrative and logistical frameworks all consume valuable resources. The **administrative and logistical benefits of a standing body consolidating the necessary corporate architecture and growing institutional expertise** underpinned the rationale for the former Group of Experts' Recommendation 1 on the establishment of an investigations Support Team within OHCHR.<sup>85</sup> The existence of METS and the establishment of an ISU, among other part of OHCHR supporting COIs/FFMs, allow for impactful developments in supporting UN human rights investigations. Despite such progress, however, our data show that certain challenges persist – beyond funding – in mandates' operations and institutional set up. Some of these challenges, discussed in detail the next sub-section, concern most directly mandates' resources and staffing.

## Part C: Staff Recruitment and Training

It is crucial that all investigative mandates required to make contributions to accountability are staffed with the right substantive expertise and operational experience. Alongside the retention of international human rights law expertise for relevant mandates (such as those mandated by the HRC and supported by OHCHR), this particularly demands personnel with practical knowledge in international criminal law and international criminal investigations; in interviewing and handling vulnerable witnesses and victims in line with criminal justice standards (including necessary expertise in SGBV and crime against children); in forensics and analysis; and in proper technological support and technical expertise to enable the secure and organised collection and storage of all forms of evidence. Because the **optimal staffing profiles of investigative mandates will be directed by the specifics of the situations with which they are concerned, these require consideration and a degree of flexibility to ensure staffing profiles can be tailored to and evolve in accordance with investigation needs**. As articulated by Beth Van Schaack (in respect of UNITAD but certainly more widely applicable):

Much of the Team's efficacy will thus depend on who ends up staffing it, with many urging the appointment of individuals with solid experience investigating and prosecuting international criminal law violations, (as opposed to career diplomats or human rights advocates) who also possess the diplomatic acumen to navigate the region's roiling political waters and the sensitivity to work with the most vulnerable of victims.<sup>86</sup>

When it came to the current realities of staff recruitment, however, the majority of respondents to our anonymised survey 'somewhat disagreed' (40.43%) or 'strongly disagreed' (28.72%) that the current recruitment process for staff of UN mandates was efficient. Over 77% of respondents disagreed with the statement that all core staff, notably in the investigative and analytical teams, were recruited within two months of the entity being established (with 53.76% 'strongly disagreeing'). Respondents' comments indicated that this was largely due to structural issues, including the fact that the budget often takes

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83 OHCHR, *OHCHR in the World: making human rights a reality on the ground*, 2021.

84 OHCHR, *Manual on Human Rights Monitoring*, 2011.

85 Group of Practitioners in Fact-Finding and Accountability, *Practitioners in Human Rights Fact-Finding and International Criminal Prosecutions Propose Practical Steps to Bridge The Hague – Geneva Divide*, 6 January 2017. Also see supra, para 3, ft. 10, Background.

86 B. Van Schaack, (2018), 'The Iraq Investigative Team and Prospects for Justice for the Yazidi Genocide', *Journal of International Criminal Justice* 16 (2018) 113-139, p. 117.

longer to be approved, delaying the necessary dispersal of funds that would allow for recruitment of staff. In the case of one COI or FFM, a respondent noted that as recruitment was initiated only once the budget was approved, 'some team members joined the team six to seven months from the start of the mandate, leaving at best two months for the effective work'. Respondents also pointed to late recruitment caused by delays in the release of staff from their previous employment, administrative delays to secondments, visa delays, and the unavailability of selected staff who found other posts due to the length of time that the recruitment process took. Several noted sharply that COIs and FFMs particularly suffered from gaps in funding where recruitment needed to be revisited with each cycle of the mandate period.

**In addition to, and despite, indications of unduly protracted recruitment processes, just 11.70% of respondents agreed that the recruitment yielded staff with the requisite expertise and skills.**

However, there was a more positive assessment from those working for the three investigative mechanisms: 48.94% of these respondents agreed that recruitment yielded staff with the requisite expertise and skills. Respondents who had worked or are working in COIs and FFMs, in particular indicated there were significant differences in expertise, knowledge, and skills between investigators who were supposed to carry out the same work. Two staff members speaking about their work on separate OHCHR-supported investigative bodies in 2020 and 2021, also stated that they believed significant pressure exists to recruit Geneva-based OHCHR staff into OHCHR-supported investigations, even where they lacked the expertise needed for that particular mandate.

Such challenges are the direct result of these entities' set-up. **Often, as noted, there is a gap between the time in which a mandate is established and the availability of the funds to recruit staff to get it off the ground. This is due to a misalignment between UN budgetary cycles (which affect all positions funded through the UN regular budget) and the establishment of mandates** by the HRC. **Even once funds are in place, a further elapse of time often passes to allow for UN recruitment processes, particularly where the decision is made to recruit fixed term staff, to swing into effect.** This means, as we mentioned above, that externally recruited positions often cannot be in place until six to nine months after a mandate's establishment. Under such circumstances, the 'loaning' (or, more appropriately, 'temporary assignment') of OHCHR staff to human rights investigations, and the provision of personnel by UN Women through its partnership with JRR or by States in the form of GPPS or NPRLs, are currently the only way to allow them to function and get off the ground. Recruiting under temporary contracts, which are less attractive to applicants due to the lower level of entitlements and greater lack of job security, may also allow for faster recruitments.

*It is crucial that all investigative mandates required to make contributions to accountability are staffed with the right substantive expertise and operational experience. When it came to the current realities of staff recruitment, the majority of respondents to our anonymised survey 'somewhat disagreed' (40.43%) or 'strongly disagreed' (28.72%) that the current recruitment process for staff of UN mandates was efficient. In addition to, and despite, indications of unduly protracted recruitment processes, just 11.70% of respondents agreed that the recruitment yielded staff with the requisite expertise and skills. Respondents' comments indicated that this was largely due to structural issues, including the fact that the budget often takes longer to be approved, delaying the necessary dispersal of funds that would allow for recruitment of staff. Inefficiencies in early recruitment, however, carries knock-on challenges even for later phases of mandates' operation.*

Besides the example provided concerning the recruitment of staff to the second phase of the 2011 Libya FFM, there are additional indications that quick recruitment of experienced staff remains a challenge. In the case of the Venezuela Fact-Finding Mission, following their renewal for two years in September 2020 and with a report having to be delivered internally by the end of July 2021, recruiting new staff (beyond the four team members who stayed on from the first mandate) did not occur until May 2021 when one additional team member was recruited. Further team members were recruited between July and September 2021, with the consequence that for the first year of the renewed mandate, the Venezuela FFM was without dedicated investigators.

Further, external recruitment often does not yield the requisite expertise because advertised positions are not sufficiently attractive (either due to the length of contracts [which are tied to mandates' limited timeframes], the degree of seniority, or the duty stations' placements).<sup>87</sup> On the contrary, such 'temporary assignments' can more attractive to OHCHR staff as they might provide for the opportunity to get experience at a higher grade level in the UN system or to make a lateral move to a position of the same grade. The combination of these factors explains what one respondent identified as 'pressure to recruit Geneva-based [OHCHR] staff', and another interviewee described as 'clientelism', in the preferential placement of Geneva-based OHCHR into OHCHR-supported investigative bodies.

A related challenge strongly documented in our respondents' survey is, however, that Geneva-based OHCHR staff may not always possess the requisite investigative, analytical, or legal expertise that is necessary for judicial accountability purposes, especially of the criminal nature. This was echoed in three later interviews of those working in OHCHR-supported investigative bodies, the functioning of which post-dated the survey. Respondents indicated that these differences could perhaps be addressed through training, with OHCHR stating that the training it provides in skills relevant to investigations is varied, and delivered through multiple avenues, including: training programmes in issues such as interviewing, open-source investigation, protection of sources, sexual violence investigation, informed consent, analysis, reporting, information management tools. These programmes are addressed to staff, including within COIs/FFMs, either as part of periodic trainings or to respond to specific needs. OHCHR has also stated that it delivers tailored start-up workshops for each COI/FFM that is established (or renewed, in case of staff changes) to refresh/harmonise skills and methodologies, in addition to supporting initial investigation planning.

*To fill gaps while budgets are approved through UN cycles, and to enable mandates to begin their work, OHCHR often places Secretariat staff on temporary assignment to mandates during their 'start-up' phase. Even once external recruitment becomes possible, the short time frame of mandates often renders position unattractive to highly competent external candidates.*

**60.87% of our respondents, however, disagreed that training relevant to judicial accountability purposes is currently being provided**, with one respondent stating that learning new skills occurred at the initiative of the individual, outside of working hours. Those who indicated that some training was in fact provided stated that the training was too generic. As there had been no assessment of the team's skill and knowledge gaps, the training had not been designed to specifically fit them. One interviewee indicated that the training, received in 2020, did not cover investigations based on the international criminal law framework. Another respondent noted that the induction training they received was good but delayed recruitment meant staff were still arriving months into the mandate, resulting in many staff not receiving that training. In addition, 65.96% 'somewhat disagreed' or 'strongly disagreed' that the mandate they worked for provided mentoring to support transfer and development of skills or knowledge in team members.

<sup>87</sup> Follow up interview with survey respondent.

At the same time, OHCHR has acknowledged that entirely building new competencies of staff recruited to implement specific mandates within tight timelines is both inefficient and of limited impact, highlighting the importance of recruiting staff with the required profile and competencies. OHCHR also acknowledged that the staggered recruitment raised by some of the respondents is a consistent challenge to the training timeliness and comprehensiveness. Regardless of efforts, it appears indeed that training is significantly under-resourced vis-à-vis current needs and could be scaled up, strengthened and expanded with greater capacity.

Furthermore, OHCHR has a roster of internal staff who can be deployed to emergency missions, but this is not used for COIs/FFMs. Based on our consultations, there also appears to be some disagreement concerning what skills are, in fact, necessary and desirable. **A recommended approach would be to develop standing rosters or to use existing standing rosters, like Justice Rapid Response, for investigators, information analysts, and legal officers, at various grade levels. These would be positions to which both internal and external candidates could apply. This would require those involved in the recruitment to have experience working in an accountability-driven entity or, at a minimum, a strong grasp of international criminal law and international humanitarian law, in addition to OHCHR's forte, international human rights law.**

*Standing rosters to be used for fast-deployment with COIs/FFMs would go a long way in bridging some of these challenges. The building and maintenance of rosters is however a labour-intensive endeavour that would require dedicated capacity, the involvement of individuals experienced in judicial accountability efforts, and a relaxation of UN hiring procedures and requirements.*

When the Group of Practitioners on Fact-Finding and Accountability proposed the establishment of an investigations Support Team, it was envisioned that such entity would include a dedicated team of officers experienced with UN recruitment procedures and with the technical requirements of the position being recruited. They would conduct formal recruitment processes and build standing rosters of individuals with the anticipated skills and experience necessary to enable immediate employment upon budget approval. This is a very labour-intensive process, particularly without the relaxation of the current rule requiring that UN rosters be refreshed annually. It also requires that those charged with recruiting the roster must possess strong knowledge about the type and level of expertise required in international criminal law investigations and analysis. Furthermore, the maintenance of such rosters would require periodic 'workforce assessments', to identify gaps in requisite skills and expertise among rostered individuals, as well as the periodic confirmation that rostered staff remains, in fact, willing and able to deploy on short notice if the need arise. It must also be recognised that such standing rostering exercises will always be somewhat approximated, in that it is impossible to predict with precision which skills (including, for example, linguistic skills) might become necessary at any given time. An alternative would be to use the Justice Rapid Response experts roster, or something akin thereto. This would require the establishment of an operational framework agreement between JRR and OHCHR to ensure inter-operability between JRR's roster and UN rosters and to facilitate deployments to OHCHR. Doing so would avoid duplication and maximise the use of an already well-established standing roster, which is available immediately. These solutions – even if imperfect – would go a long way to ensure that the most appropriately skilled people are available at short notice to support mandates at the outset.

## Part D: Standard Operating Procedures, Pre-Deployment Guidance

**Our data also indicate a need to refine further and develop deployment-ready standard operating procedures (SOPs), investigations policies, and operational guidance (particularly in regard to HRC mandated investigations).** The development and refinement of such tools would significantly benefit existing and future mandates, notably in terms of both operational and financial efficiency. **At the same time, while it is important that standards are established, articulated, and followed, some level of flexibility remains necessary to adjust to each investigation's specific circumstances and contextual requirements.**

In 2015 and 2018 respectively, OHCHR's METS published some methodological guidance in its *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*,<sup>88</sup> and *Who's Responsible?* with OHCHR clarifying that more detailed guidance is also available in *Guidance Notes, Templates and Examples from COI/FFMs practice*, available to staff /secretariats and included in the recently created OHCHR *Repository on monitoring and Investigations*. In addition, in 2021, OHCHR/METS also co-authored the *Berkeley Protocol on Digital Open Source Investigation*<sup>89</sup> and OHCHR has stated that in the same year it carried out a study on mandates to 'collect, analyse and preserve evidence', which led to the identification of guidance gaps, as well as good practices. The study involved consultations with and review of the experience of UN quasi-prosecutorial bodies. Guidance on issues related to collection and preservation of evidence mandates, including, for example, informed consent and digital information, is being developed. According to OHCHR, a review of information management tools is also underway.

These are all welcome and necessary contributions to efforts to establish consistent standards for the conduct of investigative mandates. However, the guidance currently appears to be focused on patterns of crime or victim-centred investigations, rather than perpetrator-directed investigations and the collection of evidence for potential forensic purposes, which are both increasingly required of human rights investigations.

*The develop and refinement of deployment-ready standard operating procedures (SOPs), investigations policies, and operational and methodological guidance is key to achieving efficiencies against tight time frames. At the same time, it is important that such tools envision levels of flexibility necessary to adjust to each investigation's specific circumstances and contextual requirements. Methodological guidance, in particular, is key to fulfilling mandates' accountability requirements. OHCHR METS has already embarked in significant efforts to establish consistent standards for the conduct of investigative mandates. Our data reveals however that further refinement might be necessary. The three investigative mechanisms have forged a path by drafting their own SOPs, which could be shared with other UN investigations for guidance. Making such SOPs public would also assist groups and other documentation efforts better understand standards and how to approach these accountability requirements.*

88 METS, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*.

89 OHCHR with the Human Rights Center at the University of California, Berkeley, School of Law, *Berkeley Protocol on Digital Open Source Investigations: A Practical Guide on the Effective Use of Digital Open Source and Information in Investigating Violations of International Criminal, Human Rights and Humanitarian Law*.

**SOPs covering, for example, the effective collection of linkage evidence and issues and conditions regarding informed consent to share sensitive personal data with third parties, including judicial authorities, are necessary for investigations to promote and support criminal accountability efforts.** In this regard, it is important to note that the three investigative mechanisms have forged a path by drafting their own SOPs. At a minimum, it is recommended that these are shared with other UN human rights investigations and OHCHR, in order to provide the necessary perpetrator-accountability investigation guidance. Given investigative mandates' heavy reliance on civil society organisations, **making SOPs public can also assist these groups and other documentation efforts to both understand the standards required by mandates and how they should approach their own investigative activities.** This would enhance efficiencies and streamline processes, in part by ensuring clarity for all parties and enabling civil society groups to submit the information that would be most relevant and beneficial to mandates. For example, UNITAD published a number of its SOPs, covering interviews of witnesses, child victims and witnesses, and SGBV victims and witnesses, as well as vulnerability assessments, remote witness interviews, and the remote provision of psychosocial assistance to witnesses during the COVID-19 pandemic.<sup>90</sup> It is recognised that other entities operate in very different contexts and may be unable to publish SOPs or publicise their activities due to security or other concerns. It is nonetheless recommended that the expertise of all three investigative mechanisms be harnessed for these purposes including, more precisely, the development of detailed protocols concerning the taking of properly informed consent, the gathering of linkage evidence, and the selection and use of digital technologies.

## Section II Key Take-Aways

**It is crucial to recognise that inadequacy of powers, resources, and expertise leads to inefficiencies, undermines efficacy, and fails to serve the victims of atrocities or the proper goals of the international community.** For this reason, more consistency is needed when mandating human rights investigations and tasking them with international justice requirements.

**Support for UN mandated investigations must start early.** This requires paying close attention to the language and terms of resolutions establishing investigative bodies to ensure that they are afforded the necessary conditions to enable them to operate efficiently and to fulfil their mandates. In particular, attention should be paid to language concerning mandates' timeframes and their provided resources, including specialist personnel and state-of-the-art technology and infrastructure.

**Irrespective of the strength of their accountability requirements, all investigations must be provided with appropriate funding.** It is important that political will is accompanied by sufficient resource allocation at the point that investigative mandates are created. This includes improved flexibility in determining staffing profiles such that resources are efficiently deployed and mandates can be properly fulfilled. Given the challenges and limitations presented by the UN regular budget and extra-budgetary contributions respectively, this requires exploring new avenues to ensure sufficient, efficient, and predictable funding, including for mandates supported by OHCHR. This could be achieved by adopting a mixed approach to funding. This entails specific commitments from the UN general budget for core staffing and other needs essential to the implementations of mandates that are complemented by extraordinary funding to meet additional needs and demands as they arise. To avoid the over-influencing of donor-driven priorities, the creation a pool of 'unmarked' funds – to be drawn from and administered by OHCHR for HRC-mandated investigations, as needs arise – might also be valuable. Such approach would, of course, require dedicated personnel capacity such a financial and grants officer.

90 UNITAD and the Human Rights in Trauma Mental Health Program at Stanford University, Trauma-Informed Investigations Field Guide, 2021.

**In addition, it is crucial to ensure that all mandates are appropriately staffed with the necessary expertise.** Most urgently, this demands personnel with practical expertise in international criminal law. This includes the having the knowledge on conducting interviews to criminal justice standards, as well as possessing technological expertise to manage modern forms of evidence, archiving, and analysis. A recommended approach would be to develop standing rosters for investigators, information and evidence officers, and legal officers, at various grade levels, to which both internal and external candidates could apply, with no preference given to internal candidates working in Geneva. This would require a relaxation of the rule requiring that UN rosters be refreshed annually. Furthermore, the maintenance of such rosters would require periodic 'workforce assessments' and periodic confirmation that rostered individuals remains willing and able to deploy on short notice. Such an approach would also require dedicated human-resource personnel. Alternatively, to avoid duplication, the use of Justice Rapid Response expert roster could be considered to maximise the availability of evergreen expertise outside OHCHR on areas such as financial and open-source investigation, technology, criminal investigation and prosecution, and forensic and military analysis. This would require the establishment of a formal operational framework agreement between JRR and OHCHR to ensure inter-operability between the JRR roster and UN rosters and to facilitate deployments to OHCHR.

**It is also important that staff trainings and methodologies be further refined to reflect international justice requirements, as well as the demands of modern tech-driven investigations.** This could be provided via collaborations between OHCHR METS and the three investigative mechanisms.

**A centralised, permanent institution could help achieve the kind of stability and consistency necessary to promote the success of each new mandate.** Such an institution could help from the initiation by aiding in the shaping and establishment of the mandate's language. From there, it would spearhead the process of staffing and securing financing. Its independence from OHCHR would allow it to better customise the parameters of an investigation to suit its situation. A permanent institution could also develop a suite of best practice and guidance documents that would standardise and optimise investigations.





**SECTION III.** Needs Relating to the  
Collection of Information Phase

**Summary:** The past decade saw major advances in information collection practices around atrocities and human rights violations. A greater and more sophisticated array of actors, namely civil society groups, are gathering data on-the-ground. At the same time, there have been developments in information collecting and storage that make data more potentially useful in case-building. Collectively, these trends have heightened the ability of data to be used for both human rights and criminal justice purposes and this is reflected in investigative mandates. However, to satisfy this dual purpose, data collection and analysis must be in accordance with international best practices. A permanent body would go a long way toward achieving uniformity among UN-mandated investigations. It would work synergistically with civil society actors to provide training, codify best practices, and invest in new technologies. A permanent body would also help correct for inequities in collecting data around violations performed against women and children.

UN investigations face diverse challenges as they move into the information collection phase of their work. These include the mandate's capacity to access territory where violations and/or crimes are said to have occurred; its impact on local dynamics; the level of expertise in collecting various forms of evidence (including witness testimony; documentary material, including digital assets; and information on linkage); and general operational capacity. All of these may contribute to difficulties in collecting information with sufficient forensic integrity to be relied on in criminal accountability processes.

These well-recognised challenges exist in the context of a movement to rely more heavily on tech-forward approaches, which can be seen across criminal accountability-driven entities at both national and international levels. This includes the use of artificial intelligence-based programs to search and analyse large data sets, as well as the digitisation of documentary evidence and archives. Digital investigations, including open-source investigations, geo-spatial investigations, and satellite imagery collection and analysis, are also becoming a more significant part of investigation aimed at rendering justice for the commission of core international crimes, violations of international law, and gross human rights abuses.<sup>91</sup>

Technological innovations to the work of UN investigations represent clear opportunities to expand the number of information sources an entity draws upon, while also avoiding the pitfalls of over-reliance on witness testimony, which may introduce weakness into the case-building process. Witness testimony flows from often fallible recollections of highly traumatic events, with recollections changing over time or as a result of multiple interviews. Witnesses are also often less cogent when it comes to understanding the roles and identities of perpetrators, including those higher up the chain of command.

*Mandates lack of access to relevant country situations and the opportunities afforded by the digital revolution are pushing UN investigations towards greater reliance on civil society groups on the ground and on tech-forward approaches which include the digitalisation of information and archives and the increasing use of remote sensing, open source and artificial intelligence tools to support their investigative work. This, in turn, requires an appropriate technological infrastructure and recruitment of staff with the requisite expertise to navigate and optimise such tech-forward approaches, as well as dedicated capacity to liaise and coordinate with the civil society.*

91 Federica D'Alessandra and Kirsty Sutherland, 'The Promise and Challenge of New Actors and New Technologies in International Justice,' *Journal of International Criminal Justice*, 19(1) March 2021, pp. 9-34.

The data collected for this paper indicates that prosecuting authorities held concerns relating to the reliability of material gathered by some UN-mandated bodies in the past but also suggested a growing interest in the role that such bodies stand to play in promoting and supporting accountability processes as they professionalise their approaches to evidence collection and preservation while investing tech-forward approaches, including the recruitment of staff with the requisite expertise.

## Part A: Meeting Needs and Seizing Opportunities

This section examines the common challenges faced by UN mandated investigations and, based on analysis of data collected for this paper, provides guidance on how these entities can collect and preserve information and evidence of probative value to existing and future prosecutions. This includes witness testimony, documentary and digital evidence, and appropriate approaches to the collection of evidence of sexual and gender-based violence, in addition to crimes against or directly affecting children. In doing so, attention is shown to the particular concerns which may arise in an investigative mandate's relationship with evidence providing organisations, which are situated metaphorically 'upstream' in the cycle of information and evidence reaching UN mandates, as well as with prosecuting authorities, positioned 'downstream', meaning into which mandates' investigations and analyses may flow. A permanent investigative body would allow for the development of sustained institutional expertise, including the evolution and enhancement of investigative practices. It would also allow the long-term strengthening of relationships with evidence providing actors, prosecuting authorities, and other critical contributors to and beneficiaries of international accountability efforts.

### i. Collecting Witness Accounts

#### *Relationships with EPOs*

The significance of local documentation efforts – by both domestic and international evidence providing organisations – to the international criminal justice experiment is not new. Many international courts and tribunals, dating at least from the *ad hoc* tribunals of the mid-1990s, have historically relied on the work of local documentation groups, as well as on major international NGOs, which themselves often rely on local organisations. A major INGO interviewed for this study described various roles assumed at the international criminal level, including providing research as evidence, authenticating material, providing background briefings, and connecting judicial authorities to victims and witnesses.

Relationships with CSOs are essential where UN investigative mandates cannot or are not permitted to enter the territory of the State where the violations and/or crimes are said to have occurred or be occurring, which limits the reach of their own field investigations. Raging conflicts, hostility from government authorities and/or armed groups in effective control of territory, distance, refugee flows, the passage of time, financial constraints, or political obstacles may all preclude or restrict access to valuable evidentiary material and witness testimony. If at all, UN mandated investigations may only be able to enter a crime site only after a significant period has elapsed; consequently, it may be difficult to assess, for example, the extent of damage caused by a particular event or to ascertain who is responsible. The prospects of forensic evidence collection are seriously impeded. Witnesses may have moved on, forgotten, or been influenced. Accepted, but not necessarily accurate, narratives become entrenched and difficult both to verify and challenge. While technological advances may increasingly enable distant authorities to overcome some of the challenges posed by lack of access (as discussed below), a lack of physical access may significantly limit the ability to investigate comprehensively.

For this reason, many international legal actors, including UN investigative mandates, necessarily rely on the work of civil society groups on the ground, who often are the first-response documenters of atrocities and without whom so much valuable information would be lost. Documenting events from an early

stage is crucial in circumstances in which evidence is likely to be destroyed (or 'rewritten'<sup>92</sup>), victims and witnesses increasingly difficult to locate (especially since refugee populations may be particularly vulnerable to trafficking<sup>93</sup>).<sup>94</sup>

**Threaded through the data collected for this report is a recognition of the invaluable role played by local and international civil society actors on the ground** both in collecting and communicating evidentiary material, and in facilitating understanding of cultural, religious, and regional dynamics. As observed by the IIM:

The crucial role that Syria's civil society actors have played in documenting the violations in the Syrian context is undeniable given they were the first to gather evidence often risking their lives to collect and share it.<sup>95</sup>

Within such an ecosystem, the **potential drawbacks of the reliance on the documentation efforts of some NGOs** are clear. In particular, evidence-producing organisations *may*

- Establish themselves in the immediate aftermath of mass atrocities taken place against their community or in their region, with the consequence that staff may be highly motivated, knowledgeable about events and the political, cultural, economic and religious contexts, and with access to and trust with survivors, but they are not necessarily adequately trained in the collection of information for accountability-driven processes.
- Use methodologies more suitable to human rights activists, including focusing on recording broad patterns of events and the experience of victims and survivors and engaging in advocacy. This does not always align with an accountability-driven investigation, which seeks to determine the criminal liability of individuals for specific crimes and conduct while ensuring that information collected retains its probative value with an eye to satisfying the appropriate criminal standard of proof.

*The increased professionalisation of civil society documenters can enable mandates' access to more and better information relevant to their work. At the same time, overreliance on civil society actors can also be detrimental, if not approached with deliberate strategies to overcome potential biases and if guidance is not provided to such groups concerning what form of information is most relevant and what is an appropriate collection and verification standard.*

Indeed, serious problems have been reported by prosecuting authorities interviewed who had come across such approaches:

NGO reports often rely on unidentified witnesses with whom the NGO has no continuing contact. Our judges give little weight to such information. We need to know more about the witnesses, and ideally would like to have them interviewed by our investigators or have them appear in person in our trials. We can protect their identities from public disclosure if necessary.<sup>96</sup>

92 Amnesty International, *North Korea: New Satellite Images Show Continued Investment in the Infrastructure of Repression*, December 2013; HRW, *Burma: Scores of Rohingya Villages Bulldozed*, 23 February 2018.

93 Naimul Karim, 'Trafficking in Rohingya camps feared rising as crisis rolls on' (*Reuters*, 5 February 2019) [www.reuters.com/article/us-bangladesh-rohingya-trafficking-featu/trafficking-in-rohingya-camps-feared-rising-as-crisis-rolls-on-idUSKCN1PU03P](http://www.reuters.com/article/us-bangladesh-rohingya-trafficking-featu/trafficking-in-rohingya-camps-feared-rising-as-crisis-rolls-on-idUSKCN1PU03P) (accessed 06 June 2021).

94 Sean Bain, 'A Legal Path to Justice Emerges for Myanmar' (*Justice Hub*, 7 October 2018) <https://justicehub.org/article/a-legal-path-to-justice-emerges-for-myanmar/> (accessed 06 June 2021).

95 IIM, Bulletin 5, February 2021, p. 2.

96 Interview with Prosecuting Authority.

The quality of the information is poor and of limited evidential value. Due to poor interview techniques, there is also a lot of inconsistency between the 'first account' provided to such bodies and the later account made to [prosecuting authorities]. This inconsistency will be exploited by the Defence and will erode the credibility of witnesses [called by the prosecuting authority].<sup>97</sup>

Relying primarily on interviewing survivors and eyewitnesses can not only be methodologically detrimental to investigations, but a lack of skill and training may also lead to re-traumatisation. Moreover, **the probative value of witness testimony is vulnerable to poor interview techniques such as the formulation of leading questions, as well as over-interviewing by different entities, and the erosion of memory as a result of trauma and the passage of time.**

Witnesses interviewing is a process that can also be directly or indirectly influenced by donor interests, leading, for example, to biases emphasising findings of sexual violence while neglecting proper examination of violence against children or harder to document violations such as those concerning the conduct of hostilities. Where funding requirements incentivise a focus on particular forms of harm or on a particular alleged perpetrator group, the reverberation into an investigation may be significant.

At the same time, the increasing focus on pursuing criminal accountability for international crimes that motivated the establishment of many UN investigations (and particularly, it could be argued, the novel investigative mechanisms) has led to NGOs also becoming more concerned with undertaking documentation that is relevant to and can be used in criminal investigations and prosecutions. As our data indicates, there is an apparent growing interest on the part of evidence providing organisations in gathering information in accordance with criminal procedural standards, and a desire to see gathered material used in criminal proceedings. This yields a better understanding on the part of evidence providing organisations of the challenges on the ground and facilitates more practical discussions with UN investigative mandates regarding ways to meet criminal procedural standards and enhance the guarantees and safeguards that may be afforded to victims and witnesses.

*Overreliance on witness interviewing can be particularly detrimental to investigations and, as our data shows, it has often been vulnerable to knock-on challenges arising from poor interview techniques, differing standards concerning informed consent, and the potential for inconsistencies and re-traumatisation when multiple entities interview the same witness.*

This trend was encapsulated by a senior national prosecutor interviewed for this study, who observed that while human rights advocacy organisations 'often see their priorities as different from law enforcement', **a new generation of 'very professional' evidence providing organisations keep meticulous records and are able to provide prosecuting authorities with 'belt and braces' assistance,** including facilitating access to potential witnesses, for activities like interviews.<sup>98</sup> The reported shift not only benefits prosecuting authorities directly but also increases the benefit of mandates' reliance on such groups. Thus, for UN mandated investigations, developing 'upstream' working relationships with evidence providing organisations is recognised as integral to the success of their own mandates. This is true even for mandates with greater direct access to crime scenes.

UNITAD, for example, which unlike many UN mandated investigations does have access to the sites of crime in Iraq (where security permits) and which relies primarily on its own investigations, has a dedicated office, the Office of National Engagement and Support, to liaise with Iraqi civil society and,

<sup>97</sup> Interview with Prosecuting Authority.

<sup>98</sup> Interview with Prosecuting Authority.

within it, domestic evidence providing organisations. Its Office of the Special Adviser holds an Interactive NGO Dialogue Forum twice a year as well as smaller thematic roundtables with evidence providing organisations to update them on developments, receive updates from them, answer questions, and address concerns. Field Investigative Units within the Office of Field Investigation are also responsible for developing and maintaining relationships with evidence providing organisations, and facilitating the transfer of their information to UNITAD, in accordance with a Memorandum of Understanding that UNITAD promotes directly with said organisations.

For its part, the IIM, which does not have access to Syria and whose mandate focuses significantly on collecting information from evidence providing organisations, has prioritised its relationships with such organisations. Through the 'Lausanne Protocol', the IIM seeks to engage directly with Syrian NGOs through continuous constructive dialogue 'to ensure mutual understanding regarding opportunities for collaboration, in furtherance of both parties' common goal of ensuring justice, accountability, and redress for victims of crimes committed in Syria'.<sup>99</sup>

The IIMM is also still unable to conduct in-country investigations in Myanmar. It describes its continued conduct of investigations 'through remote and other means', including 'engaging with information sources through secure electronic channels, conducting open-source investigations, and sending written requests for information'.<sup>100</sup> In March 2021, for example, the IIMM issued a public statement asking those with information on the commission of the most serious international crimes to contact the mechanism through secure communication channels.<sup>101</sup> The IIMM targeted, in particular, insider-witnesses and those who could provide evidence of illegal orders:

The persons most responsible for the most serious international crimes are usually those in high leadership positions. They are not the ones who physically perpetrate the crimes and often are not even present at the locations where the crimes are committed. To prove their responsibility requires evidence of reports received, orders given and how policies were set. This is normally not evidence that can be provided by the victims, but rather requires that those who received or were aware of illegal orders or policies reveal the truth. I encourage those who have such information to contact the Mechanism.<sup>102</sup>

Nevertheless, and while recognising that such capacities vary among evidence providing organisations and change over time, concerns about these groups' capacity to collect information for the purposes of criminal accountability persist. For example, despite persistent challenges to accessing Myanmar, the IIMM appears still to prioritise its own conduct of witness interviews:

[I]t will be essential for Mechanism personnel to travel when possible to engage with interlocutors and conduct in-person interviews of witnesses. This would guarantee the confidentiality of the process, provide an opportunity to address any concerns that witnesses may have about their safety and security, and obtain signed witness statements, which are the best method to ensure the broadest possible usability and admissibility of evidence and material in national, regional or international courts or tribunals.<sup>103</sup>

Conversely, the IIM in particular has taken significant steps to promote the optimal collection of information without enjoying direct access. The IIM's Lausanne Protocol, for example, also sets forth the services that the IIM undertakes to provide (eg through the use of 'advanced technology tools, including state-of-the-art software' to process, store, and protect material received), the modalities and

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99 IIM, Lausanne Protocol.

100 IIMM, Bulletin Issue 4, July 2021, p. 2.

101 IIMM, *IIMM: Recipients of illegal orders should contact us*, 17 March 2021.

102 IIMM, *IIMM: Recipients of illegal orders should contact us*, 17 March 2021.

103 IIMM, Bulletin Issue 4, July 2021, p. 2.

responsibilities of the transfer of data to investigative and/or prosecuting authorities, the protection of victims and witnesses (including the protection of personal data), its commitment to transparency, and its commitment to outreach, including through 'provid[ing] feedback to Syrian NGOs that have submitted information and evidence, in order to allow them to build on lessons learned and also with a view to strengthening further collaboration with the Mechanism'.<sup>104</sup> Notably, such steps are likely both to strengthen the UN-NGO relationship and to enhance domestic capacity for future legal accountability.

It is important to acknowledge that UN mandated investigations do not work under capacity-building mandates and are thus unlikely to have substantial funds to support such activities. As such, and in part because there has historically been a lack of sufficient guidance available regarding methods to meet forensic standards, **information derived from some NGOs may be used only to develop leads or to corroborate information collected through the mandates' own investigations. Where the mandate lacks access to the territory, however, digital investigations (together with field investigations in third countries, if useful) provide opportunities for UN mandated investigations** to advance their own inquiries, and to deliver to prosecuting authorities credible evidence capable of sustaining criminal prosecutions.

*Although it is important to acknowledge that capacity-building services and the provision of direct training is outside the scope of UN investigative mandates, the experience of the three investigative mechanisms (IIIM, IIMM, and UNITAD) demonstrates that it is both possible and beneficial to develop close and effective working relationships with groups in the civil society.*

## ii. Recruiting and Nurturing Expertise in Primary Collection of Testimonies

Witness testimony, particularly of victims and survivors, can be extremely effective. Witnesses are famously and repeatedly described as the cornerstones for successful investigation and prosecution. In view of the inherent fallibility of witness evidence, this may be misplaced. Nonetheless, reliance, even emphasis, on witness testimony in all sorts of inquiries, investigations, and prosecutions, remains central. It is critical to ensure the integrity of testimony and that such testimony is elicited with appropriate care and sensitivity. Once influenced, testimony is forever tainted. Where influenced material is relied upon in court, it risks contributing to a miscarriage of justice.

It is well-known that, even under peaceful conditions, eyewitness perceptions are distorted by biases and the unconscious audio-visual assumptions our brains make to 'fill in the gaps'. Memory is very malleable – to the point that people can be falsely convinced that they saw a certain individual in a certain place at a certain time, acted in a certain way themselves, were a victim of a crime, or even the perpetrator.<sup>105</sup> This is even more acute under stress. Fear and trauma inhibit the formation of memories, which may then be constructed after the events and are particularly susceptible to suggestion. The impact of prevailing narratives, however false, should not be underestimated. Again, the vulnerability of individuals to suggestion may be significantly exacerbated by circumstances such as lack of access to impartial media, or lack of access to education (as may especially impact children in conflict and disproportionately affect girls and women around the world).

104 Lausanne Protocol.

105 T. R. Benton, D. F. Ross, E. Bradshaw, W. N. Thomas, and G. S. Bradshaw, 'Eyewitness memory is still not common sense: comparing jurors, judges and law enforcement to eyewitness experts', *Applied Cognitive Psychology*, 20, 115–129. 2006, doi: 10.1002/acp.1171; E. Loftus, 'Planting misinformation in the human mind: A 30-year investigation of the malleability of memory', *Learning & Memory*, 12, 361- 366. 2005. Zaragoza, M. S., Belli, R. F., & Payment, K. E. (2007). Misinformation Effects and the Suggestibility of Eyewitness Memory. In M. Garry & H. Hayne (Eds.), *Do justice and let the sky fall: Elizabeth Loftus and her contributions to science, law, and academic freedom* (pp. 35-63). Mahwah, NJ, US: Lawrence Erlbaum Associates Publishers.

Multiple discussions of events with or between witnesses of all types raise the potential both for inconsistent accounts and for fabrication. In a rush to obtain information, journalists, aid-workers and NGOs may plunge into a developing or recent situation looking for compelling narratives and/or those most in need of assistance. By speaking to potential witnesses, they may – wittingly or unwittingly, even with the best of intentions – influence their understanding of events, promote certain narratives, encourage reporting of certain conduct, lay the blame on certain entities, or prioritise or diminish the significance of some experiences. In the words published by the Crown Prosecution Service of England and Wales (in relation to safeguards necessary in instances where therapy is to be provided to witnesses prior to testifying): as memories are built and/or repeatedly discussed, witnesses may ‘become more convinced, or convincing, in his or her evidence, but no less mistaken.’<sup>106</sup>

**The importance of interviewing insider witnesses, if they are available, must also be emphasised.** As emphasised above, testimonies of insider witnesses are often key to the prosecution of international crimes, despite the inherent trustworthiness concerns. Those who worked within the government or an armed group, the members of which are alleged to have committed crimes, are essential to understanding how information and orders flowed through the structures, and to evidencing the criminal responsibility of those at various levels of the State’s or organisation’s internal hierarchies. The interviewing of insider witnesses **requires, however, significant expertise and experience both in the planning and the conduct itself of the interview.** It is critical that UN mandated investigations have in-house specialist expertise in order to collect such testimonies – as well as those of other witnesses – for use in criminal prosecutions, including ensuring the person being interviewed understands the importance of providing their account and has consented to their account being shared with prosecuting authorities.

The research done for this paper, including the insights from working-level staff within diverse UN mandated investigations indicates that the expertise in primary investigation aimed at collecting testimonies varied greatly among entities and over time. **Human Rights Council mandated investigations, for example, often face a dual mandate where they are asked both to collect information and publicly report on broad patterns of violations, while also working to identify perpetrators of particular violations. These are two contrasting types of investigations,** making it challenging to recruit all the necessary expertise within the often very small staffing structure. In addition, and as mentioned, the routinely brief mandates and the fact the investigations are often based

*Insider witnesses are particularly important to investigations focused on accountability. Insider witnesses are essential to understanding how information and orders flow through structures, and to evidencing the criminal responsibility of those at various levels of the State’s or organisation’s internal hierarchies. The interviewing of insider witnesses requires, however, significant expertise and experience both in the planning and the conduct itself of the interview. The dual (human rights and accountability) nature of many HRC mandated investigation, alongside their short time frames, have often proven challenging to the recruitment of personnel with such forms of expertise. The independent investigative mechanisms, by contrast, appear to have more actively sought to recruit investigators with substantial expertise in interviewing witnesses and insiders.*

<sup>106</sup> CPS, *Therapy: Provision of Therapy for Vulnerable or Intimidated Adult Witnesses – Legal Guidance, Sexual Offences*, <https://www.cps.gov.uk/legal-guidance/therapy-provision-therapy-vulnerable-or-intimidated-adult-witnesses> (last accessed 08 June 2021).

in Geneva have lent itself to staff being recruited from the UN's own human rights ranks, and notably from the Geneva office. However, the collection of such witness testimony for the purposes of accountability requires staff expertise in criminal investigations. More effort should be made to identify existing expertise, both externally and within OHCHR, including those deployed to field locations where they have garnered recent hands-on experience of documenting situations of mass atrocity. Additionally, pathways should be established to ease the recruitment of external candidates with the relevant expertise, including through the use of temporary contracts (which allow for swifter recruitments) and the development of agreements/MoUs with international and domestic justice mechanisms. As considered above, a permanent body would better allow the sustained development of appropriate expertise, enabling long-term investment in staffing and ensuring that institutional expertise is retained and evolved.

In contrast, the three investigative mechanisms, which have a more singular mandate focused on supporting criminal accountability, appear to have more actively sought to recruit investigators with substantial expertise in interviewing witnesses and insiders. This includes investigators working in international and national jurisdictions. They have also encouraged States effectively to 'loan' them investigators, allowing them to work full-time on that investigation, while retaining a hold on their post in their national jurisdiction. A similar arrangement would be beneficial for OHCHR supported investigations as well, albeit with the caveats provided in the previous section.

### **Interview Methodologies**

Ensuring interviews do not yield, through the approach of the interviewer, inconsistent statements is crucial. No matter how sensitively handled by expert court advocates, witnesses will rightly face robust challenges arising from previous inconsistent statements and other controvertible assertions. Of particular importance is, thus, ensuring the interview technique is such that it does not lead or traumatise the interviewee, does not encourage inconsistent rendering of events or, worse, invertedly contaminates the evidence pool by taking witness statements poorly or with a discernible agenda. As some of our respondents put it:

Inconsistent witness statements can result in acquittals of persons who would have been convicted if the statement-taking had been done more professionally.<sup>107</sup>

With witnesses, it would be best if they simply noted that a person was present and saw what happened. If they take a statement, it can cause problems in court. Even a summary which indicates that witness will provide a pro-conviction account will make the evidence susceptible to defence attack as polluted by bias.<sup>108</sup>

When we have obtained statements taken by [UN] human rights inquiries, they are often not useful because the staff members have asked leading questions or have not followed the other steps required by judges in [hidden] and elsewhere to conclude that statements are credible.<sup>109</sup>

*"Inconsistent witness statements can result in acquittals of persons who would have been convicted if the statement-taking had been done more professionally."*

*"UN body did not obtain consent to share witnesses' information or identity with national law enforcement authorities in Europe. With [some] Commissions of Inquiry, they have tried to go back to get the consent, though it has often been difficult to locate the witnesses to obtain that consent."*

107 Interview with Prosecuting Authority.

108 Interview with Tom Laitinen, Prosecutor, Finland.

109 Interview with Investigator.

Seeking informed consent to share data and/or information is equally important. Indeed, prosecutors interviewed for this study also observed issues arising from the inability to contact witnesses due to the refusal or failure to seek the consent of potential witnesses to share relevant information with prosecuting authorities:

The usual problem has been that the UN body did not obtain consent to share witnesses' information or identity with national law enforcement authorities in Europe. With [some] Commissions of Inquiry, they have tried to go back to get the consent, though it has often been difficult to locate the witnesses to obtain that consent.<sup>110</sup>

**Recognising that it is not clear whether and to what extent it is possible to obtain fully 'informed' consent to share information with unknown potential jurisdictions in the future, the developing expertise of the investigative mechanisms may help advance understanding of the parameters of consent and data sharing.**

It is understandable that witnesses may have grave security concerns and thus be unwilling to share such information. It is also understandable that the exigencies of obtaining information in unstable conditions, and the need to build and respect trust between interviewer and interviewee, can make it difficult or uncomfortable even to mention the possibility of sharing identifying or contact information with authorities. However, striving to find ways to appropriately obtain informed consent will be key if UN mandated investigations are to optimise the possibility of criminal accountability. Some of our consultations also revealed reports of a certain hesitancy by some OHCHR-backed inquiries to share relevant information with the three investigative mechanisms. If true, this is concerning, for loss of potential evidence is a serious disservice both to the victims of human rights abuses and to justice itself. It is thus imperative to identify ways in which sources can be adequately protected while ensuring that the goals of accountability efforts can be met. Going forward, UN mandated investigations need to be equipped with the intention and the means to obtain informed consent and, where possible, to address security concerns adequately. This requires the ability to ensure witness protection, for which OHCHR and other UN entities require the support of UN member States.

Of course, consent is not really consent unless it is properly informed. At a minimum, this requires that the potential witness or 'fixer' understands why they are being questioned, that they are not obliged to answer, and the potential uses of the information they provide. The purpose, ramifications, and safeguards in place for UN mandated investigations' sharing of information with international, foreign, or domestic authorities must be explicated in terms that can be properly understood, and that understanding explicitly checked and confirmed. **Where security imperatives or other concerns or obstacles genuinely prohibit obtaining consent, investigators should at the very least retain contact details or means of contact in order that they might be able to seek specific consent should the need arise.**

The necessity of reporting expeditiously despite limitations may justifiably mean that forensic standards lie out of reach or are not prioritised. However, for no additional cost and only minimal (indeed perhaps less) effort, UN investigations can maximise evidential value (and minimise the risk of causing harm to both witnesses and investigations) by following basic best practices, such as taking biographical and contact details, and at least *seeking* consent to pass these (and, where relevant, any statement or record of interview) to investigative authorities. **Where absolutely necessary to take a statement in order to preserve evidence, it is advisable to keep as detailed a record as possible of the precise language of the answers, as well as of the questions, avoiding at all costs leading questions or approaches likely to be traumatising to the witness.**

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<sup>110</sup> Interview with Investigator.

Attributing sources of information remains key. It is important that identifying information is collected, including information as to how the witness knows what they purport to know: as a direct actor, a victim of an abuse, an eyewitness, or on the basis of second-hand (or multiple) hearsay. **While anonymity and other protective measures can be taken to ensure safety, the original source of the information needs to be revealed with sufficient detail to enable the assessment of reliability and credibility.**<sup>111</sup> Courts are likely to exclude, or least weaken the evidential value of, evidence originating from witnesses who cannot be examined by the defence.

Similarly, assessing the probative value of unattributed information (tantamount to anonymous hearsay) requires an extremely cautious approach because the source of the information is, by definition, unknown and cannot be evaluated.<sup>112</sup> International criminal tribunals have consistently held that unattributed information – including where relied upon in UN reports – cannot be considered sufficiently reliable to be admitted into evidence:

Insofar as [UN] reports emanate from independent observers who were direct observers of the facts being reported, the Chamber considers them to be prima facie reliable. However, if the author's identity and the sources of the information provided are not revealed with sufficient detail, the Chamber is unable to determine whether the contents of the report have been imparted by an eyewitness or some other reliable source. If such particulars are not available, either from the reports themselves or from their author(s), the Chamber cannot assess the reliability of the content of the reports; it is therefore unable to qualify those documents as sufficiently reliable to be admitted into evidence. Moreover, where such reports are based, for the most part, on hearsay information, especially if that information is twice or further removed from its source, the reliability of their content is seriously impugned.<sup>113</sup>

Those seeking to fulfil the mandates of the three investigative mechanisms will be acutely aware that standards in domestic jurisdictions can be stringent. All UN mandated investigations with accountability mandates will need to ensure that their methodology appropriately demands and handles potential witnesses, in accordance with internationally accepted standards. In theory, the three investigative mechanisms are indeed well placed to provide training – where warranted – to other UN mandated investigations with less in-house expertise as well as those evidence providing organisations on whom they may rely in best practices in identifying witnesses and seeking appropriate consents, and in

*Where security imperatives or other concerns or obstacles genuinely prohibit obtaining consent, investigators should at the very least retain contact details or means of contact in order that they might be able to seek specific consent should the need arise. For no additional cost and only minimal (indeed perhaps less) effort, UN investigations can maximise evidential value (and minimise the risk of causing harm to both witnesses and investigations) by following basic best practices, such as taking biographical and contact details, and at least seeking consent to pass these (and, where relevant, any statement or record of interview) to investigative authorities.*

111 ICC, Gbagbo, ICC-02/11-01/15-1263-AnxB-Red, 16 July 2019, para. 42.

112 ICC, Gbagbo, ICC-02/11-01/15-1263-AnxB-Red, 16 July 2019, para. 43. See also, Katanga and Ngudjolo, ICC-01/04-01/07-2635, para. 29.

113 ICC, Katanga and Ngudjolo, ICC-01/04-01/07-2635, 17 December 2010, para. 29. See also: Ntaganda, ICC-01/04-02/06-2359, 08 July 2019, para. 453, fn. 1283, specifically: 'Noting that the only mention of the use of mines comes from HRW report, DRC-OTP-0074-0797, at 0827, in which the source of this specific allegation is anonymous, and that no eyewitnesses confirmed their usage, the Chamber is unable to conclude beyond reasonable doubt that the UPC used land mines during this assault on Songolo.' See also: ICTR, Ndindabahizi Appeal Judgement, para. 115; Kalimanzira Appeal Judgement, paras 77-80; Muvunyi Appeal Judgement, paras 68-70; and, ECCC, Case 002/01 Appeal Judgement, paras 434 and 442.

interviewing witnesses where necessary. However, such skill and capacity-building exercises are often not in the terms of their mandates, the adherence to which is monitored by their establishing bodies. As a consequence, the three investigative mechanisms are unlikely to have the budget and staffing resources to engage in formal trainings unless such resources are facilitated. Available pathways to providing training include through a collaboration between the three investigative mechanisms and OHCHR's METS, or through the establishment of an Investigation Support Division within OHCHR or an Investigation Support Mechanism, which has within its mandate such capacity-building of the less well-resourced human rights investigations and evidence providing organisations. Indeed, as mentioned, several of the organisations interviewed for this study expressed a desire for capacity building and training to ensure that the difficult work of obtaining testimony does not go to waste and can be used effectively to pursue both political and legal accountability.<sup>114</sup> A permanent investigative body would be better able to establish and invest in longer-term relationships with EPOs, and thus enable mutually beneficial enhancements in evidence gathering expertise. While likely beyond the remit of investigative mandates, enhancement of local capabilities may be a very positive consequence.

These bodies should be as visible and proactive as possible. As the IIMM does not have access to Myanmar, they must rely on civil society groups for evidence of the crimes. This means they should make capacity building for civil society a priority (and if they do not have budget for it, they should encourage donors who wish the IIMM to succeed to provide civil society with this capacity building).<sup>115</sup>

### iii. Collecting Documentation/Digital Evidence, including through Use of Technological Investigative and Analytic Tools

The access, collection, analysis, and storage challenges facing UN mandated investigations necessitate **tech-forward approaches. This includes the use of artificial intelligence-based programs to search and analyse large data sets, as may arise from the collection of call data records, hard drives, and digitised copies of mass documentation created and held by alleged perpetrators.** Digital techniques and investigative tools are also becoming a more significant part of investigation aimed to support accountability.<sup>116</sup> As more tools become available to those seeking to document instances of mass violence, in-depth guidance is needed on how these tools can be leveraged ethically and lawfully. In this context, it is, however, important to acknowledge the progress and critical contributions that OHCHR has already made, such as the *Berkeley Protocol on Digital Open-Source Investigations*, 'developed to provide international standards and guidance for investigators in the fields of international criminal justice and human rights'.<sup>117</sup>

Technological innovations to the work of UN mandated investigations represent clear opportunities to expand the information sources an entity can draw upon, including from 'black hole' environments, such as the Democratic People's Republic of Korea, where a paucity of information might otherwise exist. They also enable investigators to effectively analyse data on modern scales, extending far beyond what human capacity can process manually. This is especially crucial for information-rich environments, such as Syria, where some activists have estimated the collection of 40 years-worth of footage alone.<sup>118</sup>

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114 Interviews with EPOs, including: the Burmese Rohingya Organisation; the Foundation for Democracy and Accountable Government; Free Yezidi Foundation; Rohingya Human Rights Network; Remembering the Ones We Lost; Syrian Center for Legal Studies and Research; Syrian Center for Media and Freedom of Expression; Shlomo; Truth Hounds of Ukraine; Women's Peace Network (Myanmar); and Yazda.

115 Interview with Maung Tun Khin, Burmese Rohingya Organisation.

116 Federica D'Alessandra, Shannon Raj Singh, and Stephen Rapp, 'Atrocity Prevention in a Transatlantic Setting', *Oxford Programme on International Peace and Security*, June 2020.

117 Berkeley Protocol on Digital Open-Source Investigations: A Practical Guide on the Effective Use of Digital Open Source Information in Investigating Violations of International Criminal, Human Rights and Humanitarian Law, Berkeley Human Rights Center and the UN Human Rights Office, 2020.

118 Jeff Deutch, Syrian Archive, *40 years' Worth of Footage from Syria Alone: Global Documentation Requires Commensurate Global Justice*, October 2021.

Valuable open-source digital information is available where many do not expect to find it, like in Yemen. Everywhere you look, it is there! These bodies must invest in the tools, and hire the talented, creative and enthusiastic personnel who can and will vigorously exploit open-source digital information. Culturally, it may be difficult for institutions that do not move quickly (and are still making do with 20th century tools) but this is essential to their success, particularly in conflict zones where they do not have access to the ground.<sup>119</sup>

Indeed, digital and documentary technologies now enable extensive 'remote' investigations as intelligence sources and capabilities once the preserves (and tools) of States have become publicly available. These include: satellite imagery; videos of events live-streamed on social media platforms, leaked audio recordings and communications, authenticated photographic evidence, as well as speeches, instructions, and commands posted on social media by perpetrators themselves. Digital open-source material holds the potential to shape policy and to overturn state narratives, while the availability of multiple sources of information can also lead to greater objectivity and overcome biases in investigations, including selection bias in witness interviews or confirmation biases in investigative decisions.<sup>120</sup> The impact of technology on the international justice and accountability landscape is already evident.<sup>121</sup>

That said, the wealth of material on the internet also presents novel challenges arising in no small part from increasingly sophisticated forgery and disinformation capabilities and the burgeoning issues that are arising as control over the digital realm is ceded to artificial intelligence. **Navigating and accessing authentic, probative material requires appropriate expertise.** Like other forms of potential evidence, digital material may be manipulated, destroyed, and authorship hidden, denied or falsified. While discerning what is true faces new frontiers, individuals and groups are showing what is possible.<sup>122</sup> At the same time, forensic standards, particularly in domestic jurisdictions, may require strong authenticating indicia for open-source material to be deemed admissible or holding probative value:

With material that we have received from open sources, we would like the most information about when and where it was taken and the identity of persons in the image, including victims.<sup>123</sup>

*Technological innovations to the work of UN mandated investigations represent clear opportunities to expand the information sources an entity can draw upon, including from 'black hole' environments. Indeed, digital and documentary technologies now enable extensive 'remote' investigations as intelligence sources and capabilities once the preserves (and tools) of States have become publicly available. That said, the wealth of material on the internet also presents novel challenges arising in no small part from increasingly sophisticated forgery and disinformation capabilities and the burgeoning issues that are arising as control over the digital realm is ceded to artificial intelligence. Ethically and appropriately navigating, forensically verifying and accessing authentic, probative material of this nature requires appropriate digital forensic and information management expertise.*

119 Interview with Eliot Higgins, Bellingcat.

120 Federica D'Alessandra and Kirsty Sutherland, 'The Promise and Challenge of New Actors and New Technologies in International Justice,' *Journal of International Criminal Justice*, 19(1) March 2021, pp. 9-34.

121 ICC, *The Prosecutor v Al-Werfalli, Warrant of Arrest*, ICC-01/11-01/17-2, 15 August 2017, paras 11-22. For a more in-depth discussion of the impact of new technologies in international justice, including the examples mentioned herein, see supra ft. 120.

122 Ibid.

123 Interview with Vincent Cillesen, Investigator, The Netherlands.

Among UN mandated investigations, it is the three investigative mechanisms that have made the greatest strides in leveraging the opportunities afforded by the digital revolution. This is reflected in the comments of prosecuting authorities interviewed for this paper:

As to the evidence that has been deposited with the new mechanisms, it is important that they have and use forensic and analytical tools, to authenticate the material and search it for information relevant to our cases. With new facial recognition software, perhaps it could be possible to search hundreds of thousands of images for matches with photos of suspects that we have provided.<sup>124</sup>

All three investigative mechanisms have centralised databases in which evidence is handled and stored according to the highest standards for evidence management. Increasing support from machine learning and artificial intelligence has also acknowledged to have vastly increased their efficiency in reviewing and analysing the wealth of digital material they are amassing. Once again, developing the right tools and partnerships will be key. The IIM explains, for example, that it is ‘working with private sector experts, international human rights organisations and relevant Syrian actors dealing with data archives to share expertise and identify ways forward’ in order to ‘make what was previously unusable, due to volume or complexity, searchable and organised to serve the needs of accountability actors.’<sup>125</sup> Similarly, UNITAD reports that ‘the criminality of Da’esh, and the quantity and variety of the evidence left behind, necessitated new thinking and new investigative approaches’, adding:

... [T]he enormity of the data involved cannot be overstated. UNITAD is investigating, examining, and analysing thousands of laptops, external hard drives, mobile and satellite phones, drones, and other data-storing devices, comprising millions of heterogeneous file types, much of it encrypted. Millions of call-data records obtained now require analysis. Nearly half of the processed data consists of image and video files, posing additional access, analysis and storage challenges.<sup>126</sup>

To this end, UNITAD developed its own evidence management platform, the Evidence Lifecycle Management System (ELMS), using a low-code database platform to build a bespoke system. UNITAD emphasises that ELMS is adaptable in its customisation, allowing investigators and analysts to electronically manage workflows, track sources and record all activities and communications related to those sources. In addition, ELMS works both on-premises and remotely in the field using a mobile application, allowing for greater flexibility, mobility, and efficiency. UNITAD also uses scene-reconstruction tools as a companion to testimonial and other physical evidence. Using three-dimensional imaging, geospatial data, aerial drone photography and satellite images UNITAD created interactive evidence-presentation platforms and a timeline of the events, which can be used by prosecuting authorities for internal review purposes as well as in the courtroom. In October 2021, UNITAD was also awarded a Relativity Innovation Award for its development of Zeteo, ‘a custom enrichment pipeline for electronic data using the latest in artificial intelligence, Microsoft Cognitive Services, machine learning, facial recognition and identification, machine translation and image analysis.’<sup>127</sup> Zeteo allows UNITAD to catalogue its data more fully, including automated tagging of faces and voices, and review of extracted audio and text to identifying emotional content, disturbing imagery, and context. Video and audio files are further enriched with text transcripts generated from automated speech recognition software, which its investigators can search and view in the document viewer. This allows UNITAD’s investigators to search all processed images, videos, and audio files alongside documentary evidence in their holding.

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124 Interview with Reena Devgun, Prosecutor, Sweden.

125 IIM, Bulletin 5, February 2021.

126 UNITAD, ‘Harnessing Advanced Technology in International Criminal Investigations: Innovative Approaches in Pursuit of Accountability for ISIL Crimes.’

127 Relativity, *Innovation Awards 2021: The Relativity Apps of the Year*.

**The significant investment all three investigative mechanisms have made towards the sourcing – and sometimes development – of such technological innovations and tools should not go to waste. A conversation should be had concerning whether such tools and innovations could be replicated by or somehow pooled with other UN mandated investigations, including those supported directly by OHCHR.** The advantages of centralising such capacity and technological infrastructure for OHCHR-supported investigations, in particular, would **lend support to the case for a finding a more permanent solution to support UN mandated investigations**, as those we explore below in Section V. The cost of mainstreaming these ever-evolving technologies, and the need to recruit expert staff might otherwise prove particularly challenging for Human Rights Council-mandated investigations given the brevity of their mandates and the concomitant limited budgets.

#### iv. Collecting Linkage Evidence

An enduring challenge to the prosecution of international crimes, whether at national or international level, remains identifying and obtaining evidence that directly links suspects to the crimes. Even through the use of the most expansive form of joint criminal enterprise – the ‘nuclear bomb in the international prosecutor’s arsenal’<sup>128</sup> – or a permissive interpretation of Article 25(3)(d) of the Rome Statute,<sup>129</sup> international prosecutors can struggle to attribute personal responsibility to those individuals before them in the courtroom. Indeed, prosecutors – especially those operating in national jurisdictions requiring closer connections between criminal act and perpetrator than might be tolerated by international courts – require evidence that proves a sufficient connection between suspect and crime:

It would depend on the level of our suspect. If high level, then we would need documents like orders and information about command structure. If lower level, we would wish for documents and information about direct crimes of suspects, including statements of witnesses who saw his conduct.<sup>130</sup>

Navigating the various modes of liability in operation at the domestic and international levels is a matter for trial lawyers, but they are entirely reliant on the linkage evidence that can be gathered. In a domestic courtroom, the ability to demonstrate direct perpetration rather than merely membership of a group or common plan may have radical consequences both for the conduct of the proceedings and for the ascription of the degree/s of liability and consequent punishment. For this reason, prosecuting authorities interviewed emphasised both the importance of linkage evidence, and that it is not usually collected by UN mandated investigations; except, of course, for those with case-building responsibilities which have an express mandate to do so.

Linkage evidence is very important and is not usually collected by [traditional] UN bodies.<sup>131</sup>

It is important for them to gather information about the structure of command and the situation in various places and times. [The investigative mechanisms] should be able to prepare short analytical reports in a form that we may be able to use in court. The IIM must be more than a depository.<sup>132</sup>

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128 Danner, A. and Martinez, J., ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law,’ 93(1) California Law Review 75 (2005), pp. 75 to 169, p. 137: *JCE raises the spectre of guilt by association and provides ammunition to those who doubt the rigour and impartiality of the international forum. If conspiracy is the darling of the U.S. prosecutor’s nursery, then it is difficult to see how JCE can amount to anything less than the nuclear bomb of the international prosecutor’s arsenal.*

129 Article 25(3)(d): In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime with the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime.

130 Interview with Prosecuting Authority.

131 Interview with Prosecuting Authority.

132 Interview with Reena Devgun, Prosecutor, Sweden.

**Prosecutors expressed an emphatic preference for documentary evidence, video footage, call data, and communication intercepts, over witness testimony.**<sup>133</sup> For high-level suspects, prosecuting authorities seek proof of effective command over the (possibly very distant) physical conduct of the crime. It is therefore necessary for both evidence providing organisations and for UN mandated investigations themselves to understand the modalities and requirements of the different forms of commission and participation,<sup>134</sup> as well as how these might be established.

The collection of linkage evidence has been another area where the three investigative mechanisms, by virtue of their explicit case-building mandates, have amassed critical expertise. Some of the most recent mandates conferred by the UN Human Rights Council, such as the 2021 mandate for Palestine/Israel and the most recent iteration of the CoHRSS, have also received similar case-building mandates, while other UN human rights investigations – notably the Myanmar Fact-Finding Mission and the DPRK Commission of Inquiry – also interpreted their mandate as requiring the gathering of linkage evidence. Given this trend is likely to continue, it is important that the proper expertise is shared and nurtured: again, this could be achieved through a partnership between the investigative mechanisms and OHCHR's METS. Such a partnership would not only immediately benefit all UN mandated investigations, current and future, but might also become instructive of relationships with evidence providing organisations and local authorities. In the case of UNITAD, for example, the entity's presence on the ground and its working relationship with Iraqi and Kurdish authorities allowed it to collect and analyse case files and battlefield evidence, as well as potentially allowing for access to the interviewing of ISIL insiders held in detention when and where the conditions of access to detainees were agreed with relevant national authorities. Other UN mandated investigations might seek and obtain access to witnesses, including defectors, now present outside of the relevant countries.<sup>135</sup> However, the collection of such testimony would, as mentioned above, require appropriate methods expertise, again highlighting that nurturing such skills and practices is crucial to the future of UN investigative mandates.

*"Linkage evidence is very important and is not usually collected by traditional UN bodies".*

*"It is important for them to gather information about the structure of command and the situation in various places and times".*

*The collection of linkage evidence has been another area where the three investigative mechanisms, by virtue of their explicit case-building mandates, have amassed critical expertise. However, "[the] investigative mechanisms] should be able to prepare short analytical reports in a form that we may be able to use in court. They must be more than a depository of evidence".*

133 'We need linkage evidence! We like documents and videos', Interview with Prosecuting Authority.

134 Namely: direct and indirect commission, and improper omission; co-perpetration (premised on joint control over the crime/s), joint criminal enterprise and common purpose; aiding and abetting, instigation, material encouragement, ordering; command responsibility; and the inchoate and preparatory acts of attempting, planning, conspiracy and incitement.

135 Again, this was the case with the DPRK Commission of Inquiry and the Myanmar FFM.

## Part B: Particular Issues Arising in the Investigation of Sexual and Gender-Based Violence

Sexual<sup>136</sup> and gender-based<sup>137</sup> violence (SGBV) has been a devastating feature of human society, committed in war and peacetime alike. Rooted in structural inequalities – notably gender inequality – sexual violence forms part of a continuum of violence and discrimination that impacts women, men, girls, and boys, and those who identify otherwise, throughout their lives. The individuals and communities most at risk are those where the political, social, economic, and cultural systems of larger society support, whether by act or omission, violence against them. The devastating prevalence of SGBV coupled with general impunity exacts a heavy toll on many populations, in many cases for generations. The importance of accountability processes for victims of such crimes, as well as for the wider community, is clear. Frustration with failed processes can be very damaging to restoring peace and the rule of law for impunity for these crimes acts to reinforce, rather than challenge, pre-existing norms and patterns of discrimination and might fuel violence cyclically. Documentation, both as a recognition of the crimes and as a path to accountability, is therefore crucial.

Significant progress has been made in recognising the need to investigate and pursue accountability for SGBV, including prosecuting those responsible. Proactively investigating SGBV is now an imperative of modern atrocity investigation, as can be seen by the focus on both sexual and gender-based violence in the 2020 Venezuela FFM report.<sup>138</sup> It remains generally accepted, however, that the prevalence of SGBV is under-reported and, critically, that interacting with victims of SGBV and handling such information requires appropriate expertise.<sup>139</sup> Such expertise can (and should) be cultivated and be made readily available, whether to evidence providing organisations, UN mandated investigations, or prosecuting authorities.

Indeed, in this context, UN investigations will often operate on the frontlines of the fight against impunity for SGBV and, thanks to the cultivation of such expertise (and collaborations with groups such as Justice Rapid Response and UN Women), they can be key to advancing practices in the collection of evidence of SGBV and employing methodologies and approaches that protect the rights and preserve the dignity of victims and survivors. In the following section, we survey some of the key approaches and methodologies that have been employed by UN mandates in the collection of information of SGBV to date, many of which draw directly from such partnerships, as well as lessons learned from other international justice institutions over the past twenty or so years. It is essential that UN mandated investigations are properly equipped with the requisite expertise in the collection and analysis of SGBV information. The advantages of embedding within UN mandated investigations developed specialist expertise in the investigation of particularly sensitive abuses also lends support to a centralised permanent investigative body.

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136 There is no agreed universal definition of sexual violence, an umbrella term that covers a wide range of criminalised conduct. Here, the term 'sexual violence' refers to 'acts of a sexual nature against one or more persons or that cause such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent'. See, OHCHR Women's Rights and Gender Section, *Integrating a gender perspective in HR investigations - Guidance & Practice* (2018)

137 Gender-based violence refers to harmful acts – sexual, physical, mental and/or economic – directed at an individual based on their gender. These can include threats of violence, coercion and manipulation, taking many forms such as intimate partner violence, sexual violence, genital mutilation, 'honour crimes,' and child marriage. Such practices may be engrained into local customs, and it might be extremely difficult to identify potential witnesses willing to testify, perhaps due to shame, stigma, fear, futility or a combination thereof.

138 Institute for International Criminal Investigations, *Guidelines for investigating conflict-related sexual and gender-based violence against men and boys*, 29 February 2016

139 Save the Children and the Oxford Programme on International Peace and Security, *Advancing Justice for Children*, March 2021, para. 138.

## i. Recognising Challenges

**Collecting information about SGBV comes with specific challenges, the most easily recognisable of which are external and can be mitigated to some degree through preparation and expertise within information collection teams.** External challenges include the difficulty in having interviewees consent to confront, admit to, and discuss extremely sensitive personal experiences. In particular, survivors are often asked to describe painful past or recent experiences, which may be profoundly distressing and retraumatising to them, as well as potentially stigmatising. Additionally, the domestic legal framework of a particular context may also contribute to an under-reporting of sexual violence. This would include instances where it is unlawful for women to have pre-marital sex, or for men to engage in same-sex sexual activity, or where the law makes no distinction between consensual and non-consensual sexual intercourse.

**Less well-acknowledged are the internal, or attitudinal challenges, harboured within individuals and institutions that might contribute (or might have contributed) to a lack of systematic attention to SGBV**

crimes by those charged with information collection. Prioritising the investigation and potential prosecution of some crimes over others may invite perceptions that society considers some victims more intrinsically valuable than others. Some communities of victims and survivors are indeed more visible than others, often resulting in them becoming vested with fuller notions of humanity. This makes it seemingly more incumbent that the crimes against those most often neglected be recorded and punished.<sup>140</sup>

Beyond attitudinal challenges and a **need to deploy deliberate strategies to overcome biases towards more visible forms of abuse, it is also crucial to overcome reductive understandings of gendered expertise** as pertaining, among others, to categories of victims, the ways in which they are specifically victimised, as well as the intersectional nature of their victimhood:<sup>141</sup> for example, crimes against women can sometimes be conflated with – or reduced to – crimes of sexual violence; similarly, there can be a tendency to exclude men and boys from the community of victims and survivors of sexual violence (to which they might belong, for example, as direct victims of rape, or of forced marriage and paternity).<sup>142</sup> In another example, overcoming biases and reductive understandings of SGBV requires understanding the ways in which other vulnerable – if under-valued – aspects of a victims' identity might

*Significant progress has been made in recognising the need to investigate and pursue accountability for SGBV, including prosecuting those responsible. Proactively investigating SGBV is now an imperative of modern atrocity investigation, as can be seen by the focus on both sexual and gender-based violence in the 2020 Venezuela FFM report, among others. It remains generally accepted, however, that the prevalence of SGBV is under-reported and, critically, that interacting with victims of SGBV and handling such information requires appropriate expertise. Such expertise can (and should) be cultivated and be made readily available, whether to evidence providing organisations, UN mandated investigations, or prosecuting authorities.*

140 See, for example: Save the Children and the Oxford Programme on International Peace and Security, *Advancing Justice for Children*, March 2021, para. 138.

141 For a discussion of how impact of intersecting marginalised identities on their access to justice, see Committee on the Elimination of Discrimination against Women, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, 14 July 2017.

142 As of 2014, national laws worldwide deny 90 per cent of men in conflict-affected countries legal recourse if they become a victim of sexual violence; 70 countries criminalise men who report sexual victimisation due to homophobic policies. See Chris Dolan, 'Into the mainstream: Addressing sexual violence against men and boys in conflict', Briefing paper prepared for the workshop held at the Overseas Development Institute, London, 2014.

affect their victimhood, including for disabled individuals, sexual and gender minorities, indigenous communities, people of colour, and children.

## ii. Embedding Expertise in the Collection of Information on SGBV within the Structure of Investigations

The success of investigative strategies depends, in large part, on the effective allocation of related expertise and resources. It is therefore essential that UN mandated investigations have embedded within their structure expertise in both the collection and analysis of information of SGBV. This necessarily means recruiting people with relevant expertise, having dedicated funding for that expertise and interviewing skill, and setting up internal structures to evaluate the extent to which a broader span of crimes is being documented, notably against communities more vulnerable to being overlooked.

To this extent, UN human rights investigations have already developed a close working relationship with UN Women and JRR, the latter of which maintains and updates a roster of expertise on SGBV. Through this relationship, JRR and UN Women provide SGBV and gender expertise to OHCHR-backed investigations, the majority of which are FFMs and COIs. JRR is an intergovernmental organisation that provides a stand-by facility for the recruitment and rapid deployment of expertise in support of the investigation and prosecution of war crimes, crimes against humanity, genocide, and other serious human rights violations. There are currently around 700 experts on the JRR roster,<sup>143</sup> including criminal and human rights investigators, human rights monitors, prosecutors, military and legal analysts, forensic experts, and psycho-social counsellors; the majority of whom have a mix of domestic and international experience.<sup>144</sup> JRR experts are recruited onto the roster through a competitive vetting and training programme, and JRR also selects experts from alumni of the Institute for International Criminal Investigations.<sup>145</sup> Once recruited, experts may be deployed to international and regional accountability mechanisms; national transitional justice mechanisms; or civil society organisations engaged in the documentation of international crimes and human rights abuses.<sup>146</sup>

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In 2009, in partnership with UN Women,<sup>147</sup> JRR created a dedicated SGBV Justice Experts Roster, which is a sub-roster of the broader JRR Roster. This partnership was born out of the recognition that justice for SGBV crimes had long been neglected by international law and that there was a need to enhance accountability for conflict-related SGBV. Under this scheme, experts are equipped with the specialist knowledge and training to be able to effectively investigate, analyse, and prosecute sexual and gender-based violence crimes, and subsequently seconded to accountability mechanisms by UN Women. The partnership of JRR, UN Women, and OHCHR has reportedly 'been instrumental in raising the standards for the investigation of SGBV'.<sup>148</sup>

143 This comprises 54% women, 42% from the Global South, speaking over 90 languages and representing more than 100 nationalities. See, Justice Rapid Response annual report.

144 Save the Children and the Oxford Programme on International Peace and Security, *Advancing Justice for Children*, March 2021, para. 128, citing interview with Federica Tronchin, 17 March 2020.

145 Justice Rapid Response, Annual Report 2020, p. 19.

146 Justice Rapid Response, Annual Report 2020, pp. 14-16.

147 At the time UNIFEM.

148 Follow on interview with survey respondent 2018.

Since 2012, JRR and UN Women have indeed deployed experts to every COI and most FFM, as well as the Office of the Prosecutor at the International Criminal Court and the novel investigative mechanisms.<sup>149</sup> In some cases, multiple experts are deployed from these rosters at the same time to fulfil various roles, including gender advisors, SGBV investigators, and dedicated interpreters on SGBV.<sup>150</sup> For example, two gender advisors/SGBV investigators, and a forensic psychologist specialised in SGBV, were deployed to the Myanmar Fact-Finding Mission and contributed to its September 2018 report, in which sexual violence was documented.<sup>151</sup> According to one former Fact-Finding Mission lawyer, the SGBV advisors and investigators interviewed victims and ensured that their experiences were adequately captured in the Fact-Finding Mission thematic report on the issue. This was a context in which SGBV was so prevalent that it would, in any event, have been a focus for the Fact-Finding Mission. However, having an expert interface with the victims was reassuring to the Commissioners. JRR experts have been also regularly deployed to the Syria Commission of Inquiry, including SGBV investigators and gender advisors.<sup>152</sup> This expertise helped to surface the prominent role of SGBV in the Syrian conflict and was key to the Commission's first thematic report on the issue.<sup>153</sup> The report, which was the first of its kind, detailed SGBV against women, girls, men, and boys committed in Syria since the uprising in 2011 and highlighted that parties to the conflict resorted to sexual violence as a tool to instil fear, humiliate and punish or, in the case of terrorist groups, as part of their enforced social order.<sup>154</sup>

In short, there can be no doubt that JRR's rostering of justice experts has been enormously beneficial to UN investigations. Some experts consulted for this study indicated that current modalities of recruitment could yet be improved to expedite recruitment of internally rostered experts to OHCHR-backed investigations. For example, recruitment of JRR experts directly to OHCHR has slower than recruitment via UN Women, suggesting that Secretariat processes could be streamlined. The investigative mechanisms have used varying contracting modalities to leverage JRR rosters to embed in-house SGBV expertise. This accords with the mechanisms' emphasis on recruiting specialists in the collection of information and evidence for accountability purposes, drawing in both from the international criminal tribunals and from national jurisdictions.

In its September 2021 report to the Human Rights Council, the IIMM detailed its strategy and priorities. Factors relevant to case selection include the number of perpetrators or victims and whether the crimes were against displaced Rohingya now living in Bangladesh. Crimes of sexual violence were explicitly mentioned as priorities, indicating that expert internal capacity to investigate SGBV violence would be built.

UNITAD, for its part, has a dedicated Gender and Children's Crimes Unit (GCCU), which is headed by senior staff at P-5 level and which has recruited lawyers, investigators and analysts who have expertise and experience in investigation SGBV and/or crimes against children. The GCCU's staff are placed across all of the Field Investigation Units (FIUs) and serve as focal points between GCCU and the FIUs. This allows those with specialist expertise to weigh in on interview planning, participate in interviews (including through leading them, if their expertise is required), analysing the testimonies and documentary information

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149 Justice Rapid Response annual report 2018.

150 Save the Children and the Oxford Programme on International Peace and Security, *Advancing Justice for Children*, March 2021, para. 131, citing an expert interviewed for that study.

151 Human Rights Council, Report of the independent fact-finding mission on Myanmar, A/HRC/39/64, 12 September 2018; Justice Rapid Response, Annual Report 2018, p. 4 (other JRR experts included a child psychologist to mentor the Fact-Finding Mission team on interviewing child victims and survivors, and a military analyst).

152 Justice Rapid Response, Annual Report 2018, p. 7, Annual Report 2019, p. 15, Annual Report 2020, p. 15. Other experts included a forensic image expert, forensic pathologists, an interpreter and military experts.

153 Human Rights Council, A/HRC/37/CRP.3, 8 March 2018.

154 In early 2018, Justice Rapid Response and UN Women provided one Sexual and Gender Based Crimes (SGBC) analyst, one SGBC investigator and one SGBC legal advisor to provide legal analysis and advise on the collection of evidence to the work of the IIMM. JRR has also contributed crucial expertise in support of criminal prosecutions, including in the cases of Hissene Habre before the Extraordinary African Chambers, Khieu Samphan and Nuon Chea at the ECCC, and Bosco Ntaganda at the ICC.

collected, and contributing to the drafting of the eventual case brief.

Similarly, the IIIM has included gender experts within core professional categories across the entire office, including investigators, lawyers and analysts, including at senior levels. The IIIM tests for gender competence in all of its recruitments, and gender-related performance goals have been formulated for all staff members. The IIIM has adopted a proactive and comprehensive gender strategy to guide the integration of a gender analysis throughout its work, and all sections have gender strategy action plans against which to measure progress. Tailored plans are being developed for integrating a gender analysis into each of the IIIM's evidentiary modules and/or case-files. Work to implement the IIIM's gender strategy is supported by the IIIM's Working Group on Gender and Victim/Survivor-Centred Approaches with focal points drawn from each section of the office. Further, a thematic expert on gender and victim/survivor-centred approaches provides peer-to-peer support across the office to promote effective implementation of the Strategy in the daily work of the IIIM team. The IIIM's ongoing consultations with Syrian civil society inform the development and implementation of the IIIM. The IIIM's Gender Strategy, along with the IIIM's Strategy on Children and Youth (see further below) are expressions of the IIIM's commitment to a victim/survivor-centred approach and are designed to facilitate inclusive justice for Syria.

The Head of the IIIM, Catherine Marchi-Uhel, has emphasised that the mandate's early work was informed by the findings of the Independent International Commission of Inquiry on the Syrian Arab Republic: 'We learned the importance of seeing and treating the investigation and prosecution of sexual and gender-based violence as an integral party of investigating and prosecuting war crimes, not as an aside. Investigation assures that sexual and gender-based violence is not marginalised or treated as collateral crimes, but is placed firmly within any case against an accused'.<sup>155</sup> She further added:

As a judge, I have seen first-hand how devastating gender-based violence is for survivors. In situations of conflict, gender is a critical structural factor in driving violence. When I reflect on past international criminal law cases, I find that this role, but also the intersection between gender and other factors, such as nationality, ethnicity, race or religion, haven't been sufficiently articulated in these cases, even if the factual basis for it was presented. As a result, the cases prosecuted have masked some of the key factors underpinning violence, thus weakening the potential for transformative change that could have been an outcome of these processes. As justice facilitators in the IIIM, we are committed to a thorough understanding of structural gender factors in the Syrian situation, and also to integrate relevant analysis into the various aspects of our accountability work. We aim to fully capture the female and male experiences of violence. It will help to support more inclusive and effective justice for victims and survivors.<sup>156</sup>

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<sup>155</sup> UN WOMEN, *Specialized investigation into sexual violence in conflict is essential for justice, experts say*, 30 April 2019.

<sup>156</sup> Catherine Marchi-Uhel, speaking in October 2021: <https://www.youtube.com/watch?v=Bm5opX8P1rc>.

## Part C: Crimes Against Children

Another important aspect of UN mandated investigations moving forward must also be a focus on crimes and violations committed against children. Children are often among the principal victims of core international crimes yet crimes affecting them, despite their magnitude, frequency, and devastating impact, have not historically received sustained attention from the international justice community.<sup>157</sup> Thankfully, in recent years, there has been a shift to ensure investigation and analyses of atrocity situations understands and records the experience of children, including from the children themselves without being filtered through the eyes of adult witnesses and survivors. Building on such positive trends is crucial. While progress is being made, there remains little understanding of children's lived experiences, and the differential impact of violence based on their personal characteristics, including their gender and age.<sup>158</sup> As a result, **in accountability-driven investigations, children are still frequently un-situated and ageless, their intersecting identities unspecified, and their voices muffled, if not unheard. Overcoming such gaps must be a priority for the future of UN mandated investigations.** As with SGBV expertise discussed above, a permanent investigative body would likely be best able to ensure that such expertise is embedded within every investigative mandate.

*In accountability-driven investigations, children are still frequently un-situated and ageless, their intersecting identities unspecified, and their voices muffled, if not unheard. Overcoming such gaps must be a priority for the future of UN mandated investigations.*

Principal among the **external challenges** of investigating such crimes are the difficulty in accessing child interviewees or in having adults give accounts of crimes committed against children and the scarcity of experience in child-centric investigations and analysis. Families may be unwilling to allow their children to interact with investigators, a decision which is understandable given the trauma and stigma the children and their families may have suffered. Adult family members, and indeed adults within the survivor community, may be unwilling to detail crimes against children for diverse reasons including trauma but also a sense of guilt from not being able to protect the children from egregious acts of violence, or concerns about deepening the stigma that may be placed on victimised children. A further difficulty of investigating and building cases on crimes against children arises when no documents through which one can verify the age of the child survive the conflict, mass atrocity, or displacement.

There are also **entrenched and mutually reinforcing attitudinal and structural barriers**, which are only now starting to be addressed in the various judicial and non-judicial accountability-driven entities. While those charged with case-building may not be consciously indifferent to the experience of children, children have remained largely invisible in the investigations and reports of most UN human rights investigations pre-dating the accountability turn, although since 2011 more and more mandates specifically required both reporting and expertise on aspects of a conflict or violence that impacted children. Even when documented, an ongoing challenge seems to be that atrocities affecting children are often addressed as part of the broader crimes committed against the (adult) civilian population, with limited age-disaggregated analyses. Furthermore, where children are explicitly considered, the experiences of boys have generally been reduced to recruitment and use of children in hostilities, and those of girls to sexual and gender-based violence.

For example, over the last ten years the Syria Commission of Inquiry has done an outstanding job describing the violations by all sides in Syria, but its documentation has overwhelmingly reflected the

<sup>157</sup> Save the Children and the Oxford Programme on International Peace and Security, *Advancing Justice for Children*, March 2021.

<sup>158</sup> Save the Children, *Stop the War on Children*, 2019, pp. 22, 27.

experiences of adult victims, even though children make up a substantial part of the civilian population and have been disproportionately affected by the violence. According to a former staff member, who served on the COI before the recruitment of a child rights expert, 'we hardly had anything on children. So, you go through interview after interview trying to find this one line you could take to put it. Maybe because we didn't have these experts.'<sup>159</sup> In contrast, a former staff member of the COHRSS reportedly observed that the incorporation of a specific focal point for children assisted its engagement with children in South Sudan.<sup>160</sup> Child rights experts have been deployed to the FFM Myanmar, Burundi COI, the Sri Lanka Accountability Project, and to the Libya FFM.<sup>161</sup>

A lack of sustained support and advocacy from State, UN leadership, and civil society have historically affected the search for meaningful accountability for violations and crimes affecting children and can, at least in part, explain such failures.<sup>162</sup> Until recently, mention of children and requirements for child-specific expertise were often neglected in establishing resolutions of UN mandated investigations, resulting in few incentives to mainstream child-competent approaches to accountability. **Donors have also historically not prioritised justice for crimes affecting children as much as other vulnerable groups, resulting in a lack of documentary focus on the ground.**<sup>163</sup>

There are also **fewer recognised experts** in the investigation and analysis of crimes against children working at the international level, and the challenges of ensuring witness protection and psycho-social support structures by scarcely resourced human rights investigations may also explain the historical reluctance of investigators to engage directly with children. Capacity and expertise, however, can be addressed by drawing from domestic jurisdictions with highly experienced investigators and analysts who hold the requisite expertise, as well as through dedicated intensive training and the sharing of best practices. In this context, it is notable that JRR has been building a dedicated child rights expert roster and has increasingly deployed child rights expertise to Commissions of Inquiry, as well as to national prosecutions and to civil society organizations documenting mass atrocities. Increasing direct access to such a roster would be beneficial for OHCHR supported investigations, in particular, given their lower levels of resources and shorter timeframes.

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159 Save the Children and the Oxford Programme on International Peace and Security, *Advancing Justice for Children*, March 2021, para. 73, citing interview with Lina Biscaia, 26 February 2020.

160 Save the Children and the Oxford Programme on International Peace and Security, *Advancing Justice for Children*, March 2021, para. 75, citing interview with Rosalind Sipos, 3 March 2020.

161 Follow up interview with survey respondent.

162 Save the Children and the Oxford Programme on International Peace and Security, *Advancing Justice for Children*, March 2021,

163 Save the Children and the Oxford Programme on International Peace and Security, *Advancing Justice for Children*, March 2021, fn. 85, citing interview with Patricia Sellers, 22 February 2020: 'The international structures have not accessed or made that a funding priority. So, we have impunity gaps that continue to exist. And we don't have some of the political will or the financial ability or commitment, and the internal structures to make all of these divisions talk to each other.'

It is also important to acknowledge that **the three investigative mechanisms have marked a significant improvement with the ways in which UN investigations have engaged – and dealt with – violence against children**. UNITAD, for example, has a specific Witness Protection and Support Unit, within which psychologists are trained to assess – *inter alia* – the vulnerability of potential adult and child interviewees, and if cleared for interview, to support them through the process. UNITAD has also developed standard operating procedures and set up a ‘Sexual and Gender-Based Violence & Crimes against Children Unit’ (known by its acronym, SGBCCU, or GCU, which also draws from experts in national jurisdictions) to support its engagement with children. Based on its periodic reports to the Security Council, it also appears that dedicated field investigation units have been designated to undertake investigative work in priority areas, including for crimes against children. Field-based activities are also reportedly prioritised to fill identified gaps, and expert thematic support is provided internally to facilitate and strengthen UNITAD’s investigations of crimes against children. Further, UNITAD has indicated that it is committed to exchanging lessons learned and best practices with other accountability mechanisms to improve processes and ensure greater successes to bring justice for crimes affecting children.<sup>164</sup>

The IIIM has also articulated a commitment to pay particular attention to crimes against children. The IIIM’s first periodic report (February 2018) identified good practices for ensuring an effective approach to such crimes includes recruiting the relevant expertise, developing policies and operational guidelines, and ensuring their ongoing implementation and revision, as well as regular training for all staff members. The report also underscored the need for cooperation ‘with other UN bodies whose mandates intersect with the Mechanism’s work, including those with “expertise on gender issues and issues concerning children”’. The IIIM has also designed its investigative architecture such that expertise in vulnerable and overlooked victims and crimes, including crimes against children, is embedded within and across its investigative staff. In its most recent report to the General Assembly, the IIIM explained:

In advancing its lines of inquiry, the Mechanism remains committed to a holistic and inclusive approach to justice, in particular regarding different categories of victims/survivors. Specific attention is paid to ensuring that analytical work products incorporate historically overlooked and insufficiently documented crimes, such as sexual and gender-based crimes and crimes against children. The aim is to integrate this focus from the commencement of every analytical project, in order to assist in accurately identifying the full range of offences to which victims and survivors were exposed. In this context, the planning and implementation of analytical projects systematically integrates elements from the Mechanism’s cross-cutting strategies on gender, crimes against children and a victim/survivor-centred approach, through a range of tools and processes, in coordination with the Mechanism’s internal office- wide working groups on these themes.<sup>165</sup>

The IIIM is developing and implementing a proactive strategy on children and youth designed to ensure that their experiences of conflict are accurately reflected in the IIIM’s analytical work and that their voices can be heard as part of the accountability process. To ensure effective integration of a child and youth sensitive approach as a core part of its daily work, the IIIM has adopted internal architecture similar to that in place for the gender strategy, including a working group on children and youth with focal points drawn from relevant sections across the office and a thematic expert on children and youth who provides peer-to-peer support across the team. The IIIM also develops tailored plans for integrating a child and youth-sensitive analysis into each evidentiary module and/or case-file. The IIIM’s ongoing consultations with Syrian civil society inform the development and implementation of the IIIM strategy on children and youth.

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<sup>164</sup> Follow up interview with survey respondent.

<sup>165</sup> UNGA, Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, A/75/743, 12 February 2021, para. 23.

In February 2020, in partnership with JRR, the IIMM recruited a Gender and Child Rights Advisor, with a background as a prosecutor in national jurisdictions and international courts and significant expertise in prosecuting cases involving crimes affecting children, which suggests that the mechanism intends to bring specific focus on these crimes in its investigations and analysis. Notably, the JRR roster support contributed to a swift deployment.<sup>166</sup>

Taking stock of these developments and of the commitment of the three investigative mechanisms to develop knowledge sharing channels, one recommendation would be to **create a focal point to secure periodic meetings, foster exchange of knowledge and best practices between these experts as well as with the staff of the International Criminal Court Gender and Children Unit, and ultimately capitalise on the lessons learned from the new strategies and policies developed by these bodies, including through dissemination of relevant lessons learned to OHCHR-backed investigations.** This function could be centralised, lending additional support to the argument for building core support capacity.

## Section III Key Take-Aways

**Developing ‘upstream’ working relationships with evidence providing organisations is integral to the success of UN mandated investigations.** This is true even for mandates with greater direct access to crime scenes. Dedicated capacity could be created or supported within the context of a permanent structure specifically dedicated to managing relationships with the civil society. Among the tasks such personnel would be responsible for could be periodic roundtables with evidence providing organisations to update them on developments, receive updates from them, answer questions, and address concerns. They could also develop and maintain relationships between field investigators and evidence providing organisations, and facilitating the transfer of their information pursuant to a platform akin to the Lausanne Platform or similar Memorandum of Understanding. Acknowledging that providing direct training to civil society organisations would be too resource-intensive as an endeavour, such personnel could also be tasked with providing guidance to civil society groups as to what type of information is helpful to mandates and in what form, as well as promoting the sharing of documentary best-practices.

**Recruiting and nurturing expertise in primary collection of testimonies, including that of insider witnesses and particularly vulnerable witnesses and survivors such as victims of SGBV and children, as well as in gathering information on linkage is key to the future of UN mandated investigations.** Such expertise demands the hiring of dedicated personnel to carry out interviews in accordance with international justice standards and best practices. This could be achieved through standing rosters which could draw, *inter alia*, from secondment schemes from willing jurisdictions akin to those utilised by the investigative mechanisms (which would need to be made more effectively available to OHCHR-supported entities). Such personnel could also provide internal training, mentoring, and methodological guidance to ensure field investigators do not risk compromising the probative value of a witness testimony or other information. Particular attention should also be paid to seeking informed consent to share valuable information and the identity of sources, with the appropriate safety measures being in place, with authorities responsible for prosecutions domestically or internationally. A collaboration between OHCHR METS (or other centralised resources within the permanent support capacity) and the three investigative mechanisms could improve retention of institutional memory in these areas, incorporate relevant lessons learned, and standardise information collection practices according to international justice requirements.

<sup>166</sup> Follow up interview with survey respondent.

**Finding ways to harness technology and maximise its reach to support UN mandated investigations also remains crucial.** This is another area where a lot can be learned from the operation of the three investigative mandates, including the use of artificial intelligence-based programs to search and analyse large data sets or collections of call data records, hard drives, and digitised copies of mass documentation created and held by alleged perpetrators. Digital techniques and investigative tools are also becoming a more significant part of investigation aimed at supporting accountability, and in-house capacity should be developed to support open-source, financial, and geospatial investigations, alongside the handling of documentary technologies to support human intelligence and remote investigations.

**Navigating and accessing authentic, probative material requires not only the cultivation of new expertise, but proper infrastructure as well.** All three investigative mechanisms have centralised databases in which evidence is handled and stored according to the highest standards for evidence management. The significant investment they have made towards the sourcing – and development – of such technological innovations and tools should be harnessed and a conversation should be had concerning whether such tools and innovations could be replicated by or somehow pooled with other UN mandated investigations, including those supported directly by OHCHR.

**Either proposed permanent option – a standing, independent UN ISM or an ISD in the OHCHR Secretariat – would help achieve the aforementioned aims by serving as a centralised manager of ‘upstream’ relationships.** It would also house experts who could help advance and sharpen best practices in data collection and storage, as well as in the investigation of SGBV and crimes against children.



**SECTION IV.** Challenges Relating to Information Analysis and Preservation

**Summary:** Alongside improving the quality of information available to UN mandated investigations, work must be done to better ensure that evidence can be leveraged by prosecuting authorities in criminal justice procedures, including through the provision of contextual material. Not only must information be properly verified and stored, but it should also include information that will assist future users of material in determining probative value. New technologies have the potential to foster stronger analysis and information sharing and should be leveraged. A permanent body would help ensure that investigators are able to incorporate best practices for criminal justice procedures in their datasets. It would also be well-placed to develop the standing relationships necessary to act as a liaison between prosecuting authorities and as a coordinator between entities to perform functions such as various types of ‘tracking’ or the closure of mandates.

Once collected, the information gathered by UN mandated investigations must be properly verified, authenticated, analysed, and stored, raising yet another set of challenges arising from the accountability turn. If such information is to be useful to accountability processes, it will require handling in accordance with the requirements of criminal justice, which are more stringent than, but not incompatible with, human rights standards. Such requirements differ, for example, with respect to verification and authentication. The preservation of information’s probative value also requires different procedural obligation if the information is ever to be used in court. This is particularly important given that these days most information will be handled digitally in some way. While digital forms of information and data present specific challenges and vulnerabilities that UN mandated investigations will need to learn to navigate, they also present enormous opportunities and advantages for investigations. Learning how to harness technology for these purposes must be a central focus of the future of accountability-driven investigations.

**Developing relationships of trust with prosecuting authorities and a better understanding of their needs and requirements is also key to the success of accountability-driven investigations, and particularly how their information is analysed and shared.** As one respondent stated:

We have a need for concrete information. When we receive a lot of extra material, it can cause problems for our cases, because it raises questions that we must follow-up even when irrelevant to our cases. This is why it is important for mechanisms to understand what we need, and respond with specific information, but also through analysis and discussion with us, identify other information that could be useful for us, and for which we can make further requests.<sup>167</sup>

**Prosecuting authorities have also indicate an increasing expectation – or at least desire – that UN mandated investigations provide expert evidence and analysis including on**

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<sup>167</sup> Interview with Klaus Zorn.

**situations' contexts (ie political histories, cultural issues, and other contextual information), as well as around issues such as military structures, linkage evidence, open-source data, and legal analysis.**<sup>168</sup> For example,

the ability of investigative mandates to generate refined analysis about a particular conflict or repressive situations can be beneficial to jumpstart domestic accountability exercises. These could include papers on the chain of command, order of battle, history of ethno-religious repression, and timelines of events. This has proven to be a real value-add of these bodies, particularly from the perspective of national prosecutorial authorities who need to get up to speed and may not have the resources to devote to a deep-dive/full-scale structural investigation into a particular foreign society. Prosecuting authorities have further emphasised their desire for **easily accessed or provided information organised by, for example, events, crime, or region, in addition to lists of key individuals (suspects or persons of relevance), possible witnesses, as well as reliable individuals 'in-country' that could communicate with investigators.**<sup>169</sup> The provision of this sort of refined investigative assistance would require UN mandated investigations to ensure that its staffing profile accommodated proficient analysis geared towards criminal proceedings as well as proper technical infrastructure. In this section, we address key challenges and lessons learned in this space drawing from the work of a range of justice actors, including, and specifically, those situated 'downstream' from UN investigations, as well as the three investigative mechanisms, as relevant.

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## Part A: Forensic Authentication and Verification

As prosecuting authorities increasingly engage with UN investigative mandates for the purposes of criminal investigations, our research indicates an increasing expectation that UN mandates will help consolidate and process evidentiary material, including by conducting authentication and verification processes, as well as by preparing contextual analyses.

The mechanisms cannot just be evidence libraries.<sup>170</sup>

It is important that mechanisms like the IIM see themselves as a value-added intermediary between the NGOs and law enforcement. The official neutrality of a UN body may add to the weight our judges give to the evidence when it originates with an NGO but has been verified by the UN body. [T]he mechanisms need to have all of the analytical and forensic tools to pull together the work of all of the NGOs into a more complete product for our cases.<sup>171</sup>

168 Interviews with Prosecuting Authorities.

169 Interviews with Prosecuting Authorities.

170 Interview with Pari Ibrahim, Free Yezidi Foundation.

171 Interview with Reena Devgun, Prosecutor, Sweden.

Understandably, prosecuting authorities also shared a clear desire for documentary and digital evidence that has been subject to rigorous forensic examination and verification. For cases arising out of Syria, Iraq, and Myanmar, all of the prosecuting authorities we interviewed were looking to the novel investigative mechanisms – and the promise of their investments in the technological space – to help achieve these ends:

As to the evidence that has been deposited with the new mechanisms, it is important that they have and use forensic and analytical tools, to authenticate the material and search it for information relevant to our cases. With new facial recognition software, perhaps it could be possible to search hundreds of thousands of images for matches with photos of suspects that we have provided.<sup>172</sup>

Underlying these desires is the prosecutor's need for forensically effective evidential material. In order to meet these expectations, UN mandated investigations (and the evidence collectors and providers on whom they rely) will require an understanding of the importance of authorship and authenticity indicia to probative value. **Probative value is intrinsic to each item of evidence, and distinct from evidentiary weight (which relates to potency in relation to the evidence as a whole).** Since determining probative value requires collection of information that permits assessment of credibility, including indicia of authenticity, accuracy and authorship, it can become increasingly difficult as material becomes further removed from its source. Unverifiable sources or material may be an indication of a problem with the investigation rather than the credibility of the material. The digital realm presents challenges in this regard, including the deletion of important 'creation' data, but also information asymmetries, digital divides, and blind spots that define the power structures of digital open-source material.<sup>173</sup>

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Prosecuting authorities in distant jurisdictions will be greatly assisted by those on the ground following simple but crucial steps that will enable (or at least enhance) secure attribution of authorship, authentication, and verification. While to some extent the concept of 'original' evidence loses its significance with digital evidence, sufficient information relating to creation remains important for forensic processes. In particular, the vulnerability of digital material, such as videos to manipulation, means that **it is helpful if as much 'creation metadata' as possible is securely retained. Where this is not possible, cross-checking material against other material and/or open sources may assist in the detection of manipulations or confirmation of veracity.** It would be very helpful to the ultimate users of collected information if UN mandated investigations could include in their reporting of digital information the degree of assessed reliability or, if this is impossible, the fact that authentication has not taken place.

The increasing proliferation of digital material – whether digital at source or digitally stored – presents new challenges for all types of atrocity investigation. Chief amongst these is the overwhelming volume and choice of data. Harnessing and navigating such material requires innovation. Independent actors such as journalists, Bellingcat, and others have pioneered techniques in identifying the verification of digital material using openly available tools. In addition, and as mentioned above, faced with the enormous

172 Interview with Reena Devgun, Prosecutor, Sweden.

173 S. Dyer and G. Ivens, 'What would a feminist open source investigation look like?' Digital War, 2020.

challenge and opportunity presented by the need to analyse data-storing devices, digital call-data records, geospatial records and other data, including information held by social media companies and on encrypted messaging platforms, the three investigative mechanisms appear to have firmly grasped the technology nettle. Such lessons learned can be applicable to other mandates.

AI and other technological aides will become increasingly necessary to process, sort, authenticate and assess the probative value of digital material. Yet, **verification processes must be designed with acute care to minimise biases, irrespective of the technology or whether it is even being used.** For example, algorithms and machine-learning tools must be subject to frequent rigorous examination to ensure they remain as objective as possible. Non-digital evidence must also be proactively pursued, not least because the ‘voices’ of victims must not be eclipsed by over-reliance on the digital. Verification processes must still aim for the triangulation of documentary, physical, and testimonial evidence.<sup>174</sup>

In a step hailed as a breakthrough for digital open-source investigations, the International Criminal Court relied on videos posted on social media sites to issue an arrest warrant against Mahmoud al-Werfalli in August 2017.<sup>175</sup> In the second arrest warrant issued against him, the Pre-Trial Chamber held that ‘an expert report [...] prepared by a renowned, independent institute’ which ‘concluded that there no traces of forgery or manipulation in relation to locations, weapons or persons shown in the video’ and was corroborated by witness evidence amounted to ‘sufficient indicia of authenticity.’<sup>176</sup> As courts adjust to digital open-source material, new norms may emerge regarding navigating and assessing overwhelming volumes of digital material. As reliance on material such as this increases, and is subject to challenge, it is likely that courts will become increasingly discerning and exacting in their determinations of probative value and evidentiary weight that can be accorded to digital open-source material.

## Part B: Storage and Preservation

Among respondents interviewed for this research, evidence providing organisations and prosecuting authorities alike envisaged that another fundamental service that should be provided by **UN mandated investigations is a secure repository of the information and evidence provided to them.**

UN investigative mandates should, at a minimum, follow basic but strict forensic rules regarding the preservation of physical or documentary material with which they come into contact. This includes full chain of custody recording and secure and appropriate storage, including in the right conditions to preserve the evidential integrity of the material. Wading ineptly into a crime scene can be catastrophic for criminal accountability – as can any gap in the chain of custody or if an object is allowed to deteriorate prior to forensic examination. Investigative mandates (and evidence-providing organisations) should be properly equipped and resourced to adhere to protocols abiding by international criminal standards.

For example, as previously recommended by the Group of Practitioners in Fact-Finding and Accountability, **non-testimonial information should be copied or photographed, and all circumstances of the source and collection of the information recorded in detail.**<sup>177</sup> Indeed, any information gathered by investigators can be stored digitally, at least in some form, including physical evidence (such as weaponry or medical records), which might be photographed and forensically assessed.

While the international criminal judicial sector catches up, UNITAD and the IIIM have firmly grasped the increasingly urgent need for suitable modern technological solutions to deal with vast tranches of

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174 A. Koenig, “Half the Truth is Often a Great Lie”: Deep Fakes, Open Source Information, and International Criminal Law, Symposium on Non-State Actors and New Technologies in Atrocity Prevention, American Society of International Law, 2019, pp. 252 et seq.

175 ICC, The Prosecutor v Al-Werfalli, Warrant of Arrest, ICC-01/11-01/17-2, 15 August 2017, paras 11-22.

176 ICC, The Prosecutor v Al-Werfalli, Second Warrant of Arrest, ICC-01/11-01/17-13, 4 July 2018, para. 18.

177 Group of Practitioners in Fact-Finding and Accountability, *Practitioners in Human Rights Fact-Finding and International Criminal Prosecutions Propose Practical Steps to Bridge The Hague – Geneva Divide*, 6 January 2017, Recommendation III:3.

complex data. UNITAD's recent report provides a detailed explanation of its innovative – and criminal accountability-focused – bespoke model designed to harness the potential of the 'digital revolution' by integrating technology into the organisation, screening and analysis of evidence.<sup>178</sup>

Our data also indicate a consistent desire for UN mandated investigations to **hold a curated,<sup>179</sup> 'searchable' database,<sup>180</sup> and to make this available to prosecuting authorities.** There are clear benefits to constructing a structured database of information that can be interrogated according to, for example, individuals, events, locations etc. This would assist UN investigative entities in conducting structural investigations of the material gathered, and enable them to proactively alert prosecuting authorities to pertinent information. Without a searchable, organised database, identifying relevant information – including chain of custody information – from a morass of data would render the exercise unfeasible for prosecuting authorities (especially where they are subject to tight court schedules). As one prosecutor put it, 'material [gathered] is precious, but not inventoried and thus difficult or impossible to access.'<sup>181</sup>

The case for UN investigative mandates to play this role is particularly compelling given that they sit at the heart of the lifecycle of evidence and are thus well-placed to assist with streamlining information concerning not only their primary evidence but also that which they receive from evidence providing organisations. For example, just two years into its operation, the IIM held over two million records, and was actively engaging with over 220 sources of information. Such a depository is an enormously valuable resource for the international community and for States seeking material to inform their domestic investigations and prosecutions. Supporting similar capacity for all UN investigative mandates to construct ordered and aptly searchable databases could be enormously valuable. However, this presents significant digitisation and information management challenges, especially in view of the volumes and types (ie non-text, in various languages etc.) of material involved. While software presents sophisticated archiving opportunities, these remain fundamentally reliant on those people gathering the material and the processes designed and implemented in constructing the databases in the first place. It also raises thorny questions about data protection, privacy and institutional independence, considered below.

*Among respondents interviewed for this research, evidence providing organisations and prosecuting authorities alike envisaged that another fundamental service that should be provided by UN mandated investigations is a secure repository of the information and evidence provided to them. For these to be helpful to prosecuting authorities, however, such databases should be curated and searchable according to, for example, individuals, events, locations, etc. The case for UN investigative mandates to play this role is particularly compelling given that they sit at the heart of the lifecycle of evidence and are thus well-placed to assist with streamlining information concerning not only their primary evidence but also that which they receive from evidence providing organisations, and how they might be relevant to proceedings and investigations carried out in specific jurisdictions.*

178 UNITAD, 'Harnessing Advanced Technology in International Criminal Investigations: Innovative Approaches in Pursuit of Accountability for ISIL Crimes.'

179 Klaus Zorn: *A searchable database is good, but there must be a process at the mechanism to screen out irrelevant matter.*

180 Interview with Prosecuting Authority.

181 Philippe Meire, Belgium.

## i. Security and Data Management

The handling of a searchable database would raise important questions concerning the security of archives and of data management. Beyond the choice of software itself, **under what circumstances and how such a database should be made available to state authorities is in itself a significant question.** On the one hand, making non-sensitive data readily available to prosecuting authorities could assist and reduce the burden on mandates responding to requests for assistance. State authorities would however likely require guidance and analysis assistance in order to successfully navigate the database, thus requiring dedicated points of contact within the investigative team. The biggest question may perhaps remain whether it is politically, legally and morally acceptable to afford state authorities unfettered access to sensitive data. And if so, which states and under what conditions? The neutrality and legitimacy of UN mandated investigations would be severely undermined were they to risk being perceived as proxy intelligence agencies for certain powerful states. Similarly, precise standards would be necessary to ensure that sensitive information is not revealed to governments that risk co-opting it in the commission of human rights violations. Reported grave failings in data management have ranged from inadequate basic data storage practices to high-profile mass biometric data transmission without informed consent.<sup>182</sup> Such errors devastatingly undermine public confidence in UN bodies and their partners,<sup>183</sup> and risk creating distrust and chilling cooperation with evidence providing organisations. There is indeed a need for standardised best practices and guidance to be made available – and the resources necessary for them to be adhered to – across all UN mandated investigations in order to ensure proper data protection.

This would also enable greater transparency and accountability for UN bodies, which would enhance public confidence therein.<sup>184</sup> It would also streamline and demystify processes through promoting a

*Importantly, the handling of a searchable database would raise important questions concerning the security of archives and of data management. Beyond the choice of software itself, under what circumstances and how such a database should be made available to state authorities is in itself a significant question. Precise standards would be necessary to ensure that sensitive information is not revealed to governments that risk co-opting it in the commission of human rights violations. In view of the sensitivity of the data collected, UN investigations must be enabled to meet the highest standards of information security. This cannot however be achieved without significant and proper investment, nor implemented without close attention to the UN technology and information security environment in which it is hosted.*

182 OIOS Audit of the Biometric Identity Management System at the Office of the United Nations High Commissioner for Refugees, Report 2018/181, 22 December 2016. This report stated that *In four out of the five country operations reviewed, OIOS observed that the level of information provided to persons of concern during the biometric registration was below the standards required by the Policy. There were also inconsistencies in the information provided, particularly regarding the access to the data by third parties.* The report continues: *There was no evidence that the persons of concern were informed of their rights and obligations, for example through the distribution of leaflets or posting of visibility materials in registration sites.* Report available at <https://oios.un.org/file/6506/download?token=h8ejkFap>; Overseas Development Institute, 'Although shocking, the Rohingya biometrics scandal is not surprising and could have been prevented', 28 June 2021, available at <https://odi.org/en/insights/although-shocking-the-rohingya-biometrics-scandal-is-not-surprising-and-could-have-been-prevented/>

183 Human Rights Watch, 'UN Shared Rohingya Data Without Informed Consent', 15 June 2021, available at [https://www.google.com/url?sa=t&rc=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwj3eeL\\_ePzAhVR-aQKHAAJAQAQFnoECAGQAQ&url=https%3A%2F%2Fwww.hrw.org%2Fnews%2F2021%2F06%2F15%2Fun-shared-rohingya-data-without-informed-consent&usq=AOvVaw0BaFy6UUKXrXJmRzTx5YgM](https://www.google.com/url?sa=t&rc=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwj3eeL_ePzAhVR-aQKHAAJAQAQFnoECAGQAQ&url=https%3A%2F%2Fwww.hrw.org%2Fnews%2F2021%2F06%2F15%2Fun-shared-rohingya-data-without-informed-consent&usq=AOvVaw0BaFy6UUKXrXJmRzTx5YgM); The New Humanitarian, 'Biometric data and the Taliban: What are the risks?', 2 September 2021, available at <https://www.thenewhumanitarian.org/interview/2021/2/9/the-risks-of-biometric-data-and-the-taliban>

184 Privacy International and the ICRC, 'The Humanitarian Metadata Problem: "Doing No Harm" in the Digital Era, October 2018, available at <https://privacyinternational.org/sites/default/files/2018-12/The%20Humanitarian%20Metadata%20Problem%20-%20Doing%20No%20Harm%20in%20the%20Digital%20Era.pdf>; The New Humanitarian, 'The cyber attack the UN tried to keep under wraps', 29 January 2020, available at <https://www.thenewhumanitarian.org/investigation/2020/01/29/united-nations-cyber-attack>

consistency in approaches between bodies, thus facilitating secure data sharing. It is essential that all mandates are equipped with the software, hardware, and workflow design necessary to uphold secure data handling. Fundamentally, mandate holders should ensure that information collection remains aimed at assisting those impacted by atrocities and does not endanger them. It is imperative that any major data-collection and processing exercise is accompanied by **appropriate investment in information security**. In view of the sensitivity of the data collected, these must meet the highest standards of information security. This cannot be achieved without significant and proper investment, nor implemented without close attention to the UN technology and information security environment in which it is hosted.

The Europol Analysis Project on Core International Crimes (AP-CIC) provides a secure database through which States and international organisations can exchange and store information relating to core international crimes, whilst retaining full control over the information that they submit and/or withdraw or share. The benefits of joining the AP-CIC include a stand-alone maximum security database connected to all other Europol databases (including counter-terrorism databases, serious organised crime database); core international crimes data collection from different sources (law enforcement, NGOs, international organisations, military); a Secure Information Exchange Network Application (SIENA) – high security communication tools; institutional/long-term storage; provider ownership; automatic crosschecking now and in future; and tailored analysis and intelligence support (open source and social media/financial intel/face recognition/mass data/CTW/satellite imagery/PNR).<sup>185</sup>

**Creating such a platform to be shared among UN mandated investigations could also support the handling of 'big data' collection and analysis**, which several prosecuting authorities have noted yields increasing value to their own investigations.<sup>186</sup> Equipping UN investigations with such technology and, **crucially, the technical, legal, and ethical expertise needed to properly operate it**, could significantly improve the quality of their own investigations, as well as the flow of information to jurisdictions prepared to use them in accordance with the highest human rights standards. Constructing and sustaining such a resource, including building and maintaining the network relationships, requires significant investment in hardware and personnel. It remains unlikely that it is currently feasible for UN investigative mandates to follow an approach akin to the AP-CIC independently.

## ii. Contextual and Legal Analysis

Another area where prosecuting authorities recognised that **UN investigative mandates can make particularly helpful – and direct – contributions to justice is assisting with the legal and factual determination of the elements of international crimes**. Evidence satisfying the contextual elements of serious international crimes is necessary to trigger the jurisdiction to investigate and prosecute those suspected of being responsible. Our data indicate that senior prosecution officials favour receiving sufficiently supported findings to demonstrate such contextual elements: for example, 'widespread or systematic attacks' or the 'existence of a government or organisational plan or policy' necessary to satisfy the necessary elements of crimes against humanity. The consequences of the lack of such information can be significant: no trials. Mistrials, or trials that are unduly protracted by the need to remedy evidential deficiencies, or the need to expend excessive time and resources on contextual elements rather than focusing on individual criminal responsibility.

UN mandated investigations have indeed historically been looked to for general contextual information on situations, with reports relied on to support judicial determinations of, for example, the existence of a non-international armed conflict.<sup>187</sup> Almost every prosecuting authority interviewed noted that

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185 K. Aksamitowska, 'War Crimes Units: Legislative, Organisational and Technical Lessons', *MATRA Project Report*, TMC Asser Instituut / Global Rights Compliance 2021.

186 Interviews with Prosecuting authorities.

187 Interview with Reena Devgun, Prosecutor, Sweden.

UN investigative mandates are well-placed to gather and analyse the information necessary to provide well-supported findings on the broader context of atrocities:

Evidence on the contextual elements of the international crimes (NIAC or 'widespread or systematic attacks on civilian population') is very important. If UN bodies do this right, we can use their reports for this part of our case.<sup>188</sup>

If we had evidence that [hidden] had carried out mass crimes (even of a less serious sort, like pillage of occupied villages), then with other evidence that our accused was with [hidden] in that time and place, we would be able to use law enforcement tools to build a case (perhaps of even more serious war crimes).<sup>189</sup>

Information about context is also important. We do use historians and country experts, but if there were UN reports that made clear findings on contextual elements (existence of civil war, and widespread or systematic attacks against civilians) this could corroborate and reinforce our expert testimony.<sup>190</sup>

Commissions of Inquiry may be challenged in developing evidence about specific events and perpetrators that meets judicial standards. However, they could do a better job on the big picture, specifically on contextual elements like existence of an armed conflict or of widespread or systematic attacks against civilians. We need this to convict for these crimes, and well-referenced findings could be very useful.<sup>191</sup>

As mentioned, the judicial response to UN investigations' findings on such contextual matters have however been mixed to date; with criminal accountability processes particularly challenging the reliability of determinations made by some UN mandates to date, or the standard they adopted in making such determinations. Yet, in this area, too, prosecuting authorities interviewed for our study credited progress made with the three investigative mechanisms:

My colleagues who worked with earlier UN entities indicate prior problems of inaccuracies in UN-provided information that caused the information to be entirely rejected by our judges. We recently have had good results with the IIIM.<sup>192</sup>

*Among the most significant and direct contributions that UN investigations can make to accountability proceedings are perhaps solid findings and analysis to assist with the legal and factual determination of the elements of international crimes. For example, the 'widespread or systematic' nature of attacks, or the 'existence of a government or organisational plan or policy' necessary to satisfy the necessary elements of crimes against humanity. Evidence satisfying the contextual elements of serious international crimes is necessary to trigger the jurisdiction to investigate and prosecute those suspected of being responsible. Our data indicate that senior prosecution officials favour receiving sufficiently supported findings to demonstrate such contextual elements. The consequences of the lack of such information can be significant: no trials, mistrials, or trials that are unduly protracted.*

188 Interview with Reena Devgun, Prosecutor, Sweden.

189 Interview with Reena Devgun, Prosecutor, Sweden.

190 Interview with Prosecuting Authority.

191 Interview with Investigator.

192 Interview with Prosecuting Authority.

In no small part due to their sustained focus, depth of evidence collection, relative longevity, tailored and situation-specific expertise, and substantial resources, the three investigative mechanisms are particularly well-placed and able to generate refined analyses on, for instance, chains of command, situation histories, patterns of behaviour, or scale of criminal activity. As is clear from our research, such material is of tangible assistance in domestic prosecution proceedings, where authorities may not have the time, material, practical ability or expertise to conduct their own full investigation into these aspects of events occurring beyond their borders. We acknowledge that any mechanism with might be less efficient as it would likely need to recalibrate its regional expertise for respective situations, as does the ICC. However, any such 'inefficiencies' would likely be outweighed by the foundational institutional efficiencies gained through immediate readiness to commence investigative activities.

## Part C: Information Sharing

As custodians of data relating to vulnerable individuals and situations, UN mandated investigations are asked to assume significant responsibilities. As they explore and utilise the technical opportunities presented by ever-advancing technologies, mandates will also need to navigate the serious ethical and practical issues of security and privacy raised by the collection, use, and sharing of such data. Data management responsibilities require that UN investigations be equipped with the institutional, technical, physical, and organisational structures to enable the secure, ethical, and effective handling of data. It is therefore self-evident that, alongside proper expertise and the apt technical infrastructure, UN investigative mandates will need comprehensive data management protocols (covering all types of data) at every stage, including collection/receipt, storage, processing, analysis, use, retention, and destruction. Some of the greatest benefits of standardisation, however, might be derived with respect to information sharing.

### i. Requests for Assistance and Other Forms of Disclosure/Cooperation

Information sharing among national authorities and between the latter and UN entities for the purposes of criminal accountability measures is, of course, nothing new. UNODC, just to cite one example, has developed a series of resources, such as a Model Law on Mutual Assistance in Criminal Matters.<sup>193</sup> This is a collection of legal and practical tools for the 'collection, preservation, disclosure and cross-border sharing of electronic evidence', called SHERLOC,<sup>194</sup> and a Practical Guide for Requesting Electronic Evidence Across Borders. Such resources are, however, only accessible to registered 'central and competent national authorities and Permanent Missions to the United Nations',<sup>195</sup> and do not appear relevant to UN mandated investigations.

Indeed, **prosecuting authorities interviewed for this study often described 'a lack' of interactions with UN mandated investigations, or characterised their interactions as 'seldom', 'cumbersome', 'slow', and sometimes**

*As stated repeatedly throughout this report, both civil society organisations and prosecuting authorities expect UN investigations to be more than mere repositories of information. This however requires the development of apt protocols and frameworks – with dedicated expertise also being put in place to handle requests for information and assistance, as well as other matters of disclosure and cooperation. This is particularly important once mandates cease their operation, but no less important while mandates remain active.*

193 [https://sherloc.unodc.org/cld/uploads/pdf/EI%20Evidence%20Hub/Model\\_Law\\_on\\_MLA\\_2007.pdf](https://sherloc.unodc.org/cld/uploads/pdf/EI%20Evidence%20Hub/Model_Law_on_MLA_2007.pdf)

194 <https://sherloc.unodc.org/cld/en/st/evidence/electronic-evidence-hub.html>

195 Ibid.

**‘obstructive’, indicating that a lot can be improved at the ‘downstream’ interface of their work.**

Respondents were markedly more positive about their interactions with the three investigative mechanisms, whose relationship with prosecuting authorities appears to be more effective than traditional OHCHR-supported investigations. This picture seems consistent with what the mechanisms themselves have reported, with the IIM for example reporting ‘a steep increase’ in the number of Requests For Assistance (RFAs) received – from 11 jurisdictions – in ongoing investigations and prosecutions, as well as a proactive attitude in ‘approaching relevant authorities which are investigating international crimes committed in Syria to deepen its understanding of domestic jurisdictions’ needs with a view to informing its strategies and priorities.<sup>196</sup> Similarly, UNITAD had received over 60 requests from 14 jurisdictions by 2021, with at least one state crediting UNITAD with providing it with information that enabled it to arrest ISIL suspects on its territory.<sup>197</sup>

Learning from the practice and experience of these entities, it would be advisable to think of ways to **render all UN mandated investigations responsive to authorities seeking information pursuant to RFAs, as well as ways in which human rights investigations can themselves (proactively) reach out to domestic jurisdictions and submit information**

which they think might be relevant to their cases. At a minimum, easily accessible forms, which make clear precisely which information and authority is required for submission as well as the substantive nature of the request, would clarify and increase the efficiency of RFAs for both the entity making the request and the mandate processing it. These functions could be well served by dedicated, centralised human resources that could be pooled to serve multiple mandates. The investment in developing and implementing necessary memoranda, legislation and information sharing, and cooperation agreements is expensive and complex; it is inefficient and a waste of valuable resources to start anew with each investigative mandate.

Such personnel could, for example, work with other UN offices, including but not limited to UNODC and the three investigative mechanisms, to ensure that best practices are consistent across UN-mandated entities, and to **facilitate both the flow and quality of information among UN entities themselves**. Experts interviewed for our study reported indeed that information is often withheld or not shared across UN mandates, with such lack of cooperation affecting, in particular, some humanitarian agencies, alongside UN investigations themselves. While humanitarian actors face very legitimate challenges when

*Respondents were markedly more positive about their interactions with the three investigative mechanisms, whose relationship with prosecuting authorities appears to be more effective. Learning from the practice and experience of these entities, it would be advisable to think of ways to render all UN mandated investigations responsive to authorities seeking information pursuant to RFAs, as well as ways in which human rights investigations can themselves (proactively) reach out to domestic jurisdictions and submit information which they think might be relevant to their cases. In addition, dedicated personnel could also support handling requests coming from those representing potential defendants as well as streamlining and standardising interactions with private sector actors holding data increasingly relevant to UN investigations.*

<sup>196</sup> IIM, Bulletin No.5, February 2021.

<sup>197</sup> EURACTIV, ‘Two IS terrorist suspects arrested in Lisbon region’, 3 September 2021.

it comes to their – real or perceived – cooperation with international accountability efforts, including the risk of losing access to vulnerable territories and populations thus effectively compromising their mandates, finding ways of sharing pertinent relevant information (at least internally to the UN system) would enormously benefit accountability efforts and the UN's own reputation.

Dedicated personnel could also support handling requests coming from those representing potential defendants. The personal experience of one of the authors of this study has indeed been that, even with the assistance of two P-5 foreign ministries or the ICC Registrar, the conduct of UN bodies holding information germane to defence cases was 'dilatatory if not brazenly obstructive'. While the processes for defence access to evidence may differ from jurisdiction to jurisdiction, and while it might be that domestic judicial authorities have processes in place to facilitate RFAs from individuals, UN bodies collating evidence must have clear mechanisms in place to facilitate defence access to exculpatory information. Where a mechanism requires a court order to accompany any defence request for information, this places the onus on judicial authorities to ensure that requests are expeditiously and fairly facilitated. This constrains mechanisms to dealing only with States with strong fair trial processes and records, which may encourage good practices more broadly. There is some indication from our data that a mechanism 'made the hearing of the defence witnesses possible'.<sup>198</sup> It is important to build on such good precedents.

In addition, dedicated capacity could be created to streamline and standardise interactions with private sector actors in the context of UN mandated investigations. This is increasingly necessary given the prominence of some industry platforms – particularly in the technology sector – to accountability efforts. The case of Myanmar, where Facebook's role concerning hate speech that contributed to the intensification of violence against the Rohingya minority came under scrutiny is perhaps the most prominent, but sadly not the only, example of the real need to solicit and receive sensitive information relating to international crimes by social media companies and other private actors. While Facebook has stated that it is working with the IIMM to identify and share relevant information, the Head of the IIMM has recently stated that although they 'have been meeting regularly' and 'received some [information]', they have 'certainly not [received] all [the information] that we have requested', adding that they 'continue to negotiate with them' in the hope of receiving more information.<sup>199</sup> Supporting and standardising such forms of interactions is another function that lends itself well to centralisation.<sup>200</sup>

## Part D: Additional Coordination Functions

It was observed by respondents to our study that UN mandated investigations could, with due resources being provided to them, contribute to ensuring that duplicative efforts by various authorities approaching the same topic be minimised, and that the investigation by one country or mandate not be thwarted by the endeavours of another – including, for instance, an insider witness being arrested on lesser charges being brought by another jurisdiction. Centrally dedicated capacity – which, again, could serve multiple mandates – could allow UN mandated investigations to increase efficiency and to help avoid so-called 'blue on blue' or 'friendly fire' missteps in which different national authorities unaware of each other's efforts inadvertently damage their cases.<sup>201</sup>

In addition, respondents to our study highlighted that **dedicated, central (and pooled) capacity would be beneficially provided to UN investigations to assist coordinating functions such as the tracking or suspects and the closure of mandates.**

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198 Interview with Tom Laitinen, Prosecutor, Finland.

199 The Diplomat, 'UN Investigator: Crimes Against Humanity Under Myanmar Junta: Preliminary evidence shows that attacks against civilians are widespread, systematic and follow a pattern,' 8 November 2021.

200 This is explored in an ongoing project between our Institute and UC Berkeley's Human Rights Center, Mass Atrocities in the Digital Age Preserving Social Media Evidence.

201 Interview with Prosecuting Authority.

## i. 'Tracking' Services

Several prosecution authorities expressed a desire for a 'suspect tracking' and financial tracking services. Notably, demonstrating the feasibility of integrating tracking services into the function of human rights investigations, *Al Jazeera* and Google have established an interactive project to track Syrian defectors.<sup>202</sup> Prosecutors expressed however concerns regarding the possibility of public campaigns to identify and expose suspects present in their countries, and emphasised the importance of any such function being performed confidentially.

We participate in the European Genocide Network of Eurojust and with Europol. We would like to see the mechanisms develop formalised relations with Eurojust or Europol. Within Eurojust and Europol we can share information freely, because it is all subject to agreed protocols. We wish that the mechanisms could supply information or evidence to these entities in a way that could be shared automatically with each of the members.<sup>203</sup>

Regarding tracking of potential suspects, we would be concerned about public campaigns to identify and expose suspects present in various countries but would appreciate receiving such information directly and confidentially, in order to follow up.<sup>204</sup>

For reasons of independence and legitimacy, it might be the case that UN bodies would be limited to interacting with established international police bodies such as INTERPOL and Europol, or with UNODC.<sup>205</sup> Formalised, practical partnership with these entities would be likely to provide UN mandated investigations with greater insight into potential witness (including 'insider witness') flows and the ability to conduct structural investigations with more information from State intelligence (through, for instance, cooperation with state-level immigration authorities and services).

To the extent that such a function would require substantial investment of resources and particular expertise and the consistency of funding necessary to safeguard its efficacy, it seems unlikely that OHCHR would currently have the capacity to sustain a suspect tracking service. However, the blueprint for the necessary sharing of information and the infrastructure for its dissemination is already established. As a desired function that would further the aim of assisting criminal justice accountability, this function should be considered for integration into any more permanent mechanism model.

## ii. Closure of Mandates

Worryingly, our research reveals an **historic lack of attention to the important issue of the closure of mandates**. This is true even for the investigative mechanisms, which have performed well on other areas covered in our research. Gathering and holding sensitive material that may well have been collected at great risk and which contains information relevant to understanding of complex situations engenders

*In addition, respondents to our study highlighted that dedicated, central (and pooled) capacity would be beneficially provided to UN investigations to assist coordinating functions such as the tracking of suspects and the closure of mandates. Worryingly, our research reveals an historic lack of attention to the important issue of the closure of mandates. This is true even for the investigative mechanisms, which have performed well on other areas covered in our research.*

202 *Al Jazeera, Interactive: Tracking Syria's defections*, 30 July 2012.

203 Interview with Reena Devgun, Prosecutor, Sweden.

204 Interview with Prosecuting Authority.

205 INTERPOL, *Identifying terrorist suspects; Tracing terrorist finances*.

an ongoing responsibility to those who provided the information, those who might rely on it in political or legal accountability processes, and to the wider human community even after the closure of mandates. Currently, however, the process for accessing 'archived' materials by UN investigations after the closure of their mandates can be cumbersome, for it requires the approval of the UN Office of Legal Affairs in New York. Some respondents to this study reported this is often problematic where particular accountability efforts are hotly contested by powerful member states.<sup>206</sup> It is important for supportive States to consider archiving and long-term access regulations early on in order to make sure that material can be used in furtherance of accountability or other justice endeavours, especially if an entity is vulnerable to abrupt closure due to the use of a veto or inability to secure sufficient affirmative votes to renew its mandate.

For this reason, we urgently recommend that, from their inception, all UN mandated investigations have a clear understanding of how and where its records will be preserved. In order to ensure an enduring legacy both to historical understanding and possible accountability measures, archives need to be well-ordered and modalities for access made transparent. Again, we submit that dedicated capacity to create archives and maintain datasets after the closure of mandates could be centralised and serve (ie pooled among) multiple mandated investigations.

## Section IV Key Take-Aways

**Developing 'downstream' relationships of trust with prosecuting authorities and a better understanding of their needs and requirements is key to the success of accountability-driven investigations.**

For example, prosecuting authorities have indicated an increasing expectation – or at least desire – that UN investigative mandates provide expert evidence and analysis including on situations' contexts (ie political histories, cultural issues, and other contextual information), as well as information around issues such as military structures, linkage evidence, open-source data, and legal analysis, particularly around the establishment of the contextual elements of international crimes.

**Prosecuting authorities have also indicated that UN mandated investigations can perform a crucial role concerning the forensic verification and authentication of information,**

with respect to which we recommend the adoption of 'gradated' categories of probative weight to be accorded to material (including open-source information) gathered in the course of investigations. Prosecuting authorities also emphasised the need to preserve chain of custody for physical or documentary material. We recommend that UN investigations develop protocols for the forensic authentication of all evidence, including the preservation of digital copies of documentary records.

**Prosecuting authorities also called for a central repository of evidence in the form of an organised database that be easily searchable**

by, for example, events, crime, or region, and for lists of key individuals (suspects or persons of relevance) to directly support their investigations. Building such capacity would require significant institutional investment – which could, however, seek to maximise the significant technological investment already made by the novel investigative mandates – as well as the hiring and retention of dedicated personnel able to navigate such infrastructure. It is clear that UN mandated investigations stand to improve efficiencies of cost, effort, and time through an integrated, shared approach to the development and use of effective and secure software infrastructures, as well as the conditions under which these can be accessed by states. State authorities would, however, likely require guidance and assistance in order to successfully navigate the database, thus requiring dedicated points of contact which could be centralised to serve multiple mandates.

<sup>206</sup> Interviews with experts.

**Another important area for UN investigations seeking to make contributions to accountability must be their ability to process and respond to Requests for Assistance, alongside other forms of disclosure and cooperation.** Here, again, we submit that centralising and pooling capacity would not only directly assist relationships with prosecuting authorities but also support the centralisation and standardisation of UN investigations' interactions with actors ranging from defence counsel to other UN entities and mandates (such as humanitarian bodies), and actors in the private sector such as social media companies.

**Finally, it was observed by respondents to our study that UN mandated investigations could, with due resources being provided to them, contribute to other coordinating functions** such as ensuring that duplicative efforts by various authorities approaching the same investigations be minimised, that some 'tracking services' (for suspects and financial flows) be made *confidentially* available to interested jurisdictions, and that archives be preserved and maintained at closure of mandates. The blueprint for such functions to be formed is already established and, again, pursuing them would require the building of a centralised infrastructure, or at least dedicated and pooled capacity.

**A permanent body would be best positioned to help investigations maximise the potential of their data to be used in criminal justice proceedings by serving as the liaison to 'downstream' actors,** namely prosecuting authorities. In pursuit of this end, such a body would provide guidance and best practices to investigators on supplementing data sets with contextual information and leveraging advances in database technology. Finally, it could coordinate all actors working on an investigation to produce 'tracking services' and to guarantee the closure of mandates.





**SECTION V.** Building the Support  
Required for Effective Accountability

## Part A: Conclusions

### i. Geneva's Necessary Role in Accountability for Serious Human Rights Violations

Significant questions remain as to whether the UN Human Rights Council is the appropriate body to be mandating, and OHCHR the appropriate office to be orchestrating and staffing, investigations of serious violations of human rights that amount to atrocity crimes under international law, especially when these investigations are to make direct contributions to criminal accountability for perpetrators. This is because of the fundamentally different nature of human rights and criminal investigations with respect to the crucial public reporting and advocacy role of the former. Preserving such function is foundational to the integrity of the international human rights law regime. Equally, human rights and criminal investigations require, as we have demonstrated, different, if compatible, approaches. Yet, extant political realities – primarily that the UN Security Council has been stalemated by threatened vetoes in almost all the recent situations involving the commission of mass atrocities – mean that the pathway to accountability in the UN now necessarily moves through the existing human rights system.

Similarly, it is implausible to await the intervention of independent judicial systems, which may never come or, at best, will arrive too late. Many situation countries are not party to the ICC, and third country investigations are limited in their ability to do external investigations, particularly while violence is ongoing. All forms of accountability require the swift and accurate assessment of an atrocity situation. There is a great need to gather now all the proof that is available, or it will be lost or intentionally destroyed by perpetrators.

Of course, UN investigations – and UN human rights inquiries, in particular – cannot do it all. They can and should, however, focus on what can practically be accomplished that will be of benefit both to their public reporting and to eventual criminal accountability where possible. Examples of this include methodically documenting patterns of violations that could provide proof of either the existence of widespread or systematic attacks on civilians or the existence of a plan or policy to carry out the attacks. Moreover, UN mandated investigations of all forms can make significant efficiency and effectiveness gains by relying less on repetitive first-person interviews and making better use of the work of civil society groups and external open-source experts. By virtue of their neutrality and multi-lateral mandates, UN mandated investigations are especially qualified to conduct the crucial exercise of collating and verifying information and evidential material, and then identifying further necessary areas of investigation. By focusing resources on the secure and expert conduct of this work, UN investigative bodies will stand to better optimise their contribution to all forms of accountability.

This work is hard and contentious, not least because almost all recent UN investigations have been mandated in situations where a State's leadership or its allies are suspected of responsibility for most serious violations of human rights. Thus, investigations are confronted by non-cooperation, resistance, denunciation, and disinformation. However, failing to fulfil these mandates risks diminishing the capacity of the UN human rights apparatus both to deal with less serious violations and to promote processes for consensual solutions as to compliance with obligations.

Focusing exclusively on 'political' accountability through investigations that do not need to reach more forensic standards does not optimise the opportunity to deter abuses. This is particularly the case where such reports are premised upon less rigorous investigations and thus easier to discredit. Certainly, processes for responding to less lethal violations should remain a priority, particularly as these violations are often precursors to the commission of atrocities. Fundamentally, however, the human rights system cannot hold credibility if it does not use the most effective means available to it to respond to the most serious violations. If it does not, it also fails to do its necessary part for victims and survivors in protecting their human right to have the violations from which they suffered properly investigated and remediated.

## ii. Resource Challenges

OHCHR is profoundly under-resourced for all of the responsibilities it holds. Less than half of its funding comes from UN budgets raised from assessed contributions, while a majority comes from the voluntary contributions of human rights-supporting member States.

In order to preserve neutrality, Human Rights Council mandates for country-specific situations have traditionally been funded from assessed contributions under budgets approved by the ACABQ and Fifth Committee of the UNGA. This has the benefit of ensuring that UN human rights investigations will receive funding from the UN budget in circumstances in which reliance on state contributions might lead the opponents of such investigations to argue against any budgetary funding. On the other hand, OHCHR's personnel and funding proposals are often reduced by UN headquarters, where the budgetary processes rely on consensus and opponents are able to withhold their support in order to frustrate proceedings until positions are eliminated or funding limited. This makes the fulfilment of accountability mandates more difficult. A clear recent example is the funding of the provision of UN Human Rights Council Resolution 46/1 on Sri Lanka adopted in April 2021, which provided for dedicated capacity within OHCHR to create what was characterised as a 'mechanism lite' to gather, analyse, and preserve evidence of violations. OHCHR proposed 12 positions headed by a P-5 and the funding to support them for the latter half of 2021. In New York, the ACABQ approved only three positions led by a P-4. It is feasible that the 5<sup>th</sup> Committee, consisting all of UN member states, could restore these positions and provide the necessary funding for the UN regular budget for 2022-2023. However, since the 5<sup>th</sup> Committee almost operates by consensus, and its processes are less visible than mandate-making at the HRC, there is in practice rarely sufficient pressure to ensure that the right resources are provided to fulfil accountability mandates.

Cumbersome, time-consuming UN recruitment processes also serve the interests of those opposed to robust accountability mechanisms. Even where experienced persons from all regions of the world are readily available from rosters of the Geneva-based Justice Rapid Response, recruitment for the whole team to be operational under a coherent direction cannot begin until the budgets are approved, generally months into a mandate's existence. This means that positions are ultimately filled by those already employed by the UN in Geneva, often persons with experience in monitoring violations of human rights from their base in Geneva, and not to a criminal justice standard. When and if persons with criminal justice experience join the teams, it is almost too late for them to have an impact. Such bureaucratic delays must be overcome if robust accountability can hope to be realised.

Of course, not all situations are created equal. Some mandates are adopted by overwhelming majorities while some barely pass through with a plurality of yes votes and the benefit of abstentions (for example, the Venezuela Fact-Finding Mission was approved in the HRC by 19 'yes' votes, seven 'no' votes, and 21 abstentions). This variation in State support can significantly impact the funding, personnel, and speed required to implement the mandates fully. The same political realities may also impact support for OHCHR, as well as any proposal to increase its capacity to provide robust support for all investigations. Some States may wish to see some inquiries better resourced but balk at the prospect of supporting a body with global reach and *proprio motu* powers.

The three investigative mechanisms have been notable exceptions. They have each achieved UNGA approval of annual budgets for c. \$20 million (with the Syria IIM initially required to survive on voluntary contributions and receiving UN funding only after a rare split vote in UNGA 5<sup>th</sup> Committee in December 2019). Unlike OHCHR-supported investigations, they can and have raised additional voluntary funding from States for specific parts of their work. This may reflect the fact that they are independent of any intermediate authority within the UN, including OHCHR itself. The Head of each novel investigative mechanism is appointed by the UNSG, and reports to him and to their respective mandating bodies (UNITAD to UNSC, Syria IIM to UNGA, and Myanmar IIM to UNHRC). With the investigative mechanisms,

States know what they are getting and who is responsible. This reality could be seen as favouring the creation of a single, standing mechanism to provide support to all human rights investigations, including Commissions of Inquiry and Fact-Finding Missions with accountability mandates. On the other hand, some States that have voted for the current investigative mechanisms could oppose a single mechanism with global reach. A plausible remedy to this might be that a single standing mechanism be limited to working only according to specific mandates adopted by UN bodies, and not granted the broader responsibility of OHCHR to report on violations globally under Item 2 of the Human Rights Council agenda. For example, where mandates are to be invested with criminal case-building responsibilities, one possibility would be to require a vote by the General Assembly, if the Security Council remains unable to fulfil its primary responsibilities vis-à-vis the maintenance and enforcement of international peace and security. It is important to underscore that such mandates, where conferred, should not ‘displace’ the voice of public reporting and advocacy bodies, which should continue to be conferred by the Human Rights Council, if more consistently.

### iii. Bureaucratic Challenges

The provision of support for UN investigations – and chiefly Commissions of Inquiry and Fact-Finding Missions – has traditionally constituted only a fraction of the responsibilities of various UN offices, with their staff committed to other duties, such as for example the Rule of Law and Democracy Section, which provides advice on the international legal framework for investigative mandates and serves as a resource on matters of law, or the Women’s Human Rights and Gender Section, *inter alia*, which provides guidance and support on gender integration in investigations and on investigating sexual violence and applying a victim-centred approach. Within OHCHR, in particular, the Field Operations division (FOTCD) has also developed budgets, managed recruitment, and assisted in operations. The Thematic Engagement Division, through its Methodology, Education, and Training section (METS), has provided guidance on methodology as well as training and technical assistance. However, little support has been provided for the external relations of OHCHR supported investigations, whether ‘upstream’ with civil society organisations engaged in documenting violations (who also needed help in meeting standards), or ‘downstream’ with the users of their product, i.e. prosecution authorities. This is problematic, and particularly acute once UN investigations are ‘completed’ and their product archived, since approval for access to the material of ‘closed’ UN investigations requires the approval of the UN Office of Legal Affairs in New York. In order to properly support the continuing legacies of ‘completed’ UN investigations, solutions must be identified to avoid losing valuable evidential material to a bureaucratic ‘black holes’.

The proposal made by the Group of Practitioners of Fact-Finding and Accountability in 2017 to create a Permanent Investigation Support Unit (PISU) recommended that most of these tasks be brought under the purview of an office led by an official at the D-1 (chief of division) level. This proposal enjoyed the support of the then-High Commissioner for Human Rights on the basis that the PISU be funded by State contributions and led by a newly authorised D-1. However, the idea failed to generate sufficient support to overcome both internal opposition (from those who considered a PISU would detract from other OHCHR divisions) and external opposition (from human rights opponents with the power to block even the voluntary funding of the necessary positions at the ACABQ).

Nevertheless, since the denial of approval by the ACABQ in October 2018, the idea has been partially implemented. With the financial support of the Government of The Netherlands, an Investigative Support Unit (ISU) in the OHCHR’s FOTCD was established in March 2020, with responsibility to assist in start-up, recruitment, and operationalisation of Commissions of Inquiry and Fact-Finding Missions appointed by the Human Rights Council. The ISU indicated that its potential has already been evident in the productivity of the UN Independent Fact-Finding Mission for Libya: in the face of a ‘hiring freeze’ of positions under the UN regular budget, the ISU stated it was able to bridge part of the gap with temporary staffing funded by the emergency funding provided by the Government of The Netherlands and deployment of three experts by

the JRR-UN Women partnership. However, concerns about a perceived tendency for internal recruitments of Geneva-based staff were repeatedly raised and should be addressed.

If properly staffed and committed to recruiting and rostering individuals with relevant expertise, the support that could be provided by the ISU would be welcomed by those whom we surveyed for this study. Prosecuting authorities and past and present staff members of UN investigative mandates expressed a strong appetite for a standing office that could provide technical and specialist expertise,<sup>207</sup> while acting as a repository of institutional memory and thus enabling the most efficient utilisation of available resources between mandates and entities.<sup>208</sup> As one respondent aptly put it, such a unit 'could provide the consistency, efficiency, and essential contemporary capabilities that should really be expected of these kinds of institutions.'<sup>209</sup> The ISU remains limited in its ability to satisfy all that the respondents sought, such as training on criminal justice standards,<sup>210</sup> since this remains the responsibility of METS.

METS itself has been active in improving methodology and training, particularly in the attribution for responsibility of violations. In 2015 and 2018 respectively, OHCHR's METS published helpful methodological guidance in its *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*,<sup>211</sup> and *Who's Responsible?* with OHCHR clarifying that more detailed guidance is also available in *Guidance Notes, Templates and Examples from COI/FFMs practice*, available to staff /secretariats and included in the recently created OHCHR *Repository on monitoring and Investigations*. In addition, in 2021, OHCHR/METS also co-authored the *Berkeley Protocol on Digital Open Source Investigation*<sup>212</sup> and in the same year, again with the financial support of the Government of The Netherlands, METS brought a person experienced in the investigation and prosecution of international crimes on temporary detail to assist in adapting the standards and the training for greater consistency with the requirements of international criminal law.<sup>213</sup>

It remains, however, suboptimal to divide these related responsibilities. Staff recruitment requires an understanding of the methodology to be used by the staff, and the deployment of new personnel requires appropriate training on an ongoing basis. Meeting the important needs of the external relations of the mandates is above the pay grade of the heads of sections or units and does not fit well within in the responsibilities of the chiefs of Field Operations or Thematic Engagement divisions. Even the very positive recent improvements provide an insufficient 'anchor' for accountability and risk the support for these vital investigations being washed away by future personnel or organisational changes.

## Part B. Meeting the Need for Sustained Support

The subjects of these essential accountability efforts are the gravest violations of international law. Violations of the most important human rights – the right to life and physical integrity without which

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207 91.96% agreed (of which 63.22, strongly) that a PISU could provide stand-by specialist expertise – for example, on financial investigations, suspect tracking, crimes against children– to multiple concurrently-existing entities on request, while 90.81% (of which 62.07%, strongly) agreed that a PISU could provide investigative and analytical surge capacity to entities on request.

208 95.41% agreed (of whom 65.52%, strongly) that it would be useful for a PISU to be responsible for tasks common to various entities, such as the drafting of policies, procedures and forms. We submit that – with appropriate resources – the PISU would hold the potential to play a crucial coordination role in closure of mandates; as a coordinating entity between mandates and this new ecosystem; and also as liaison with domestic authorities - not least in harnessing the knowledge and practical powers of domestic authorities, as well as alerting national authorities to the presence or existence of suspects, potential witnesses, or case connections in or between jurisdictions.

209 Interview with Prosecuting Authority.

210 82.76% of respondents to our anonymous survey of 103 OHCHR staff agreed (of whom 39.08%, strongly) that a PISU would be helpful in providing targeted trainings to team members with skills and knowledge gaps. A similar number agreed that the PISU could also have a mentoring function. In fact, only 9.30% strongly agreed that a PISU would not be useful.

211 METS, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*.

212 OHCHR with the Human Rights Center at the University of California, Berkeley, School of Law, *Berkeley Protocol on Digital Open Source Investigations: A Practical Guide on the Effective Use of Digital Open Source and Information in Investigating Violations of International Criminal, Human Rights and Humanitarian Law*.

213 Follow up interview with survey respondent.

none of the other human rights can be enjoyed – appear to be increasing in frequency and severity. The international community faces the staggering reality that a record 86.8 million persons have fled home largely to avoid becoming victims of these violations. By necessity, the UN human rights apparatus headquartered in Geneva has the responsibility to establish the truth and to contribute effectively to ending impunity for these violations.

While ‘Geneva’ mechanisms are not alone in these efforts, they constitute an essential part of the ecosystem of accountability that has grown in response to these violations. Upstream, there are the civil society organisations that are gathering documentation near scenes of mass violence and from the social media through which many violations are now incited and organised. Downstream, there is increasing appetite and capacity amongst judicial authorities who are prepared to use forms of jurisdiction recognised under international law to bring perpetrators to trial, delivering justice for victims as well as important deterrence to would-be violators. Crucially, UN investigations increasingly sit at the heart of this lifecycle of evidence on the commission of atrocities, and at the junction where various pathways to accountability intersect.

In view of today’s geo-political realities, sustainable necessary support for accountability appears to require that the work of these investigations be centred within the UN system at sufficiently high level and visibility, so that external stakeholders can mobilise support for their adequate funding both in the regular budget and through the voluntary contributions of human rights-supporting Member States.

However, if investment is necessary in bolstering the capacity of UN investigations to better and more directly support judicial accountability, including of the criminal nature, the crucial ‘public facing’ reporting and advocacy function that is core to UN human rights investigations cannot be extinguished, for it goes to the heart of the functioning of the UN system. Criminally focused investigations require confidentiality and are often at odds with such reporting. An exclusive focus on such investigations, without preserving the public reporting of traditional human rights investigations, would thus be detrimental to the global fight against impunity and the international rule of law. This is, admittedly, one of the hardest challenges any proposals of reform face. And yet, ways must be found to ensure that both of these functions can be performed and accommodated by the UN human rights system, for impunity would be the alternative.

## **i. Our Recommendations**

OHCHR has taken welcome steps to improve the capacity of Commissions of Inquiry and Fact-Finding Missions to achieve results that will further accountability. These have included the relatively recent establishment of the ISU within FOTCD and the review and revision of methodology by the METS – both projects which, as stated, have benefitted from the generous extra-budgetary support of the Government of The Netherlands. However, these improvements may not be sustainable since they will remain dependant on the priorities of future High Commissioners and division directors as well as the availability of extrabudgetary support. Further, this difficult and controversial work is vulnerable to being deprioritised in the event that future leadership were to ‘mainstream’ accountability within broader responsibilities. It is also notable that managers of sections or units within a bureaucracy such as FOTCD are not able to deal appropriately in necessary external relations with the sources and users of information that are so essential for effective accountability.

Furthermore, OHCHR’s improvements will not diminish efforts to mandate additional investigations, or to create new mechanisms in the future. However, the creation of new mechanisms could risk additional inefficiencies and duplications, as well as create an insufficiency of resources for new Fact-Finding Missions or Commissions of Inquiry. Equally, as mandates of current and future Commissions of Inquiry and Fact-Finding Missions draw to a close, a need persists to ensure proper access to their archives. The answer, instead, is to ‘anchor’ accountability either within in its own division in OHCHR or outside of it, as has been

done with the three investigative mechanisms. We submit that this requires the implementation of one of the following two options:

**Option 1. Establish an Investigative Support Mechanism (ISM)**, independent of OHCHR in the same manner as the three investigative mechanisms. The ISM would act both as a **service provider to other mandates** concerned with accountability – including Commissions of Inquiry and Fact-Finding Missions when these are conferred by the Human Rights Council – and, **when triggered by a competent UN body, as an investigative mechanism of its own**, under provisions like those contained in the establishing resolutions and Terms of Reference of the investigative mechanisms for Syria, Myanmar, and Da’esh/ISIL. In addition, when give a case-building mandate the ISM would also fulfil a **coordinating role and provide strategic advice** wherever multiple actors are pursuing investigations on the same situation, thus maximising the potential for making effective use of gathered materials. Like the mechanisms, it would be headed by an individual recruited at the Assistant-Secretary General level with prior experience in judicial accountability processes. While the ISM could provide services as to multiple situations, and the request of competent mandates including human rights investigations established by the Human Rights Council, it would be strictly limited to carrying out case-building investigations for those situations to which it is mandated by a relevant UN body. Various potential triggers could be considered for such criminal-case building mandates, including by a UN Security Council resolution. Where the UNSC failed to take appropriate measures, the UN General Assembly could do so through resolution offered by State(s) or the High Commissioner for Human Rights, with the latter having first submitted the question of whether a case-building investigation was warranted to a panel of independent experts. For the authorisation of case-building mandates by the UN General Assembly approval by more than a simple majority vote could be required. The ISM and the existing investigative mechanisms would be encouraged to share best practices and develop arrangements for common services, particularly in maintaining state-of-the-art expertise and capacity in the use of digital tools in investigations and analysis. Once the work of each of the present investigative mechanisms reaches the completion phase, mandating bodies could also bring the remaining work of a mechanism into the ISM, with staffing and budgets adjusted accordingly.

**Option 2: Establish an Investigative Support Division (ISD) within OHCHR.** The ISD would assist in the prompt recruitment and deployment of effective and well-resourced teams as required for each UN mandated investigation. It would serve as a repository of institutional memory and achieve efficiencies by standardising the preparatory processes and the drafting of investigative plans for each Fact-Finding Mission or Commission of Inquiry that is established by the Human Rights Council, and would provide direct support towards the fulfilment of mandates’ accountability requirements, as well as supporting mandates’ case-building functions, wherever such investigative mechanisms are not established as independent from OHCHR. The ISD would also assist each mandated investigation with budget preparation, administration, methodology, staff recruitment and training, identification of experts, collaboration with standing rosters such as Justice Rapid Response, and information storage and analysis. It would manage information for current investigations and the archives of UN investigations that have completed their work, as well as outreach with evidence-providing organisations and liaison with UN bodies and national authorities to make and respond to requests for information and other assistance. To function effectively, the ISD would need to be headed by an individual recruited at the D-1 level with the requirement of prior experience in criminal investigations and prosecutions and other transitional justice processes.

Because human rights fact-finding should be complementary to the work of accountability-focused mandates, and is in fact often preliminary to the creation of such mandates, OHCHR’s human rights work should continue irrespective of which model is pursued, and should thus be properly resourced. This means that whether OHCHR’s own capacity to support accountability mandates is bolstered (Option 2), or whether such competence is given to an independent entity external to OHCHR (Option 1), neither option should be pursued to the detriment of OHCHR’s core human rights work.

## ii. Building the Necessary Capacity

UN investigations play a crucial role in prompting international action in response to serious violations of international law that might amount to atrocity crimes and in galvanising political and legal accountability for such atrocities. There can only be effective accountability for the most serious violations if the commitment of Member States, UN leadership, and other stakeholders is sustained and if sufficient resources and other forms of support are regularly received by UN mandates. Human rights-supporting States, in particular, have an obligation to invest political and financial capital in efforts to strengthen accountability for atrocities. Crucially, this requires not only supporting the creation of an independent Investigative Support Mechanism (Option 1) or an Investigative Support Division within OHCHR (Option 2), as proposed in paragraphs 216 and 217 above, but also that attention be paid (within whichever solution is adopted) to specific matters that are crucial to ensuring UN contributions to the fight against impunity serve the interests both of human rights and of global justice.

More specifically, strengthening the functioning of UN investigations requires sustained investment in improving strategies and approaches across the spectrum of mandates' existence and operations, as well as in providing the investigation support infrastructure with the resources it needs to perform its functions. This includes addressing challenges related to the creation of mandates, the start-up phase of operations, their deployment and collection of information phase, and the analysis and preservation of information with which mandates are entrusted. We hereby set out an additional set of recommendations that we, alongside our partners and expert advisors, consider the ideal blueprint for achieving these objectives – while acknowledging, of course, the range of political, budgetary, and structural challenges mandates are currently facing and may continue to face.

### ***1. In-house Personnel and the Provision of Common Services:***

- a. We recommend that in order to function optimally, any permanent investigative support structure should incorporate specific in-house personnel tasked to provide expert logistical and resourcing support across mandates. Specific positions identified as necessary include:
  - International criminal law and criminal investigations experts to ensure sustained improvements in the quality of inquiries and evidence gathering.
  - Information analysts and OSINT specialists.
  - Financial and grants personnel to handle all budgetary matters, including grants and XB contributions.
  - Human resources personnel to ensure optimal efficiency and suitability of recruitment, and to maintain standing rosters.
  - Data security and management personnel with technical (including forensic and analytical) expertise.
  - Personnel to maintain the security of archives at the closure of mandates and handle requests for assistance by relevant justice authorities.
- b. Any support structure should also incorporate an external liaison officer(s) tasked to maintain relationships with and respond to requests for assistance and information from:
  - Civil society groups, including evidence-providing organisations.
  - Prosecuting and judicial authorities, including counsels for the defence and, as relevant, victims.
  - Other UN agencies.
  - Private sector entities.

- c. It is notable that mandates should be able to respond to Requests for Assistance and Requests for Information alongside other forms of disclosure and cooperation, a function which could be streamlined across multiple mandates.
- d. Given that actors in the private sector, such as social media companies, often hold valuable information relating to international crimes, emphasis should be placed in particular on the role of the external liaison officer(s) in supporting and standardising interactions with private sector entities.

## ***II. Dedicated Expertise***

- a. Because accountability-focused investigations demand specific personnel profiles, we recommend that external expertise also be incorporated into mandates at the point of conferral, most urgently with respect to:
  - International criminal law and international criminal investigations, including in the conduct of interviews with special categories of victims (such as children, victims of SGBV, and insider witnesses).
  - Forensic military (including ballistic) expertise.
  - Expertise in the technology necessary to access and manage modern forms of evidence, archiving and analysis.
- b. Efficient recruitment and deployment are critical to ensuring that delays do not exacerbate the already existing challenges facing mandates. We therefore strongly recommend that more streamlined processes for the swift recruitment and deployment of suitable expertise are urgently adopted. This could include, for example, the use of ‘when employed’ contracts that are pre-arranged and become operative when called upon. More direct use should be made of the expert rosters of Justice Rapid Response to support investigations mandated by the Human Rights Council. This would require the establishment of an operational framework agreement between JRR and OHCHR to ensure inter-operability between JRR’s roster and UN rosters and to facilitate deployments to OHCHR, or alternatively to an Independent Support Mechanism (ISM).
- c. Another recommended approach is to develop standing rosters as permitted by UN personnel rules. These rosters could include investigators, information analysts, and legal officers at various grade levels, to which both internal and external candidates could apply. Due to resource constraints, this would require a relaxation of the rule requiring that UN rosters be refreshed annually. Similarly, rosters could be established by candidates who were offered for secondment by their governments, provided that were similarly subject to a competitive process and were vetted to ensure their independence. Of course, the maintenance of such rosters would require periodic confirmation that rostered individuals remain willing and able to deploy on short notice. This approach would therefore justify the embedment of dedicated human-resource personnel in the permanent support structure.

## ***III. Methodology, Trainings, and Standard Operating Procedures***

- a. Due to the different requirements of accountability-focused investigations (specifically with respect to the requirements of traditional human rights investigations), we recommend that the staff trainings and methodologies of mandates continue to be refined to reflect international justice requirements and the demands of modern tech-driven investigations. In particular, expertise should be nurtured in:
  - The primary collection of testimonies (maximising their probative value).
  - The handling of special categories of witnesses (such as ‘insider’ witnesses or survivors of CAAC and SGBV).

- The identification and collection of linkage evidence.
  - Digital investigations and tools (including open-source, remote sensing, financial intelligence, and documentary technologies).
  - Chain of custody for physical, documentary, and digital material.
  - Authentication and verification protocols, as well as information disclosure.
  - Analysis (including structural, contextual and legal).
- b. Particular attention should also be paid to seeking informed consent to share information and the identity of sources with authorities responsible for domestic or international prosecutions. This should be sought, of course, with the appropriate safety measures being in place.
  - c. It is notable that the refinement of staff trainings and methodologies could be provided via collaboration between OHCHR METS (or other centralised resources within the permanent support capacity) and the investigative mechanisms. Such a collaboration, we submit, would both improve retention of institutional memory in these areas, incorporate relevant lessons learned, and standardise information collection practices according to international justice requirements.
  - d. Security and data management should include individualised risk assessments about sources and compliance with other relevant UN requirements on the management of sensitive information – which should however conform with international best practices.
  - e. Crucially, cyber security must be at the core of all handling of digital data. As data holders, mandate holders assume serious responsibilities relating to the security of sensitive personal and political information. Robust cyber security systems and protocols are thus critical, especially since mandate holders will be likely targets of cyber-attacks and that actors providing information may have serious reservations regarding the security of UN systems.
  - f. We therefore recommend that mandates develop protocols for the forensic authentication of all evidence, the preservation of digital copies of documentary records, and chain of custody records for physical and documentary material.
  - g. We also recommend that urgent attention be paid to developing protocols for the orderly and secure closure of mandates, including the archiving of data and its secure preservation and maintenance. Notably, this is another function that could be centralised within the permanent support capacity.

#### ***IV. Digital Revolution and Technological Infrastructure***

- a. Recognising the potential of the digital revolution to benefit UN investigations, we recommend that appropriate technological (software and hardware) infrastructure – as well as the expertise to navigate it – be provided centrally to: (i) search, analyse and organise large data sets (according to the highest standards for evidence management); and (ii) create secure repositories of evidence in the form of an organised database searchable by, *inter alia*, events, crime, region, and individuals.
- b. Notably, such infrastructure could also facilitate ‘tracking services’ (for suspects and financial flows, to be made *confidentially* available to interested prosecutions) and support the maintenance and preservation of archives upon the closure of mandates, alongside assisting the fulfilment of other coordinating functions as needed.
- c. We further recommend that artificial intelligence-based machine learning programs be better leveraged to search and analyse large data sets, including those that are likely to arise from the collection of call data records, hard drives, and digitised copies of mass documentation created and held by alleged perpetrators.

- d. Given that digital techniques and investigative tools play an increasingly significant role in investigations aimed to support accountability, in-house capacity should be developed to support open-source, financial, and geospatial investigations, alongside documentary technologies to support human intelligence and remote investigations.
- e. Building such capacity, of course, would require significant institutional investment. For this reason, capacity-building efforts should seek to maximise the significant technological investment already made by the investigative mechanisms, thus achieving an 'economy of scale', or at least initially determine whether any such capacity can be shared with or replicated for OHCHR-supported mandates.

#### ***V. Relationships with EPOs:***

- a. Developing 'upstream' working relationships with evidence-providing organisations is integral to the success of UN investigations. This is true for mandates both with and without access to situations involving the commission of mass atrocities.
- b. We therefore submit that an already-occurring 'cultural shift' concerning the relationship between EPOs and UN investigations be further entrenched. This entails acknowledging the role of civil society actors as the primary accountability stakeholders, recognising the critical utility, and contribution of many of EPOs documentation efforts to accountability processes, and understanding that nurturing relationships with civil society must be a core function of all mandates. While a positive trend of increasing symbiosis is already discernible, more can be done to enhance the role of EPOs in UN investigations at this interface.
- c. In particular, in recognition of the fact that cooperation with EPOs best serves the interests of victim communities and accountability efforts when conducted in a spirit of mutual respect rather than a 'top down' exercise, we recommend that mandates develop either a platform akin to the Lausanne platform or a similar Memoranda of Understanding. This would emphasise that cooperation is a multi-faceted endeavour and that identifying and overcoming challenges requires ongoing dialogue, as well as building and maintaining trust, including where documentation efforts do not contribute directly to the investigative function of mandates.
- d. Notably, it is important that mandates themselves be proactive with respect to articulating to victim groups the scope and limitations of the contributions to justice and redress that mandates can make.
- e. Recognising that considerable differences persist in the documentary capacities of the various civil society groups active in documentation efforts on the ground and noting that there may be some contradictions between documentation tools and investigative manuals now available to most civil society actors, we also recommend that the most up-to-date best practices be collated and prepared for distribution by mandates. This should include guidance on the elements of crimes, the importance of linkage, the types of evidence that might be relevant to mandates, and collection and preservation protocol (including when and how *not* to engage directly with a certain type of information – e.g. collecting names and contact details, or taking brief note as to events witnessed but leaving formal interviews to trained investigators).
- f. Likewise, mandates should provide direction on which type of information they are most interested in receiving in the context of specific investigations, including guidance as to which forms of data it is best able to receive.
- g. In addition, acknowledging resource constraints, we recommend that mandates work in tandem with other groups (be they INGOs or other UN entities) to provide training in best practices and

capacity building to civil society groups on the ground. This would ensure that the probative value of the evidence collected is maximised (including in relation to witness identification, consent to be interviewed, metadata storage) and is in coordination with joint strategies for case prioritisation and the provision of material and expert support, where possible and necessary.

- h. Finally, we also recommend that engagement with EPOs be ongoing, even after the conclusion of mandates. This would justify, accordingly, the creation of an EPO liaison position within the permanent support structure. Responsibilities of such a position could include:
- Organising periodic roundtables with EPOs to provide and receive updates on developments.
  - Developing and maintaining relationships between field investigators and EPOs.
  - Facilitating the transfer of information pursuant to a platform akin to the Lausanne Platform.

#### ***VI. Relationships and Cooperation with Prosecuting Authorities***

- a. UN investigative mandates should not be only depositories of information. Instead, the information they gather should also be used optimally to serve affected communities. In this regard, mandates could also provide expert evidence and analysis to prosecuting authorities on the context of mass atrocity situations (including political histories, cultural issues, and key risk factors), as well as on issues such as military structures, linkage evidence, open-source data, and legal analysis, particularly around the establishment of the contextual elements of international crimes.
- b. Furthermore, mandates could perform a crucial role with regard to the forensic verification and authentication of information. Considering that those closest to the collection of information are best placed to provide information necessary for future assessments of probative value, we recommend that as much information as possible relating to the nature of the source of the information be recorded by UN investigations.
- c. Where mandated to proactively pursue the support of cases and engage with authorities, the success of investigative mandates will depend on their development of 'downstream' relationships with prosecuting authorities. We submit that establishing mutual trust is therefore key to ensuring a productive understanding of their needs and requirements, and thus to optimising the support given to accountability efforts.

#### ***VII. Cooperation with Other UN entities***

- a. UN investigative mandates should seek to find wherever possible ways to cooperate with one another and with other UN entities, even if 'quietly'. This includes, in particular, sharing information and data gathered in the ordinary course of their activities that might be relevant to other mandates. Where consent to share such information is necessary, this should be sought accordingly.
- b. Acknowledging that serious concerns and limitations might hamper many forms of cooperation across entities with differing priorities and mandates, we recommend that all UN entities, at a minimum, ensure that the parties they interact with are aware of the existence of other mandates with competence on the same situation, including means of engagement.
- c. We also recommend that cooperation be strengthened between Geneva-based investigations and New York-based mandates (such as the SRSGs on CAAC and SGBV, or the Special Adviser on Genocide Prevention) who can brief the UNSC. This would be another way to support and preserve mandates' core human rights function, particularly with regard to their advocacy and public reporting objectives.

### **VIII. Relationships and Cooperation among International Justice Actors**

- a. It is crucial to acknowledge that the proliferation of accountability-focused mandates, as well as the existence of a multiplicity of actors around the same scenes of mass violence, calls for increased cooperation and coordination. In this capacity, UN investigative mandates are uniquely placed to play a coordinating role – bearing in mind that other justice actors might have independent relationships with one another that need not be channelled through mandates.
- b. We therefore recommend that the existence of multiple mandates and actors be leveraged to improve efficiencies and the flux and quality of information. Without this, the risks of fragmentation are great. However, improving the non-judicial investigative infrastructure should not occur to the detriment of existing judicial institutions, such as the International Criminal Court. Instead, strategies should be deliberately implemented to standardise practices and foster cooperation, including among UN investigations and between the latter and institutions such as the ICC.
- c. Attention should be equally paid by donor countries, in particular, not to ‘starve’ existing institutions or groups already carrying out important justice-related work, as this would be detrimental to the international justice landscape as a whole.
- d. In this regard, UN investigations could play a role in fostering exchanges among justice authorities (including various forms of UN investigations, and international and domestic prosecution authorities), including by creating opportunities for sharing best practices, and by utilising secondments and field visits to institutions that collect, analyse, process, and present evidence in court.

### **iii. The Support Required from States**

#### **IX. Mandates Establishment and Sources Thereof**

- a. We submit that the establishment of UN investigative mandates should be more consistent, including both *when* such mandates are conferred (ie in response to which situations) and *how*. This improvement in consistency is necessary to both enhance normative and policy commitments to accountability, improve the operational realities that mandates face, and promote trust in the international human rights and justice architectures.
- b. In particular, States should develop and follow clearer guidelines as to the situations under which mandates should be established. This includes clarity and logical consistency regarding: (i) the specific triggers for establishment; (ii) applicable timeframes for establishment as well as for reporting and renewal periods; and (iii) which bodies are empowered to confer mandates. The need for operable timeframes was notably recognised in a statement delivered by Ireland on behalf of a cross-regional grouping of 33 countries at the 32<sup>nd</sup> Session of the UNHRC in 2016:

Taking into account that 12 months is generally too short a timeframe for mandates operations, particularly for accountability-driven investigations, it is recommended that mandates be set up for an initial period of 15-24 months (with the possibility of yearly renewal thereafter).

- c. Furthermore, States should develop clearer guidelines to assist diplomats in negotiating the terms of establishing resolutions, since wording can ‘make or break’ a mandate’s ability to perform its desired functions. One identified option would be to develop a ‘matrix’ of mandates’ possible functions and related language (by reference, for instance, to the operative clauses of previously established resolutions), with the goal of providing standardisation while also leaving sufficient room for flexibility to accommodate needs as they arise. In this regard, we believe that resolutions must afford mandates flexibility to accomplish their mandate in the face of changing dynamics or situations.

## **X. Funding**

- a. We strongly recommend that States support a mixed approach to funding UN investigations to ensure that specific commitments from the UN general budget can be complemented by extraordinary budget allocations.
- b. Receiving funding from the RB is crucial to ensure mandates' operations, independence, and institutional reinforcement. For this reason, we recommend that RB funding be allocated both to each new mandate *and* to the 'permanent support structure'.
- c. In addition, we recommend that avenues be carved out to ensure that mandates can receive XB funding and that mandates can apply for grants directly.
- d. We also recommend that a 'trust fund' be created from XB funds to support 'special projects'.
- e. In addition, we recommend the creation of a pool of 'un-earmarked' funds to be administered by OHCHR as needs arise as a way to mitigate the risk that political influences or donor-driven priorities may adversely affect budgetary allocations.
- f. With regard to the preparation and drafting of budgets and Programme Budget Implications (PBIs), we acknowledge that initial budgets, including organisational diagrams and details of functional staff positions for each mandate, could be conceived by OHCHR and approved by the Office of Legal Affairs. However, States must insist that budgets be flexible enough to be adjusted based on investigations' operational requirements. To optimise suitability and effectiveness, we therefore recommend that mandate holders be afforded the ability to develop their own vision, and to craft and adjust their own budgets and staffing plans as needed.
- g. While UN investigations must be afforded the independence necessary to do their work, financial integrity and freedom from external control can and should be verified through auditing. In this regard, we additionally note that States providing direct funding may also require detailed reporting on the allocation of funds and expect to be included in processes examining specific deliverables.

## **XI. Non-Financial State Support**

- a. It is crucial that mandates are sufficiently funded. In this regard, committed financial support from Member States remains essential. At the same time, State support can, and we recommend *should*, be provided beyond financial contributions. Additional forms of support could include, for example:
  - Assisting with the protection and support of witnesses and victims in order to ensure valuable testimony can be secured, including providing avenues for relocation where necessary.
  - Seconding or embedding domestic experts within mandates, sharing knowledge, and strengthening mutual understanding.
  - Advocating on behalf of mandates (for issues such as access, resources, and personnel).
  - Amending domestic frameworks to facilitate cooperation and mutual legal assistance with mandates.
  - Actively sharing information of potential relevance with mandates in order to assist their investigative actions, in recognition of the fact that cooperation is mutual and should be pursued proactively, and not only in response to RFAs.

- b. In addition, States must recognise that the establishment of mandates is not a substitute for other necessary action. Particularly in light of the short-term nature of mandates, it is crucial that States view engagement with accountability mandates as one of many steps in their broader strategy to respond to a given situation involving mass atrocities and that a 'pathway' to accountability must be facilitated even after the closure of mandates.
- c. Similarly, it remains important that States continue to seek to navigate the political realities of a given situation successfully, including by compromising where necessary to ensure action. Recognising that some action that preserves evidence is better than no action at all, political realities might require that mandates be conferred progressively (eg fact-finding missions being established before accountability-driven investigations can be conferred), or that accountability requirements in mandates be strengthened over time.

# ANNEX 1. Members of our Project's Advisory Committee

**Kingsley Abbott** – Head, Global Accountability Initiative, International Commission of Jurists

**Dapo Akande** – Professor of Public International Law and Co-Director, Institute for Ethics, Law and Armed Conflict, University of Oxford

**David Akerson** – Justice Sector Consultant, United Nations Office on Drugs and Crime

**David-Mandel Anthony** – Acting Director, Office of Global Criminal Justice, US Department of State

**Cecile Aptel** – In her capacity as Professor of Practice of International Law, Fletcher School of Law and Diplomacy, Tufts University

**Reed Brody** – Counsel and Spokesperson, Human Rights Watch

**Agnés Callamard** – Currently Secretary General, Amnesty International; served in her former capacity as UN Special Rapporteur on the extrajudicial, summary or arbitrary executions

**Yasmine Chubin** – Legal Advocacy Director, Docket Initiative of the Clooney Foundation for Justice

**Alison J. Cole** – Senior Lecturer, Hong Kong University

**Jill Coster van Voorhout** – Assistant Professor, University of Amsterdam

**Marzuki Darusman** – Chair, International Fact-Finding Mission for Myanmar; former Attorney General, Indonesia

**Eric David** – Professor of Law, Free University of Brussels; former Member, International Humanitarian Fact-Finding Commission

**Mary Davis** – Chair, International Commission of Inquiry for Gaza (2014); former Justice, New York Supreme Court

**Joörn Eiermann** – Legal Officer, Office of the Special Adviser, UNITAD, formerly Legal Officer/Special Assistant to the Head, International, Impartial and Independent Mechanism for Syria

**Alistair Graham** – Senior Investigator, International Criminal Court (*ex-officio*)

**Baroness Arminka Helic** – Member, UK House of Lords; Board Member, ICC Trust Fund for Victims

**Nadim Houry** – Director, Arab Reform Initiative; Member, High-Level Panel on Media Freedom

**Michelle Jarvis** – Deputy Head, International, Impartial and Independent Mechanism for Syria (*ex officio*)

**Nerma Jelasic** – Deputy Director, Commission for International Justice and Accountability

**Larry Johnson** – Adjunct Professor, Columbia University; former UN Assistant Secretary General for Legal Affairs

**Nick Kaldas** – Former Chief of Investigations, OPCW-UN Joint Investigative Mechanism; former Deputy Commissioner, NSW Australia Police

**Baroness Helena Kennedy** – Director, IBA Human Rights Institute; Member, UK House of Lords

**Naomi Kikoler** – Director, Simon Skjodt Center for Genocide Prevention, US Holocaust Memorial Museum

**Justice Michael Kirby** – Former Chair, Commission of Inquiry for the Democratic People’s Republic of Korea; former Justice, Australian Supreme Court

**Andreas Kleiser** – Director for Policy and Coordination, International Commission on Missing Persons

**Nicholas Koumjian** – Head, Independent Investigative Mechanism for Myanmar (*ex-officio*)

**Catherine Marchi-Uhel** – Head, International, Impartial and Independent Mechanism for Syria (*ex-officio*)

**Angela Mudukuti** – Senior Legal Advisor, Global Justice Center, formerly International Justice Lawyer, South Africa Litigation Centre

**Yasmin Naqvi** – Special Advisor, Organisation for the Prohibition of Chemical Weapons (*ex officio*)

**Claudia Paz y Paz** – Director, Centre for Justice & Law; former Attorney General, Guatemala

**Matevz Pezdirc** – Head of the Secretariat, Eurojust Genocide Network

**Akila Radhakrishnan** – President, Global Justice Center

**Cristina Ribeiro** – Investigations Coordinator, International Criminal Court (*ex officio*)

**Robert Roth** – Former Director, Geneva Academy; former Presiding Judge, Special Tribunal for Lebanon

**Dan Saxon** – Former Coordinator, International Commission of Inquiry for Syria; former Trial Attorney, International Criminal Tribunal for the Former Yugoslavia

**Ken Scott** – Former Member, UN Commission on Human Rights in South Sudan; former Trial Attorney, International Criminal Tribunal for the Former Yugoslavia; Consultant, Special Tribunal for Lebanon

**Yasmin Sooka** – Chair, UN Commission on Human Rights for South Sudan; Executive Director, Foundation for Human Rights in South Africa

**James Stewart** – Former Deputy Prosecutor, International Criminal Court

**Lyal Sunga** – Affiliated Professor, Raoul Wallenberg Institute

**H. E. Abubacarr Tambadou** – Registrar, International Residual Mechanism for Criminal Tribunals; Former Minister of Justice, The Gambia

**Maria Bringas Warren** – Former Chief of Evidence, the International Criminal Tribunal for Rwanda; former Head, Operations Division, Office of the Prosecutor of the Special Court for Sierra Leone

**Jamie Williamson** – Executive Director, International Code of Conduct Association for Private Security Service Providers; former Legal Advisor, International Committee of the Red Cross

## **ANNEX 2.** Additional Study Participants

As part of this study, we spoke to members of prosecuting authorities in:

- **Belgium**
- **Denmark**
- **Finland**
- **France**
- **The Netherlands**
- **Norway**
- **Sweden**
- **Ukraine**
- **The United Kingdom**
- **The International Criminal Court**

As part of this study, and in addition to those who wish to remain anonymous, we spoke to members of these evidence providing organisations:

- **Al-Haq**
- **Assistance Mission for Africa (South Sudan)**
- **Arakan Rohingya National Organization**
- **Bellingcat**
- **Burmese Rohingya Organisation UK**
- **Civitas Maxima**
- **Free Burma Rangers**
- **Fédération Internationale Pour les Droits Humains**
- **Foundation for Democracy and Accountable Government**
- **Fortify Rights**
- **Free Yezidi Foundation**
- **Human Rights Watch**
- **International Truth and Justice Project**
- **Mwatana of Yemen**
- **Physicians for Human Rights**
- **Redress**
- **Rohingya Human Rights Network**
- **Remembering the Ones We Lost**
- **Syrian Center for Legal Studies and Research**
- **Syrian Center for Media and Freedom of Expression**
- **Shlomo**
- **Syrian Network for Human Rights**
- **Truth Hounds of Ukraine**
- **Videre est Credere**

- **Women's Peace Network**
- **Yazda**

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