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Front cover: *Alberto Gandolfi inspects his fresco of Hugo Grotius in Florence. Trained for years in fresco painting and restoration, including at the Accademia di Belle Arti di Firenze, he employs the fresco techniques used since the 1400s in Florence, including preparing ingredients such as the lime plaster himself. An exceptional level of quality control of the preliminary stages is required for the paintings to stand the test of time. Photograph: © CILRAP 2017.*

Back cover: *Section of a Roman street close to where the Statute of the International Criminal Court was negotiated, paved with 'sampietrini' cobblestones of trimmed, black basalt-cubes. When each stone is precisely cut and placed, they make up a robust and attractive whole, with the ability to withstand pressure and inundation. Preliminary examination is similarly made up of numerous small steps, each of which should be undertaken with proper quality control. Photograph: © CILRAP 2018.*

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The ICC's Interplay with UN Fact-Finding Commissions in Preliminary Examinations

Mutoy Mubiala*

26.1. Introduction

The Office of the Prosecutor of the International Criminal Court ('ICC-OTP') has on several occasions launched preliminary examinations preceding, coinciding with, or following the deployment of United Nations ('UN') Fact-finding Commissions ('UNFFCs') and human rights monitoring bodies and missions. This has been the case in most of the ICC situations in Africa. Despite their distinct nature (one outside and the other inside the criminal justice system), the two processes have experienced some levels of interaction. In its first section, this chapter examines this interaction, in light of three case studies on Darfur, Libya and the Central African Republic ('CAR'). In the second section, the chapter examines the issue of quality control of the information provided by the UNFFCs to the ICC-OTP in preliminary examinations and, subsequently, its implications for judicial review by the ICC Pre-Trial and Trial Chambers. The chapter concludes by formulating recommendations on ways and means to streamline UN fact-finding and ICC-OTP's preliminary examination.

26.2. Interaction between the ICC-OTP and UNFFCs in Preliminary Examination

Before reviewing the cases illustrating the interaction between the ICC-OTP and UNFFCs in preliminary examination, it is important to provide a

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brief overview of the legal and institutional framework of the co-operation between the ICC and the UN.

26.2.1. Legal and Institutional Framework of the Co-operation between the ICC and the UN

As provided by the ICC-OTP's Policy Paper on Preliminary Examinations, preliminary examinations rely on various sources of information, including international organisations, non-governmental organisations and testimonies received at the headquarters of the Court. In this regard, the ICC has signed several agreements with various entities, including with the UN on 4 October 2004.[1] Of particular importance are Articles 18 and 20 of the Agreement.

According to Article 18:

> 1. With due regard to its responsibilities under the Charter of the United Nations and subject to its rules, the United Nations undertakes to cooperate with the Prosecutor and to enter with the Prosecutor into such arrangements or, as appropriate, agreements as may be necessary to facilitate such cooperation, in particular when the Prosecutor exercises, under Article 54 of the Statute, his or her duties and powers with respect to investigation and seeks the cooperation of the United Nations in accordance with this Article.
>
> 2. Subject to the rules of the organ concerned, the United Nations undertakes to cooperate in relation to requests from the Prosecutor in providing such additional information as he or she may seek, in accordance with Article 15, paragraph 2, of the Statute, from organs of the United Nations in connection with investigations initiated *proprio motu* by the Prosecutor pursuant to that Article. The Prosecutor shall address a request for such information to the Secretary-General, who shall convey it to the presiding officer or other appropriate officer of the organ concerned.
>
> 3. The United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new information shall not be disclosed

[1] Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 4 October 2004 (https://www.legal-tools.org/doc/9432c6/).

> to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations.
>
> 4. The Prosecutor and the United Nations or programmes, funds and offices concerned may enter into such agreement, as may be necessary to facilitate their cooperation for the implementation of this article, in particular in order to ensure the confidentiality of information, the protection of any person, including former and current United Nations personnel, and the security or proper conduct of any operation or activity of the United Nations.[2]

Regarding the protection of confidentiality, Article 20 of the Agreement further provides:

> If the United Nations is requested by the Court to provide information or documentation in its custody, possession or control which was disclosed to it in confidence by a State or an intergovernmental, international or non-governmental organisation or an individual, the United Nations shall seek the consent of the originator to disclose that information or documentation or where appropriate, will inform the Court that it may seek the consent of the originator for the United Nations to disclose that information or documentation. If the originator is a State Party to the Statute and the United Nations fail to obtain its consent to disclosure within a reasonable period of time, the United Nations shall inform the Court accordingly, and the issue of disclosure shall be resolved between the State Party concerned and the Court in accordance with the Statute. If the originator is not a State Party to the Statute and refuses to consent to disclosure, the United Nations shall inform the Court that it is unable to provide the requested information or documentation because of a pre-existing obligation of confidentiality to the originator.[3]

It is in the framework of the two above provisions that the UN bodies, in particular the Office of the High Commissioner for Human Rights ('OHCHR') and UNFFCs, have developed close co-operation with the ICC-OTP in relation to preliminary examinations.

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2 *Ibid*., p. 7.

3 *Ibid.*, pp. 7–8.

26.2.2. Case Studies

The Policy Paper also provides that preliminary examination consists of four phases, including:

1. the initial jurisdictional assessment of all information of the alleged crimes received;
2. the factual and legal analysis of information arising from referrals by a State Party to the Statute, the United Nations Security Council ('UNSC') and the open source information received at the seat of the Court, to assess whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court;
3. the admissibility of potential cases in accordance with Article 17 of the Rome Statute on complementarity, to assess the ability or willingness of the national authorities to prosecute the presumed authors of the alleged crimes; and
4. the examination of the interests of justice for the opening of an investigation.[4]

On the basis of this division, this section reviews three case studies illustrating the interaction between the ICC-OTP and UNFFC in preliminary examinations representing three scenarios: (1) the UNFFC's deployment *preceding* preliminary examination (Darfur); (2) the UNFFC's deployment *coinciding* with preliminary examination (Libya); and (3) the UNFFC's deployment *following* preliminary examination (CAR II). The work of each of the three UNFFCs deployed in the three countries contributed to the completion of one or several phases of the related preliminary examinations. The section focuses on one aspect of the contribution of each Commission:

1. the factual and legal analysis of the information and the identification of potential cases falling within the jurisdiction of the Court and of the presumed authors of international crimes (Phase 2) for the Darfur Commission;
2. the review of the subject-matter jurisdiction of the Court (Phase 2) for the Libya Commission; and

[4] OTP, *Policy Paper on Preliminary Examinations*, 1 November 2013, p. 19 (http://www.legal-tools.org/doc/acb906/).

3. the implementation of the principle of complementarity (Phases 1 and 3) for the CAR Commission and other fact-finding bodies and missions involved in the country.

26.2.2.1. Darfur

UNFFCs were particularly involved in the situation in Darfur. In April and May 2003, OHCHR deployed fact-finding missions in Darfur and Eastern Chad. The UN Human Rights Council's Special Rapporteur on Sudan and the UN Secretary-General's Special Representative on the situation of Internally Displaced Persons also visited Darfur during the same period. In October 2004, the UNSC established the International Commission on Darfur. The Darfur Commission, which operated from November 2004, submitted its final report to the UN Secretary-General on 31 January 2005.[5] This report was presented by the then High Commissioner Louise Arbour to the UN Security Council on 16 February 2005.[6] Based on the findings and recommendations of the Commission, the UNSC, by its resolution 1593 (2005) adopted on 31 March 2005, referred the situation in Darfur to the ICC.

Evaluating the outcome of the Darfur Commission, Philip Alston wrote the following:

> The Darfur Commission Report […], even though miraculously completed in the space of only 90 days, was comprehensive in scope, assembled a very detailed factual account of the situation, evaluated the extent to which genocide had been involved, and succeeded in identifying by name 51 suspected perpetrators of various crimes. Another major accomplishment, with broader ramifications beyond this particular case, is its clarification of the legal principles applicable in such situations. The Report provides a careful and systematic analysis, written in clear and comprehensible language, of a number of complex legal issues which will arise in most comparable cases. They include issues such as the relationship between human rights and international humanitarian

5 Report of the International Commission of Inquiry on Darfur to the Secretary-General, UN doc. S/2005/60, 1 February 2005 (http://www.legal-tools.org/doc/1480de/).

6 United Nations, Statement by Ms. Louise Arbour, High Commissioner for Human Rights, to the Security Council on the International Commission of Inquiry on Darfur, New York, 16 February 2005, p. 1.

> law ('mutually reinforcing and overlapping in situations of armed conflict', § 144), the extent and nature of customary law in this area (an analysis completed before the publication of the ICRC study) and the applicability of the relevant norms to non-state actors (an analysis based in part on general principles and partly on agreements accepted by the key actors in Sudan, §§ 172–174). It is significant that these legal analyses were not subject to any noteworthy criticisms or challenges in the Security Council or the Commission on Human Rights.[7]

The findings of the Darfur Commission have been heavily relied on by the ICC-OTP in preliminary examination on the situation in Darfur, as it was not on the ground. These findings and the list of the suspected authors of international crimes provided by the Commission, among other things, enabled the ICC-OTP to conclude to a reasonable basis to believe that war crimes and crimes against humanity were perpetrated in Darfur during the period under review,[8] leading to the opening of an investigation.

26.2.2.2. Libya

The UNSC referred the situation in Libya to the ICC on 15 February 2011. A few days after, on 25 February 2011, the UN Human Rights Council established the International Commission on Libya, which was granted access to Libya. The work and outcome of the investigations of the Libya Commission then became instrumental for the preliminary examination opened by the ICC-OTP, which had no access to Libya.

As this author has written elsewhere:

> Traditionally, international fact-finding commissions were tasked to investigate serious international human rights law and international humanitarian law violations. In many recent mandates, several hybrid commissions have been tasked to investigate international crimes as included in the ICC

[7] Philip Alston, "The Darfur Commission as a Model for Future Responses to Crisis Situations", in *Journal of International Criminal Justice*, 2005, vol. 5, no. 3, p. 604 (footnotes omitted).

[8] ICC, Synthesis Sheet: Situation in Darfur, February 2007.

> Statute. This development has led to increased application of international criminal law by the hybrid commissions.[9]

As far as the Libya Commission is concerned, according to Philip Kirsch, who chaired it:

> International human rights law applied at all stages of the situation, i.e. both in peace and times of armed conflicts. Libya became a party over the years to a number of major United Nations Human Rights Treaties and is therefore bound by them, as well as by relevant customary international law. Non-state actors, including the NTC [National Transitional Council] at that time, are not formally bound by treaties but are increasingly seen, when occupying de facto control over territory, as having the obligation to respect fundamental rights of persons in that territory.
>
> When it comes to situations of non-international and international armed conflicts, international humanitarian law applies. Here again, Libya became a party to a number of applicable international instruments and is bound by them and by customary international law. However, it is not a party to other instruments which may be relevant to the situation at hand.
>
> In addition to the above, international criminal law also applies to the Libyan situation, by virtue of the referral by the Security Council to the International Criminal Court (ICC) of the situation in Libya even though Libya is not a party to the Rome Statute. The ICC can currently exercise jurisdiction on three categories of crimes, two of which, war crimes and crimes against humanity are relevant.[10]

The information provided by the Libya Commission to the ICC-OTP was instrumental in completing its preliminary examination and con-

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9 Mutoy Mubiala, "The Historical Contribution of International Fact-Finding Commissions", in Morten Bergsmo, CHEAH Wui Ling and SONG Tianying and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 4*, Torkel Opsahl Academic EPublisher, Brussels, 2015, p. 523 (http://www.toaep.org/ps-pdf/23-bergsmo-cheah-song-yi).

10 Philippe Kirsch, "The Work of the International Commission of Inquiry for Libya", in M. Cherif Bassiouni and William A. Schabas (eds.), *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?*, Intersentia, Antwerp, 2011, pp. 303–304 (footnotes omitted).

cluding that there was a reasonable basis to believe that crimes against humanity were perpetrated in Libya, leading to the opening of investigation, on 3 March 2011,[11] less than a month after the UNSC's referral.

26.2.2.3. Central African Republic II

The CAR Commission was established by the UN Secretary-General in accordance with the UNSC resolution 2127 (2013) adopted on 5 December 2013 to investigate the international crimes allegedly perpetrated in the country from 1 January to 31 December 2013 and to identify the presumed perpetrators of these crimes. The Commission started its work in March 2014. In the meantime, on 7 February 2014, the ICC Prosecutor, Fatou Bensouda, announced the opening of a preliminary examination of the same alleged crimes. Having an office in the CAR since the opening of the investigation into the alleged crimes perpetrated in the CAR in 2003, the ICC-OTP was in a better position to get the relevant information than the CAR Commission, which did not access some of the areas concerned by the investigation for security reasons. The latter then mainly relied on the open source information gathered by the OTP. They had meetings and co-operated in the exchange of information. In its preliminary report, the Commission recognised the ICC-OTP support:

> The Commission has also enjoyed the full support of the Office of the Prosecutor of the International Criminal Court, which has opened a preliminary examination in order to ascertain whether the criteria of the Rome Statute for opening an investigation into the alleged crimes committed in the Central African Republic, which fall within the jurisdiction of the Court, have been met. On 1 April 2014, the Commission sent a request to the Prosecutor to facilitate access to open-source material gathered by the Office of the Prosecutor, a broad selection of open-source material was subsequently provided to the Commission.[12]

In addition to the CAR Commission, other fact-finding mechanisms were deployed in the CAR by some UN bodies, including the UN Human

[11] OTP, Report on the Preliminary Examinations Activities, 13 December 2011, p. 24 (http://www.legal-tools.org/doc/4aad1d/).

[12] Preliminary Report of the International Commission of Inquiry on the Central African Republic, submitted pursuant to Security Council resolution 2127, S/2014/373, 26 June 2014, p. 10.

Rights Council Independent Expert on the situation of human rights in the CAR and the Human Rights Division of the Multidimensional Integrated Mission in the Central African Republic ('MINUSCA'). Their work also contributed to that of the ICC-OTP, as illustrated by its review of the admissibility of the situation in the CAR. In its Article 53(1) Report, the Prosecutor explicitly referred to the findings and recommendations of UNFFC:

> 245. During the mission of the Office to Bangui in May 2014, all of the CAR authorities whom the members of the mission met with indicated that the CAR judicial system is currently unable to investigate or prosecute individuals for crimes committed since 2012 that could fall under the ICC's jurisdiction. The main challenges raised by the authorities relate to the general lack of security and the specific dangers facing judicial personnel, as well as the lack of infrastructure and capacity at all levels of the criminal justice system, in Bangui and even more so in the provinces. […]
>
> 246. The Office understands that both the general lack of security and the prevalence of political pressure are the main obstacles to conducting domestic proceedings. […] In August 2014, the UN independent expert on the human rights situation in the CAR also came to the conclusion that security concerns, insufficient protection and political pressure are preventing magistrates and lawyers from doing their work. Similarly, a United Nations multidisciplinary team which visited the Central African Republic in 2014 confirmed "an almost total lack of capacity of national counterparts in the areas of police, justice and corrections" and found that "there are no guarantees that national magistrates can render justice in an impartial manner and without fear of political interference or physical violence."[13]

It is on the basis of these findings, including those by other UN fact-finding bodies and missions, that the ICC-OTP concluded the admissibility of the situation of CAR II, in accordance with Article 17 of the Rome Statute.

[13] ICC, *Situation in the Central African Republic II Article 53(1) Report*, 24 September 2014, ICC-01/14, paras. 245–246 (footnotes omitted) (http://www.legal-tools.org/doc/1ff87e/).

These three case studies illustrate the increased co-operation between the ICC-OTP and OHCHR, the UN supporting body of UNFFCs in preliminary examinations. As pointed out by the report of an international expert seminar on the "The Peripheries of Justice Intervention", jointly organised by the Grotius Centre for International Legal Studies and the Centre for International Law Research and Policy (CILRAP), held in The Hague, on 29 September 2015:

> 28. Further attention was given to the relationship between the ICC and other fact-finders. Participants identified points of convergence between PEs and the work of fact-finding bodies (e.g. in term of material jurisdiction, applicable standard – 'reasonable basis'/'reasonable grounds'). Participants stated that the work of fact-finding bodies can inform the OTP analysis and can be complementary to PEs. For example, Commissions of Inquiry (COIs) may have better access on the ground, while PEs remain remote, and their reports can inform the OTP about patterns of crimes. It was further pointed out that COIs have an important role in preserving evidence. These synergies should be used to 'break silos' between institutions and avoid that each institution needs to 're-invent the wheel'. At the same time, the sequencing of COIs and PEs might require attention.[14]

From the review of the above-mentioned three case studies (Darfur, Libya and CAR II), one can conclude that UNFFCs played a catalytic role in preliminary examinations of the ICC-OTP. This is why it is important to pay special attention to the quality control of the information provided by UNFFCs, which may be used for judicial purposes.

26.3. Quality Control in the Relationship between the ICC-OTP and UNFFCs in Preliminary Examination

The Phase-2 analysis of the statutory-based approach procedure is specified in the Policy Paper on Preliminary Examinations:

> 81. Phase 2 analysis entails a thorough factual and legal assessment of the crimes allegedly committed in the situation at hand with a view to identifying the potential cases falling within the jurisdiction of the Court. The Office will pay par-

[14] *Preliminary Examination and Legacy/Sustainable Exit: Reviewing Policies and Practices*, Grotius Centre for International Legal Studies, The Hague, 2015, p. 6.

> ticular consideration to crimes committed on a large scale, as part of a plan or pursuant a policy. […] Phase 2 leads to the submission of an 'Article 5 report' to the Prosecutor, in reference to the material jurisdiction of the Court as defined in article 5 of the Statute.[15]

One can therefore say that this phase represents the 'fact-finding' part of preliminary examinations, even though it normally falls outside the criminal justice system. Hence, it is important to determine how the two processes can influence each other in terms of quality control. The increased reliance of the preliminary examinations on UNFFCs has resulted in two trends: (1) the 'justiciability' of information and evidence provided by UNFFCs, and (2) the 'criminalisation' of UNFFCs. Before examining these two trends and evaluating their respective challenges, it is important to compare preliminary examination with both UNFFCs as well as the judicial review of the situations by the Pre-Trial Chambers.

26.3.1. Preliminary Examination between Fact-Finding and the Review by Pre-Trial Chambers

Items	UNFFCs	Preliminary Examination
1. Legal framework	International human rights law, international humanitarian law and the mandates of the UNFFC bodies.	International criminal law, in particular Article 53 of the Rome Statute.
2. Guiding principles	• Do no harm; • Independence; • Impartiality; • Transparency; • Objectivity; • Confidentiality; • Credibility; • Visibility; • Integrity; • Professionalism;	• Independence; • Impartiality; • Objectivity; • Transparency; • Confidentiality; • Complementarity; • Prevention.

[15] OTP, *Policy Paper on Preliminary Examinations*, p. 19, see *supra* note 4.

	• Consistency.	
3. Methods of work	• Identification of the sources of information; • Determination of the modalities of the assessment or verification of information, including through field visits; • Formulation of the framework to ascertain the consent of sources on the judicial use of information collected. • **Applicable standard of proof:** 1. Fact-work: The reasonable ground threshold; 2. Account-work: The reasonable suspicion threshold (International Commission of Inquiry on Darfur)	• Review of information to consider whether: 1. It provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; 2. The case is or would be admissible under article 17 of the Rome Statute; and 3. An investigation would serve the interests of justice. • Applicable standard of proof: The reasonable basis threshold.
4. Outcome	• Submission of a report to the mandating body, including findings on the allegations of violations of IHRL and IHL, as well as recommendations, including on judicial prosecution of the presumed authors of these violations; • Publication of the report; • Development and sealing of the list of the presumed authors of the violations of IHRL and IHL for their transmission, through the Office of the UN Secretary-General, to the competent judicial bodies, including and particularly the ICC.	• Article 53(1) report on the existence of a reasonable basis to proceed with an investigation or not; • Submission of the report to a Pre-Trial chamber of the ICC; • Review of the report by a pre-trial chamber and adoption of a decision to authorise or not an investigation on the situation of the concerned country (Article 15 of the Rome Statute).

Table 1: Fact-Finding and Preliminary Examination

Items	Preliminary Examination	Prosecutor/ Pre-Trial Chamber
1. Provision	Article 53(1) ("The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute")	Article 15 ("(3) If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorisation of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence. (4) If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorise the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.")
2. Source of information	Various sources, including reports of UNFFC bodies.	Article 53(1) reports and supporting material submitted by the ICC Prosecutor.
3. Standard of proof	The reasonable basis threshold.	The reasonable basis threshold.
4. Outcome	Request for authorisation to open an investigation into a situation.	Trial Chamber's Article 15 Decision on the authorisation of an investigation into a situation.

Table 2: Fact-Finding beyond Preliminary Examination and the Judicial Review of the Situations by the Pre-Trial Chambers

From the above comparisons, one can conclude that fact-finding outside criminal justice and preliminary examinations have similar methods of work, including a lower standard of proof than that applied by a criminal court. The main consequence of this similarity is the increased reliance by the ICC-OTP on the information collected by UNFFCs, in comparison with the other sources of information (States, non-governmental organisations, victims' representations, and so on). Therefore, preliminary examination plays the role of a 'Trojan horse' in the injection of information collected by UNFFCs in the judicial proceedings of the ICC. This is made easy by the fact that the Pre-Trial Chamber reviewing the Prosecutor's requests for authorisation to open an investigation proceeds from the same standard of proof (the reasonable basis threshold), as illustrated by the Table 2.

Commenting Article 53(1) in relation to Article 15 of the Rome Statute, an author rightly observes that:

> It follows from the wording of the chapeau of Article 53 that the threshold to start an investigation is the presence of a 'reasonable basis to proceed'. The same threshold is to be found in Article 15 (3), (4) and (6) ICC Statute and in Rule 48 ICC RPE, with regard to proprio motu investigations. A contextual interpretation clarifies that similar considerations underlie the 'reasonable basis to proceed' standard of Article 15 and 53. More precisely, it follows from Rule 48 ICC RPE that in determining whether there exists a 'reasonable basis to proceed' under Article 15 (3) ICC Statute, the Prosecutor shall consider the factors set out in Article 53 paragraph 1 (a) and (c)'.
>
> This was acknowledged by the Pre-Trial Chamber II, when it held that it would be illogical to dissociate the 'reasonable basis to proceed' standard in Article 15(3) and Article 53(1) (with respect to the Prosecutor) from the threshold provided for under Article 15(4) ICC Statute (with respect to the Pre-Trial Chamber) […]. The Pre-Trial Chamber emphasised that these standards are used in the same or related Articles and that they share the same purpose: the opening of an investigation […].
>
> With regard to Article 15(4) ICC Statute, ICC Pre-Trial Chamber III observed that the purpose of the 'reasonable ba-

> sis to proceed' standard lies where it prevents "unwarranted, frivolous, or politically motivated investigations" […].[16]

As will be demonstrated in the following section, the reliance of the ICC-OTP on the information from UNFFCs in preliminary examinations has legal and procedural implications for its review by the ICC Pre-Trial Chambers and, subsequently, Trial Chambers.

26.3.2. The 'Justiciability' of the Information Provided by the UNFFCs

With reference to the situation in Kenya and Côte d'Ivoire, this section examines the judicial consequences of the cross-cutting of fact-finding with preliminary examinations, as well as related issues and challenges.

26.3.2.1. Kenya

On 26 November 2009, the Prosecutor submitted a request for authorisation to open an investigation into the situation in Kenya relating to post-electoral violence occurred in the country in 2007 and 2008. In his submission, he recorded the sources of information he collected, where UNFFCs' reports are referred to, as follows:

> **Office of the High Commissioner for Human Rights (OHCHR), "Report from OHCHR Fact-finding Mission to Kenya" (6-28 February 2008)**
>
> 32. Between 6 and 28 February 2008, the UN Office of the High Commissioner for Human Rights (OHCHR) dispatched a fact-finding commission that investigated allegations of human rights violations. The ensuing 'Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008' provides an analysis on the context, the patterns as well as a list of human rights violations. The OHCHR Mission conducted on-site visits to the affected areas and met with a wide range of actors in the Government, among the opposition, and met with victims, human rights defenders as well as the diplomatic community. The OHCHR Mission also analysed underlying civil, political, economic, social and cultural rights issues and formulated recommendations on possible accountability mechanisms.

[16] Karel De Meester, "Article 53", in Mark Klamberg (ed.), *Commentary on the Law of the International Criminal Court*, available in Lexsitus (www.cilrap-lexsitus.org).

Office of the Coordination of Humanitarian Affairs (OCHA) Humanitarian report updates

33. In response to the post-electoral violence in Kenya, the UN Office for the Coordination of Humanitarian Affairs (OCHA) has expanded the staff in their Kenya offices and has produced a series of publicly available humanitarian updates entitled "Humanitarian Report Updates for Kenya".

34. The Prosecution's application refers to 4 different Humanitarian Update volumes covering the periods between 21 and 28 January 2008; 11 and 15 February 2008; 23 and 27 February 2008 and 8 to 30 October 2009.

UNICEF, UNFPA, UNIFEM and Christian Children's Fund, 'A Rapid Assessment of Gender-Based Violence (GBV) during the post-election violence in Kenya' (Jan-Feb 08)

35. The report consists in an inter-agency gender based violence assessment carried out in January and February 2008 in selected sites in the North Rift Valley, South Rift Valley, the Coastal Region, Nairobi and Central Province. The assessment examined the nature and scope of sexual violence during flight [sic], as well as within the internally displaced persons (IDP) camps and alternative settlements.

Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions "Mission to Kenya" (26 May 09)

36. Philip Alston, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions visited the Kenyan provinces of Nairobi, Rift Valley Province (Nakuru, Eldoret and Kiambaa), Western Province Bungoma and Kapsokwony), Nyanza Province (Kisumu), and Central Province (Nyeri) from 16 to 25 February 2009 in order to: ascertain the types and causes of extra-judicial killings; investigate whether those responsible for such killings are held to account; and propose constructive measures to reduce the incidence of killings and impunity. The main focus was on extrajudicial killings by the police, violence in the Mt Elgon District, and killings in the post-election period. The Special Rapporteur concluded those responsible for the post-election violence, including those police responsible for extrajudicial

> executions, and officials who organized or instigated violence, remain immune from prosecution.[17]

The mentioned reports and the information they provided were instrumental for the determination by the Prosecutor of the crimes against humanity falling under the jurisdiction of the ICC, including: murders, rape and other forms of sexual violence, deportation or forcible transfer of population and other inhuman acts. In addition, they also largely assisted in the identification of the persons or groups involved in these crimes, as well as in their legal characterisation as crimes against humanity.[18]

Anticipating the question on the probative value of the information provided in his application, the Prosecutor argued that:

> 102. The Prosecutor submits that the Court should proceed to authorise the investigation so long as it is satisfied that the Prosecutor's Application and supporting material reveal the existence of facts or information warranting investigation. The standard at this stage of the proceedings relates to the investigation of crimes of relevance to the situation as a whole and the existence of relevant information that provides a foundation to the request. It is not the opportunity to proceed with the identification of individual criminal liability.
>
> 103. The expression 'reasonable basis' in Article 15 indicates that a decision to authorize the commencement of an investigation shall be made pursuant to a lower standard than the one required for the issuance of a warrant of arrest or summons to appear. The test of reasonable basis is the lowest found in the Rome Statute, which applies four escalating tests for the progressive phases of the proceedings.[19]

While Pre-Trial Chamber II authorised the investigation on the basis of the information from UNFFC and non-governmental organisations,[20] Judge Hans-Peter Kaul provided an extensive dissenting opinion,

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17 OTP, Situation in the Republic of Kenya, Request for authorisation of an investigation pursuant to Article 15, 26 November 2009, ICC-01/09-3, pp. 13–14. (http://www.legal-tools.org/doc/c63dcc/).

18 *Ibid.*, pp. 22–36.

19 *Ibid*., pp. 36–37 (footnotes omitted).

20 ICC, Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation into the Situation in the Republic of Kenya, 31 March 2010, ICC- 01/09-19, 31 March 2010, p. 83 (http://www.legal-tools.org/doc/338a6f/).

in which he challenged the position of the majority on the characterisation of crimes against humanity based on reports of different sources, including UNFFCs. He pointed out the following:

> 19. […] The decision whether or not the Prosecutor may commence an investigation rests ultimately with the Pre-Trial Chamber. Thus, the Pre-Trial Chamber's decision pursuant to article 15(4) of the Statute is not of a mere administrative or procedural nature but requires a substantial and genuine examination by the judges of the Prosecutor's Request. Any other interpretation would turn the Pre-Trial Chamber into a mere rubber-stamping instance. […]
>
> 72. Indeed, crimes, such murder, rape, mutilations, looting, destruction of property, arson and eviction, seem to have occurred on the territory of the Republic of Kenya at least in the course of events between 28/29 December 2007 and 28 February 2008, commonly referred to as the post-election violence. Numerous abhorrent, brutal and vile incidents have been described in the reports upon which the Prosecutor based his determinations. But the point is not whether or not these crimes took place. The question is, whether those events reach the level of crimes against humanity *as defined under the Statute* and are thus subject to the jurisdiction of this Court. After having meticulously analysed the information contained in the supporting material and the victims' representations, I conclude that this threshold is not met.[21]

Contrary to this position, regarding the supporting material, as pointed out by two authors, "Pre-Trial Chamber II noted in its decision on Kenya that, due to the limited powers the Prosecutor has during the preliminary phase, the information available to the Prosecutor is not expected to be 'comprehensive' or 'conclusive', compared to evidence gathered during the investigation".[22]

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[21] *Ibid*., Dissenting Opinion of Judge Hans-Peter Kaul, pp. 11 and 38 (emphasis in original, footnotes omitted).

[22] Morten Bergsmo and Jelena Pejić, "Article 15 Prosecutor", in Otto Triffterer and Kai Ambos (eds.), *Rome Statute of International Criminal Court: A Commentary*, C.H. Beck, Hart, Nomos, Munich, 2016, p. 775.

26.3.2.2. Côte d'Ivoire

After the completion of the preliminary examination and the drafting of the Article 53(1) report, the Prosecutor submits a request for authorisation of an investigation pursuant to Article 175 of the Rome Statute. In the situation in Côte d'Ivoire, the Prosecutor submitted this request on 23 June 2011, which was then assigned to Pre-Trial Chamber III for review. There, in the examination of the available information, the Prosecutor started with the information provided by the UNFFC. These included: the press releases and reports of the United Nations Operation in Côte d'Ivoire ('UNOCI'); the Report of the Independent Commission of Inquiry on Côte d'Ivoire established pursuant to resolution 16/25 adopted by the UN Human Rights Council in May 2011 and released in June 2011; the progress reports of the UN Secretary-General on the situation in Côte d'Ivoire; other reports established and issued by OHCHR in February and June 2011; and the Office for the Coordination of Humanitarian Affairs ('OCHA') reports.[23]

In the Request, UNFFC was the main source of information of the Prosecutor. He referred to the materials of the various UN bodies involved for the particulars of the crimes (alleged crimes and statements of facts; identification of places of their alleged commission; their time period; the identification of the persons or groups involved), as well as for their legal characterisation (including the reasons that they fall within the jurisdictions of the Court).

Relying largely on such UNFFC-based information provided by the Prosecutor, Pre-Trial Chamber III authorised the opening of an investigation by its decision of 3 October 2011.[24] In her dissenting opinion, Judge Silvia Fernández de Gurmendi opined that believed the majority exceeded their supervisory role was their "fragmentary approach" to the supporting

[23] ICC, Situation in the Republic of Côte d'Ivoire, OTP, Request for Authorisation of an Investigation Pursuant to Article 15, 23 June 2011, ICC-02/11-3, pp. 11–12 (http://www.legal-tools.org/doc/1b1939/).

[24] ICC, Situation in the Republic of Côte d'Ivoire, Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, ICC-02/11-14 (http://www.legal-tools.org/doc/7a6c19/).

material, which she thought should be taken holistically.[25] This raises the general issue of the scope of the Pre-Trial Chamber's assessment of the material, including UNFFC reports, contained in the Prosecutor's Request.

The case studies of Kenya and Côte d'Ivoire illustrate the extensive reliance of the Pre-Trial Chambers on UNFFC findings as channelled through the Prosecutor's requests for authorisation of an investigation. This trend raises methodological and legal issues. UNFFC has been plagued by several weaknesses, as identified by this author elsewhere:

> The basic challenge of international fact-finding commissions is the lack of a (common) regime. With a special emphasis on the creation and operation of international fact-finding commissions, this section examines the reasons for the origins of this gap and its main consequences on the quality of fact-work and account-work. […]
>
> The multiplicity of the mandating bodies, their *ad hoc* approach and the lack of a legal framework relating to the establishment of international fact-finding commissions have caused the political, institutional and legal challenges faced by fact-finding in international human rights law, international humanitarian law and international criminal law. […]
>
> The first challenge is caused by the *multiplicity* of the mandating bodies and the risk of competition […] Also, depending on their decision-making process, the main mandating bodies are not in the same situation while establishing an international fact-finding commission. […] [A]s demonstrated by participants in a workshop jointly organised by the Permanent Mission of Portugal (during its presidency of the Security Council) and the UN Office of the Coordination for Humanitarian Affairs in New York in November 2011, there is no consistent approach to fact-finding between the Security Council and the other UN mandating bodies. Moreover, even the practice of the Security Council itself is not coherent. […] This is largely due to the political process of the decision-making. […]

[25] ICC, Situation in the Republic of Côte d'Ivoire, Pre-Trial Chamber III, Corrigendum to "Judge Fernandez de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire", 5 October 2011, ICC-02/11-15-Corr, pp. 13–16 (http://www.legal-tools.org/doc/eb8724/).

> The other consequence of the multiplicity of the mandating bodies has been the *proliferation* of international fact-finding commissions. There has been a plethora of such commissions. Over the past two decades the OHCHR has provided support to 40 international fact-finding commissions established by various UN bodies. Some countries have hosted several international fact-finding commissions in a short period. For example, various UN bodies, including the Human Rights Council, the Secretary-General (at the request of the Security Council) and the OHCHR, have deployed five international fact-finding commissions in Côte d'Ivoire from 2002 to 2011. This proliferation is a serious challenge in international fact- finding.
>
> On the *legal aspects*, international fact-finding commissions have been established on an *ad hoc* basis, mostly through the adoption of resolutions by the mandating bodies. Each international fact-finding commission has its legal framework and is mostly guided by the practice established so far by previous commissions.[26]

These observations are relevant to the case studies on Kenya and Côte d'Ivoire: diversity and multiplicity of the mandating bodies of UNFFCs, in their nature (commissions of inquiry, fact-finding missions, special procedures), composition (independent experts, international civil servants, governmental experts, etc.) and in their methods of work (the independent commissions of inquiry working on the basis of higher standards than OHCHR staff and political missions, like the UN Security Sanctions Committee). These weaknesses of UNFFCs have a potential to negatively impact on the quality of information collected and used in the context of preliminary examinations and, subsequently, in the review of the Pre-Trial Chambers, as mentioned in the two dissenting opinions. That said, so far, UNFFCs' reports have been used by the Court as sources of leads, rather than probative information. However, the judicial review of this information raises several issues, which will be further examined in the following section.

[26] Mubiala, 2015, pp. 536–38, see *supra* note 9 (emphasis in original, headings omitted).

26.3.2.3. Issues Relating to the Judicial Use of UNFFCs' Information by the ICC

As seen in the two dissenting opinions above, the judicial consideration of the information and evidence provided by the UNFFCs has brought a number of legal issues to which ICC jurisprudence has not yet coherently responded. As this author has written elsewhere:

> The ICC prosecutor has initiated preliminary investigations in some situations, based on the findings and recommendations of international fact-finding commissions. This has been the case in Guinea (2009) and in Mali (2012). In addition, the Office of the Prosecutor has also requested the OHCHR to provide it with documentation and material collected by international commissions of inquiry it has supported (for example, the 2004 International Commission of Inquiry on Côte d'Ivoire, whose report was not officially issued). This raises the question as to whether human rights fact-findings could be used for judicial purposes. The jurisprudence of the ICC on this is not coherent. While the ICC Trial Chamber in the *Katanga and Ngudjolo* case admitted the evidence provided by the UN Human Rights Field Office in the Democratic Republic of the Congo, the ICC Pre-Trial Chamber in the *Gbagbo* case did not attribute probative value to the materials provided by several sources, including United Nations reports.[27]

At the doctrinal level, the issue of the relationship between the ICC and UN fact-finding bodies was discussed during a Chatham House conference held on 22 January 2014:

> **PROBLEMS POSED BY INTERACTION BETWEEN FACT-FINDING AND INTERNATIONAL CRIMINAL LAW INVESTIGATIONS**
>
> The main problem that arises when fact-finding commissions 'hand over' to international criminal investigations is the multiple interviewing of witnesses. This inevitably entails conflicting statements, not because the witness is not truthful but owing to varying perspectives and standards of investigation. There is also the risk of taint of witnesses. Finally, the

[27] *Ibid*., pp. 530–31 (italics in original, footnotes omitted).

> collection of physical evidence and documents poses problems in terms of chain of custody and integrity of evidence.
>
> The first prosecutor of the ICC was heavily criticized for over-reliance on preceding investigations by NGOs and commissions, as well as human rights reports. Such criticisms were voiced by both commentators and judges. Of late there has been an effort within the prosecution to conduct investigations that are more thorough and to uncover higher-quality, more reliable information. However, a problem is posed by the court's reliance, at least for lead purposes, on information emanating from other inquiries, and from states. Further, this poses a risk that a certain narrative becomes fixed early in the investigative process as to the course that events took and the attribution of responsibility. This can be difficult to rebut and test, and is another reason why fact-finders should be of the highest possible quality.[28]

The last observation above explains the move of UN fact-finding towards a 'criminalisation' of their methods of work.

26.3.3. The 'Criminalisation' of the UNFFCs' Methods of Work

The trend of the 'criminalisation' of UNFFCs started with the emergence and development of the account-work by UNFFCs. This has resulted in the extension of their subject matter to international criminal law and to the adaptation of their methods of work in line with criminal justice.

26.3.3.1. The Extension of UNFFCs' Subject Matter to International Criminal Law

Since 1993, there has been a trend for the UN mandating bodies to task UNFFCs with the identification of the perpetrators of the alleged violations of human rights and international humanitarian laws for their further prosecution. An example is the International Commission on Central African Republic established in January 2014 following UNSC resolution 2127 (2013) of 5 December 2013, where the Council requested the Secretary-General:

[28] Sir Nigel Rodley and Alex Whiting (meeting summary by Shehara de Soysa), UN Fact-finding and International Criminal Investigation, Chatham House, 22 January 2014, p. 4, available on the web site of Chatham House.

> to rapidly establish an international commission of inquiry […] in order immediately to investigate reports of violations of international humanitarian law, international human rights law and abuses of human rights in the Central African Republic by all parties since January 2013, to compile information, to help *identify the perpetrators* of such violations and abuses, point out their possible *criminal responsibility* and to help ensure that those responsible are *held accountable*.[29]

Despite the explicit reference to international human rights and international humanitarian laws, the Commission interpreted its mandate more broadly to include international criminal law in the applicable law:

> **2. *Bodies of Applicable International Law***
>
> 102. The Commission has applied three bodies of international law to the situation in the CAR: international human rights law, international humanitarian law, and international criminal law.
>
> […]
>
> **iii) International Criminal Law**
>
> 111. Although the Security Council resolution creating this Commission of Inquiry makes no specific reference to international criminal law, this body of law is an essential complement to both international human rights law and international humanitarian law, in that it establishes individual criminal liability for serious violations of those other two bodies of law. The Central African Republic ratified the Rome Statute of the International Criminal Court on 3 October 2001, thereby giving the Court jurisdiction over war crimes, crimes against humanity and genocide as defined in the Statute in relation to crimes committed on the territory of the CAR or by its nationals since 1 July 2002. On 30 May 2014 the transitional government of the CAR referred the situation on the territory of the CAR since 1 August 2012 to the Prosecutor of the ICC.[30]

[29] Emphasis added.

[30] International Commission of Inquiry on the Central African Republic, Final Report, Annex, UN doc. S/2014/928, 22 December 2014, pp. 37, 39.

This trend for UNFFCs to include international criminal law in their subject matter, as seen in the CAR example, has resulted in an increased co-operation between the ICC-OTP and UNFFCs. This is illustrated, for example, by the Standard Operating Procedures adopted by the ICC and the UN Department of Peacekeeping Operations for the provision of information collected by the human rights components of peacekeeping missions to the ICC-OTP. This co-operation raises the issue of the quality control of the information provided by UNFFC, in relation to criminal justice.

26.3.3.2. Quality Control in UN Fact-Finding in Relation to Criminal Justice

Based on the good practices developed during more than two decades, UNFFCs and OHCHR have improved the standard of proof in fact-work and account-work, developed criteria for information-sharing and taken initiatives for the professionalisation of UN fact-finding.

26.3.3.2.1. Standards of Proof for the Determination of the Facts

A field of special interest for the interaction between the ICC-OTP and UNFFCs in preliminary examinations is their respective methods of work. As already mentioned, the lower standard of proof of preliminary examination is close, if not similar, to that applied in UNFFC. As this author has written elsewhere:

> In principle and practice, international fact-finding commissions apply human rights methodology, in the context of which valuable information may be collected and contribute to the establishment of patterns for criminal investigations. Recently, the hybrid commissions have developed quasi-criminal methodological approaches. Influenced by the former or current judicial affiliation of their members and staff, some commissions of inquiry have adopted the "beyond a reasonable doubt" standard of proof, which is relevant to criminal investigations, rather than to fact-finding outside criminal justice. International fact-finding commissions should apply the "reasonable ground to believe" standard of

> proof (fact-work), as well as the "reasonable suspicion" standard of proof (account-work).[31]

The Policy Paper, while providing that the ICC-OTP should indicate in its report on preliminary examination the persons involved (if identified) in the perpetration of the alleged crimes,[32] does not provide the applicable standard of proof. To be more relevant and useful for the ICC-OTP's preliminary examination, UNFFC should apply the 'reasonable suspicion' standard of proof. The criteria for the application of this standard of proof were articulated by the Darfur Commission. According to an author:

> The criteria of identifying perpetrators was first spelled out by the Darfur Commission of Inquiry, which decided that it could not comply with the standards adopted by criminal courts (proof of facts beyond a reasonable doubt), or with that used by international prosecutors and judges for the purpose of confirming indictments (that there must be a *prima facie* case). It concluded that the most appropriate standard was that requiring a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.
>
> The Darfur Commission also set the methodology of how to practically approach this issue. While it has collected sufficient and consistent material (both testimonial and documentary) to point to numerous (51) suspects, the Commission decided to withhold the names of these persons from the public domain. This decision was based on three main grounds: 1) the importance of the principles of due process and respect for the rights of the suspects; 2) the fact that the Commission has not been vested with investigation or prosecutorial powers; and 3) the vital need to ensure the protection of witnesses from possible harassment or intimidation. The Commission instead listed the names in a sealed file that was placed in the custody of the United Nations Secretary-General. The Commission recommended that this file be handed over to a competent Prosecutor (the Prosecutor of the

[31] Mubiala, 2015, pp. 524–525, see *supra* note 9.

[32] OTP, *Policy Paper on Preliminary Examinations*, p. 19, see *supra* note 4.

> International Criminal Court, according to the Commission's recommendations), who may use that material as he or she deems fit for his or her investigations.[33]

The adoption of the 'reasonable suspicion' standard of proof by the UN Commission on Darfur was a milestone in the criminalisation of UNFFCs. Based on this practice, OHCHR has been developing guidance on "Attributing individual responsibility for violations of international human rights and humanitarian law in UN-mandated commissions of inquiry, fact-finding missions and other investigations", which was discussed at an experts' meeting convened in Geneva on 18 October 2016. The meeting discussed, among other things, issues relating to information sharing with the criminal justice system, including in particular the ICC.

26.3.3.2.2. Information-Sharing

In several situations under preliminary examination, the ICC-OTP has relied on information provided by UNFFC, including OHCHR field offices and human rights components of peace missions, where they exist, according to the 2004 UN-ICC Cooperation Agreement. This raises the issue of confidentiality. According to OHCHR's policy, prior and informed consent of victims and witnesses is required for the disclosure of information by the ICC. The concerned victim or witness must be informed that the information and/or documentation he/she provides could be used for judicial purposes and subsequently give informed consent. Sharing this information or documentation with the ICC-OTP or another jurisdiction is, therefore, subject to such consent.

In this regard, the challenges between the rules on the confidentiality of information and evidence gathered from the UN and the Prosecutor's power to disclosure have been pointed out:

> the UN and the Prosecutor may agree that the former will provide documents to the Prosecutor "on condition of confidentiality and solely for the purpose of generating new evidence," and that the documents "shall not be disclosed to other organs of the Court or to third parties… without the consent of the United Nations." The Prosecutor is expressly

[33] Mona Rishmawi, "The Role of Human Rights Fact-Finding in the Prevention of Genocide", Paper presented at the International Conference on the Prevention of Genocide, Brussels, 31 March–1 April 2014, p. 8 (on file with the author).

authorized to enter into such confidentiality agreements by Article 54(3)(e) of the Rome Statute, which authorizes the Prosecutor to "(a)gree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information actually consents…" At the same time, however, the Prosecutor is required under Article 67(2) of the Rome Statute to "disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. The Prosecution is also obligated, under Rule 77 of the Rules of Procedure and Evidence, to "permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are," *inter alia*, "material to the preparation of the defence."

Thus, there exists a tension between these provisions of the Rome Statute and the Rules, which allow the Prosecution to collect "lead" evidence on condition of confidentiality, on the one hand, and require the Prosecution to disclose or allow access to any potentially exonerating evidence, on the other. This tension came to a head in June 2008, when Trial Chamber I halted the trial against Thomas Lubanga Dyilo due to the Prosecution's failure to disclose potentially exculpatory documents obtained from the UN and other organizations on condition of confidentiality. […] the problem was ultimately resolved for purposes of the *Lubanga* trial, which commenced in late January 2009. However, given the fact that the Prosecution has admitted to relying heavily on confidential lead evidence obtained from the UN and various non-governmental organizations in its investigations in the Democratic Republic of Congo, and has potentially done the same in other situations under investigation by the ICC, it is likely that the tension between Article 54(3)(e) and 67(2) of

> the Rome Statute will become an issue before the Court again.[34]

The issue of information-sharing of fact-finding in relation to criminal justice system was thoroughly discussed by a Geneva experts' meeting in October 2016. Based on the outcome of this meeting, OHCHR has been preparing a guidance on "Attributing Individual Responsibility for Violations of International Human Rights and Humanitarian Law in UN-Mandated Commissions of Inquiry, Fact-Finding Missions and other Investigations". It is expected that the guidelines under finalisation will contribute to clarifying the issue of information-sharing by OHCHR and UNFFCs in relation to criminal justice system. Due to the increased reliance of the ICC-OTP on the information and material collected by the UNFFCs and in order to ensure a high quality of this information, OHCHR, in addition to developing methodological tools on fact-work[35] and account-work (on-going), has been doing efforts to professionalise UN fact-finding, in particular the staff servicing UNFFC mechanisms.

26.3.3.2.3. Towards the Professionalisation of UN Fact-Finding

A main weakness of UNFFC is the *ad hoc* character of its membership and staffing. This has led to inconsistent practice and diverse quality of information collected by UNFFCs and shared with the ICC-OTP. To address these challenges, OHCHR, as the supporting body to UNFFCs, has recently taken an initiative to put in place an arrangement for a dedicated staff to support UN human rights inquiries and fact-finding. If established, the proposed structure would contribute to streamline UNFFC and to develop coherence as well as institutional memory. Such a structure would also facilitate the operational relationship between UNFFC mechanisms/OHCHR and the ICC-OTP in preliminary examination.

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[34] The Relationship Between the International Criminal Court and the United Nations, War Crimes Research Office, Washington College of Law, American University, August 2009, pp. 43–45 (footnotes omitted).

[35] OHCHR, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights Law and International Humanitarian Law: Guidance and Practice*, United Nations, New York/Geneva, 2015.

26.4. Conclusion

As illustrated by the three case studies on Darfur, Libya and CAR II, UN Commissions of Inquiry and FFCs have contributed to preliminary examinations carried out by the ICC-OTP and the shared information has played a catalytic role in the opening of investigations by the latter into several situations. In turn, as seen in the situation of CAR II, UNFFCs have also benefited from the open source information gathered by the ICC-OTP in preliminary examinations. Overall, even when they have been deployed at the same time, the two entities have proceeded in a complementary, rather than competitive, manner. UN fact-finding and preliminary examinations are two cross-fertilizing and mutually reinforcing processes. In particular, preliminary examinations include a phase (the Phase 2 analysis), which involves factual and legal analyses similar to those of UNFFCs. As the two processes relate to two separate systems, namely non-criminal and criminal justice systems, their interaction raises the issue of quality control of the shared information, as illustrated by the case studies on Kenya and Côte d'Ivoire. This explains the on-going efforts by OHCHR to streamline and professionalise UN fact-finding, with a view to improving the quality of information provided to the ICC-OTP. In particular, high-quality information from UNFFCs could contribute to increasing its probative value before the ICC.

The interplay between UN fact-finding and preliminary examination provides, therefore, a good basis and an opportunity for the development of the co-operation between OHCHR and the ICC-OTP. Due to the limited capacity of the ICC-OTP, a more institutionalised co-operation with OHCHR can revitalise the interplay of UNFFCs with the ICC-OTP in preliminary examinations. The exchange of information between OHCHR, as the depository entity of the archives of UNFFCs, and the ICC-OTP has been based, so far, on the 2004 UN-ICC Cooperation Agreement. In this regard, this author recommends that the two entities agree on the adoption of standards of operating procedures (SOPs) similar to those existing between the ICC-OTP and the UN Department of Peacekeeping Operations, which are more specific and complementary to the 2004 UN-ICC Cooperation Agreement.

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