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Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions

By Stephen Wilkinson

This research project was undertaken under the auspices of the Geneva Academy of International Humanitarian Law and Human Rights in close cooperation with Geneva Call.

Stephen Wilkinson led the research at the Geneva Academy of International Humanitarian Law, assisted by Amélie Larocque, while Jonathan Somer coordinated Geneva Call's input.

This project is dedicated to the memory of Antonio Cassese, who kindly met the research team and provided inspiration, comments and stimulating input during the early stages of its formulation. It truly was a privilege to engage with such a brilliant mind and inspirational personality. His charm, warmth and energy were simply without compare.

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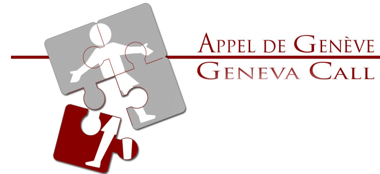

This project was undertaken after discussions with the Program on Humanitarian Policy and Conflict Research (HCPR), which is currently working on a project on Monitoring, Reporting and Fact-Finding. It is hoped that the research done here will feed into and complement the work of HCPR.

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EXECUTIVE SUMMARY

As human rights and humanitarian commissions of inquiry and other fact-finding mechanisms gain influence in international society, a key question that has not yet been fully addressed is whether such bodies need to apply a minimum formal standard of proof (or degree of certainty) when they adjudicate on such serious matters. This report starts to address that question.

Section I sets out the rationale for the project. It proposes a working definition of fact-finding, discusses its relevance in international relations, and considers the notion of standard of proof and its importance for fact-finding work. This section mentions some recent controversies associated with fact-finding missions, certainty of findings and standards of proof.

Section II addresses the general concept of a standard of proof and how it is traditionally applied in judicial settings. It considers conviction standards, civil law standards, and a range of international and regional judicial mechanisms, including the standards used by international criminal tribunals and possible parallels with fact-finding work.

Section III examines the practice of human rights and humanitarian law fact-finding missions. To focus the discussion and set out the various frameworks, mandates and activities of fact-finding missions, it analyses seven case studies. These are: the Yugoslavia Commission of Experts; the United Nations El Salvador Commission; the Darfur Commission; the Guinea Commission; the Gaza Fact-Finding Mission, the Democratic Republic of Congo Mapping Exercise; and the recent Libya and Syria Commissions of Inquiry. Each case study describes some key findings, the standards of proof used, the mission's output, and outcomes.

This section also supplements the analysis by providing a brief overview of other relevant mechanisms, including the work of NGOs (Geneva Call, Amnesty International, and Human Rights Watch), and the Monitoring and Reporting Mechanisms established under Security Council Resolutions 1612 and 1960.

Section IV draws the report together. It proposes and analyses a practical and theoretical framework for assessing standards of proof in the context of humanitarian fact-finding. It discusses the usefulness and utility of standards of proof, how much standards can and should be expressed (externally, internally, fixed, multiple, varied), and what standards are most appropriate in specific situations.

The reports' conclusions and the next steps are settled in its **Section V**. The report concludes that balance of probability is likely to be the most coherent standard of proof to apply in most circumstances, because of the inherent limitations of fact-finding mechanisms coupled with the interests at stake. However, this remains only a coherent starting point as a sliding scale may be needed. Hence, the report goes on to identify factors that might justify the adoption of a higher or lower standard in certain circumstances. The factors discussed include: the norm being addressed; policy determinations; attribution of responsibility to groups; attribution of responsibility to individuals; the public or private nature of the findings; the standing and interest of the investigating and mandating authorities; the contestability of the facts; and the quality of cooperation with those who are being investigated. An additional factor is the effect that fact-finding exercises may have on the work of other transitional justice mechanisms. This may also guide the selection of standard of proof. In each case, the report makes a provisional recommendation of best practice.

The report also concludes by affirming two important points. Firstly, fact-finding remains a limited and often preliminary mechanism of legal adjudication. Its limitations should be understood but also embraced; fact-finding inquiries should not impose on themselves overly burdensome standards of proof, yet a balance must be made in order to ensure credibility and accuracy. Secondly, the development of a clear framework on standards of proof must proceed alongside the development of criteria for assessing the quality of information that is required to make legal and factual assessments.

Summary of the recommendations made in the report

- The application of a standard of proof should be a central methodological consideration before and during a FFM.
- FFM should state their methodological standards at the outset of their report.
- The certainty of factual findings is rarely uniform and the reality is that an FFM will be more certain of some findings than others. Adopting a layered approach will add credibility to findings and enable FFMs to convey their findings more accurately. They will also avoid the risk of falsely appearing to attach one level of certainty to all their findings. In this light, the UNCTES appears to provide an excellent framework for best practice.
- Balance of probabilities is a coherent starting point for the application of a set standard of proof. The four working standards and definitions are:

– Reasonable suspicion: Grounds for suspicion that the incident in question occurred, but other conclusions are possible. (40%). Classic expression is <u>may be reasonable to conclude.</u>

– Balance of probabilities (sufficient evidence). More evidence supports the finding than contradicts it. (51%). Classic expression <u>is reasonable to conclude.</u>

– Clear and convincing evidence. Very solid support for the finding; significantly more evidence supports the finding and limited information suggests the contrary. (60%.) Classic expression is <u>it is clear that.</u>

– Overwhelming evidence. Conclusive or highly convincing evidence supports the finding. (80%.) Classic expression is <u>it is overwhelming, it is undeniable.</u>

- It may be important to give certain norms specific consideration when assessing the appropriate standard of proof. The approach taken may be influenced by the nature of the mandating body, and by specific historical, cultural or political sensitivities relating to the norm.

- When assessing whether violations reflect a policy of unlawful behaviour, FFMs should first ask whether or not such a judgement is necessary to their legal findings. If so, a balance of probabilities standard may remain sufficient. If not, a higher standard may be more appropriate.

- Only very occasionally, when attribution is particularly problematic, should FFMs consider increasing the degree of certainty above a general balance of probability standard.

- When individuals are to be identified, a clear standard of proof should be applied. Balance of probability remains an appropriate standard as a starting point but, if a

decision is made to list those involved publicly, greater scrutiny may be appropriate. While the involvement of an individual may be determined, individuals can only ever be *suspected* of committing a crime.

- The nature of the mandating authority may mean that certain interests are placed above others. However, any FFM mandated to assess violations of humanitarian or human rights law should primarily assess such violations as they find them. A failure to report behaviour (for example, as a result of applying an exaggeratedly demanding standard of proof or deliberately avoiding clear determinations), even for honourable reasons, may delegitimize the fact-finding process as well as the sponsoring institution and is an affront to victims of abuse. In the same manner, FFMs should ensure that their findings are credible and reliable; lower standards of proof should therefore be accepted only in limited circumstances. Any desire to establish violations of all parties involved should be only be done with clear reference to the certainty of the assertion and hence should be framed against objective standards of proof.

- Some consideration should be given to the possible consequences of the FFM Report. If a positive impact is likely to result from the findings, or is indeed a central rationale (such as halting on-going atrocities) then a lower standard *may possibly* be tolerated. If the likelihood is strong that certain findings will have a negative impact, on the other hand, a clear and convincing standard may be more suitable.

- FFMs should give consideration to the level of cooperation that can be expected from the parties under investigation. The more they are open and receptive, the more likely it is that the FFM can apply a clear and convincing standard of proof. (This does not imply that such a standard *should* be adopted.) When the parties under investigation are not open and receptive, it is likely that some findings will only ever reach the standard of "*one of the reasonable conclusions*". The FFM may need to rely on adverse inferences.

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> "*In the nature of things, absolute certainty can never be attained in human affairs. Human beings must order their lives upon the basis of convincing possibility*"[1]
>
> ***Sir Frank Soskice***

SECTION I: INTRODUCTION AND OVERVIEW

1. Introduction

Over the last ten years, many *ad hoc* fact-finding and inquiry commissions have been established to assess some of the most serious situations of human rights and humanitarian law violations across the world: in Darfur[2] and Lebanon,[3] in Guinea[4] and Georgia[5], in Israel and the Occupied Palestinian Territories, and most recently in Côte d'Ivoire[6], Libya[7], and Syria.[8] High profile fact-finding missions, such as the Gaza fact-finding mission led by Richard Goldstone,[9] have not only increased public awareness of fact-finding and inquiry processes but have highlighted the importance of their role as a key mechanism for implementing legal norms of international human rights and international humanitarian law.[10] Non-governmental organisations (NGOs) have also significantly increased their visibility in such matters, either supporting such missions with information or providing independent reports on the same situations of grave concern.

As such mechanisms gain influence in international society and acquire the potential to be "a significant weapon in the armoury of world order",[11] a key question that has not yet been fully addressed is whether a minimum formal standard of proof (or degree of certainty) exists or is required when such bodies adjudicate on such serious matters. If a standard exists (or should exist), the question to be answered is at what point between conjecture and absolute certainty should such a threshold of certainty lie? As one legal expert commented:

> "*The underlying question paramount to the issue of concluding 'undisputedly' that certain facts and alleged violations are correct is the standard of proof required. However, this standard of proof greatly varies according to the mandate and procedure in which the fact-finding process takes place.*"[12]

This research has assessed a range of mechanisms, starting with formal judicial processes, and the "*natural home*" of standards of proof. After an initial overview, the report considers a range of case studies, including *ad hoc* fact-finding missions mandated by the United Nations (such as Richard Goldstone's mission) but also the work of non-governmental organizations, regional bodies, international experts and other relevant bodies operating in the international arena that are tasked, to some extent, to make legal adjudications with regard to alleged serious violations of human rights or humanitarian law. The report concludes with some general remarks and recommendations designed to promote further discussion and debate.

a. Defining fact-finding

Before addressing the concept of standards of proof as such, it is important to clarify the terms used, and more specifically the place that fact-finding occupies in human rights and humanitarian protection.

- What it is?

The only truly international document that defines fact-finding is the *Declaration on Fact-finding by the*

United Nations in the Field of the Maintenance of International Peace and Security, which says that fact-finding under the auspices of the United Nations, is:

> "*any activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent United Nations organs need in order to exercise effectively their functions in relation to the maintenance of international peace and security*."[13] (Emphasis added.)

This general and institutionally specific definition has been developed and tailored specifically to cover human rights and humanitarian fact-finding by both practitioners and academics, and may be read alongside the definition offered by J.N, Agnieszka in the Max Planck Encyclopaedia of Public International Law on "*fact-finding*", who describes it as a dispute settlement mechanism in public international law.[14] The following definitions from recent research and academic commentary add precision to what we will broadly classify as "*humanitarian fact-finding*":

T. Frank & S. Fairley (1980)

> "*Invoking broadly recognized normative standards, fact-finders typically examine data, hear testimony, and consider contextual circumstances, they also deduce whether normative standards have been violated and may thus reach conclusions about conditions, which involves them in making a quasi judicial determination. The fact-finders' report, given full publicity, serves to clarify misconceptions, absolve or embarrass the investigated party, influence public opinion, and, where appropriate, facilitate further expressions of community disapprobation.*"[15]

Guidelines on International Human Rights Fact-Finding Visits and Reports (The Lund-London Guidelines) (2009)

> "*For the purposes of these guidelines, fact-finding means a mission or visit mandated by an NGO to ascertain the relevant facts relating to and elucidating a situation of human rights concern, whether allegedly committed by state or non-state actors. In many instances this activity will result in a report*."[16]

Théo Boutruche, Legal Advisor to the EU Led Georgia-Russia Inquiry (2011):

> "*A method of ascertaining facts through the evaluation and compilation of various information sources… Fact-finding serves to illuminate the circumstances, causes, consequences and aftermath of an event from a systematic collection of facts. This can be done to dispel or verify allegations. The contexts, forms, techniques and purposes of fact-finding vary greatly in international relations.*"[17]

To recapitulate in simple terms, for the purposes of this paper, international fact-finding is deemed to refer to predominately *ad hoc* investigative mechanisms tasked with ascertaining relevant facts and information relating to a situation of human rights or humanitarian concern, by means of which it is determined whether or not the relevant international normative framework has been violated by states or non-state actors. They are most commonly called "*international commissions of inquiry*" or 'fact-finding missions' (the acronym FFM will be used hereafter[18]) and will involve the collection of first-hand information (at the location in question, or by other forms of direct access).

- What it is not

While fact-finding may involve many bodies and take many forms, one thing is clear and undisputed: fact-finding itself is not able or tasked to make authoritative or binding judicial declarations. Its findings cannot therefore be compared to those made by courts or tribunals. (This point is made in many fact-finding reports.) FFMs do not, and cannot be expected to apply the same degree of scrutiny or

standard of certainty and it follows that, if the findings of formal criminal processes subsequently contradict them, this does not of itself invalidate the value or justification of FFM reports.[19]

Fact-Finding must be distinguished not only from "*top-end*" mechanisms, such as formal judicial processes and mechanisms of binding legal authority, but from mechanisms at the "*low-end*" of the enforcement spectrum. Here we are mainly dealing with monitoring and reporting. A possible example would be the Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka. In this case, the panel who themselves openly stated that they were not a fact finding mission, could not be described as fact-finding, because it did itself directly assess whether human rights standards had been violated *per se*.[20] The report predominately assessed the steps Sri Lanka had taken in response to reports of human rights abuses.[21] Vocally supported by the human rights community, its report called for a full international inquiry.[22]

b. Importance of fact finding in international relations

Despite some limitations (notably their *ad hoc* nature*,* limited timeframe and non-binding nature), FFMs serve a clear and necessary function.[23] In specific terms, they set out key facts on situations of international concern; are often the only independent source of information; provide an explicit (if limited) legal adjudication on state or group behaviour (especially important in a system that lacks a central mechanism of implementation); identify individuals involved in or responsible for specific abuses; or are a precursor for formal judicial or reparatory action. The Goldstone Report provides a good example of the last effect as it led the government of Israel to instigate more than 400 investigations. The Darfur inquiry, was followed by the Security Council referring the situation of Darfur to the International Criminal Court, offers another. While the findings of the FFMs may not be the only factor leading to subsequent criminal action, they certainly played an important role.

c. Application of general standards in humanitarian fact finding

As we can see from the above, when FFMs make determinations, their weight and significance should not be downplayed. If FFMs findings are to be credible, they need to be able to stand up to honest and fair scrutiny, which implies setting clear objective standards to help frame their work and help to ensure they make accurate, impartial and non-arbitrary findings of fact.

As Frank & Fairly aptly state, "*the prospects for fact-finding rest upon a fragile assumption of fairness and credibility that only a conscious vigilance can sustai*n".[24] In consequence, "*since the efficacy of fact-finding rests so largely on credibility, and credibility emanates primarily from manifest integrity of process, sound procedures are not merely desirable but a functional prerequisite*".[25]

Several aspects of process are relevant to the credibility, impartiality and accuracy of a FFM's work. They include the terms of reference, the selection of commissioners and staff, the team's methodology, the use made of the product, etc.[26] A central component is naturally the procedures employed in the investigative process which should allow the fact finder to distinguish "*between objective facts and slanted information*…".[27]One aspect to this is the degree of certainty applied to make any finding of legal fact.

d. Centrality of the Standard of Proof

A "*standard of proof*":

> "*marks a point somewhere along the line between two extremes: a mere conjecture at one end, and absolute certainty at the other. Proof furnished in support of a particular proposition must meet or surpass this point for*

> *a […] finding to be made. In practice, this may either constitute a very explicit exercise of applying a standard of proof, […] or […] based upon a number of unarticulated factors concerning the evidence that has been furnished.*"[28]

In fact finding missions the term "*standard of proof*" is often avoided in favour of the term "*degree of certainty*". In the present context, these terms will be used interchangeably (and reflecting the general definition above). "*Standard of proof*" is the more traditional term, "*degree of certainty*" is preferred by some fact-finders, but for our purposes the content of both phrases is the same.

The certainty attached to the findings of a fact-finding body is a central issue, but it is far from straight forward: "*Lawyers know that there are few "pure" facts*"[29] In any general situation, some "*facts*" are likely to be subject to a range of interpretations and plausible explanations, and this is even more probable when the abuses investigated are as serious as genocide, crimes against humanity, arbitrary killing and enforced disappearances.

- Challenges

Establishing and verifying that serious violations of international law have occurred is far from straightforward. The contexts in which serious abuses of human rights occur raise huge challenges and influence the quality, quantity and accuracy of information. First, "*mass violations frequently are committed in a situation of armed conflict or severe social violence which complicates the documentation of violations*".[30] Second, the state or non-state organizations that commit serious violations – the entities subject to scrutiny – tend to be "…*particularly adept at destroying evidence and concealing the identities of perpetrators*".[31]

Furthermore, any FFM must ensure the security of personnel; assess highly partisan information; respect and protect sources of information, work in a manner that ensures the co-operation of the accused state or non-state actor but manages the pressures placed on it by the authorizing body (including time frame); and interpret often very loose legal concepts (such as IHL rules on the conduct of hostilities).

It is certainly possible to assess adherence to human rights norms, notably via formal judicial processes; but it is challenging to do so using a mechanism whose natural parameters are *ad hoc* and fluid. It is not feasible to apply the same degree of rigour or scrutiny to the facts; nor should this be expected.

- Central dilemma

It is in this challenging context that fact-finders must find a balance: while recognising that FFMs do not provide a judicial standard of scrutiny, they must make sure that their findings are credible and accurately reflect the behaviour of the parties under scrutiny. If they raise the standard of proof, it becomes more likely that certain behaviours will go unreported; if they adopt a low standard, their investigation will not stand up to rigorous scrutiny and their findings may be discredited. Both outcomes are unsatisfactory: the challenge is to find a balance between the two.

- Finding of facts vs. Legal findings

The focus of this paper will be upon those Fact Finding Missions and Commissions of Inquiry which make some form of explicit or implicit determination of adherence or not to the international legal framework, and hence the discussions of a standard of proof focuses on such legal findings not pure factual finding alone. "Pure" fact-finding remains important as all legal findings are based on facts and the certainty of a basic fact are certainly part and parcel of the legal assessment. This report has not considered it necessary to clearly distinguish between legal findings and pure factual assessment, and

believes they are better to be seen as a whole as several facts will coalesce together to allow for a legal assessment based upon the normative human rights or humanitarian law framework.[32]

e.Standards of Proof- highlighted concern in recent fact finding coverage

Identifying an appropriate standard of proof for fact-finding is not a minor methodological issue of interest only to a small number of fact-finders and observers working in the human rights field. Three recent cases have demonstrated that it needs to be addressed urgently. Most notably, the recent retraction by Justice Goldstone of some of the findings of the UN Fact-Finding Mission into the Gaza Conflict naturally caused observers to review its methodology and standards.[33] Some subsequently questioned the reliability of the entire report. Second, and more explicitly relevant to standards of proof (SOP), the Office of the High Commissioner for Human Rights (OHCHR) released a mapping report in 2010 on human rights abuses and possible crimes committed in the DRC between 1993 and 2003.[34] Both the leaked and final versions of this report included allegations of genocide against Hutus, which led the Rwandan government to accuse the OHCHR of using the "lowest possible standard of evidence".[35] The government stated that, for such serious accusations, only a "beyond reasonable doubt" standard was appropriate.[36] Third, Geneva Call (an NGO based in Geneva that works with non-state actors to improve respect for international humanitarian norms) conducted a verification mission in the Philippines to assess whether or not the armed group (MILF) had fully respected its commitment to abjure use of anti-personnel landmines, as agreed with Geneva Call under one of its Deeds of Commitment (DOC).[37]The mission opted to apply a "beyond reasonable doubt" standard of proof for assessing adherence to the DOC, and as a result was unable to reach a definite conclusion.[38] Geneva Call made it clear that this was not the standard it applied to all its verification processes; it was a unique standard applied to a unique situation.[39]

f. Standards of Proof- literature and comment

The issue has also been discussed to some degree in documents and academic papers that set out practical guidelines on fact-finding. Théo Boutruche, legal adviser to the EU-led Georgia-Russia Inquiry, for example, suggested in a recent paper that:

> "*The underlying question paramount to the issue of concluding "undisputedly" that certain facts and alleged violations are correct is the standard of proof required. However, this standard of proof greatly varies according to the mandate and procedure in which the fact-finding process takes place.*"[40]

As explained in the same article, Sylvain Vité identifies three main standards of proof, which are distinguished by the degree of evidence or certainty they require to establish facts:[41]balance of probabilities or preponderance of evidence;[42] convincing proof;[43] and beyond reasonable doubt. Since these standards reflect and re-affirm traditionally accepted standards of proof, as Boutruche himself states, the problem remains that: "*Most fact-finding bodies do not elaborate on the criteria of proof used to ascertain facts when applying the most common standard of "balance of probabilities"*".[44]The balance of probabilities standard is an approach that Bertrand Ramcharam supported:

> "*As a general rule the standard of proof applied by fact-finding bodies should be a balance of probabilities. Probability in this sense may be defined as an evaluation of the likelihood of a past event having happened, given the facts and assumptions, expected or adopted for the purposes of the evaluation*".[45]

Aside from these general comments, given the increasing importance and expansion of FFMs, there is surprisingly little systematic or detailed elaboration of this topic.

2. Nature of research

It is in response to this challenge that the Geneva Academy of International Humanitarian Law and Human Rights, in consultation with Geneva Call, has undertaken this research project to evaluate the standards of proof used by "*fact-finding*" bodies. It assesses the standards used in practice, evaluates their coherence from a theoretical standpoint, and proposes tentative recommendations to promote further discussion and debate.

SECTION II : CONCEPT OF A STANDARD OF PROOF-TRADITIONAL APPLICATION

"Employing a legalistic focus can enhance the perception of objectivity …."**[46]**

1. Basic concept

Before we look specifically at the practice of fact-finding bodies, it is crucial to review the basic concept and traditional application of a standard of proof (SOP). This will allow a comparative assessment to be made when we discuss the practice and theory of applying a SOP in a fact-finding setting.

Formal judicial mechanisms provide the clearest framework for standards of certainty. For example, common law countries apply the "*beyond reasonable doubt*" SOP when establishing guilt in criminal trials. Specific SOPs or degrees of certainty are prevalent at all stages of the criminal process, from allowing police officers to undertake searches and arrests to judicial indictments.

SOP and its less formal brother "*degree of certainty*" are not confined to criminal processes, however. They are also used in non-criminal judicial contexts, notably civil court proceedings.

Whether or not such standards (that range from reasonable suspicion, preponderance of evidence, probable cause, to beyond reasonable doubt) can easily be transferred to international fact-finding processes is not self-evident, because the latter are less formalised and have somewhat limited mandate and powers. However, if such standards are going to be used as terms of art in fact-finding processes, as appears to be the case, it will become necessary to understand their content and the contexts in which they are applied. For example, will it be appropriate - or technically feasible - to apply a "*beyond reasonable doubt*" test in fact-finding processes? Do the interests at stake justify the application of such standards, or is it more appropriate to apply lower investigatory tests? While intuition might suggest the latter, the research undertaken for this report shows that the best solution is not always obvious.

2. Why Are Standards of Proof Used?

Investigative bodies are rarely, if ever, absolutely certain of the facts they gather and analyse. As stated earlier, standards of proof will make it possible to "mark a point between […] two extremes: a mere conjecture at one end, and absolute certainty at the other".[47] The difficulty lies in establishing where the standard should be situated along that scale. Standards of proof are traditionally applied to regulate certain actions that would otherwise be prohibited, or as a threshold for reaching a finding in a legal context. Degrees of persuasiveness appear to be fair because they take into consideration the issues at stake and the possible impact of punishments that may be authorised. Setting standards of proof is therefore central to efforts to prevent arbitrary infringements of individual liberty and false accusations.

If there were no standards of proof, it would not be possible to evaluate the rationality or fairness of decisions that have serious consequences for individuals and for society.

3. Standards applied in practice

The report will now look to address how standards are applied in practice in a range of judicial and investigative settings.

a. Approaches in Domestic Systems: conviction and determinations

To start with, we analyse national judicial standards because these are the starting point for any discussion of the evolution of standards of proof at international level. To appreciate the contours, nuances and specifications of SOPs, we must refer back to their traditional source and setting.

Since international fact-finding, as stated, is "*international in nature*", it is also important to take into account a range of legal systems. We therefore look at Common law, Civil law, and Islamic legal systems.

i.Criminal Law Systems (UK/USA)

Criminal Cases: beyond reasonable doubt

The United Kingdom and the United States of America both have an accusatory procedure that is typical of common law systems. The judges or juries analyse both the prosecutor's and defence's version of the facts, then decide, applying the relevant standard of proof, which version convinces them the most. The criteria in question is the "beyond a reasonable doubt" standard.[48] This means "proof to a virtual certainty".[49] The prosecutor needs to demonstrate to the court that the accused is guilty and that there can be no doubt concerning his innocence. If it were to be quantified, conviction should correspond to a 95 per cent probability that the accused is guilty (even if in practice it is closer to 75 per cent).[50] This high standard is rationally justifiable if we consider the rights of the accused that are at stake. The presumption is that it is more costly to convict an innocent person than to acquit a guilty one. Otherwise, a lower standard, a preponderance of the evidence, would seem to suffice.[51] This is the justification advanced in old cases in both British and American jurisprudences and it is still followed today."*If, at the end of, and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal*"[52]. (Emphasis added)"[…] *A task of the law is making the choice appropriate to the situation; the law may aim to minimize overall errors, to decrease dangers of deception or bias or to disfavour certain claims, or to avoid a special kind of error such as convicting the innocent*"[53]. (Emphasis added)

Civil Cases

- General: Preponderance of evidence

In civil litigation, "preponderance of evidence" provides the degree of certainty needed to adjudicate a given legal matter.[54] In simplified terms, this standard permits a finding of guilty if the defendant is more likely than not to have been responsible for the act or event at issue.[55] Mathematically, it could be quantified as 50 per cent plus one. Compared to criminal proceedings, the standard is lower because the consequences of the civil proceeding decisions are less grave. Courts are likely to impose damages or specific performance (reparations) on the defendant rather than deprive him or her of liberty. In short, there is parity with regard to the competing interests; the court is as concerned to address guilty conduct as it is to avoid making an inaccurate attribution of responsibility.

- Exceptional: *clear and convincing*

A higher standard may be used in exceptional civil trials, when the imperative rights of the person need to be considered. Such cases might relate to immigration, parental access to children, *habeas corpus* or psychiatric placement.[56]The criterion used in such cases is one of "*clear and convincing evidence*".[57] Although no single definition of this standard is generally adopted, it could be summarised as "*much more likely than not*".[58] The term has been formulated in many ways but one can agree that it falls

between the *"beyond a reasonable doubt"* and "*preponderance of evidence*" standards.

ii. Civil Law Judicial Systems (Germany/France)

Traditional civil law systems and traditional common law accusatory processes work differently. In civil law the procedure is inquisitional, which means that judges do not reach a verdict by acting like a referee between the prosecution and the defence's arguments, but take an active role in gathering facts and evidence and intervene during trials.[59]

Despite the changing role of the judge in the procedure, it is interesting to look at the standard of proof used in Germany, which closely resembles the one in common law. The standard of proof adopted in all administrative, criminal, or civil cases is based on "*beyond reasonable doubt*".[60] On the other hand, the threshold of appreciation used in France in all cases relies on an "intime conviction", [61] which corresponds to guilt without the shadow of a doubt.[62]

The civil standard is similar to or stricter than the common law standard, in the sense that only a serious doubt will overthrow an "*intime conviction*".[63]

iii. Other Systems: the example of Islamic Law

To provide a foundation for comparing standards of proof used in domestic judicial systems and processes of international fact-finding, it is helpful to reflect briefly on domestic systems that do not belong to the common law and civil law traditions. As an example, Islamic law provides a different approach, because its law is intrinsically related to the state's religious uniformity: the law and the state are one body. Islamic law is not found in all countries that have a Muslim identity, since modernists believe that the canonical aspect of the law should be separated from the law itself; but it has been re-introduced in a number of countries, including Pakistan, Saudi Arabia, Afghanistan, Iraq, Nigeria, and Sudan.[64]

It is important to understand some basic points of Islamic law before discussing the standard of proof, because the reasoning is somewhat complex. The source of religious law is the Sharia, based on the tradition of the Prophet.[65] The standard of proof under Sharia law depends entirely on the crime in question. The different "*standards*" provided by Sharia law are Al-Iqrar (confession), Al-bayyinah (evidence), Al-yameen (oath), and Nukuul (refusal to take the Oath).[66] If there is the "*slightest doubt*" regarding the culpability of the accused in such cases, the judges must order an acquittal.[67] This standard of proof is theoretically high, because the punishments are fatidic and harsh. The rules of evidence are also very strict and this has led to significant criticism, especially when dealing with crimes perpetrated against women. If a woman is raped, for example, she must present four male witnesses in order to prove her claim.[68] Most of the time, the evidence rules cannot be fulfilled; the slightest doubt principle plays in favour of the accused and against the woman.[69]In Islamic systems, the judges also have great discretionary powers. If there is no pre-established standard of proof for a certain crime, the judges can use their "*wisdom*" and practical experience to infer a standard they consider more suitable.[70]In some jurisdictions, such as Egypt, judges will sometimes overrule a certain standard of proof in favour of a lower standard, on grounds of public order.[71]

b. Investigative standards in the domestic criminal setting: United Kingdom

In addition to providing standards for purposes of conviction, degrees of certainty are also used at other points in the criminal justice process. Their use in these contexts may reflect the needs of fact finding more closely.

i. Warrant for arrest

In the UK, a warrant of arrest will be issued if the police have "*reasonable grounds for suspecting*" that an individual has committed a crime.[72] The reasonableness standard has to be appreciated from facts or elements of proof. Suspicion in itself cannot rely on another police officer's request. It is also possible to arrest someone on the site of a criminal offence without an arrest warrant, if the constable "*suspected on reasonable grounds that an arrestable offence ha[s] been committed*".[73]

ii. Decision to press charges

Prosecutors will only press charges and take cases to court if, first, they are satisfied that the evidence is sufficient to provide a "realistic prospect of conviction against each defendant on each charge". This means that a jury or bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the alleged charges. When a case meets the evidence requirement, this does not necessarily mean that a conviction will result: it is for the court to decide whether a defendant is guilty beyond a reasonable doubt, based on the evidence put before it.

In addition to this standard, there is a second consideration. Even though the general rule is that prosecution will occur if the evidential standard is reached, it does not do so if "there are public interest factors tending against prosecution which clearly outweigh those tending in favour". This is clearly a very discretionary standard.

iii. Parallel interests with fact-finding?

If we consider in broad terms the actions that can be taken when evidentiary standards are reached, parallels might emerge between the arrest warrant stage and an FFM's decision to undertake certain actions. A warrant for arrest represents a preliminary step in terms of prosecution; it has some impact on a person's liberty but it is not permanent or long lasting. Similarly, an FFM report, like an arrest warrant, may lead to future criminal action or sanctions; and threatens the accused's interests in that they are put under suspicion of violating a legal norm. In a similar way, the decision to prosecute may possibly be compared to a decision to make public determinations in a fact-finding context; in both cases, decisions may not rely only on the achievement of an evidentiary standard.

c. Approaches in the international and regional judicial setting: convictions and judgement

i. European Court of Human Rights (ECtHR)

This section considers the standard of proof applied at the ECtHR, but it is important to stress that the Court also has an independent fact-finding role.[74] The European Convention on Human Rights and the rules from which the Court draws its conclusions are both silent with regard to an explicit standard of proof. The Court is therefore not legally bound to apply any specific standard. However, its practice shows that it applies a standard of proof on a case-by-case basis.[75] Though no pre-established degree of certainty is affirmed in relevant Court documents, the jurisprudence has been constant in employing the standard of "*proof beyond reasonable doubt*".[76] The "*reasonableness*" criteria that needs to be surpassed is defined as follows: "*Not a doubt based merely on a theoretical possibility or raised in order to avoid a disagreeable conclusion, but a doubt for which reasons can be drawn from the facts presented*".[77] Even if this standard is drawn from common law systems, the two should not be confused because in the ECtHR it plays a different role. While in domestic criminal proceedings the criterion is used to guarantee that an innocent person will not be found guilty, the ECtHR has recourse to this standard in order to reflect the Court's commitment to protect human rights at the level of the state.[78] The standard can be altered because it is possible for judges to draw negative inferences from the facts. This

is often the case when states are trying to hide facts or maliciously lying about something.[79]

ii. International Court of Justice (ICJ)

The ICJ's statute does not mention any applicable standards of proof[80] and the Court remains vague in its judgments as to its intention to follow a unique standard. In its first contentious case, the *Corfu Channel*, the ICJ referred to three different standards of proof.[81] In later attempts to specify degrees of certainty, the Court confirmed how prolific and creative it can be in its interpretation of the credibility of evidence. The wording used by the Court varies and has been expressed in some fifteen different forms: "*balance of evidence*",[82] "*balance of probabilities*",[83] "in all probability",[84] "*consistent with the probabilities*",[85] "proof to the court's satisfaction",[86] "*with a high degree of probability*",[87] "*beyond any reasonable doubt*",[88] "beyond possibility of reasonable doubt",[89] "*no reasonable doubt*",[90] "little reasonable doubt",[91] "sufficient certainty",[92] "*with any degree of certainty*",[93] "*with certainty*",[94] "*with the necessary degree of precision and certainty*",[95] "*conclusive evidence*",[96] and "*evidence that is fully conclusive*".[97]Two reasons mainly explain this variety. First, the judges will often apply the standard with which they are most familiar, which they apply in their domestic jurisdictions (mostly Common Law or Civil Law systems).[98] Second, the standard of proof is influenced by the matter being dealt with.[99]As claims become more serious, judges tend to apply a higher standard of proof.[100] This can be demonstrated through the two functions of the Court: the declarative function and the determinative function. The declarative function deals with issues such as defining a boundary. A lower standard of proof is applied because the Court's task is to ascertain a fact rather than determine whether an illegal act was performed. In such cases, the Court will usually have to decide which of the parties have the most evidentially plausible version of the facts.[101] This criterion is similar to the "*preponderance of probabilities*", a lower standard, that has been used in other legal proceedings that deal with the determination of a territorial or maritime frontier.[102]

On the other hand, the determinative function requires a higher standard of proof when it examines state responsibility.[103] Judges have been keen to adopt a higher standard of proof when the consequences of their decision will have a significant impact on a state's interests (accusations of genocide or use of force against another state).[104]

Overall, a large array of standards of proof has been used. This is why there is an emerging desire to establish clearer indications of standards of proof used by the ICJ. Some judges have said that it is necessary to establish a more universal and comprehensive standard of proof.[105]

iii. International Criminal Tribunals

At the international level, *ad hoc* tribunals have significantly contributed to the practice of applying standards of proof in a humanitarian setting. The ICTY is an international tribunal that was established in 1993 by Security Council's Resolution 827.[106] Its mandate is to try those who were responsible for serious violations of international humanitarian law during the Balkan conflict.[107] Its verdicts are rendered by a panel of international judges drawn from both civil and common law systems. The diversity in the judges' countries of origin no doubt explains their adoption of a special procedure that is partly inquisitional and partly accusatory. The standard of proof used by the ICTY is "*proof beyond a reasonable doubt*".[108] This standard is set out in the Court's rules of evidence:

"*When both parties have completed their presentation of the case, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private. A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.*"[109] (Emphasis added.)

The ICTR, which was created in the aftermath of the Rwandan genocide, uses the same standard of

proof. Its rules of procedure and evidence state:

"*After presentation of closing arguments, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private. A finding of guilty may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.*"[110] (Emphasis added.)

The "*beyond reasonable doubt*" standard is, or is expected to be applied by most existing international tribunals: the Special Court of Sierra Leone,[111] the Special Tribunal for Lebanon[112] and the International Criminal Court.[113]

d. Investigative Standards at the International Level: The International Criminal Court (ICC)

i. Initiation of Investigation

A case may be brought before the ICC in three ways. First, a State Party can refer a situation to the Prosecutor. Second, the Security Council can issue a referral, acting under Chapter VII of the United Nations (UN) Charter. Both of those procedures are inherently political, and a discussion of the degree of certainty is not relevant. Third, however, the Prosecutor may initiate an investigation, which requires the ICC to establish a specific degree of certainty regarding the occurrence of international crimes for referral and investigation. We analyse below this third category, where the prosecutor decides *proprio motu* on cases he wishes to pursue.

Under the ICC's rules, investigation is the first step in the procedure. To initiate an investigation, the Prosecutor must conduct a preliminary investigation and then send a request to investigate to the Pre-Trial Chamber (PTC). The Prosecutor must respect rules of procedure and evidence as well as the Rome Statute when formulating this demand.[114] Among other criteria, and if the Prosecutor concludes there is a *reasonable basis* to proceed, he submits to the PTC a request to authorize the investigation of a situation. The Prosecutor can also conclude that further investigation is not justified, in the absence of sufficient legal or factual evidence. The Prosecutor may re-open an investigation and refer a case again to the PTC if new facts come up.[115] Subsequently, the PTC determines (in light of material evidence) if there is a "*reasonable basis to proceed*"[116] or if there are "*substantial reasons to believe*" that a prosecution would not serve the interests of justice.[117]

This is the lowest of all the standards considered by the ICC since it is the earliest stage of the procedure. If the standard is reached, an investigation will start if other requirements of gravity and complementarity are also fulfilled. For the investigation, the prosecutor gathers information by conducting interviews, collecting testimonies, and talking with NGOs and people in the field. The next step towards indictment is to issue either a warrant of arrest or a summons to appear. Because the work of the Court is relatively new, this analysis focuses on the situations of Sudan and Kenya, because they are examples that can guide us in drawing distinctions of methods and standard of proof at the ICC.

ii. Warrant of Arrest: the case of Al Bashir

At any time after the initiation of an investigation the PTC may, on the application of the Prosecutor, issue a warrant of arrest against a person. Warrants of arrest are mainly used in cases where the individual is likely to be unwilling to present himself before the court. For an arrest warrant to be issued under article 58 of the Rome statute, there needs to be:

> "[…] *[R]easonable grounds to believe the person has committed a crime within the jurisdiction of the court and (b) The arrest of the person appears necessary: (i) To ensure the person's appearance at trial, (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.*"[118]

In the Al Bashir case, the main standard of proof issue was the degree of certainty in regard to charges of genocide. The Prosecutor first presented the charges against Al Bashir before the PTC: two counts of war crimes and five counts of crimes against humanity. However, the PTC did not find "*reasonable grounds to believe*" that a crime of genocide had been committed. It was alleged that the under Al Bashir's authority various arms of government had:

- systematically committed acts of pillaging after the seizure of the towns and villages that were subject to their attacks;[119]
- unlawfully attacked that part of the civilian population of Darfur perceived by the Government of Sudan as being close to the armed groups opposing it in the on-going armed conflict;[120] and
- subjected, as part of such unlawful attack, thousands of civilians to acts of murder, extermination, forcible transfer, torture and rape.[121]

The Prosecutor also wished to charge him with three counts of genocide, a request the PTC refused to grant on the grounds that the Prosecutor had not met the high standard of proof required by the Court. The relevant standard of proof identified by the PTC must demonstrate:

> " *[…] that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe in the existence of a specific intent to destroy in whole or in part the groups"[122] (in this case the ethnic groups of Fur, Masalit and Zaghawa).* (Emphasis added.)

The PTC concluded that, since:

> "*the existence of a genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution, the Prosecution Application in relation to genocide must be rejected as the evidentiary standard provided for in article 58 of the Statute would not have been met.*"[123]

According to the PTC, the acts that constituted war crimes (intentionally directed attacks against a civilian population) and crimes against humanity (murder, forcible transfer, torture, and rape) did not amount to the genocidal intent necessary to justify a warrant of arrest on charges of genocide.[124]

In February 2010, the Appeals Chamber (AC) reversed the PTC decision and brought precision to the standard of proof required to issue arrest warrants for a charge of genocide. The AC decided that the PTC had applied a standard of proof that was too high for the arrest warrant phase. According to the AC, the Prosecutor was not properly asked to demonstrate that there are "*reasonable grounds to believe*" that genocide had been committed, as required by Rome Statute.[125] The AC concluded that an error of law had been made, since the standard of proof imposed by the PTC was much higher than the one required at the investigative stage of the procedure. The case was then sent to the PTC for revision and it found that there were "*reasonable grounds to believe*" that genocide might have occurred or that "*one of the reasonable conclusions that could be drawn*" from the facts was that genocide had occurred.[126] In July 2010, the PTC concluded that the Prosecutor could include the charges to genocide in the warrant of arrest. The warrant specified killing (under Article 6(a) of the Statute), genocide by causing serious bodily or mental harm (under Article 6(b) of the Statute), and genocide by deliberately inflicting conditions of life calculated to bring about physical destruction (Article 6(c) of the Statute).[127]

e. Summons to Appear in the case of Kenya

As an alternative to a warrant of arrest, the Prosecutor may also apply to the PTC to issue a summons for a person to appear, if the PTC is satisfied that there are reasonable grounds to believe that person committed the crime. When issuing a summons, the PTC believes that the individual will present himself to the hearing without an arrest being necessary:

"*As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons*, *with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain: (a) The name of the person and any other relevant identifying information; (b) The specified date on which the person is to appear; (c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and d) A concise statement of the facts which are alleged to constitute the crime.*"[128] (Emphasis added.)

An individual who has been summoned may be detained or released before the confirmation of charges. The procedure for delivery of a summons follows the same standard of proof - "*reasonable grounds to believe*" - as a warrant of arrest.[129] In the case of the summons issued to William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang (part I) and Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali (part II), for charges of crimes against humanity, the Pre-Trial Chamber II held that:

"*On the basis of the application, the information and the summary of evidence presented (collectively, the "material"), the Chamber finds that there are reasonable grounds to believe that, […] an attack was carried out*."[130]

Upon surrender of the persons to the Court, the PTC must satisfy itself that the person has been informed of the crimes and of his or her right to apply for interim release pending trial.

f. Confirmation of Charges

Within a reasonable time after the person's surrender or voluntary appearance before the Court, the PTC is required to hold a hearing to confirm the charges on the basis of which the Prosecutor intends to seek trial. The confirmation of charges calls for a considerably higher threshold of appreciation. The PTC determines whether there is sufficient evidence to establish the charges. The degree of certainty that needs to be reached for endorsement of a charge is "*substantial ground to believe*".[131]If the charges are confirmed by the PTC, the case can go to trial.

Standards of Proof Applied at the ICC	
Stage of Process	**Standard Applied**
Investigation	Reasonable basis to proceed.
Arrest Warrant/Summons to Appear	Reasonable grounds to believe the person has committed a crime within the jurisdiction of the court (AC in Al Bashir clarified that "*reasonable grounds*" means "*one of the reasonable conclusions that could be drawn*". (Emphasis added.)
Confirmation of Charges	Substantial grounds to believe
onviction	Beyond reasonable doubt.

SECTION III: STANDARDS OF PROOF IN FACT FINDING-PRACTICE

1. Overview of different standards in practice

As mentioned in Section II, many standards of proof or degrees of certainty are applied in formal judicial structures. It remains to be seen whether or not specific standards of proof, originating in traditional judicial settings, can be relevant to fact-finding. As a first step, we will therefore evaluate FFM practice, to see whether "*reasonable suspicion*", "*preponderance of evidence*", "*probable cause*", "*beyond reasonable doubt*" and other standards are applied in practice by FFMs.

This section catalogues and examines how FFMs have used explicit standards of proof, and applied explicit criteria to the verification of information. The information we have reviewed is far from consistent. However, this is not altogether surprising considering the diversity of the mandating bodies involved, and the different time frames and means available to each mission.

To highlight this diversity, the terms that FFMs have used to identify standards of proof include: "*beyond reasonable doubt*"; "*sufficient credible and reliable information*";[132]sufficiently substantiated; [133]overwhelming evidence;[134] substantial evidence; clear evidence; concrete evidence; systematic evidence; "*reasonable to assume"; "serious and concurring evidence*";[135]"*less than that expected by criminal trials*"; [136]"(evidence collected to) demonstrate that a person may responsibly be suspected of committing a crime";[137]"*approach proper to judicial standards*";[138]"*convincing proof*";[139]"*leaves no doubt*";[140]"*requiring a reliable body of material*".[141]

2. Case studies

To help focus a discussion of the approaches taken by FFMs, seven case studies have been selected. These are supplemented by some general comments on the approaches to standards of proof that leading NGOs, Special Rapporteurs, and monitoring and reporting mechanisms established by Security Council Resolutions 1612 and 1960 have taken.

Each of the seven FFMs selected has unique features that are relevant to discussion of appropriate standards of proof. We examine primarily the features that are relevant to standard of proof, but will also address other differences that influence the discussion, including the nature of the mandate and mandating body, and the outputs and consequences of the mission. These examples underline the complex and varied landscape of humanitarian fact-finding and help to identify the various factors that may need to be taken into consideration when addressing standards of proof.

The selected case studies are:

- The Commission of Experts Established Pursuant to Security Council Resolution 780 (Yugoslavia) (a).
- The United Nations Commission on the Truth for El Salvador (b).
- The International Commission of Inquiry on Darfur (c).
- The United Nations Fact-Finding Mission on the Gaza Conflict (d).
- The International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea (e).
- The Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of Congo between March 1993 and June 2003 (f).
- The International Commission of Inquiry to investigate all alleged violations of international

human rights law in the Libyan Arab Jamahiriya (g).
- The International Commission of Inquiry on Syria (h).

Aside from traditional mechanisms of fact finding, other forms of investigation may help to evaluate the coherence of methodologies applied by *ad hoc* fact-finding missions. Due to their frequent involvement in crises, several other kinds of organisations have experience of gathering information during situations of emergency.

Non-Governmental Organisations (point 3 below):

- Geneva Call (Report of the 2009 Verification Mission to the Philippines to Investigate Allegations of Anti-Personnel Landmine Use by the Moro Islamic Liberation Front).
- Amnesty International.
- Human Rights Watch.

And United Nations Monitoring and Reporting Mechanisms established under the Security Council Resolutions 1960 & 1379.

a. The Commission of Experts Established Pursuant to Security Council Resolution 780 (Yugoslavia Commission of Experts)[142]

i. Overview and Mandate

The Security Council has established a wide-variety of Commissions to handle tasks related to the maintenance of international peace and security. One such Commission was established on 16 November 1992, pursuant to Security Council Resolution 780, to examine and analyse evidence relating to grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.

The Yugoslavia Commission of Experts (YCE), chaired by first by Frits Kalshoven and then by Cherif Bassiouni, had 18 months to complete its investigations and transfer its findings and relevant documentation and material to the ICTY, which was being established at the time.

ii. Key Findings

The Commission reached numerous factual findings. It started by analysing the situation, made highly complex by the involvement of Croatia, Bosnia Herzegovina and Serbia, and concluded that the conflict should be qualified as an international armed conflict (IAC).[143]The Commission devoted significant time to setting out the applicable law and factual background information, including important historical data, and describing the internal structures of the armies and governments that were parties to the conflict.

With respect to violations of international human rights or humanitarian law, the Commission's general findings were that the "… *level of victimization in this conflict has been high. The crimes committed have been particularly brutal and ferocious in their execution*" (paragraph 310). The Commission found "*significant evidence of and information about the commission of grave breaches of the Geneva Conventions and other violations of international humanitarian law*…" For example, regarding the siege of Sarajevo:

> "*The cumulative effect of the number of civilian casualties, the destruction of non-military structures, attacks upon and destruction of protected targets, such as hospitals, cultural property and other impermissible targets,*

evidence a consistent and repeated pattern of grave breaches of the Geneva Conventions and other violations of international humanitarian law."[144]

With respect to detention camps, the report brought to light important facts about the camp in Prijedor and the number of people that were arbitrarily killed between 1991 and 1993.[145]The information it collected enabled the Commission to conclude that acts of malnutrition, torture, mass executions, rape, beatings and deportation were committed in various other camps.[146] Other key findings relating to humanitarian law concerned the destruction of the Mostar Bridge and cultural property in the old town of Dubrovnik. The Commission concluded that in both cases the principles of military necessity, proportionality and neutrality were not respected.[147]

With respect to genocide and crimes against humanity, the Commission determined that "*it is likely to confirm"* that genocide was committed.[148] It also concluded that crimes against humanity by means of ethnic cleansing (murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assaults, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on destruction of property) occurred.[149]

iii. Standards of Proof/Degree of Certainty

The standard applied by the Commission appears to correspond to a balance of probabilities or reasonableness criterion, although an overarching standard is not explicitly laid down. The Commission employs phrases such as "*reasonable to conclude*",[150] "*reasonable to presume"*,[151] or a "*reasonable degree of certainty*".[152]With regard to crimes against humanity, the Commission also mentions that there is *"sufficient evidence to conclude"* that acts of ethnic cleansing were planned and coordinated.[153]

The Secretary General of the United Nations "*expressed his confidence that the material collected and analysed by the Commission, which had been forwarded to the Prosecutor of the International Tribunal for the former Yugoslavia, would greatly facilitate in carrying out the Tribunal's mandate*".[154] A direct link can therefore be presumed between the work of the YCE and subsequent criminal prosecutions, since all the information collected by the YCE was turned over to the ICTY Prosecutor.

iv. Impact Assessment: Consequences of the report and action

The Commission can certainly be seen as a clear precursor to formal criminal action, both complementary[155] and in some ways instrumental to it.[156]Yet, as the Head of the Commission himself conceded, most of its information could not be used directly as evidence in prosecutions.[157] For example, all evidence was inadmissible that did not identify the source of the information. The FFM's overarching role seems to have been one of "*helping to establish the location, character and scale of violations*", and thereby pave the way for criminal proceedings. It was not a formal part of the criminal process.[158] The link or potential link between FFMs and formal criminal action may have a significant impact on the application of a standard of proof, as this report discusses below.

To date the ICTY has indicted 161 persons, sentenced 64 and acquitted 13. 35 cases are still ongoing.

b. The United Nations Commission on the Truth for El Salvador

i. Overview and mandate

Between 1980 and 1991, the Republic of El Salvador was engulfed in an armed conflict that left thousands dead. A key part of the peace agreement (April 1991) was the establishment of a "Commission on the Truth" (hereinafter UNCTES). The Commission was "*…so named because its very purpose and function were to seek, find and publicize the truth about the acts of violence committed on both sides during the war*".[159] The transitional justice component was clear because it was deemed that "learning the truth and strengthening and tempering the determination to find it out; putting an end to impunity and cover-up; settling political and social differences by means of agreement instead of violent actions…"[160] was essential to avoid any future relapse into armed violence.

More specifically, Article 2 of the peace agreement stated that "The Commission shall have the task of investigating serious acts of violence that have occurred since 1980 and whose impact on society demands that the public should know the truth".[161]The Commission was headed by three international commissioners, appointed by the Secretary-General of the United Nations; former Colombian president Belisario Betancur was chairman.
The UNCTES conducted its work over a period of eight months, from July 1992 to March 1993.

ii. Key Findings

The UNCTES report provides an extensive detailed account of egregious abuses of human rights committed by all sides in the conflict, including extrajudicial killings, attacks on hospitals, enforced disappearances, massacres, death squad assassinations, and abductions. With respect to many types of behaviour the report often provided an *"illustrative"* case to show the wider practice; it also reported in detail particular cases which the Commission deemed should be reported. The findings not only identify facts (acts and behaviour), but also to list the names and involvement of identified perpetrators.[162]

Beyond establishing the facts of behaviour and individuals responsible for crimes and abuses, the report makes clear broad recommendations designed to promote national reconciliation. These cover, *inter alia*, institutional reform, democracy, compliance with the rule of law, judicial reform, and reparation by means of material and moral compensation. Additionally, those whom the report declared were responsible for orchestrating and committing violence were to be prohibited from holding positions in the armed forces and civil service, as well as other public offices.

iii. Standards of proof/Degrees of certainty

Unlike the YCE, the UNCTES clearly describes its working methodology and standards of proof (in the report's terms, "*degrees of certainty*").

> *"The Commission decided to apply three different standards when formulating its findings in each section of the report. The different degrees of certainty were:*
>
> *1) Overwhelming evidence: conclusive or highly convincing evidence supports the Commission's finding.*
> *2) Substantial evidence: very solid evidence supports the Commission's finding.*
> *3) Sufficient evidence: more evidence supports the Commission's finding than contradicts it.*
>
> *The Commission decided not to reach a specific finding on cases or situations or any aspect thereof when the evidence in support of a finding was less than "sufficient*".[163]

For example, when it considered massacres of peasants by the armed forces, the Commission concluded that there was *full proof* that units of the Atlacatl Battalion "*deliberately and systematically killed a group of more than 200 men, women and children*";[164] and that there was *sufficient evidence* that troops

massacred the non combatant civilian population in La Joya Canton.[165]With regard to the murders of several Jesuit priests, the Commission found that there was *substantial evidence* that colonel René Emilio Ponce (in collusion with others) gave the order to "*kill Father Ignacio Ellacuria and to leave no witnesses"*; that there was evidence that officers and other knowingly "*took steps to conceal the truth*"; there is *full evidence* that none of the Officers of the Military College had any objection to the murder and that the operation was carried out by listed individuals; substantial evidence that the Commander of the Battalion "*knew of the murder and concealed incriminating evidence*".[166] This pattern of explicitly stating the degree of certainty for each finding is found throughout the report.

In terms of the criteria the Commission used to ensure the reliability of information on which its finding were based, the UNCTES "…*insisted on verifying, substantiating and reviewing all statements as to facts, checking them against a large number of sources whose veracity had already been established. It was decided that no single source or witness would be considered sufficiently reliable to establish the truth on any issue of fact needed for the Commission to arrive at a findings.*"[167]

vi. Impact Assessment: Consequences of the report and action

At the time of its publication, the report was highly controversial. Both the government and armed forces rejected the findings.[168] The key recommendations regarding judicial reform were simply not followed or implemented.[169] In terms of prosecution, few cases were brought against individuals (unsurprisingly, because the Legislative Assembly of El Salvador approved an amnesty law covering all the violent events of the war five days after the commission issued its report). The few human rights cases that have been conducted were able to proceed in large part due to the evidence collected by the Commission; however, these cases have seldom resulted in convictions.[170] The amnesty law itself was deemed to be a violation of international law by the Inter American Commission.[171]

Groups and individuals have sought to involve foreign courts as an alternative avenue to seek justice. In 2008, for example, the Centre for Justice and Accountability and the Spanish Association for Human Rights filed a lawsuit in Spain against former President Alfredo Cristiani Burkard and 14 Salvadorian military officers and soldiers for their involvement in the 1989 murder of several Jesuit priests. The case against Cristiani was dismissed on the grounds that the court lacked jurisdiction.[172] Some recommendations on the armed forces were followed to a small degree; for example, around 200 senior officers were removed from the army. High-ranking members of the armed forces were retired, with full honours, a few months after the report was released.[173]

Under pressure from the international community, "*a new Criminal Procedure Code was passed in 1996, enhancing the procedural rights of defendants and of victims, which was one of the commission's recommendations. The structure for judicial appointments and review of performance was also reformed*".[174]

c. International Commission of Inquiry on Darfur, January 2005[175]

i. Overview and mandate

The International Commission of Inquiry on Darfur (ICID) was established by Security Council Resolution 1564 in 2004. It was mandated to deal with four elements: (1) to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties; (2) to determine whether or not acts of genocide had occurred; (3) to identify the perpetrators of violations of international humanitarian law and human rights law in Darfur; and (4) to suggest means of ensuring that those responsible for such violations were held accountable.

The Commission was headed by Antonio Cassese, first President of the ICTY (1993-1997). It was supported in its work by a legal research team and by an investigative team composed of forensic experts, military analysts, and specialists in gender violence.

The ICID began its work on 25 October 2004. The Commission submitted its findings to the Secretary-General on 25 January 2005, completing its work within three months.

ii. Key Findings

The ICID found that "*it is undeniable"* that mass killing has occurred in Darfur, perpetrated by Government forces and the Janjaweed. The same forces were also engaged, or acquiesced in, behaviour deemed to amount to crimes against humanity; rape and other forms of sexual violence; torture and/or inhumane and degrading treatment; forced displacement of the civilian population (estimated at 1.8 million); and enforced disappearances.[176]

While the Commission did not find a systematic or a widespread pattern to violations committed by rebels, it "*nevertheless found credible evidence that members of the SLA and JEM are responsible for serious violations of international human rights and humanitarian law which may amount to war crimes.*"[177](Emphasis Added).

In one of the most important findings, the Commission concluded that the Government of Sudan had not pursued a policy of genocide because "*the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned*".[178] However, "*The Commission does recognize that in some instances, individuals, including Government officials, may commit acts with genocidal intent*"[179]

In addition to discussing general issues of state and rebel groups' behaviour, the ICID identified numerous individuals who were possibly involved in atrocities. This list was kept private (in contrast to UCTES (case study 2) and the Guinea Report (see case study 6)), but included officials of the Government of Sudan, militia members, members of rebel groups, and foreign army officers. Their involvement and liability fell under the different heads covered by international criminal law: direct perpetration, planning or ordering, aiding and abetting, command responsibility, etc.[180]

iii. Standards of proof/Degrees of certainty

In terms of explicit methodology the ICID divided its working methods into various categories. In relation to the first and second tasks (to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, and to legally characterize the violations with a view to ascertaining whether genocide had occurred):

> "*The Commission decided to examine existing reports on violations of international human rights and humanitarian law in Darfur, and to verify the veracity of these reports through its own findings, as well as to establish further facts. Although clearly it is not a judicial body, in classifying the facts according to international criminal law, the Commission adopted an approach proper to a judicial body. It therefore collected all material necessary for such a legal analysis.*"[181]

In relation to the third task, that of identifying perpetrators, the ICID deemed that this "*posed the greatest challenge*":[182]

> "*The Commission discussed the question of the standard of proof that it would apply in its investigations. In view of the limitations inherent in its powers, the Commission decided that it could not comply with the standards normally 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 (emphasis added). The Commission would obviously not make final judgments as to criminal guilt; rather, it would make an assessment of possible suspects that would pave the way for future investigations, and possible indictments, by a prosecutor."[183]

It should also be said that in many cases the Commission's conclusions reflected the degree of evidential certainty. As noted, the Commission found that genocidal intent "*appears to be missing*"; where the evidence was more conclusive (with regard to mass killings, for example), it said "it is undeniable…"[184] Other phrases it used include "*it is apparent*", "*it is estimated*" and "*considers that*", terms that assess the degree of certainty of specific statements.

iv. Impact Assessment: Consequences of the report and action

The ICID submitted its report to the UN Security Council. "*Taking note of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur*", the Secretary of the Council, for the first time in its history, referred a situation to the International Criminal Court.[185] Following this referral and subsequent investigation by the Prosecutor, four cases are currently before the Pre-Trial Chamber, including one case against the current President of Sudan, Omar Al Bashir.[186]

d. The United Nations Fact-Finding Mission on the Gaza Conflict (GFFM), September 2009[187]

i. Overview and Mandate

The United Nations Fact Finding Mission on the Gaza Conflict (GFFM) was established by the UN Human Rights Council.[188]The mandate of the GFFM was to investigate possible violations of international humanitarian law and international human rights law that could have been committed during the military operations on the Gaza strip between 19 June 2008 and 31 July 2009.[189]More precisely, the mission was asked (i) to shed light on and establish the relevant facts of the conflict;(ii) to analyse Israeli policies as the occupying power; and (iii) to give a particular attention to the civilian population affected in the region.
The GFFM was headed by Justice Richard Goldstone, and hence the GFFM is known as the Goldstone Commission. The GFFM conducted its work in three months. Israel refused to cooperate in any respect with the work of the GFFM.[190]

ii. Key Findings

Based on the information it gathered, the mission concluded that a range of violations of international humanitarian law and international human rights law were committed by both Israel and Hamas. Notably, it considered that Israel did not fully respect its obligation under international humanitarian law with regard to the blockade imposed on Gaza.[191] With respect to Israeli military operations, the mission stated that in statistical terms between 1,387 and 1,417 Palestinians died during attacks that occurred during the period reviewed.[192] When it considered international humanitarian law, the Commission concluded that the attacks did not comply with the precautionary principle (article 57 of Additional Protocol 1 of the Geneva Convention, (API)).[193] In some instances, no distinction was made between military objectives and civilians (article 52, API).[194] Certain attacks did not respect the principle of proportionality (articles 51§5b), and 57§2a) iii), API); [195]and some attacks were indiscriminate (article 51§5, API).[196] Deliberate targeting of civilians and other non-military

objectives are also alleged to have occurred (articles 50 and 52, API)[197], including of the Al Quds Hospital (violating articles 18 and 19, of the Fourth Geneva Convention, Fourth GC).[198] Such violations represented grave breaches under the Fourth GC. Additionally, the GFFM held that Israel failed to respect articles 23, 28, 31, 37, 55, 56, and 59 of the Fourth GC, and articles 51(2), 53, 54, 55, and 57(7) of API (applicable due to their customary nature).[199]The Commission also concluded that numerous human rights provisions had been violated, in particular violations of the right to life.[200]

With regard to the detention of Palestinians, the mission found that Israel had failed to comply with international humanitarian law. Violations occurred with regard to conditions of detention, humiliation, infliction of torture, and inhumane and degrading treatment (violating articles 27, 71, 72, 73, 76, and 78 of the Fourth GC and the norms in article 75 of API).[201] It also reported violations of the right to liberty of movement.[202]

One important statement, which attracted much attention, concerned the question of intent:

> "*Taking into account the ability to plan, the means to execute plans with the most developed technology available, and statements by the Israeli military that almost no errors occurred, the Mission finds that the incidents and patterns of events considered in the report are the result of* ***deliberate planning and policy decisions.****"*[203] (Emphasis added).

Justice Goldstone, speaking personally, subsequently withdrew from saying that Israel had a policy of targeting civilians.[204]

With regard to Palestinian operations, the Commission reported that actions that resulted in violations of international humanitarian law and human rights law were considerably fewer in number.[205] It concluded that some Palestinian attacks against Israeli civilians were indiscriminate and might constitute war crimes or crimes against humanity.[206]

iii. Standards of Proof/Criteria applied to information collection

The Commission stated that it would follow international standards of investigation that have been developed by the United Nations.[207] In terms of its stated methodology, the mission relied on corroboration of fact and a general standard of "*sufficient credible and reliable information*" to justify its findings.

With respect to "*sufficient credible and reliable information"*, the mission elaborated as follows:

> "*The Mission's final conclusions on the reliability of the information received were made taking into consideration the Mission's assessment of the credibility and reliability of the witnesses it met, verifying sources and methodology used in reports and document produced by others, cross-referencing the relevant material and information, and assessing whether, in all the circumstances, there was sufficient information of a credible and reliable nature for the Mission to make a finding in fact.*"[208]

References to this standard are found throughout the report.[209]

Like many FFMs, when it defined a certain standard of proof, the Commission provided a negative formulation, recognising that the standard of proof necessary in criminal trials to establish individual criminal responsibility is not appropriate in a fact-finding context.

iv. Impact Assessment: Consequences of the report and action

The Goldstone Report has remained in the public eye, attracting praise and controversy in almost equal measure. A direct result was the creation of a Committee of Independent Experts (CIE), which monitors and assesses domestic, legal or other actions taken by Israel or the Palestinian authorities in light of the GFFM's findings.[210]

The CIE established that Israel conducted 400 command investigations in relation to Operation Cast Lead, and 52 criminal investigations of which three have led to prosecutions. However, the CIE has questioned the promptness, impartiality, and level of victim participation in such processes, placing a shadow over their credibility.[211] Furthermore, in regard to completed cases, sentencing decisions do not appear to be appropriate. For instance, two soldiers who forced a boy to search bags suspected of being booby-trapped were only demoted and received suspended sentences.[212]

The steps taken by the Israeli judicial systems led Justice Goldstone to publicly retract some of the findings of the original GFFM on the grounds that subsequent investigations had brought certain information to light that undermined its initial findings. Goldstone directly referred to one example, which he felt, established that Israel did not intentionally target civilians. This concerned the killing of 29 members of the al-Samouni family, which Goldstone concluded resulted from erroneous interpretation of a drone image. According to him, while the length of this investigation is frustrating, it appears that an appropriate process is underway. By contrast, the CIE experts report stated that:

> "[*T]he Committee does not have sufficient information to establish the current status of the on-going criminal investigations into the killings of Ateya and Ahmad Samouni, the attack on the Wa'el al-Samouni house and the shooting of Iyad Samouni. This is of considerable concern*."[213]

With regard to the controversial claim that it was Israel's policy to target civilians, Goldstone felt that the CIE's findings allowed him to say that civilians were not intentionally targeted as a matter of policy.[214]However, the CIE clearly stated, "*there is no indication that Israel has opened investigations into the actions of those who designed, planned, ordered and oversaw Operation Cast Lead* ".[215]

Regardless of these controversies, some of which are fundamental and will be subject to further discussion in Section V, the GFFM had a significant impact, because it caused the Israeli authorities to commission over 400 investigations, suggesting that many of the concerns the GFFM rose did indeed deserve judicial scrutiny.

e. International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea (ICIG)[216]

i. Overview and mandate

The ICIG, established by the UN Secretary General[217] and supported by the Security Council, was given two months to investigate the facts and circumstances relevant to the events of 28 September 2009 and related events in their immediate aftermath regarding the alleged massacres and rapes in Conakry stadium, Conakry, Guinea.

The ICIG was asked to: (i) establish the facts; (ii) characterise the crimes; (iii) determine responsibilities; and (iv) make recommendations, in particular regarding accountability measures.
The Mission completed its work within two months.

ii. Key Findings

In its final report, the ICIG set out relevant contextual, historical and factual information, including information on the structure and organisation of the security forces, and on events leading up to the 28th of September. The report provided a statistical description of the acts committed: it identified a minimum of 156 persons who were killed or who disappeared; confirmed that at least 109 women were subjected to rape and other sexual violence, including sexual mutilation; reported hundreds of cases of torture or cruel, inhuman or degrading treatment; reported widespread arbitrary detention.[218] The Commission also clearly analysed the nature, means and method of attacks, including executions, killings, rapes, other forms of sexual violence, torture, arbitrary arrest and detention, as well as other relevant behaviour in the aftermath of the violence, notably the removal of bodies and restriction of access both to medical facilities (for the injured) and to corpses (for the victim's family).[219]

Based on the information it collected, the Commission stated that the events described, "constitute serious human rights violations". It specifically identified violations of: articles 6, 7, 8, 9, and 21 of the ICCPR; Article 12 of ICECSR; and Articles 4 (right to life), 5 (prohibition of torture), 6 (right to liberty and security), 16 (right to health), 14 (right to property) of the African Charter on Human and People's Rights.

With regard to violations of international criminal law, the Commission concluded:

> "*Although the question as to whether or not crimes were committed can be finally and conclusively resolved only by a court with the requisite jurisdictional competence, the Commission believes that there is a set of characteristics which demonstrate that the acts perpetrated on 28 September 2009 were sufficiently serious to justify their qualification as crimes against humanity*."[220]

The Commission then listed, publicly, the names of individuals it believed were involved in commissioning or carrying out the atrocities identified. It made significant recommendations that focused on: steps that needed to be taken to prevent any worsening of the situation; internal institutional weaknesses; steps the government of Guinea should undertake to "*shed light*" on the event; issues of compensation (specifically to ensure that compensation is paid to victims); and victim and witness protection.

iii. Standards of Proof/Criteria applied to information collection

In terms of standards, paragraph 22 of the ICIG report sets out the Commission's approach:

> "…*in order to obtain the quality of evidence needed to establish the facts, the information received must be checked against independent sources, preferably eyewitness accounts, and independently verified evidence assembled to demonstrate that a person may reasonably be suspected of having participated in the commission of a crime. Thus, the report does not include any testimony that has not been corroborated by at least one other source and the statistics on the various types of violations refer only to individuals who have been identified by name*."

Aside from these baseline threshold standards, the Commission, when it publicly named individuals purportedly involved in the massacre, articulated four degrees of certainty in relation to those accused of being involved directly or indirectly in the perpetration of crimes.

- Reasonable grounds (to suspect individual criminal responsibility).[221]
  - *Prima facie* evidence.[222]
  - Sufficient grounds.[223]
- Grounds for saying that persons *may* be held criminally liable.[224]

- *Presumed* involvement (but further in-depth investigation required to determine exact responsibilities).[225]

iv. Impact Assessment: Consequences of report and action

Since the report of the ICI was completed in December 2009, little clear information is available about the progress of any formal judicial processes, although the ICC stated in October 2009 that the situation in Guinea was under "*preliminary analysis*".[226] At the same time, the Minister of Foreign Affairs for the Republic of Guinea visited the ICC, had close discussions with the Deputy Prosecutor and stated that Guinea was "*able and willing*" to proceed.[227] Following a visit to Guinea in November 2010, it appears that Guinea remains on the Prosecutor's radar but little information is available about the likelihood of specific action. To date there have been no documented prosecutions for the events of 28 September 2009.[228]

More broadly, since the massacres and the resulting international outcry, elections have taken place in Guinea that aimed to end 52 years of authoritarian rule. It may be that the current delicate transition in Guinea may be one factor restricting the commencement of national or international trials.[229]

f. OHCHR Mapping Report on the DRC (March 1993 to June 2003) (DRC Mapping Report), August 2010[230]

i. Overview and Mandate

The discovery by the United Nations (MONUC) of three mass graves in the Democratic Republic of Congo in 2005 represented a stark reminder that many violations committed in the DRC "*remained largely un-investigated and that those responsible had not been held to account*".[231] Following the discoveries, the UN Secretary General indicated (in his report to the Security Council of June 2006) his intention to "dispatch a human rights team to the Democratic Republic of Congo to conduct a mapping of the serious violations committed between 1993 and 2003".[232] In general terms, the:

> "P*urpose was not to identify perpetrators of violations and make them accountable for their actions, the objective of the Mapping Exercise was not to establish or try to establish individual criminal responsibility of given actors, but rather to expose in a transparent way the seriousness of the violations committed, with the aim of encouraging an approach aimed at breaking the cycle of impunity.*"

The report itself was keen to stress that:

> "*A mapping exercise is not an end in itself, it remains a preliminary exercise leading to the formulation of transitional justice mechanisms, be they judicial or not. It represents a fundamental step in enabling the identification of challenges, the assessment of needs and better targeting of interventions*".[233]

ii. Key Findings

The mapping report provided an inventory of the most serious violations that occurred in the DRC between March 1993 and June 2003. It covered 617 violent events; analysed the context and trends during the 10 year period under review (including the outbreak of two armed conflicts and the failure of DRC's democratisation process); and legally classified the acts of violence identified.[234]

The Mapping Report concluded that the vast majority of incidents, if investigated and proven in a judicial process, amounted to war crimes,[235] crimes against humanity,[236] or in several instances

genocide.[237] The report gave specific attention to violence against women and sexual abuse,[238] violence against children,[239] and acts of violence linked to the exploitation of natural resources.[240]

In terms of responsibility, the report identified the participation of Rwandan, Ugandan and Burundian forces in the attacks reviewed, and recommended that the international community should prosecute those responsible.

In addition to the mapping process, in line with its mandate, the report assessed the capacity of national justice systems to deal with the violations,[241] and made many recommendations regarding transitional justice and transitional justice mechanisms.[242]

iii. Standards of proof/Criteria applied to information

The team was relatively explicit about its standards of proof:

> "…*since the primary objective of the Mapping Exercise was to "gather basic information on incidents uncovered", the level of evidence required was naturally lesser than would be expected from a case brought before a criminal court. The question was therefore not one if being satisfied beyond reasonable doubt that a violation was committed, but rather of reasonably suspecting that the incident did occur. Reasonable suspicion is defined as "necessitating a reliable body of material consistent with other verified circumstances tending to show that an incident or event did happen.*"

In terms of criteria:

> "*Each of the incidents listed is backed up by at least two independent sources identified in the report. As serious as they may be, uncorroborated incidents claimed by one single source are not included.*"

iv. Impact Assessment: Consequences of report and action

The leaked and final versions of the report generated a great deal of political heat. In particular, the government of Rwanda reacted angrily. The Rwandan foreign minister, Louise Mushikiwabo, stated that the report was a "*moral and intellectual failure- as well as an insult to history*" and that "the standard of proof used to justify the allegations in it is woefully inadequate".[243] The Rwandan government threatened to reconsider its contributions to UN peacekeeping missions,[244] a threat that potentially had serious consequences because Rwanda contributes thousands of peacekeepers to the UN-African Union mission in Darfur, and the commander of the force is a Rwandan.

The Mapping Exercise aimed at "*providing a key advocacy tool vis-à-vis the Government and Parliament [DRC], as well as the international community*".[245] It appears too early to say whether or not it has been successful in this light.

g. International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya (Libya Commission of Inquiry (LCI)), June 2011[246]

i. Overview and mandate

In response to the outbreak of violence in Libya in February 2011, the LCI was established pursuant to paragraph 11 of resolution S-15/1, as requested by the Human Rights Council. In one of the broadest mandates given to a commission of inquiry established by the Human Rights Council, the LCI was tasked with investigating:

> "*All alleged violations of international human rights law in the Libyan Arab Jamahiriya, to establish the facts and circumstances of such violations and of the crimes perpetrated and, where possible, to identify those responsible, to make recommendations, in particular on accountability measures, all with a view to ensuring that those individuals responsible are held accountable*."

On releasing its report, the LCI stated that it "reviewed all allegations raised in connection with issues arising under its mandate".[247] The LCI conducted its mission after two months of investigation, a very short time considering the practical challenges posed by ongoing conflict.

Just one day after the creation of the LCI, the Security Council referred the situation in Libya to the Prosecutor of the International Criminal Court.[248]249.

ii. Key Findings

The Commission established that a wide range of violations had been committed by the Libyan Government. They included: the use of excessive force against demonstrators;[250] torture and other forms of cruel, inhuman or degrading treatment;[251] enforced disappearances and arbitrary detentions;[252] and attacks committed against journalists.[253]With regard to the conduct of hostilities, the Commission established that: at the very least indiscriminate attacks had occurred; there was a failure to take sufficient precautionary steps; there had been deliberate destruction of objects indispensable to the civilian population; and the emblem of the Red Crescent had been misused and attacked.[254]

In terms of rebels' behaviour, the Commission concluded that rebel forces had been responsible for torture and other forms of cruel, inhumane and degrading treatment.[255]

On the basis of these violations, the Commission concluded that international crimes, and specifically war crimes, had been committed in the Libyan Arab Jamahiriya by both sides, and that the government had committed crimes against humanity.[256]

Interestingly, the Commission was also keen to comment in detail on violations that it was unable to verify and that "*would require further investigation*". Cases included the use of force by security forces in the latter days of the protests; intentional targeting of civilian objects; intentionality of attacks on humanitarian units; unlawful use of mercenaries; concern about the use of weapons such as expanding bullets, cluster munitions and phosphorous weapons in highly populated area (further forensic analysis needed to confirm their use); accounts of rape; and the use of child soldiers.[257]

In terms of identifying those responsible, in accordance with its mandate, the Commission reported that many of the violations were "carried out by Colonel Qadhafi and members of his inner circle"[258]and stated that it had "*received some information concerning individual perpetrators of crimes*".[259] It was "*not in a position to identify those responsible*".[260]

iii. Standards of Proof/degrees of certainty

The LCI admitted that the quality of evidence and information it had to deal with "*varied in its accuracy and reliability*".[261] In light of this, the Commission "*opted for a cautious approach*",[262] by "*consistently referring to the information obtained as being distinguishable from evidence that could be used in criminal proceedings, whether national or international*".[263] It was also careful to distinguish between information and reports received, and in this context "*sought to rely primarily and whenever possible on information it gathered first hand*". [264] Despite giving priority to first hand information, the Commission clearly stated that it would take

into account all forms of information "*notwithstanding their qualitative differences*".[265]

Despite these general statements the LCI made it clear that:

> "…*this cautionary approach should not, however be read as an indication that the allegations of international human rights law and international humanitarian law violations contained in the report are not credible or sufficient in quality to warrant the concern of the international community*".[266]

Overall, the approach taken is somewhat confusing, since the Commission appears to have relied on some criteria, but did not indicate a specific standard in any detail. At the same time, it stated that all forms of information would be considered, regardless of quality.

It would appear that the limited time frame and the on-going conflict severely limited the application of a formal process or clear externally observable standards. In many ways the credibility of the report depended on the fact that the commission' members were acknowledged experts in international law, well respected in the international community. This view is supported by the fact that many of the incidents to which the report referred were deemed to require additional and more detailed information. (For example, the use of expanding bullets needs to be verified by forensic testing.) It is also noteworthy that the LCI felt it could make no clear determination on certain violations that often resonate most with international civil society, such as rape and use of child soldiers.

vi. Impact Assessment: Consequences of the report and action

The mandate of the FFM has been extended and will look to finish its work in 2012.[267] There is a clear implication here that this FFM has a more preliminary character nature than, for example, the DCI or the GFFM. In recent months, the Qadhafi regime has fallen and the conflict has ended. The ICC remains seized of the case but it appears that no cases will take place at the ICC due to the fact that the ICC Prosecutor has expressed his support for the new government of Libya in conducting the criminal investigations, in particular of Saif Qadhafi.

h. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (November 2011) (Syria Commission of Inquiry)[268]

i. Overview and Mandate

In response to the widespread anti-government protests in Syria and the grave deterioration of the human rights situation in Syria, and having considered an earlier Fact-Finding Mission Report for Syria (established pursuant to Resolution A/HRC/RES/S-16/1 adopted by the Human Rights Council on 29 April 2011), the Human Rights Council during its seventeenth special session (August 2011) established an independent international commission of inquiry to investigate alleged violations of human rights since March 2011 (Resolution S-17/1).

The Commission was mandated to:

> "…*investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view of ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable*. "[269]

Despite attempts to engage with the Syrian authorities, the Government of Syria stated that due to the fact that an:

"*independent special legal commission had been established to investigate all cases pertaining to the events that had taken….The Government would therefore examine the possibility of cooperating with the commission once its own commission had concluded its work*."[270]

Ultimately the Commission did not have access to the Syrian Arab Republic.The SCI published its report on the 23rd of November, just ten weeks after the selection of the three commissioners: Paulo Pinheiro (Chairperson), Yakin Ertürk and Karen Koning Abu Zayd.

ii. Key Findings

In the summary paragraph the commission states that:

"*The Commission documents patterns of summary execution, arbitrary arrest, enforced disappearance, torture, including sexual violence, as well as violations of children's rights. …The substantial body of evidence gathered by the commission indicates that these gross violations of human rights have been committed by Syrian military and security forces since the beginning of the protests in March 2011. The commission is gravely concerned that crimes against humanity have been committed in different locations in the Syrian Arab Republic during the period under review.* "[271]

In the main body of the report, Section IV explicitly addresses the violations and crimes committed under international law.

In terms of human rights violations (§§ 84-96) the report states a "…*prevailing systematic impunity for human rights violations and its entrenchment in legislation awarding immunity for State officials*"[272]; violations of the right to life "*though the use of excessive force by military and security forces as well as by militia, such as Shabbiha, acting in complicity with, or with the acquiescence of, State officials and forces*"[273]; violations of the right to peaceful assembly and the right to freedom of expression[274]; arbitrary detention and violations of the right to fair trial with many "*detainees charged with broadly defined crimes such as weakening the national sentiment*"[275]; "*expresses its deepest concern over consistent reports of extensive violations of children's rights*"[276]; violations to the right to freedom of movement;[277] and violations of economic and social rights, in particular the right to heath and medical assistance.[278]

With regard to torture and sexual violence the Commission concluded, that the "*information received demonstrates patterns of continuous and widespread use of torture…the pervasive nature, recurrence and reported readiness of Syrian authorities to use torture as a tool to instil fear indicate that State officials have condoned its practice… the Commission is particularly disturbed over the extensive reports of sexual violence, principally against men and boys, in places of detention.*"[279]

In terms of assessing possible violations of international humanitarian law the Commission "*was unable to verify the level of intensity of combat" and hence "[f!or the purposes of the present report…the Commission will not apply international humanitarian law to the events in the Syrian Arab Republic*."[280]

With regard to international criminal law, in short:

"*The commission is thus gravely concerned that crimes against humanity of murder, torture, rape or other forms of sexual violence of comparable gravity, imprisonment or other severe deprivation of liberty, enforced disappearances of persons and other inhumane acts of a similar character have occurred in different locations in the country since March 2011, including, but not limited to, Damascus, Dar'a, Duma, Hama, Homs, Idlib and along the borders.*"[281]

In terms of being explicit on responsibility the report clearly states that:

> "*According to the principles of State responsibility in international law, the Syrian Arab Republic bears responsibility for these crimes and violations, as well as the duty to ensure that individual perpetrators are punished and that victims receive reparation*."[282]

iii. Standards of Proof/ degrees of certainty

Unlike the previous Human Rights Council mandated commission of inquiry (Libya) the Syria Commission of Inquiry very explicitly addresses the question of the applicable standards of proof. The commissioners agreed that the first component of the mandate i.e. to establish facts and circumstances required the commission to act as a fact-finding body. As such, the standard of proof used was one of "*reasonable suspicion*". This standard was met when the commission obtained a reliable body of evidence, consistent with other information, indicating the occurrence of a particular incident or event. This is a lower standard of proof than that applied in a criminal proceeding:

> "*In order to fulfill the second component of the mandate ("to identify those responsible"), the commission understood that it had to collect a reliable body of material to indicate which individuals might be responsible for human rights violations*."[283]

Aside from the clear methodological statement at the beginning of the report, the findings and conclusions within the report are expressed with the certainty of the said findings, a few examples include: "…*substantial body of evidence gathered by the commission indicates that gross violations of human rights have been committed by*…"[284]; "*gravely concerned that crimes have occurred*"[285]; "*information received demonstrates*…"[286]; "...the commission is *particularly disturbed* over the *extensive reports* of… "[287]; and "…*expresses its deepest concern over consistent reports* of …"[288] Most of these statements are not conclusively stating that something has occurred, and the somewhat more tentative nature of the certainty reflects the fact that the mission did not have access to Syria. The transparency of such expressions and descriptions allow the reader to digest the degree of certainty within many of the findings, even if that certainty is clearly limited and often based on suspicion alone (reflecting the overall low standard of reasonable suspicion). The report also explicitly addresses an important issue that is has been "*unable to verify*".[289]

vi. Impact Assessment: Consequences of the report and action

To date the situation in Syria remains tense and the violence continues. The Security Council have not referred the situation to the ICC. The Human Rights Council following the SCI Report have established the role of a Special Rapporteur for Syria.[290]

Fact Finding Mission	**Standard of Proof**
Commission of Experts: Yugoslavia	Mixture of terms: •Reasonable to conclude. •Reasonable to presume. •Reasonable degree of certainty. •Sufficient evidence to conclude.
El Salvador	Used three explicit categorised standards against which all findings are measured: 1) Overwhelming evidence 2) Substantial evidence

	3) Sufficient evidence Did not arrive at any finding where evidence was "insufficient".
Darfur	Generally, "adopted an approach proper to a judicial body." Named individuals (confidential list): to do so "require[ed] 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."
Gaza	Generally, "*would follow international standards of investigation*". In all circumstances "*there was sufficient information of a credible and reliable nature for the Mission to make a finding in fact*."
Guinea	Only set explicit standard in relation to individuals: "…person may reasonably be suspected of having participated in the commission of a crime." Additionally when naming individuals, it applied different degrees of certainty regarding involvement: •*prima facie* evidence. •sufficient grounds. •may be held liable. •presumed involvement. "Information received must be checked against independent sources, preferably eyewitness accounts, and independently verified… Thus, the report does not include any testimony that has not been corroborated by at least one other source."
OHCHR- Mapping Report	Reasonable suspicion: each incident listed was backed up by at least two independent sources.
Libya	Nothing explicit: •Distinguish its evidence from evidence that could be used in criminal proceedings. • Sought to rely primarily on first hand information. •Took into account all forms of information, notwithstanding their qualitative differences.
Syria	Overarching application of "reasonable suspicion" supported by a mixture of descriptive terms.

3. Other relevant processes

The cases examined involved *ad hoc* fact-finding by international and regional institutions and intergovernmental bodies, of which the most common were missions authorized by the United Nations. However, the work of non-governmental organizations (NGOs) is also pertinent. Human Rights Watch and Amnesty International systematically monitor situations that are subject to international scrutiny, using inquiry missions. An assessment of their practice may therefore contribute to discussion of degrees of certainty. Furthermore, because many FFM rely partly on NGOs' reports for their information, a reflection on the standards applied by NGOs' reports is directly relevant.

It might be assumed that NGOs, which engage in significant advocacy, might be quicker to identify violations and might in consequence scrutinize the evidence less rigorously. Such an assumption should be put to one side. The case of the GFFM Report shows why. The GFFM concluded that Israel had targeted civilians as a matter of policy. This finding was not supported by Human Rights Watch, which stated that: "*Deeply troubling as these cases were, they were too isolated for us to conclude that the misconduct of individual soldiers reflected a wider policy decision to target civilians*".[291] This highlights the point that organizations such as Amnesty International and Human Rights Watch take the reliability and credibility of their fact-finding very seriously. It is not a matter that is of concern only to "*high profile*" United Nations missions.

It may be worthwhile at this point to briefly mention in general terms the importance of NGO-led fact-finding, as well as the possible advantages such mechanisms can have over the ICIs. When it comes to implementation, NGOs may in fact be capable of producing a stronger factual product. Such advantages include:

- Often more reactive, NGOs will be quicker to respond. If they are already on the ground, their investigations are not necessarily *post facto*: they may be able to document atrocities as and when they happen.
- Due to the continuous nature of their mandate, NGOs may have deep expertise and experience, surpassing that available to those involved in *ad hoc* processes, especially regarding local culture, language, etc. Additionally NGOs may well have local and trusted sources of information, as well as more insight to judge credibility of information.
- NGOs are not subject to the same political restraints as, for example, an UN-Mandated International Commission of Inquiry.

Beyond these general observations, NGOs are varied, differently driven by their mandates, funding obligations, donor pressures, working methodologies, etc. For the purposes of this report, we therefore focused on three NGOs that are involved in high profile fact-finding work: Geneva Call, Amnesty International, and Human Rights Watch.

a. Geneva call

Geneva Call is an international NGO that works with Non-State Actors (NSAs) towards increasing respect for international humanitarian norms. As NSAs cannot become party to international treaties, Geneva Call has created *deeds of commitment*, which allow NSAs to demonstrate their adherence to specific international standards-such as in this case, the anti-personnel landmine ban—and to "*allow and cooperate in the monitoring and verification of [their] commitment…by Geneva Call and other independent international and national organizations associated for this purpose with Geneva Call*".[293]. This NGO has produced a Report of the 2009 Verification Mission to the Philippines to Investigate Allegations of Anti-Personnel Landmine Use by Moro Islamic Liberation Front (June 2010) which is analyzed below in the light of the standards of proof question.[292]

i. Overview of Mission to Philippines

Following reports that anti-personnel mines were being used in the Southern Philippines, Geneva Call undertook a mission to assess whether or not the Moro Islamic Liberation Front (MILF) had respected its commitments, in three specific instances where credible allegations had been made. In each case, the Mission was to assess, first, whether or not the device in question was a landmine as defined by the DOC, and, second, whether it could it be verified that the MILF were responsible for its deployment.
Like many other broadly labelled "*fact-finding*" missions, the Mission was keen to state its non-judicial nature.[294]

ii Key Findings

The conclusion reached by the Verification Mission was that the DOC was not violated, as the Mission could not establish in any of the three cases that the device was both an AP landmine and that it was laid by the MILF, if some cases the former was established but not the latter, and *vice versa*. Therefore the verification mission, although stating that there "*were substantial grounds for concluding that there may have been such involvement [in laying AP mines]*", the central conclusion was that the DOC was respected, or it could not be established that it was violated.[295]The fundamental difficulty in this situation was the "*limited evidence to allow the Mission to determine who was responsible for planting the devices*".[296]

iii. Standards of proof

The Mission explicitly decided to apply a standard of "*beyond reasonable doubt*", yet they went onto state that "*this standard of proof reflects the circumstances of this particular Mission rather than constituting a general Geneva Call standard*".[297] The particular circumstances of the Mission which necessitated such a standard have not been detailed.

b. Amnesty International

In 2001, Amnesty International and CODESRIA (the Council for the Development of Social Science Research in Africa) released guidelines for Monitoring and Investigating Human Rights in armed conflict. Three key points concerning the application of standards of proof can be derived from these guidelines. The first is that the appropriate standard depends upon two key factors:

- As the actions planned after an investigation become more significant or serious, the quality of proof required rises.[298]
- Readership of the report.

Additionally the guidelines clearly state that:

- Any final report should state the standard of proof used.
- As far as possible, standards should be consistent (unless there are clear reasons not to be consistent).
- Incidents that are not 100 per cent established can be included in a final report as long as the level of probability is disclosed.

In the situation above, phrases such as "*very likely*", "*probable*", "*eye witnesses stated that*" or similar phrases should be utilized.

c. Human Rights Watch

In evaluating the reports of Human Rights Watch (HRW) no clear formal standards could be derived as such. Replies to requests made to the author of the report to HRW stuff confirm this evaluation.

d. Other United Nations Fact Finding and Reporting Mechanisms

The UN assesses adherence to human rights obligations in many instances, through treaty monitoring bodies and special mechanisms, as well as the newly introduced monitoring mechanisms with regard to children in armed conflict and violence against women in armed conflict. We will briefly overview the last two, and assess the approach they take to certainty when allegations of serious violations of human rights and humanitarian law are made.

Security Council Resolutions 1379 and 1960

In December 2010 the United Nations Security Council unanimously adopted Resolution 1960, requesting the Secretary-General to publicly list parties who commit acts of sexual violence and rape in his report to the Security Council. Based on such reports, the process of listing perpetrators will be used "*as a basis for more focused United Nations engagement with those parties, including as appropriate, measures in accordance with the procedures of the relevant sanctions committees*".[299]

The mechanism continues the development of monitoring and reporting mechanisms on specific human rights issues, which started with Security Council Resolutions 1261 and addressed the abuse of children in armed conflict. Due in part to strong concerns over lack of implementation, paragraph 16 of Security Council resolution 1379 (2001) demanded that the annual reports submitted to the Security Council (which began in 2000) were to contain a list of parties to armed conflict that recruit or use children in violation of relevant international obligations. Resolution 1612 developed this mechanism further in relation to the six gravest violations of children's rights that occur during armed conflicts. Again the purpose of the mechanism was to receive and process reliable and accurate information, on the basis of which a newly formed Security Council Working Group could make targeted and specific recommendations, and to list violators in the Annex to the Secretary General's Annual Report to the Security Council on Children in Armed Conflict.[300]

The technique of "*naming and shaming*" has had some success and has led to compliance of relevant actors in the past. This was emphasized when, in resolution 1882 (2009), the Security Council requested the Secretary-General to expand the scope of his annexes. These annexes now list parties who have a pattern of committing sexual violence against children, or killing and maiming them. These violations must be systematic, wilful and intentional to fulfil the listing criteria. To be removed from the list, parties must agree a time-bound action plan with the United Nations.

Standards for listing violating parties?

The Monitoring and Reporting Mechanism established to assess violations against children in armed conflict (flowing from Security Council Resolution 137) is relatively silent on the question of standards of proof. It simply affirms that:

> "*Ensuring accuracy, reliability and timeliness of information – A system of analysis and verification should be established, and the process should ensure that information is gathered and transmitted in a timely manner*". [301]

While Resolution 1379 is silent regarding any standard that needs to be applied to a party listed for violations, relying instead on information-collecting processes and scrutiny, the new system relating to sexual violence (Resolution 1960) does refer to a standard of sorts:

> "*Encourages the Secretary-General to include in his annual reports submitted pursuant to resolutions 1820 (2008) and 1888 (2009) detailed information on parties to armed conflict that are credibly suspected of committing or being responsible for acts of rape or other forms of sexual violence, and to list in an annex to these annual reports the parties that are credibly suspected (emphasis added) of committing or being responsible for patterns of rape and other forms of sexual violence in situations of armed conflict on the Security Council agenda; expresses its intention to use this list as a basis for more focused United Nations engagement with those parties, including, as appropriate, measures in accordance with the procedures of the relevant sanctions committees.*"

This is an interesting case, where we are not necessarily dealing with traditional *ad hoc* fact-finding but a

process of monitoring; and where, unlike classic reporting of a situation, direct consequences follow from becoming "*credibly suspected*" of being responsible for patterns of rape and other forms of sexual violation. One consequence is being listed, and hence selected for "*more focused United Nations engagement*", including the possible application of sanctions. It is interesting that, for such serious consequences, the standard applied is "*credibly suspected*". If such a standard is appropriate for relatively serious and direct consequences, and if fact-finding only ever has indirect consequences (such as judicial action), is it coherent for fact-finding to use similar or lower standards?

SECTION IV: ANALYSIS

Having set out in general terms how the concept of a standard of proof is applied in traditional judicial mechanisms, and examined via different case studies how standards of proof or degrees of certainty appear to have been employed by recent FFMs and other relevant mechanisms, we now draw together the information gathered so far, suggest some best practices, and propose tentative recommendations for further discussion.

This section will:

- Examine the usefulness of standards of proof for the work of FFMs (1).
- Examine the expression of standards of proof in the reports (2).
- Summarise the ways in which standards of proof can be, and have been used (3).
- Present an argument for applying a balance of probabilities approach as a guiding standard (4).
- Suggest internal and external factors that may make it necessary to apply a higher or lower standard than the guiding standard (5).

1. Usefulness of standards of proof for the work of FFMs

Before we address what standards are appropriate for FFMs, we should, first, address the usefulness of applying such standards and, second, assess how such standards should be expressed.

How useful are standards of proof, applied as a threshold for making findings of fact with regard to legal and international norms, when such standards are transposed from their traditional judicial setting and applied in a more flexible, *ad hoc,* and quasi-judicial process?

Because FFMs are often mandated to determine whether or not international norms have been violated, the application of a standard of proof to their decisions appears to be logical and coherent. Having a minimum threshold of certainty for propositions alleging very serious acts, such as genocide, forced disappearance, killings or rape, appears appropriate. Yet the practical constraints that FFMs face - limited access to information, short time frames, lack of enforcement powers, sometimes an advocacy focus - may make some reticent to apply formal standards of proof to a very informal process.

It seems that the nature of the work demands a discussion of standards of proof, but that discussion should address the specific purposes of FFMs and must therefore take into account their inherent limitations when they scrutinize information in a non-judicial context.

Basic Recommendation: The application of a standard of proof should be a central methodological consideration before and during a FFM.

2. Expression of standards of proof in the reports

If we accept the basic premise that standards of proof (or degrees of certainty) are useful, we must address how such standards are to be expressed.

The first question is whether there should be an external or internal dynamic to these standards. The second is whether standards of proof need to be fixed, singular or varied.
In judicial mechanisms, two general approaches to forming and applying a standard. The traditional common law approach is to define and apply the standard explicitly. The civil law approach has been to

arrive at a standard of proof based on a "*number of unarticulated factors concerning the evidence that has been furnished*" (internal).[302]

What approach should a truly international and less formal process take? Is it necessary to state standards of proof explicitly, or do internal standards serve the purpose of FFM better? Or is a case-by-case assessment to be preferred?

a. External

The common law approach has the merit of being transparent. It enhances credibility by enabling an external reader, victim or accused, to evaluate the veracity of the claims being made. This rigour can help to differentiate FFMs from more and less formalized processes. It can also facilitate any subsequent process, such as a judicial action, because the findings are based on clear criteria and as a result future investigators can assess the extent to which they may rely on the information, given their own standards of proof.

The recent controversy regarding the Goldstone Report (even though it applied an explicit standard) would seem to support the argument that the credibility of a report should derive from the strength and clarity of its methodology rather than from the reputation or personal standing of the Commissioners.

b. Internal

An internal approach was adopted, at least to some extent, by the DCI (in relation to its general approach), the YCE, and the LCI. The phrases they use to refer to standards of evidence are often negative in form. For example, it is said that the standards applied do not meet the standard of judicial scrutiny, but no positive formulation is advanced.

The best example of this approach is the recent Libya Commission of Inquiry (LCI). In reference to standards of proof, it variously "opted for a cautious approach",[303] "consistently refer[ed] to the information obtained as being distinguishable from evidence that could be used in criminal proceedings, whether national or international",[304] showed a clear preference for facts observed first hand,[305] and stated that the Commission would take into account all forms of information "notwithstanding their qualitative differences".[306] Although we have some sense that the material was scrutinised, it is difficult to assess objectively the certainty of each of the Commission's findings.

This is not to say that the internal process is less comprehensive. Even when standards of certainty are not clearly expressed, the Commissioners have extensive experience of working in previous fact-finding missions, or as criminal investigators, judges or prosecutors, and their ability to handle complex information and draw conclusions based on fact will usually be of a high order. A degree of scrutiny will be applied, even if its procedure and character are not declared. The omission of a clear definition regarding standards of proof may give Commissioners a margin of flexibility and discretion that may be particularly helpful for FFMs that want to reach a politically agreeable conclusion, or want to instigate future action, or that are severely handicapped due to restricted access or limited timeframe.

Basic Recommendation: FFM should state their methodological standards at the outset of their report.[307]

c. Fixe/ Variable

Standards of proof when externally expressed can be used in several ways.

i. A singular overarching standard

The application of one standard is set out at the beginning of the report and all findings must reach the threshold set. As a result, there are no apparent differences in the certainty of each determination.

> Example: GFFM "*assess[ed] whether in all circumstances there was sufficient information of a credible and reliable nature for the Mission to make a finding in fact.*"

ii. Several overarching standards

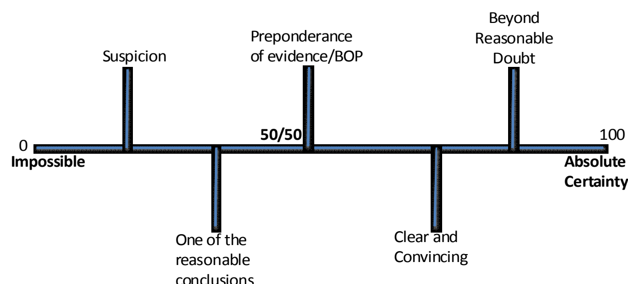
More than one standard of proof is set out at the beginning of the report. As a result, each finding must still reach a minimum standard but, if a finding surpasses this standard and attains a higher degree of certainty, this is reflected in a clear manner.

> Example: UNCTES based its findings on three standards: sufficient, substantial, overwhelming.

In addition to overarching standards, either singular or multiple, descriptive expressions of certainty are always useful. A factual finding is expressed in a manner that reflects the certainty of the claim. Such approaches may be used alongside overarching standards or may replace them when no clear overarching methodological standards are feasible or adopted.

Basic Recommendation: The certainty of factual findings is rarely uniform and the reality is that an FFM will be more certain of some findings than others. Adopting a layered approach will add credibility to findings and enable FFMs to convey their findings more accurately. They will also avoid the risk of falsely appearing to attach one level of certainty to all their findings.

In this light, the UNCTES appears to provide an excellent framework for best practice.



3. Ways in which standards of proof can be, and have been used

Having discussed the usefulness of standards and examined how standards should be expressed, the core question remains. What standards of proof are most appropriate to the work of FFMs?

a. Overview

In terms of the actual content of possible standards, three standards of proof are well accepted in a range of judicial processes: beyond a reasonable doubt; clear and convincing evidence; and a balance of

probabilities.

For the purposes of FFM, which are often preliminary and short term exercises, frequently constrained by poor quality of information, two less demanding standards may be considered: "one of the reasonable conclusions" and "reasonable suspicion". These standards have been used when addressing the genocide charge on the arrest warrant of Omar Al Bashir, and in the British domestic system when issuing arrest warrants.

b. Defining four standards for fact-finding

To start with, although the terms "*standard of proof*" and "*degrees of certainty*" have been used interchangeably, the latter phrase seems to be more appropriate for a less formalized process such as fact-finding. Avoiding the phrase "*standard of proof*" will help to differentiate FFM processes from their more formal judicial cousins. On the same reasoning, the highest standard of "*beyond reasonable doubt*" should be replaced with "*overwhelming evidence*" because the "*beyond reasonable doubt*" standard is synonymous with the level of proof required for a common law criminal conviction, cannot realistically be attained outside a courtroom, and has a different character when applied by FFMs. The term "*overwhelming evidence*" appears to be more appropriate.

The four working standards and definitions are therefore:

- Reasonable suspicion: Grounds for suspicion that the incident in question occurred, but other conclusions are possible. (40%)*. Classic expression is: may be reasonable to conclude.
- Balance of probabilities (sufficient evidence). More evidence supports the finding than contradicts it. (51%). Classic expression is: reasonable to conclude.
- Clear and convincing evidence. Very solid support for the finding; significantly more evidence supports the finding and limited information suggests the contrary. (60%.) Classic expression is: it is clear that.
- Overwhelming evidence. Conclusive or highly convincing evidence supports the finding. (80%.) Classic expression is: it is overwhelming, it is undeniable.

*Numerical values have been added for guidance purposes only.

4. Balance of probabilities approach(sufficient evidence) as a guiding standard

FFMs include an array of *ad hoc,* highly politicized, and diverse mechanisms. When it comes to recommending the degree of certainty that FFMs should aim for in practice, commentary and discussions with those who have experience of them suggest that "*balance of probability*" (often expressed as "*reasonable to conclude*" or "*sufficiency*") is the best starting point.

a*. Limited Nature of Fact Finding*

It must be remembered that fact-finding remains a limited legal mechanism, usually having no capacity for enforcement, which examines extremely serious and egregious behaviour. It is therefore important to understand what FFMs can and cannot do. They often have a limited and restricted mandate, work under strict time constraints, have no powers of enforcement, and are not in a position to apply the same levels of scrutiny to their findings that would be expected of formal judicial processes. In this light, the recommended standard would be simple balance of probability; or, put simply, "is there more evidence to support a finding than not?" It would appear illogical to apply a higher starting point of certainty to a mechanism that is preliminary and often a tool of advocacy.

b. Reflected by practice

Such an approach is logical, and is supported by available literature on the topic. It also finds support from practitioners who were asked to consider this issue during the research. To paraphrase conversations with those involved with the Darfur Commission, to apply a standard higher than balance of probability is simply not coherent, because "beyond reasonable doubt" (and even *prima facie* case) is a standard that requires judicial scrutiny, which FFMs lack. Furthermore, the standard can easily be communicated to FFM members, who are simply required to decide whether a given violation was more likely to have been committed than not.

Of the case studies assessed it can be said that in general terms at least seven of the nine used such a standard. (The two exceptions were the IFFMCG and LCI, which applied a lower standard.)

c. Nature of the behaviour being investigated

While, in general terms, using a balance of probabilities standard appears to be credible for a non-judicial process, FFMs that examine grave violations of human rights and international humanitarian law may need to adopt a higher standard, given the seriousness of the acts and the consequences that may flow from their judgements. An analogous debate occurred with regard to international tribunals. It was asked whether such international judicial mechanisms need to take a different approach to the application of standards (or their interpretation), compared with domestic courts, because of the nature of the behaviour they judge - behaviour that is internationally repudiated and occurs in an environment of lawlessness.

Domestic crimes prove exceptions to the norm of lawfulness; international crimes, by contrast, take place in a context in which violence is so widespread, officially approved, and socially accepted that it cannot be considered deviant…In such a context- where so many are guilty- heightened concern about preventing the wrongful conviction of innocents that a particularly stringent conception of the beyond a reasonable doubt standard instantiates may not be necessary.[308] Combs is not suggesting "*we convict on the basis of speculations*". She suggests, "*the factual context surrounding the crimes … may inform our views about how much doubt is tolerable*". The factual context for FFM is often similar if not identical to situations that have merited international criminal action. The nature and context of situations may shift our underlying assumption, with regard to criminal trial, that convicting the innocent is more costly than acquitting the guilty. In this criminal context:

> "*it may not be as costly to wrongfully convict a defendant of one crime when there is a non trivial likelihood that he is guilty of another crime than it is to wrongfully convict a defendant, who if he did not commit the crime for which he has been charged, is entirely innocent*".

Although these issues are clearly discussed in the context of international criminal trials, the theoretical basis for applying standards can be transferred to fact-finding. The consequences of failing to report on abuses of human rights and humanitarian law must be of equal and possibly at times of more concern, than occasional inaccurate accusations of illegal behaviour.

The latter can be tolerated, to the extent that fact-finding remains a limited mechanism that is often subject to obstruction and lack of cooperation by states, and where the harmful consequences of inaccurate statements amount to misinformation. In the violent environments that FFMs investigate, this harm is unlikely to outweigh the value of conveying information pertinent to assessing the human rights situation.

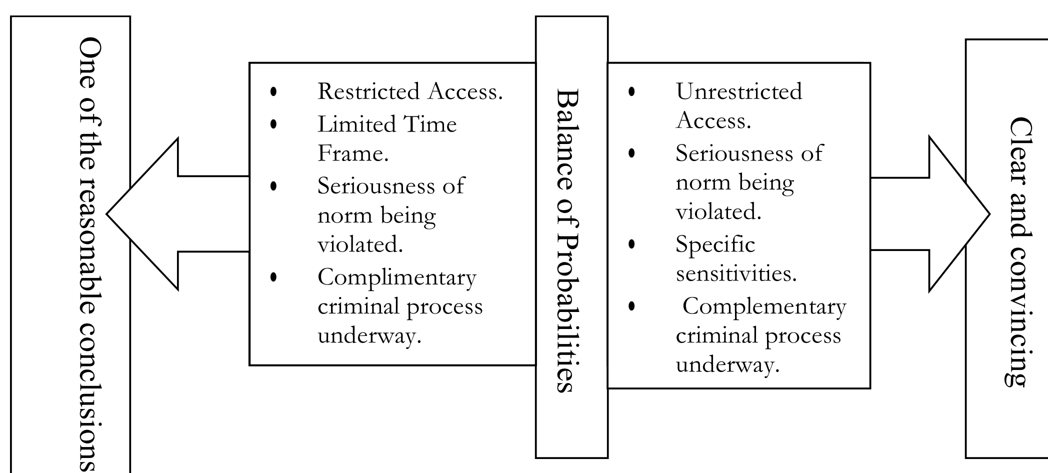
d. Need for credibility

A balance of probabilities approach is therefore realistic; it can also provide credibility and accuracy. Any argument for using a lower standard as a general standard for FFMs, such as "reasonable suspicion", may cause FFMs to report all allegations that they suspect have occurred, reducing the rigour of the process and levels of scrutiny. This would not be appropriate for high profile inquiry mechanisms that examine very serious violations. FFM findings must be considered to have some certainty, and FFMs must avoid speculative accusations. Setting "one of the reasonable conclusions" or "reasonable suspicion" as a general standard would therefore appear to be problematic.

Basic Recommendation. Balance of probabilities is a coherent starting point for the application of a set standard of proof.

4. Internal and External Factors that may make it necessary to apply a variation (higher or lower) standard than the guiding standard

While the balance of probabilities standard appears to be an appropriate guiding standard (which would certainly benefit from further discussion with leading experts), it would be superficial to say that this standard is necessarily appropriate in all circumstances. FFMs undoubtedly need to address many issues and factors that will require them to reflect on the appropriateness of a balance of probabilities standard. In particular, they might need to apply a lower or higher standard of proof in order to fulfil certain mandated activities or manage specific circumstances associated with their mission.



a.Importance of the norms being investigated

The FFMs deployed to various emergency situations across the world, from Darfur and El Salvador to Libya and Israel, have had to investigate some of the most egregious behaviour in human society, often assessing situations where hundreds and at times thousands of people have been killed, abused, torture, raped, and ultimately denied their most basic rights. The seriousness of the behaviour that FFMs investigate is not in question. Yet an argument can be made, not least by FFMs themselves, that some norms of international law carry with them an extra degree of stigma and may require a differentiated approach. In such cases, a balance of probabilities standard may be inadequate. Both genocide and torture might fall into this category.

A hierarchy of serious human rights violations may not be universally acceptable; yet there is a degree of coherence in saying that, when dealing with the most serious abuses, an extra degree of rigour is appropriate. The International Court of Justice, for example, applies different standards according to the seriousness of the violation it examines.[309]

On further scrutiny, however, this argument becomes far from straightforward. Indeed, a case can be made that, the examination of very grave violations may requires a *lower* level of scrutiny, because it may be more important to show that a state committed very serious violations (at some risk of error), if the consequence of applying high standards of proof will be that an FFM is unable to bring to light evidence of genocide or torture. The gravity of the behaviour under review means that a high standard of proof is required if the interest of those accused is the primary consideration; it requires a lower standard, if the interests of victims are the primary concern.

FFMs may also need to take special care when they address behaviour that certain societies particularly stigmatize. A possible example is provided by the OHCHR Mapping Report, which caused an outcry when it suggested that forces under the control of the Patriotic Front of Rwanda (RPF) may have committed acts of genocide against the Hutu population. The dilemma in such a situation is to weigh up the natural sensitivities of victims, the rights of those accused of crimes, the broader political sensitivities and the duty to report all cases of serious human rights violations.

Recommendation. It may be important to give certain norms specific consideration when assessing the appropriate standard of proof. The approach taken may be influenced by the nature of the mandating body, and by specific historical, cultural or political sensitivities relating to the norm.

b. Single instances, patterns and policy

The time and logistical constraints placed on each FFM normally mean that FFMs seek to identify patterns of behaviour rather than scrutinize single instances of concern (although the finding of a pattern can only be based upon the establishment of several single instances). In itself, this does not appear to have significant implications for standards of proof, though it strengthens the claim that a lower standard (such as balance of probability) is more appropriate, because FFMs will often draw on individual cases to illustrate broader trends. Consequently, the level of scrutiny they require is lower than in judicial cases when each instance or situation is assessed individually.

When FFMs come to decide whether a pattern of behaviour represents a *policy* of a group or institution, the legal and political implications can be extremely important and may require a discussion of standards of proof that raises many of the issues considered above, with regard to very grave violations.

It may be relatively easy to establish that soldiers of State X violated international norms, and that State X is therefore responsible, but much harder to show that such incidents represent a policy or a consistent intention to commit the violations in question. Such a claim must be seen as an aggravated charge, and a case can therefore be made for applying a higher standard of certainty to such a determination.

If claims that violations are a matter of policy should be subject to higher standards of proof, fact finders will need to avoid some of the pitfalls made by previous fact-finding bodies. The most important question is a simple one. Is it legally relevant to assert that the violations in question were committed as a matter of policy? If the policy aspect is significant for the legal determination (as with a crime against humanity, for example), then a balance of probabilities approach may remain appropriate, because it is inherent to the legal assessment. In other cases, however, it may be argued that, due to the

sensitivities involved, and also the added gravity of asserting intentionality, a higher evidence standard may be desirable. The risk is that, otherwise, the FFM may be adjudged to have made a political statement rather than adopted objective legal positions.

Recommendation. When assessing whether violations reflect a policy of unlawful behaviour, FFMs should first ask whether or not such a judgement is necessary to their legal findings. If so, a balance of probabilities standard may remain sufficient. If not, a higher standard may be more appropriate.

c. Attribution

i. Groups

From this research, it does not appear that judgements with regard to the behaviour of states or groups demand a specific or different approach. Although it may be challenging to attribute responsibility for violations to a group (and though in many ways this may be the central question to answer), it remains integral to the legal assessment. However controversial or complicated the assessment is, the interests involved do not appear to demand a separate approach; there is no rational reason to do so merely because the group responsible is a state or a non-state entity. This said, depending on the situation and the issues at stake, it may be appropriate to apply some form of sliding scale.

Recommendation. Only very occasionally, when attribution is particularly problematic, should FFMs consider increasing the degree of certainty above a general balance of probability standard.

ii. Identifying Individuals

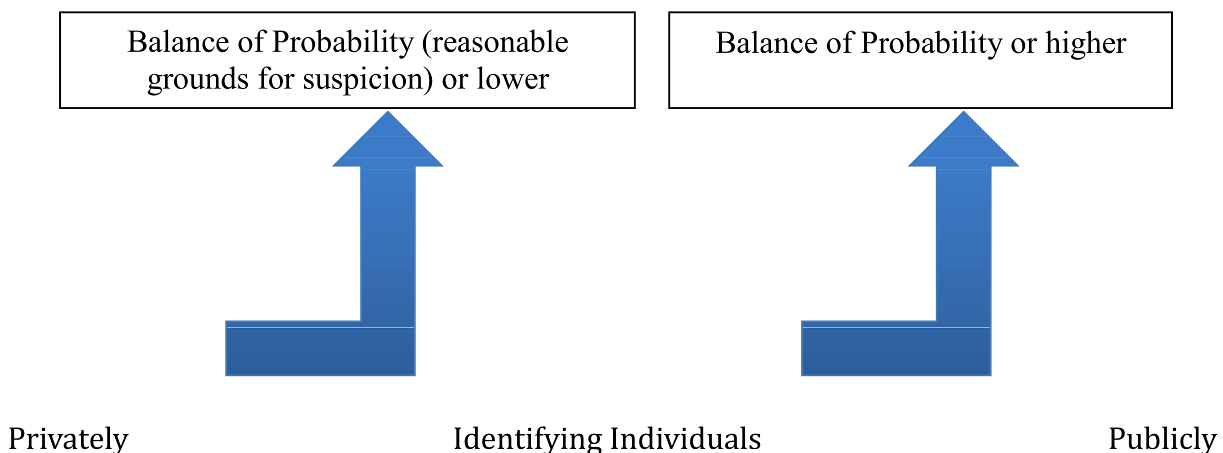
The identification of individuals involved in the commission of violations is one of the most controversial and challenging aspects facing modern FFMs. It is an aspect of fact-finding that clearly resembles more formalized criminal processes.
Identifying individuals is an essential aspect of the process of truth telling and fact-finding. Victims and the wider community have a right to know who was responsible for atrocities. However, the process of identifying individuals via a relatively informal process such as fact-finding naturally raises concerns regarding the rights of those who are alleged to be responsible. The risks of making an erroneous determination, or naming an individual on weak grounds, are evident, and doing so has clear implications for the person's liberty and interests, especially when the alleged crime is a grave one. A wide range of issues arise, from fair trial rights to personal safety. While it is undoubtedly important to protect individuals from being erroneously labelled as murders, torturers, war criminals, genocidaires, etc., however, does this mean that FFMs should apply a higher standard of proof when they identify individuals, than when they attribute responsibility to states or groups?
A key point to make is that individuals can only ever be suspected of committing crimes. To state with certainty would naturally involve a criminal process. The naming of individuals involved in state violations must therefore be distinguished from attribution of criminal responsibility, since the latter can only be established by means of a criminal process. While FFMs may certainly make determinations regarding the involvement of individuals, therefore, their statements are naturally circumspect with regard to actual guilt. In practice this means that FFMs will employ terms such as "*reasonable to suspect*" when they refer to individuals, and "*reasonable to conclude*" when they refer to states. Both phrases use the same threshold or standard, but the frameworks involved are different: one being criminal in nature, the other civil.

We face here an interesting conundrum. On one hand, the interests involved are more serious and therefore the standards of proof may need to be raised. On the other hand, attributing criminal

responsibility outside of a formal criminal process is necessarily more difficult and hence individuals can only ever be suspected of committing a crime and hence the standard of certainty is inherently lower due to the nature of the normative framework.

The identification of individuals was as the heart of the work undertaken by the Darfur and Guinea Commissions. The standard applied by the DCI "*require[ed] 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 Guinea Commission used a similar approach: "v*erified evidence assembled to demonstrate that a person may reasonably be suspected of having participated in the commission of a crime*". However, the Guinea Commission differed from the Darfur Commission in two fundamental ways. First, it applied a range of descriptive standards to assess the certainty of the involvement of different individuals, from "*may have been involved*" to "a prima facie" case. Second, it made public the list of individuals named.

How should the publication of such information be handled? If names are published, should a higher standard of proof be adopted? It can be certainly be argued that the interests at stake are such that the evidence should be clear and convincing. FFMs may also deal with this problem as the Darfur report chose to do, by naming individuals but not releasing the list of those named directly into the public domain.



When decisions are made about whether or not to release individual names publicly, the experience and practice of truth and reconciliation processes can be useful. They seem to provide an excellent good practice guide for fact-finders to follow:

> "*There may be a range of legitimate reasons for not naming names: security risks for commissioners, victims or witnesses, a lack of sufficient evidence, or an inability to give proper notice or safeguards for those accused. If a commission decides not to name perpetrators, it should at least set out reasons that are politically, morally and legally defensible. Where it does name names, it must clearly state that its findings do not amount to a finding of legal or criminal guilt.*"[310]

Basic Recommendation: When individuals are to be identified, a clear standard of proof should be applied. Balance of probability remains an appropriate standard as a starting point but, if a decision is made to list those involved publicly, greater scrutiny may be appropriate. While the involvement of an individual may be determined, individuals can only ever be *suspected* of committing a crime.

d. Mandating authority: interests and audience

Fact-Finding usually cannot transpire in a political vacuum; fact finders must take into account the prevalent socio-political commitments of the organ sponsoring their inquiry.[311]

The mandating body and its socio-political commitments will necessarily have an influence on the choice of standard of proof. The institution, its reputation, its constituency and priorities, will all influence the standard of certainty adopted when pronouncing on human rights or humanitarian law violations. Some institutions, for example, will prioritise engagement (Geneva Call), others resolution of a diplomatic crisis (Palmer Report[312]) or peace and security (UNSC, UNSG, IFFMCG) over borderline judgements on humanitarian norms. As a result, they are likely to comment only on violations that have demonstrably occurred. By contrast, human rights advocacy organisations (HRC, HRW, AI) may feel it is appropriate to report cases where there is a reasonable suspicion that human rights norms have been violated.

Additionally there may be a desire, motivated by a misunderstanding of impartiality to find violations on both sides, and hence this may skew the standard of proof applied.

Recommendation: The nature of the mandating authority may mean that certain interests are placed above others. However, any FFM mandated to assess violations of humanitarian or human rights law should primarily assess such violations as they find them. A failure to report behaviour (for example, as a result of applying an exaggeratedly demanding standard of proof or deliberately avoiding clear determinations), even for honourable reasons, may delegitimize the fact-finding process as well as the sponsoring institution and is an affront to victims of abuse. In the same manner, FFMs should ensure that their findings are credible and reliable; lower standards of proof should therefore be accepted only in limited circumstances. Any desire to establish violations of all parties involved should be only be done with clear reference to the certainty of the assertion and hence should be framed against objective standards of proof.

e.Output, Consequences and Interrelationship with other Transitional Justice Mechanisms

While no FFM can predict the future, certain consequences, likely or intended, may be worth considering when deciding on an appropriate standard of proof.

Post Fact Finding

→ National reform (Democratic, Truth Commission, other transitional justice processes)
→ Continuation of Ffm/ICI
→ Domestic or International Criminal Investigations
→ Civil Proceedings
→ Consensus Building
→ Increased International Scrurtiny/Engagement
→ Impunity
→ Peace and Security (de) Stabilized
→ End /or Continuation of violations.

The direct or indirect impact of FFMs should not be downplayed. A brief review of the case studies shows that international inquiries, or the events they investigate, generate numerous forms of response.

They include democratic reform in Guinea, a referral to the ICC by the Security Council of the situation in Darfur that led to the indictment of a sitting head of state, and over 400 investigations by the Israeli government in reaction to the GFFM.

The question for our discussion is whether or not the standard of proof selected by a FFM should be adjusted upwards if it is foreseeable that its report will elicit significant reactions. Often the main job for a FFM is simply to put information in the public arena. For instance, why should referral of the situation in Libya to the ICC influence the LCI's methodology? Are the consequences of the report completely separate considerations, unlinked from the LCI's methods, or is there a relationship?

i.Criminal Action

FFMs increasingly consider the possibility of formal criminal action. The majority of the case studies examined here do so, not in terms of their findings (since FFMs state clearly that their conclusions do not imply criminal guilt), but in the way they identify individuals responsible for violations or frame their concluding statements, or recommend that criminal processes should be undertaken.

Fact-Finding and Criminal Processes (CP)

No Subsequent CP (El Salvador)

Prior to CP (GFFM, Darfur, Yugoslavia)

Run concurrently to a CP (Libya)

The record shows that FFMs have a rather varied and complex relationship to formal judicial processes. While the GFFM and Darfur Report have preceded criminal investigations (the former at domestic, the latter at international level), the El Salvador FFM triggered little judicial action despite its recommendations. Most recently, the Libya Commission of Inquiry was mandated a mere three days before the Security Council referred the situation to the ICC, and both the FFM and ICC investigators were subsequently in Libya simultaneously.

The FFM case studies highlighted output and consequences partly because, as noted, these may influence the standard of proof that is appropriate. The possibility of criminal action is obviously relevant because standards of proof are central to criminal processes, and have been derived from them. A further question here is whether applying criminal methodologies is useful or feasible.

For now it can be stated that the processes remain separate and FFM do not have to adhere to the same level of scrutiny in comparison with their work as a criminal investigator who have to consider the admissibility of the information they collect. Nevertheless, it can still be asked whether knowledge that criminal investigations are taking place or might do so, or the certainty that they will not occur, should affect the choice of standard of proof.
Scenario 1: *Concurrent or possible future criminal investigations*

Argument for a higher degree of certainty: knowing that criminal investigations have started, a FFM that seeks to be relevant must, to the extent possible, apply the highest standard of proof possible to its work, to the scrutiny of information and to the certainty of its findings, in order to facilitate use of its investigation and information by the criminal courts. Where it has access to individuals and materials that the criminal authorities are unaware of or unable to access, or where it is possibly the sole source of information, a FFM should use standards appropriate to criminal investigation for processing information. Evidently, if a FFM makes accusations that are subsequently repudiated in a court process, this will undermine the credibility of the FFM.

Argument for a lower degree of certainty: Frequently, only a small proportion of the many incidents that occur during an armed conflict or emergency are subject to criminal investigation. While FFMs should be open to sharing their information, they remain separate processes and should apply separate

rules. Indeed, where more formal processes are undertaken, FFMs are under less pressure and can be less cautious. FFMs should not be afraid of having their findings overturned or disproved in a formal criminal process, because the occurrence of a criminal prosecution demonstrates the presence of a *prima facie* case; a criminal prosecution based on an event detailed in a FFM is a success for the FFM. Whether or not criminal guilt is established, or criminal investigation brings new facts to light is not the point: the task of FFMs is to make the best evaluation possible based on the information that is available at the time.

Scenario 2: *No future investigation or accountability*

Argument for a higher degree of certainty: If prosecution and other accountability mechanism are likely to be frustrated, the FFM will become the only, or one of few, authoritative records of the events that occurred. Both its methodology and standards of proof should therefore be rigorous, to ensure that its findings are robust. It should reference only those violations that certainly occurred.

Argument for a lower degree of certainty: If no individuals are likely to face prosecution for serious violations of human rights, this demonstrates that the government (or organization in control) does not take human rights abuses seriously. It should not be rewarded for this stance and FFMs should therefore assemble the fullest information possible, including incidents that certainly occurred and incidents that are suspected to have occurred. The role of FFMs is to promote, strengthen and protect human rights and they do victims a disservice if they apply standards of proof that prevent the disclosure of abusive behaviour.

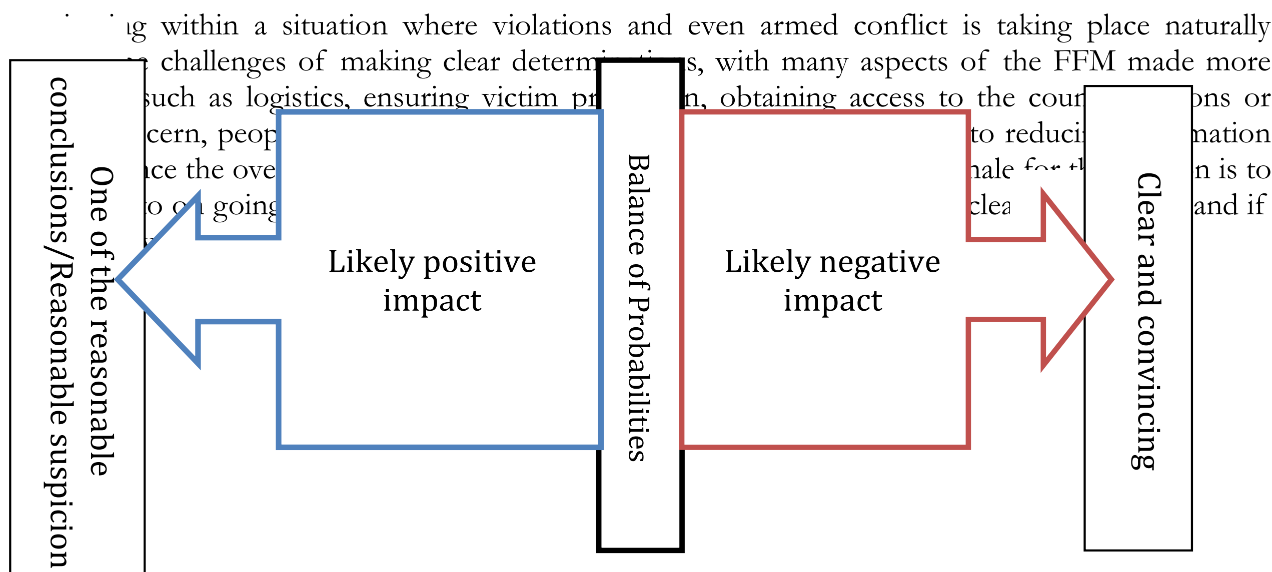
ii. Broader Impact

In addition to being a possible trigger for criminal action, FFM findings may have a range of impacts that may be positive or negative. Negatively, they may cause disengagement from a peace process, the withdrawal of peacekeepers, an increase in tension, or further conflict. Positively, they may lead to democratic reform (see Guinea), prevent ongoing violations, increase political engagement by conflicting parties, and the creation of transitional justice mechanisms.

iii. Ongoing violations and the insertion of a fact finding mission

In the light of the fact that two recent commissions of inquiry (Libya and Syria) have been undertaken at a time when on-going abuses are taking place, it is worth assessing the role such missions can and should play in halting on-going atrocities. In the traditional sense, inquiries are undertaken *ex post* in response to an event or series of events that have taken place. However, with the Libya and Syria Commissions, engaging in their work at a point when the violations are on-going, FFMs may in fact play a crucial preventative role in such situations.

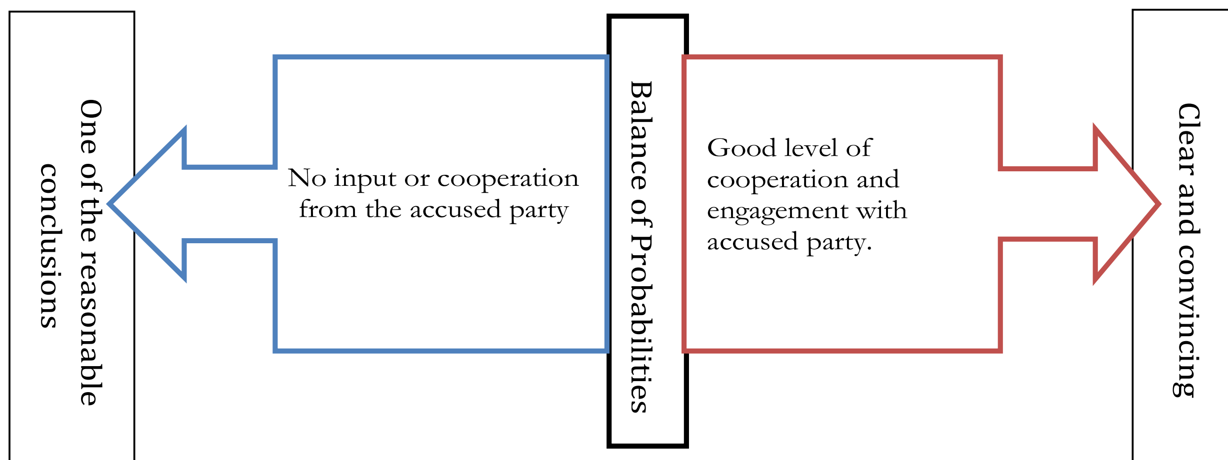
…ng within a situation where violations and even armed conflict is taking place naturally … challenges of making clear determ…s, with many aspects of the FFM made more … such as logistics, ensuring victim pr…n, obtaining access to the cour…ons or …cern, peop… to reduci…nation …ce the ove… …ale for th…n is to …o on going… clea… and if



Recommendation. Some consideration should be given to the possible consequences of the FFM Report. If a positive impact is likely to result from the findings, or is indeed a central rationale (such as halting ongoing atrocities) then a lower standard *may possibly* be tolerated.[313] If the likelihood is strong that certain findings will have a negative impact, on the other hand, a clear and convincing standard may be more suitable.

f. Contestability of facts and level of engagement with parties under investigation

A serious discussion of standards of proof must take into account the practical hurdles that many FFMs face: lack of cooperation, lack of access, lack of security, hostility, and deliberate deception. Even if a high standard of proof is desired, these practical realities may make it impossible to achieve. If a FFM is able to engage and cooperate with the accused state or party under investigation, the conditions of investigation will naturally improve and findings are likely to be more certain. The opposite will be true when relations are poor or break down. On many occasions, FFMs should be allowed have to make adverse inferences where parties or individuals refuse to provide relevant requested information and hence such refusal or silence, may be taken as a suggestion that wrongdoing occurred.



Recommendation: FFMs should give consideration to the level of cooperation that can be expected from the parties under investigation. The more they are open and receptive, the more likely it is that the FFM can apply a clear and convincing standard of proof. (This does not imply that such a standard *should* be adopted.) When the parties under investigation are not open and receptive, it is likely that some findings will only ever reach the standard of "one of the reasonable conclusions". The FFM may need to rely on adverse inferences.

SECTION V: CONCLUSIONS

"Since the efficacy of fact finding rests so largely on credibility and credibility emanates primarily from manifest integrity of process, sound procedures are not merely desirable but a functional prerequisite."[314]

1. Place of the standards of proof in the FFM

The adoption of standards of proof is only one aspect of a fact-finder's methodology. Other core elements include: appropriate handling of information; the selection of commissioners; adopting clear terms of reference; setting up appropriate structures to ensure witness protection; as well as working in a manner that is impartial and objective. While the other methodological issues are important, definitely taking a sound approach to standards of proof, or degrees of certainty, will help ensure the accuracy and credibility of fact-finding processes. Establishing good practice in this complex area can only be a positive step to making FFMs more robust and credible.

As more high profile fact-finding missions are established, the importance of having a clear understanding of this issue is increasingly evident.

2. Key central considerations

While many points in this report have been raised to promote discussion, FFMs should take the following into account when they set standards of proof.

►Fact Finding remains a limited, often preliminary mechanism of implementation. Embrace the limitations.

When they seek to apply clearer standards, fact-finders should be aware that their essential task is to make a quasi-judicial determination on whether normative standards of human rights, international criminal or humanitarian law have been violated. Fact-finding commissions of inquiry do not, should never, and should not be deemed to, make authoritative or binding determinations. The nature of the mechanism is that, at best, it makes preliminary adjudications. In fact, fact-finding missions have a responsibility to admit that when they are uncertain.

If a mandating body wishes to create a more comprehensive mechanism, it would need to take some of the steps below. (These may or may not be realistic or desirable.)

- Significantly expand the time frame, budget, and personnel.
- Provide FFMs with legal powers to compel witnesses to testify.

►Standards are not abstract. They start and end with quality of information.

Standards of proof do not themselves ensure that findings of FFMs are of high quality, credible or accurate. Standards of proof are useful only if clear criteria and procedures are applied to each item of information collected.[315] For example, the standard of "*beyond reasonable doubt*" is unlikely to be feasible in a FFM's fluid and *ad hoc* process because it is not an arbitrary threshold but governs the whole process. It requires individual facts to be probed by cross-examination or other processes of verification. FFMs are not able to attain such detailed levels of scrutiny.

3.Next Steps

Standards of proof/degrees of certainty are being applied, though not uniformly and only to some extent. They cannot be ignored. As we have seen, it is not easy to agree a clear framework for standards of proof. Though many actors are familiar with the phrases "beyond reasonable doubt", "judicial standards" or "convincing proof", it is not evident what these mean or imply when they are used outside a "traditional" courtroom setting in the context of international humanitarian fact-finding. Experience has shown that, even in common law criminal justice systems, where standards of proof originated and where a "beyond reasonable doubt" standard must be reached to secure a conviction, there has been a "large variance in the way jurors interpret the phrase".[316] If less formal processes increasingly feel the need to set standards of proof, how should these be adapted, responsibly, to meet the purposes of fact-finding?

The recommendations made in Section IV represent provisional, yet we believe strong recommendations, and should be discussed in detail in order to help develop a clear and consistent document containing best practice guidelines. The following steps are the suggested follow up of this project:

- Production of a shorter "*brochure*" version for wide distribution.
- Expert Meeting discussing and developing the recommendations.
- Standards of proof forming one part of a larger study on clear guidelines for fact-finding and commissions of inquiry missions.

FOOTNOTES

[1] Corfu Channel case, Public Sitting of 17 January 1949, Pleadings, Oral Arguments, Documents, vol. IV, p.479.
[2] International Commission of Inquiry on Darfur, 2004-2005. For details see Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004 (January 2005). Available online at: http://www.un.org/news/dh/sudan/com_inq_darfur.pdf.
[3] Commission of Inquiry on Lebanon, 2006. For details see Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution s-2/1, Implementation of General Assembly Resolution 60/251 of 15 March 2006, UN. Doc. A/HRC/3/2 (23November 2006). Available online at http://reliefweb.int/node/417831
[4] International Commission of Inquiry in Guinea, 2009. For details see Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea, Letter dated 18 December 2009 addressed to the President of the Security Council by the Secretary General, UN. Doc S/2009/693 (18 December 2009). Available online at http://www.un.org/ga
[5] Independent International Fact-Finding Mission on the Conflict in Georgia, 2009. For more details see Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, Council of Europe (decision 2008/901/CFSP of 2 December 2008) (September 2009). Available online at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/30_09_09_iiffmgc_report.pdf.
[6] Report of the international commission of inquiry to investigate the facts and circumstances surrounding the allegations of serious abuses and violations of human rights committed in Cote d'Ivoire following the presidential election of 28 November 2010. Available online at http://www2.ohchr.org/english/bodies/hrcouncil/17session/reports.htm.
[7] International Commission of Inquiry on Libya. For more details see Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, UN. Doc A/HRC/17/44 (1 June 2011). Available online at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44_AUV.pdf
[8] See Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc A/HRC/S-17/2/Add.1 (November 2011). Available online at www.ohchr.org/Documents/.../A.HRC.S-17.2.Add.1_en.pdf
[9] United Nations Fact-Finding Mission on the Gaza Conflict (Hereinafter Gaza FFM). For details see Report of the United Nations Fact-Finding Mission on the Gaza Conflict, Human Rights in Palestine and Other Occupied Arab Territories, UN Doc. A/HRC/12/48 (25 September 2009) (Herafter GFFM). Available online at http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf
[10] United Nations bodies seem to use "fact finding mission", "inquiry commission" and "commission of inquiry" interchangeably.
[11] T. Frank& H.S. Fairley, Procedural Due Process in Human Rights Fact Finding by International Agencies, American Journal of International Law (1980) 308-345, at 345.
[12] T. Boutruche, Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice, 16(1) Journal of Conflict and Security Law (2011) 105-140, at113.
[13] See Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security, General Assembly Resolution, A/RES/46/59 (1991); United Nations Office of Legal Affairs, Handbook on the Peaceful Settlement of Disputes between States (1992) 24-33.
[14] See J.N, Agnieszka, The Max Planck Encyclopaedia of Public International Law."*Fact-finding" or "inquiry" is a recognized form of international dispute settlement through the process of elucidating facts, given that it is the varied perceptions of these facts that often gives rise to the dispute in the first place. The fact-finding process is frequently employed in addition to other diplomatic dispute resolution means such as negotiation, mediation, good offices, and conciliation as well as in arbitration and litigation. Fact-finding is a process distinct from other forms of dispute settlement in the sense that it is aimed primarily at clarifying the disputed facts through impartial investigation, which would then facilitate the parties' objective of identifying the final solution to the dispute. The fact-finding process may involve an impartial and neutral body carrying out the inquiry-either a body appointed ad hoc or a standing panel available at every stage of a dispute-or a joint body consisting of the representatives of the disputing parties, which conducts the fact-finding activities. Additionally, the same body charged with the establishment of the facts may be required by the parties to evaluate the facts, including a legal assessment of responsibility and relevant recommendations for the future resolution of the dispute. An example of such a model of quasi-judicial and quasi-mediatory body is the Dogger Bank International Commission of Inquiry where the mandate enshrined both the investigative and judicial functions.*"
[15] Frank & Fairley, *supra note* 11, at 308.
[16] International Bar Association: Human Rights Institute, Guidelines on International Human Rights Fact-Finding Visits and Reports (Lund-London Guidelines), 1 June 2009, available at: http://www.unhcr.org/refworld/docid/4a39f2fa2.html.
[17] Boutruche, *supra* note 12, at 106.
[18] For the purposes of this report no distinction will be made between "*fact-finding missions*" and "*commissions of inquiry*"; the terms are used interchangeably.
[19] See for example R. Goldstone, Reconsidering the Goldstone Report on Israel and war crimes, Washington Post (2 April 2011). In this OpEd Justice Goldstone stated: "*If I had known then what I know now, the Goldstone Report would have been a different document*". As a result Israel and the US Senate have called for the report to be annulled formally by the UN. Goldstone was apparently referring to investigations undertaken by Israel. To call for the annulment of the report on this ground is misplaced and purely political because, if these investigations drew conclusions that contradicted the key findings of Goldstone's report, this would not provide a basis for withdrawing the full report, since they are different mechanisms

subject to different levels of scrutiny. (As it happens, I do not believe that later reports contradicted the Goldstone report's findings. See Report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9 (available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.16.24_AUV.pdf, at paras 42-48), which severely questions the adequacy of later investigations.)
[20] See para. 424 for the closest reference in terms of violations of the normative standards: "*If proven, these credible allegations on both sides would amount to serious violations of international humanitarian and human rights law; many would amount to war crimes and crimes against humanity*."
[21]Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka (31 March 2001). Available online at http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf.
[22] *Ibid.,* at para 424 (Recommendation 1.B). See also Human Rights Watch, Sri Lanka: UN Chief Should Establish International Inquiry (25 April 2011). Available online at http://www.hrw.org/en/news/2011/04/25/sri-lanka-un-chief-should-establish-international-inquiry.To date no such commission has been established, see *Reuters*, U.N. chief says can't order probe into Sri Lanka war' (26 April 2011). Available online at http://uk.reuters.com/article/2011/04/26/uk-srilanka-un-idUKTRE73P01020110426. In regard to the recommendation that he establish an international investigation mechanism, the Secretary-General is advised that this will require host country (Sri Lankan) consent or a decision from member states through an appropriate intergovernmental forum.
[23] Frank & Fairley, *supra* note 11, at 345.
[24] Frank & Fairly, *supra* note 11, at 309.
[25] *Ibid.,* at 310.
[26] See Frank &Fairly, *supra* note 11, at 311: "*…5 indicators of procedural probity: (1) choice of subject (2) choice of fact finders, (3) terms of reference, (4) procedures of investigation, ad (5) utilization of product*".
[27] *Ibid.,* at 317.
[28] K. Del Mar, The International Court of Justice and Standards of Proof, in: Bannelier, Chistakis, Heathcote (eds), The ICJ and the Development of International law. The Lasting Impact of the Corfu Channel case (Routledge, 2011).
[29] Frank & Fairly, *supra* note 11, at 309.
[30] L. Sunga, How Can UN Special Procedures Sharpen ICC Fact Finding, The International Journal of Human Rights, 15:2, 187-205, at p. 187.
[31] *Ibid.*
[32] See also page 82 *infra* (Section IV-Conclusions)Standards are not abstract. They start and end with quality of information.
[33] Reconsidering Goldstone, *supra* note 19.
[34] DRC: Mapping human rights violations 1993-2003, Office of the High Commissioner for Human Rights (2009). Available online at http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf.
[35] Republic of Rwanda (Ministry of Foreign Affairs and Cooperation), Flawed and Dangerous Report Threatens Regional Stability:Rwanda, Press Statement (30 September 2010).
[36] *Ibid.*
[37] Geneva Call, Report of the 2009 Verification Mission to the Philippines to Investigate Allegations of Anti-Personnel Landmine Use by Moro Islamic Liberation Front" (June 2010). Available online at http://www.genevacall.org/resources/other-documents-studies/f-other-documents-studies/2001-2010/2010-GC-Report-Philippines-Web.pdf.
[38] *Ibid.,* at p15, § 9.
[39] *Ibid.*
[40] Boutruche, *supra* note 12, at 113.
[41] S. Vité, L'expertise au service du droit: comment la norme façonne le processus d'enquête dans la mise en œuvre des droits de l'homme et du droit des conflits armés in D Debons and others (eds), Katyn et la Suisse (Georg, Geneva 2009) at 259-64.
[42] "The less demanding standard of proof and most commonly used consists of comparing information that confirms a fact or violation with information that questions it. If the former proof is the most convincing, the fact will be considered "established".
[43] "The second standard of proof to assess evidence is the one used by the Inter-American Court of Human Rights in which the Court relies on evidence "capable of establishing the truth of the allegations in a convincing manner"."
[44] *Ibid,* at 114.
[45] B. Ramcharan, "Evidence", in: B. Ramcharan (ed), *International Law and Fact-Finding in the Field of Human Rights* (Martinus Nijhoff: The Hague,1982) 63-84, at 78.
[46] Law, Politics and Fact-Finding: Assessing the Impact of Human Rights Reports, 2(1) Journal of Human Rights Practice (2010) 166–176, at 167.
[47] K. Del Mar, *supra* note 28.
[48] J. Kokott, The burden of proof in comparative and international human rights law: civil and common law approaches with special reference to the American and German legal systems, (Martinus Nijhoff Publishers, 1998) at 19.
[49] K. M. Clermont & E. Sherwin, A Comparative View of Standards of Proof, American Journal of Comparative Law, vol. 50, 2002, at 251.

[50] *Ibid.*
[51] N. Combs, Fact Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions, Cambridge University Press, 2010, at 355.
[52] Woolmington v. Director of Public Prosecutions, AC 46 [1935] UKHL, p. 7., and is still cited today see Wang v. HL [2005] UKHL,1 WLR 661
[53] K. M. Clermont, Procedure magical number three: Psychological bases for standards of decision, Cornell Law Review, vol. 72 1987, p. 1119-1120. USA Cases : Leland v. Oregon, 343 U.S. 790, 795 , 1005, 1006 (1952), Holland v. United States, 348 U.S. 121, 138 , 136, 137 (1954), Speiser v. Randall, 357 U.S. 513 , 525-526, 1342 (1958), Coffin v. United States,156 U.S. 432 (1895).
[54] Jack B. Weinstein and al. Evidence, Foundation Press, New York, 1988, p. 19.Miller v. Minister of Pensions, [1947] 2 All ER 372
[55] Clermont & Sherwin, *supra* note 49, at 251.
[56] Calderon v. Thompson*,* 523 U.S. 528, 1998.Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990).
[57] Kokott, *supra* note 48, at 20.
[58] Clermont & Sherwin, *supra* note 49, at 251.
[59] *Ibid.,*at 256.
[60] Kokott, *supra* note 48, at 18.
[61] Article 355 Code de procédure civil. La loi ne demande pas compte aux juges des moyens par lesquels ils se sont convaincus, elle ne leur prescrit pas de règles desquelles ils doivent faire particulièrement dépendre la plénitude et la suffisance d'une preuve; elle leur prescrit de s'interroger eux-mêmes dans le silence et le recueillement et de chercher, dans la sincérité de leur conscience, quelle impression ont faite, sur leur raison, les preuves rapportées contre l'accusé, et les moyens de sa défense. La loi ne leur fait que cette seule question, qui renferme toute la mesure de leurs devoirs: Avez-vous une intime conviction ? Affaire Jean-Louis Muller, Cour d'Appel de Colmar, Affaire Xavier Philipe.

[62] J.M. Baissus, Common v. Continental: A reaction to Mr. Evan Whitton's1998 Murdoch Law School Adress 5 Murdoch U Elec J.L. no 4, at. 77.

[63] JD Bredin, Le doute et l'intime conviction, Revue Française de théorie juridique, vol. 23, 1996, at 27.
[64] G.F. Cole, C. E. Smith, Criminal Justice in America, Cengage Learning, 2007, at 70.
[65] I.A.K. Nyazee,Theories of Islamic Law: The Methodology of Ijtihad, Islamic Research Institute, publication no. 97, Islamabad, 1994, p. 38.
[66] Honorable Justice Umar Faruk Abdullahi*,* Inter Relations Between Common Law and Sharia Law, paper presented during the 20th Anniversary Conference of the International Society for the Reform of Criminal Law, held in Vancouver, Canada, from June 22 to June 26, 2007, at10.
[67] L. M. Holscher, Rizwana Mahmood, Borrowing From the Shariah: The Potential Uses of Procedural Islamic Law in the West, in From International Criminal Justice: Issues in a Global Perspective, Delbert Rounds, 2000, at 82.
[68] Nyazee, *supra* note 65, at80.
[69] O. Arabi, Studies in Modern Islamic Law and Jurisprudence, Kluwer Law International, the Hague, 2001, at 12.
[70] S.H. Amin, Islamic Law in the Contemporary World, Royston Limited, Glasgow, 1985, at 11.
[71] Arabi, *supra* note 69, at 15.
[72] O'Hara v Chief Constable of the Royal Ulster Constabulary; House of Lords, [1996], 12 December 1996.
[73] Mohammed-Holgate v. Duke [1984] A.C. 437
[74] In its fact-finding role, the Court will usually rely on domestic investigations to reach its judgment. If the State is unwilling or unable to conduct such inquiry or if there are great differences over facts between the parties, the ECHR will conduct its own fact-finding mission. See Philip Leach, Costas Peraskeva, GordanaUzelac, International Human Rights and Fact-Finding: An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights, Human Rights & Social Justice Research Institute, London Metropolitan University, 2009, p. 5.
[75] David J. Harris, Michael O'Boyle and Colin Warbrick, Law of the European Convention on Human Rights, Butterworths, 1995, p. 598.
[76] Denmark, Norway, Sweden and the Netherlands v. Greece (the Greek case), ECHR, Commission Report, 1969, § 30; Ireland, v, United Kingdom, ECHR, serie A no. 25, 1978, § 61; Aydin v. Turkey, ECHR, 1997, § 72*;* Mentes and Others v. Turkey, ECHR, 1997, § 66;*Kaya* v. Turkey*,* ECHR, 1998, § 38; Veznedaroglu v. Turkey, ECHR, 2000, § 30*;* Cakici v. Turkey, ECHR, 1999, § 92; Kilic v. Turkey, ECHR, 2000, § 64.
[77] Ribitsch v. Austria*,* ECHR, 1974, § 104.
[78] L. Loucaides, Standards of proof in proceedings under the European Convention on Human Rightsm in Présence du Droit Public et Des Droits de l'Homme: Mélanges offerts à Jacques Vélu, vol. 3, Bruylant, 1992, p. 1431-1443.
[79] Ireland v. United Kingdom*,supra* note 76, § 161;*Tas v. Turkey*, ECHR, 2000, § 66; Timurtas v. Turkey, ECHR, 2000, § 66; Tangiyeva v. Russia, ECHR, 2007, § 82*; Ergi v. Turkey,* ECHR, 1998, §81.
[80] Article 52 of the ICJ deals with reception of evidence by the court but nothing further.
[81] The three standards are: "*degree of certainty*", "*no room for reasonable doubt*" and "*fall short of conclusive evidence*".Corfu Channel case, (UK v. Albania), Merits Judgment, ICJ Reports 1949, p. 4, p. 177, Del Mar, *supra* note 28, at. 21.
[82] Oil Platforms (Islamic Republic of Iran v. United States of America)*,* Judgment, 2001, ICJ Reports, 161 p. 189, § 57.
[83] Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras and Nicaragua Intervening), ICJ Reports 1992, at 351, 506 (§ 248).

[84] Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia). ICJ Reports 2002, p. 625 Judgment, p. 662, § 121.
[85] Case Concerning Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1986, at 14, 85, §158.
[86] Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgement, ICJ Reports 2005, at 168, 201, 205, 213,paras. 62 and 106.
[87] Case concerning the Land, Island and Maritime Frontier Dispute, *supra* note 83, p. 456,para. 155.
[88] Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equitarial Guinea intervening), Judgment, ICJ Reports 2001, p. 40, Separate Opinion of Judge Kooijmans, pp. 313. 325, 374, 389, paras 157, 195, 268, 327, 369; *South West Africa (Ethiopia v. South Africa and Liberia v, South Africa*) ICJ Reports 1962, p. 319, Joint Dissenting Opinion of Sir Percy Spender and and Sir Gerald Fitzmaurice, p. 473-474.
[89] South West Africa, Joint Dissenting Opinion of Sir Percy Sender and Sir Gerald Fitzmaurice, *op. cit*, note 40, p. 511.
[90] Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), ICJ Reports 1962, p. 6 Judgment, pp. 21, 58 ; Case Conserning the Aerial Incident of July 27, 1955 (Israel v. Bulgaria), ICJ Reports 1959, p. 127, Joint Dissenting Opinion of Judges Sir Hersch Lauterpacht, Wellingtom Koo and Sir Percy Spender, p. 162.
[91] Case Concerning the Temple of Preah Vihear, *supra* note 90, p. 55.
[92] Oil Platforms, Separate Opinion of Judge Kooijmans, *supra* note 82, p. 265, § 63.
[93] Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan, *supra* note 84, p. 677, § 120.
[94] *Ibid.,*p. 678, § 124.
[95] Case concerning Kasikili/Sedudu Island (Botswana/Namibia), Judgment, ICJ Reports 1999, p. 1045, p. 1106, § 99.
[96] Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Separate Opinion of Judge Oda, p. 244, para. 76.
[97] Application of the convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Merits, Judgment of 26 February 2007, 76, at § 209.
[98] Del Mar, s*upra* note 28, at 3.
[99] *Ibid.*
[100] *Ibid.,* p. 3 and 16.
[101] Del Mar, *supra* note 28, at 4, Northern Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, ICJ Reports 1969, p. 3, p. 22, para. 18 and 20; Land and Maritime Boundary Between Cameroun and Nigeria, *supra* note 40, p. 359,para. 84,
[102] Case Concerning the Land, Island and Maritime Frontier Dispute, *supra* note 83, p. 351, p. 506 para. 248.
[103] Del Mar, *supra* note 28, at 6.
[104] See for example the high standard applied in Application of the convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 97.
[105] *Oil Platform,* Judge Higgins, pp. 233-234, paras. 30 and 33, and Judge Buergenthal, p. 286, para.41, *supra* note 82, Application of the convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 97, para. 209.
[106] S/RES/827(1993).
[107] *Ibid.,* Article 1.
[108] ICTY, Criminal Proceedings, consulted on March 29th 2011, available at: http://www.icty.org/sid/146.
[109] Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, (IT/32/Rev.45), Amended 8 December 2010, p. 89, rule 87(A).
[110] Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Amended 9 February 2010, at 101, rule 87(A).
[111] Rules of Procedure and Evidence of the Special Court for Sierra Leone, Amended 28 May 2010, at 45, Rule 87(A): "After presentation of closing arguments, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private. A finding of guilty may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt. For specific application see Prosecutor v. Moinina Fofana and Allieu Kondewa, Judgment, SCSL, (**04-14-A),** Appeal Chamber, 28 May 2008, at 25, paras. 61 and 63, and at 37,para. 97.
[112] Rules of Procedure and Evidence of the Special Tribunal for Lebanon, Amended 29 November 2010, p. 146, Rule 148(A): "*When both Parties have completed their presentation of the case, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private. A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt*".
[113] Article 66§3 ICC Statute: in order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.
[114] Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/Conf.183/9, as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999, entered into force 1 July 2002, (hereafter the Rome Statute), article 53§1)a)b)c) and Rules of Procedure and Evidence of the International Criminal Court, (ICC-ASP/1/3 (Part.II-A), 9 September 2002, article 48.
[115] *Ibid*., Article 19§1
[116] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC, (01/09), Pre-Trial Chamber II, 31 March 2010, p. 10.
[117] Rome Statute, *supra* note 1, article 13: "*The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:(a) A situation in which one or more of such crimes appears to have been committed is referred to*

the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15".
[118] *Ibid.,* article 58§1b.
[119] Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09-3 (4 March 2009) para. 77.
[120] Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09-3 (4 March 2009) para. 94-97.
[121] *Ibid.,* para 100-108.
[122] *Ibid.,* para. 158.
[123] *Ibid.,*para 159.
[124] *Ibid.,*para 165, 172, 179, 181, 201 and 204-206.
[125] Rome Statute, Article 58(1).
[126]Al Bashir, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09-95 (12 July 2010), para 23-40.
[127] *Ibid*., para 11-17.
[128] Rome Statute*,* Article 58§7
[129] Prosecutor v. William Samoeiruto, Henry Kiprono Kosgey and Jushua Arap Sang, ICC, (01/09-01/11), Pre-Trial Chamber II, 8 March 2011, at 6.
[130] *Ibid.,*at 8.
[131] *Ibid*., at 5. See also Rome Statute, Article 61§7.
[132] United Nations Fact-Finding Mission on the Gaza Conflict.
[133] Special Rapporteur on torture."*The visit did not permit direct examination of the cases but the Special Rapporteur found them sufficiently substantiated and consistent with each other and with previous allegations to submit them to the Government of Indonesia for its observations*."*Situation of human rights in East Timor,* UN Doc. A/54/660.
[134] The United Nations Commission on the Truth for El Salvador.
[135] The Independent International Fact-Finding Mission on the Conflict in Georgia.
[136] Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of Congo between March 1993 and June 2003; International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya.
[137] OHCHR Mission to Lebanon and Israel, 2006, UN Doc.
[138] See Darfur Inquiry, *supra* note 2. "*The Commission adopted an approach proper to a judicial body*." See also International Commission of Inquiry for Burundi, "*The Commission was given no judicial powers, and its mission was one of fact-finding regarding violations and the possibility of making broad recommendations. However, the Commission adopted (as far as possible) judicial standards not only to give its eventual conclusions a solid base, but also in order to amass evidence that could be of use for any later judicial proceedings.*"
[139] Eritrea-Ethiopia Claims Commission; The United Nations Commission on the Truth for El Salvador; MONUC, Enquête spéciale sur les événements de mars 2007. At: http://www.ohchr.org/Documents/Countries/evenementmars2007Kinshasa.pdf.
[140] International Fact Finding Mission to Investigate Violations of international law, including international humanitarian law and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance. UN Doc.
[141] International Commission of Inquiry on Darfur, *supra note*2.
[142] Final Report of the Commission of Experts Established Pursuant to Security Council resolution 7*80* (1992), 27 May 1994, (S/1994/674).
[143] *Ibid.,* at. 13, §§ 43-44.
[144]*Ibid..,* at 45, §§ 188-191.
[145] *Ibid.,* at 37, §153: Allegedly 52, 811 individuals died or disappeared.
[146] *Ibid.,* at 41, p. 52 §170, 171, 224, and §§ 228-230.
[147] *Ibid.,* at 67, § 293 -297.
[148] *Ibid.,* at. 43, § 182.
[149] i*bid*, at. 33, § 129.
[150] *Ibid.,* at 47, §§ 201-202.
[151] *Ibid*., at 48, § 205.
[152] *Ibid*., at 49, § 209.
[153] *Ibid*., at 35, § 142.
[154] Chapter V Subsidiary organs of the Security Council established or continuing during the period 1993 to 1995, available online at:http://www.un.org/en/sc/repertoire/93-95/93-95_05.pdf#page=4.
[155] Although the Security Council adopted Resolution 827 deciding to establish the ICTY on 25 May 1993, the Commission of Experts continued to operate and gather information until April 1994.
[156] Sunga, *supra* note 30, at 192.
[157] Sunga, *supra* note 30, at 193.

[158] *Ibid.*
[159]Truth Commission: El Salvador, Truth Commissions Digital Collection, United States Institute of Peace. Available at: http://www.usip.org/publications/truth-commission-el-salvador, accessed 12 December 2010. Hereinafter UNCTES Report.
[160] *Ibid.*, at 18.
[161] *Ibid.,* at 11.
[162] The commission admits that *"it could be argued that, since the Commission's investigation methodology does not meet the normal requirements of due process, the report should not name the people whom the Commission considers to be implicated in specific acts of violence. The Commission believes it had no alternative to do so…the whole truth cannot be told without naming names...not to name names would be to reinforce the very impunity to which the Parties instructed the Commission to put an end.*" *Ibid.,*at 25.
[163] *Ibid.,* at 24.
[164] *Ibid.,* at 120.
[165] *Ibid.*
[166] *Ibid.,* at 53.
[167] *Ibid.,* at 24.
[168] See Truth Commission: El Salvador, Truth Commissions Digital Collection, United States Institute of Peace; available at http://www.usip.org/publications/truth-commission-el-salvador, accessed 12 December 2010.
[169] *Ibid.*
[170] *Ibid.*
[171] See Inter-American Commission on Human Rights, Monsignor Romero v. El Salvador, at 159.
[172] Trial Watch, *Track Impunity Always (TRIAL).*At: http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profile.html?tx_jbtrial_pi2[tab]=facts&tx_jbtrial_pi2[profile]=alfredo_cristiani-burkard_805&cHash=34235331e5.
[173] *Ibid.*
[174] Truth Commission: El Salvador, Truth Commissions Digital Collection, United States Institute of Peace. Available at:http://www.usip.org/publications/truth-commission-el-salvador,accessed 12 December 2010.
[175] ICID Report, *supra* note 2.
[176] *Ibid.,* at para630-646.
[177] *Ibid.,* at 160, para 639.
[178] *Ibid.,* at 160, para. 640.
[179] *Ibid.*
[180] *Ibid.,* at 161-162, §§ 643-646.
[181] *Ibid.,* at 11, § 14.
[182] *Ibid.,* at § 15.
[183] *Ibid.*
[184] *Ibid.,*at 79, § 293.
[185] Security Council Resolution 1593 (2005).
[186] See: http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/.
[187] GFFM, *supra* note 9.
[188] Human Rights Council, The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip, Resolution S-9/1, 12 January 2009, A/HRC/S-9\L.1.
[189] GFFM, *supra* note 9, § 5-7.
[190] *Ibid.*, at 6, § 8.
[191] *Ibid.*, at 10, § 28.
[192] *Ibid.*, at 10, § 30.
[193] *Ibid.*, at 13, § 26.
[194] *Ibid.*, at 12, § 34.
[195] *Ibid.*, at 14, § 39.
[196] *Ibid.*, at 14, § 41.
[197] *Ibid.*, at 16, § 44. The reports noted that the Israeli forces disregarded the principle of having military objectives.
[198] *Ibid.*, at 14, § 39.
[199] *Ibid.,* at 24, § 55 and 72.
[200] *Ibid.*, p. 16, § 46 .
[201] *Ibid.*, p. 22, § 86-91.
[202] *Ibid.*, p. 29, § 92.
[203] *Ibid.*, p. 21, § 61.
[204] Goldstone, Reconsidering Goldstone, *supra* note 19. See also A. Eldar, What exactly did Goldstone "*retract*" from his report on Gaza? Ha'aretz, 12 April 2011, available at: http://www.haaretz.com/print-edition/features/what-exactly-did-goldstone-retract-from-his-report-on-gaza-1.355454.

[205] GFFM, *supra* note 9, at 25, § 76.

[206] *Ibid.,* at 32, § 108.

[207] *Ibid.,* at 7, § 17.

[208] *Ibid.,* at 9, § 24. Emphasis added.

[209] *Ibid.*, at 143, para. § 465; 153, § 501; 164, § 509; 173, §. 593; 205, §. 721; 211, § 739; 250, § 214; 220, § 775; 227, § 796; 256, § 918; 276, § 1007; 375, §1348; 383, §1372; and 510, § 1635.

[210] Report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution, UN Doc. A/HRC/16/24 (18 March 2011); hereafter CIE. Available online at: http://www2.ohchr.org/ english/bodies/hrcouncil/docs/16session/A.HRC.16.24_AUV.pdf.

[211] *Ibid.,* §§40-46.

[212] *Ibid.,* § 31.

[213] *Ibid.,* § 27.

[214] Goldstone*, supra* note 19.

[215] *Ibid.,* § 79.

[216] *Supra* note 4.

[217] Letter dated 28 October 2009 from the Secretary-General addressed to the President of the Security Council, UN Doc S/2009/556.

[218] *Supra* note 24, at 2. See also 39-41 at §§ 169-200. It is important to note that the Commission also found that, in the aftermath of the abuses of the 28 September, the Guinean authorities "*deliberately embarked on destruction of the traces of the violations committed, with the aim of concealing the facts: cleaning of the stadium, removal of the bodies of the victims of executions, burial in mass graves, denial of medical care to victims, deliberate alteration of medical records and military take-over of hospitals and morgues*". The Commission therefore concluded that the number of victims of violations is probably higher.

[219] *Ibid.*, §§ 53-168.

[220] *Supra* note 4, §180.

[221] *Ibid.,* § 215.

[222] Prima facie evidence against President Moussa Dadis Camara and Lieutenant Aboubacar Chérif Diakité (alias Toumba).*Ibid.,* § 216, and § 229.

[223] Sufficient grounds to assume direct and command responsibility of Commander Moussa Thégboro Camara. *Ibid.,*at 236.

[224] Among others, Captain Claude Pivi (alias Coplan), Minister with responsibility for the Presidential Guard, and Colonel Abdulaye Chérif Diaby, Minister of Health. *Ibid.,* § 243.

[225] Second Lieutenant Marcel Koivogui, aide-de-camp to Lieutenant Toumba, and SankaraKaba, the President's chauffeur, particularly regarding their direct involvement in the events where they were personally identified by numerous witnesses.; the Minister of Public Security, Major-General Mamadouba Toto Camara, and officials of the national police, particularly as regards police involvement in the events; Brigadier-General Sékouba Konaté, Minister of Defence, and army officials, including those of the national gendarmerie and those in charge of the military camps, particularly as regards the involvement of the gendarmes in the events and the involvement of the gendarmes and the military in moving the bodies and in the other events that took place in the Samory Touré and Kundara camps; Militia officials, particularly as regards their role in the events of 28 September and the days that followed; FodébaIsto Keira, Minister of Youth and Sports and Director of the stadium, particularly as regards the cleanup of the stadium and subsequent destruction of evidence; Doctor Fatou Sikhe Camara, Director of Donka Hospital, particularly as regards the military takeover of her hospital and the various measures taken to conceal medical facts; Civilian CNDD officials, particularly as regards the concealment of the facts. *Ibid,* § 252.

[226] 'ICC Prosecutor confirms situation in Guinea under examination', ICC-OTP-20091014-PR464 (14 October 2009). At: http://www.icccpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/guinea/icc%20prosecutor%20confirms%20situation%20in%20guinea%20under%20examination.

[227] Guinea Minister visits the ICC - Prosecutor Requests Information on National Investigations into 28 September Violence', ICC-OTP-20091021-PR468 (21 October 2009). At:http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/ office%20of%20the%20prosecutor/comm%20and%20ref/guinea/guinea%20minister%20visits%20the%20icc%20_%20prosecutor%20requests%20information%20on%20national%20investigations%20into%20 28.

[228] Human Rights Watch remains concerned that "*there has been scant information regarding progress on the investigation and no evidence of government efforts to locate the more than 100 bodies believed to have been disposed of secretly by the security forces*". See Human Rights Watch, 'Guinea: One Year On, No Justice for Bloody Stadium Massacre', 27 September 2010 At:http://www.hrw.org/en/news/2010/09/26/guinea-one-year-no-justice-bloody-stadium-massacre.

[229]BBC News, Guinea's Alpha Conde confirmed presidential poll winner (3 December 2010). Available at:http://www.bbc.co.uk/news/world-africa-11906860.

[230] Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003 (DRC Mapping Report), August 2010.

[231] *Ibid.,*at 2.
[232] *Ibid.*.
[233] *Ibid.,*at 4.
[234] It is important to note that the team applied a gravity threshold to select the cases that were included in the final report. See *Ibid.,* §§ 4-6.
[235] *Ibid.*., §§ 23-24.
[236] *Ibid.*., §§ 25-26.
[237] *Ibid.,* §§. 27-33 (Executive Summary).
[238] *Ibid.,* §§ 35-36.
[239] *Ibid.,* §§ paras 37-39.
[240] *Ibid.,* §§ paras 40-42.
[241] *Ibid.,* §§ paras 43-53.
[242] *Ibid.,* §§ paras 54-84.
[243] Statement by the Government of Rwanda on UN Report on DRC, 1st October 2010. Available at http://www.minaffet.gov.rw/images/stories/press%20statement.pdf
[244] BBC News, Rwanda threatens UN over DR Congo 'genocide' report (28 August 2010). Available online at http://www.bbc.co.uk/news/world-africa-11122650.
[245] *Supra* note 230, § 88.
[246] *Supra* note 7.
[247] *Ibid.,* at 2.
[248] Security Council Resolution 1970.
[249] *Supra* note 7, summarized at pp 2-8.
[250] *Ibid.,* §§ 82-99.
[251] *Ibid.,* §§ 121-126
[252] *Ibid.,* §§ 100-120.
[253] *Ibid.,* §§ 140-154.
[254] *Ibid,* §§ 155-189.
[255] *Ibid,* at 3 and paras 127-129.
[256] *Ibid.,* at p7.
[257] *Ibid.,* at 3-8.
[258] *Ibid.,* at 7 (para 5).
[259] *Ibid.*
[260] *Ibid.,* at 8 (para 6).
[261] *Ibid.,* at 2 (para 6).
[262] *Ibid.*
[263] *Ibid.*
[264] *Ibid.,* at para. 10.
[265] *Ibid.,* at 2 (para 2).
[266] *Ibid.*
[267] *Ibid.*
[268] *Supra* note 8.
[269] *Ibid.,* § 4.
[270] *Ibid.,* § 5.
[271] *Ibid.,* at p1.
[272] *Ibid.,* § 85.
[273] *Ibid.,* § 87.
[274] *Ibid.,* §§ 88-89.
[275] *Ibid.,* § 90.
[276] *Ibid.,* § 94.
[277] *Ibid.,* § 95.
[278] *Ibid.,* § 96.
[279] *Ibid.,* § 92 Emphasis Added
[280] *Ibid.,* § 99.
[281] *Ibid.,* § 108.
[282] *Ibid.,* § 109.
[283] *Ibid.,* §§ 5-6.
[284] *Ibid.,* at p1. Emphasis Added
[285] *Ibid.* Emphasis Added.
[286] *Ibid.,* § 92. Emphasis added.
[287] *Ibid.* Emphasis Added.
[288] *Ibid.,* § 94. Emphasis added.
[289] *Ibid.,* § 99. Emphasis added

[290] Resolution adopted by the Human Rights Council S-18/1: The human rights situation in the Syrian Arab Republic, 2 December 2011. UN Doc A/HRC/RES/S-18/1, at operative paragraph 10.
[291] K. Roth, Gaza: the stain remains on Israel's war record, *The Guardian* (April 5 2011) Available at: http://www.guardian.co.uk/commentisfree/2011/apr/05/gaza-stain-remains-israel-war-record.
[292] *Supra* note 37.
[293] Article 3, Geneva Call Deed of Commitmement.DOC available online at www.genevacall.org .
[294] *Ibid.,*at 15.
[295] *Ibid.,*at 39-40, paras 88-109.
[296] *Ibid.,*at 37.
[297] *Ibid.,* at 15, para 9.
[298] They go on to provide an example. "*A letter of concern sent to the authorities may only need credible second hand reports of human rights violations. In comparison with a UN agency looking into torture which may require a more substantial degree of persuasiveness. However a major report meant for publication would require more substantial evidence on violations.*"
[299] Security Council Resolution 1960 (2010), at para 3.
[300] For example see Doc A/65/820 S/2011/250 at pp 52-55 which lists 61 Parties in Afghanistan, the Central African Republic, Chad, Democratic Republic of Congo, Iraq, Myanmar, Nepal, Somalia, Sudan, Southern Sudan, Darfur, Columbia, Philippines, Sri Lanka, Uganda and Yemen, that "*recruit or use children, kill or maim children and/or commit rape and other forms of sexual violence against children in situations of armed conflict not on the agenda of the Security Council, or in other situations of concern, bearing in mind other violations and abuses committed against children."*
[301] MRM Guidelines and Field Manual: Monitoring and Reporting Mechanism (MRM) on Grave Violations Against Children in Situations of Armed Conflict, at page 10.
[302] Del Mar, *supra* note 28.
[303] LCI, *supra* 7.
[304] *Ibid.*
[305] *Ibid.,* at para 10.
[306] *Ibid.,* at 2 (para 2).
[307] Terms taken from the Informal Working Group of the Security Council on General Issues of Sanctions (S/2006/997), section V, Methodological standards for reports of sanctions monitoring mechanisms (criteria and best practices) at para. 26: "*Monitoring mechanisms should, where appropriate, state their methodological standards at the outset of each report and adhere to those standards*."
[308] Combs, *supra* note 51*,* at 356.
[309] Del Mar, *supra* note 28.
[310] International Institute for Democracy and Electoral Assistance, Reconciliation After Violent Conflict, Policy summary, 2003 at 22.
[311] Frank & Fairly, *supra* note 11, at 309.
[312] The Palmer Report, which addressed the Gaza Flotilla incident, illustrates how consensus building may sideline legal adjudication. The report acknowledged that its purpose was to prevent similar events and resolve the diplomatic crisis. It deemed the Gaza blockade legal, although all previous UN reports and assessments had declared the blockade illegal. This shows how some investigative mechanisms prioritize other interests over humanitarian concerns, either sidelining the issue of standard of proof or setting a standard that is impossibly high. See Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, September 2011. At: http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf.
[313] Although such an approach would be open to the criticism that this in a form a social engineering.
[314] Frank & Fairly, *supra* note 11, at 311.
[315] An aspect stressed by those involved in the Darfur Commission.
[316] Evans, Othus and Spurrier, Distributions of Interest for Quantifying Reasonable Doubt and Their Applications, available online at: http://www.valpo.edu/mcs/pdf/ReasonableDoubtFinal.pdf, at 2.