

**Practitioners in Human Rights Fact-Finding and
International Criminal Prosecutions Propose Practical Steps to
Bridge The Hague – Geneva Divide**

Introduction to the Project

The first major trials under international criminal law (ICL) were held at the end of World War II in Nuremberg and Tokyo, but thereafter international criminal justice advanced little during the politically contentious Cold War years. It was revived in 1993 when the UN Security Council created the International Criminal Tribunal for the former Yugoslavia (ICTY) and based it in The Hague. The following year the UN Security Council established the International Criminal Tribunal for Rwanda (ICTR), and provided for its first instance trials to be held in Arusha, Tanzania, but for its appeals to be heard in The Hague at an Appeals Chamber that it would share with the ICTY. Even more significantly, The Hague was selected as the seat of the permanent International Criminal Court (ICC), established in July 2002. This “City of Peace and Justice” has also been home to the Permanent Court of Arbitration since its establishment in 1899, the International Court of Justice (formerly the Permanent International Court of Justice created in 1919), and several temporary international, hybrid, or mixed tribunals mandated to prosecute certain crimes committed in specific countries.

Geneva has played an equally pre-eminent role in international law and diplomacy, having been the seat of the League of Nations from 1919, and since 1945, the seat of the European headquarters of the United Nations. It has also functioned as the hub of international human rights promotion and protection through the UN Commission on Human Rights which was established in 1946 to draft the Universal Declaration of Human Rights and which led the development, elaboration and implementation of international human rights law (IHRL) in the ensuing decades. The UN Human Rights Council (HRC), composed of 47 member States, succeeded the UN Commission on Human Rights in 2005 as the world’s premier forum for monitoring, investigation and public reporting on human rights issues. Following the Vienna World Conference on Human Rights in 1993, the Office of the High Commissioner for Human Rights (OHCHR) was established in Geneva and became the UN’s human rights secretariat. Geneva has also been the home of the International Committee of the Red Cross (ICRC) which since 1864 has spurred the development of

international humanitarian law (IHL). The ICRC has held the leading role in promoting compliance with the Geneva Conventions, their Additional Protocols and customary international law as to the conduct of hostilities and the protection of noncombatants.

Over the years, The Hague and Geneva have come to be seen as two separate legal realms, with differing but related objectives—one seeking to adjudge individual responsibility, the other seeking to further the respect of a wide range of legal norms by states and non-state actors. Of course, not all work for the enforcement of ICL is conducted in The Hague, nor all of the work for compliance with IHRL and IHL conducted in Geneva. The UN has joined in establishing hybrid courts to prosecute cases under ICL in Sierra Leone and Cambodia. There has been an increasing recognition of the importance of prosecutions as close as possible to the victims and the affected communities. Under the principle of “complementarity” on which the ICC was founded, the primary obligation to investigate and prosecute is at the national level. Even in places where the ICC does not have jurisdiction, and international, hybrid, or mixed courts have been established, national prosecutors have remained responsible for the vast majority of cases. Similarly, compliance with IHRL has been significantly furthered by regional human rights courts, and regional and national human rights commissions. The ICRC has looked to authorities of States to prosecute grave breaches and other serious violations of IHL. Yet in ways that replicate “The Hague – Geneva divide” the processes for enforcement and compliance with ICL, IHRL, and IHL have separately developed at the regional and national level.

Recently these worlds have increasingly intersected as the HRC in Geneva, and the UN Security Council (UNSC) in New York, have established human rights inquiries to investigate and report on situations of mass violence. They have mandated these inquiries to make findings as to whether there have been serious violations of international human rights law (IHRL), and for many of the inquiries to determine if the conduct violated IHL and if it constituted genocide, crimes against humanity, or war crimes under ICL. For some inquiries they have called for identification of individuals who may have been responsible and for recommendations of measures to end impunity, restore the rule of law, and promote national reconciliation. Several human rights inquiries have found that international crimes were perpetrated and have collected information concerning the individuals reasonably believed to be responsible. Some have recommended referral of situations to the ICC, or the creation of other criminal accountability mechanisms.

It was thus increasingly likely that these situations of mass violence will become “crime scenes” that would be investigated by international tribunals or national courts. While human rights reporting and criminal prosecutions are in several respects different processes, it is essential that human rights inquiries and criminal investigations that seek witnesses to the same events and gather information in the same places conduct their work in ways that maximize

benefits and minimize harms to both sides. Yet, The Hague and Geneva-led processes have all too often remained isolated from each other.

The UN General Assembly (UNGA) very recently recognized the need for more effective efforts to further criminal accountability, even in a situation where a human rights inquiry has been very active. On 21 December 2016, the UNGA adopted A/RES/71/148 that created an *International, Impartial, Independent Mechanism (IIIM) to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*. The UNGA resolution mandated the IIIM to pursue “practical steps...to ensure justice for all victims” by cooperating with the HRC-created Commission of Inquiry “to collect, consolidate, preserve and analyze evidence...to prepare files in order to facilitate and expedite fair and independent criminal proceedings in...courts or tribunals that have or may in the future have jurisdiction over these crimes....”

The need for such cooperation had been recognized earlier by The Hague Institute for Global Justice (Institute). In 2014, it launched a research project entitled “Fact-Finding to Evidence” looking for ways that human rights fact-finders and criminal prosecutors could more effectively interact with each other without compromising their respective mandates. The project identified numerous “challenges, tensions and potentialities” and recommended that institutional actors and career professionals from both sides be brought together to discuss and develop approaches that would foster better “methodological and operational cohesion.” In late 2015, the Simon-Skjoldt Center for the Prevention of Genocide at the US Holocaust Memorial Museum (Center) joined the Institute in implementing this recommendation by recruiting and sponsoring a series of meetings of a representative group of practitioners with past and present institutional affiliations and “hands-on” experience on both sides of the “The Hague – Geneva divide.” This consultative process also received major financial support from the Humanity United Foundation.

In selecting this *Group of Practitioners in Fact-Finding Accountability*, the convenors sought in particular individuals who have been involved in recent efforts to improve practices within the separate processes, including projects to strengthen human rights fact-finding, monitoring and reporting; to identify and implement emerging “best practices” in the investigation and prosecution of international crimes; and to develop standards for documentation of human rights violations and atrocity crimes by civil society and humanitarian actors.

This group of practitioners eventually totalled twenty-seven individuals. They were engaged through personal visits, email communications, and teleconferences to refine a list of issues on which it might be possible to achieve consensus solutions that would benefit both human rights inquiries and international criminal investigations. The group identified matters that required further research and the necessary work was completed. The practitioners convened in person

for three conferences to discuss, deliberate, and draft recommendations -- on 20-21 April 2016 at The Hague Institute for Global Justice in the Netherlands, on 25-26 July 2016 at the Geneva Academy of International Humanitarian Law and Human Rights in Switzerland, and on 25-26 October 2016 at the Rockefeller Foundation's Bellagio Center in Italy.

The resulting recommendations focus on strengthening human rights inquiries because they are most likely to be "first to the scene," and may have access to sites, witnesses, documents and other information that may later be lost or unavailable. International criminal investigators may follow after months or years, or perhaps never if there is no tribunal with jurisdiction. Indeed, it is national prosecutors who may be next to the scene, and they may also take several years to arrive. The authorities of the territorial state that suffered the mass violence will need time to develop the necessary capacity to conduct independent investigations and trials. Other states will generally not claim jurisdiction until they can identify a possible perpetrator who has settled within their borders.

There may also be situations where human rights inquiries will need the assistance of criminal investigators and prosecutors to fulfill their mandates. This can be accomplished by implementation of the information sharing and liaison proposals that are contained in the recommendations. But most importantly, it can be achieved by adoption of a "win-win" approach by both human rights fact-finders and criminal prosecutors. It is in this spirit that the group of twenty-seven practitioners convened, discussed, and unanimously proposed practical steps to "bridge The Hague – Geneva divide."