

**Bridging The Hague – Geneva Divide:  
Recommendations to Maximize Benefit and Minimize Harm for  
Human Rights Inquiries and Criminal Investigations at the  
Same Scenes of Mass Violence**

*Preamble*

*Acknowledging* that Commissions of Inquiry and Fact-Finding Missions (CoIs and FFMs, here together referred to as Human Rights Inquiries or HRIs) are increasingly established in response to the perpetration of mass atrocities and with the expectation that they will contribute to the prevention of impunity for these acts,

*Recognizing* that while HRIs are expressly mandated to make findings as to whether there have been violations or abuses under international human rights law (IHRL), they are often also asked to determine whether the same acts violate international humanitarian law (IHL) and international criminal law (ICL), to identify individuals who are suspected of responsibility, and to recommend measures to promote accountability,

*Noting* that a wealth of guidance for improving the effectiveness of HRIs has been developed by many organizations and groups, including the *Minnesota Protocol on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*; the *Istanbul Protocol on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; the *International Protocol on the Investigation of Sexual Violence in Conflict*; the *London-Lund Guidelines on International Human Rights Fact-Finding*; the *Siracusa Guidelines on International, Regional and National Fact-Finding Bodies*; the *HPCR Advanced Practitioners Handbook for Commissions of Inquiry*; the *Handbook on Civil Society Documentation of Serious Human Rights Violations*; and the verification handbook and manual of *Guidance and Practice for Commissions of Inquiry and Fact-Finding Missions* published by the United Nations Office of the High Commissioner for Human Rights (OHCHR),

*Observing* that while the fundamentals of information gathering are similar, the nature, scope, and purpose of HRIs differ from other accountability mechanisms, and that none of the previously cited guidance has been sufficiently directed toward assisting them in resolving issues at the intersection of IHRL, IHL and ICL,

*Finding* that to be fully effective in fulfilling their mandates in situations of mass violence, including preventing impunity for the violations that they have documented, HRIs require additional resources, administrative support, technical expertise and practical guidance,

*And concluding* that this can be efficiently achieved through the implementation of the recommendations in these areas: provision of administrative, budgetary and human resources; adoption of guidance for the resolution of legal issues; and promotion of best practices for making findings on factual matters.

### ***I. Recommendations on Administrative, Budgetary & Personnel Matters***

The necessary resources, expertise, and assistance could best be provided to HRIs through the implementation of the following res:

1. Support Team. *Establish* a small, specialized Support Team (ST) in the Office of the High Commissioner for Human Rights (OHCHR). The ST would assist in the prompt recruitment and deployment of effective and well-resourced teams as required for HRIs. It would serve as a repository of institutional memory and achieve efficiencies by standardizing the preparatory processes and drafting investigative plans for each HRI. The ST would support the HRIs in the following areas: budget preparation, administration, staff recruitment and training, identification of experts, and information management. It would also include capacity for the management of information and archives, including for HRIs that have completed their work, and for liaison between HRIs and UN bodies and other entities in order to make and respond to requests for information and other assistance.
2. Budgetary and Human Resources. *Provide* each HRI with the budgetary and human resources necessary to carry out its work in a timely and effective manner. To this end the ST should seek a cooperative understanding with the relevant UN bodies for the accelerated preparation, consideration, and approval of budgets. The regular budget of the OHCHR should include an emergency fund that would enable the deployment by HRIs of quick-reaction teams to collect vital information when it might otherwise be lost during the period of budgetary consideration.
3. Information Technology. *Equip* each HRI with sufficient expertise and technical capacity necessary to access, analyze, and store relevant information. Given the volume of relevant digital material available from open sources this will generally require the retention of an information specialist with the skills to capture online videos and the associated metadata and render expert opinions as to time and place of origin and possible alterations.

4. Investigative Expertise. *Include* on the deployed teams persons experienced in situations similar to those for which the HRI will need to make findings. When confronted by mass atrocities, this means hiring persons who have been successful in interviewing victims of such situations, including children and those who have suffered sexual and gender-based violence, and in responding sensitively to psycho-social trauma. While human rights inquiries differ from criminal investigations, fact-finding in situations of deadly violence may benefit from the participation of persons experienced in criminal investigative techniques and forensic analysis.
5. Experienced Legal Counsel. *Recruit* legal expert(s) with substantial experience in all relevant areas of law as part of the staff of each HRI. This is essential when the mandate requires determinations as to whether violations are crimes, findings as to criminal responsibility, or recommendations of measures to promote accountability.
6. Immediately Deployable Experts. *Develop* and *maintain* relationships with UN and treaty bodies and with independent organizations that can provide the immediately deployable experts who could most effectively assist in situations where HRIs are likely to be created.
7. Information Management and Information Sharing. *Facilitate* the processes for obtaining and sharing information from other UN bodies and outside entities and for responding to requests for information sharing from national and international authorities. To this end, the ST should include the capacity to manage information, including that of past HRIs, and to assist with requests for information and assistance between HRIs and UN offices and missions, as well as outside entities.
8. Use of Documents and Data. *Allow* and *encourage* HRIs to take custody and make appropriate use of relevant non-testimonial information gathered by third parties unless it is determined that the information was obtained in a manner that would undermine the integrity of the fact-finding process. Make all reasonable efforts to gather and preserve such evidence consistent with norms applicable to criminal proceedings.
9. Witness Protection. *Negotiate* arrangements that would permit referral of high-value, at-risk witnesses to the protection services of willing States. *Encourage* the development of a program, managed by independent experts, to raise and distribute funds to support the temporary protection and subsistence of such witnesses when the threat against them cannot be otherwise mitigated.

10. Security and Logistics. *Ensure* that each HRI is provided with security, logistics and other necessary support. To this end the ST should develop processes for requesting the required assistance from relevant UN entities, consistent with the frequent need for prompt action.

## ***II. Recommendations for Resolution of Legal Issues***

The ST should prepare guidelines for HRIs to assist them in making the legal determinations that may be necessary given their mandates and the situations that are the subject of their inquiries. This may require them to look to international humanitarian law (IHL) and international criminal law (ICL). The guidelines should include the following:

1. Accountability – *Remember* that justice for IHRL and IHL violations is not achieved solely by judicial processes. Depending on their mandates, HRIs may recommend measures to establish truth, provide redress to victims and survivors, and prevent recurrence of the criminal conduct. HRIs may provide information relating to whether one or more relevant national systems have adequate capacity and independence so that justice may be delivered closer to the victims and affected communities. HRIs may thus recommend specific measures to augment the capacity and independence of national systems. HRIs may provide information relevant to whether an international court or tribunal, such as the International Criminal Court (ICC), could be an appropriate judicial forum. As an example, because the ICC’s jurisdiction only applies to situations that are of sufficient gravity and where states are found to be unwilling or unable to carry out genuine investigations or prosecutions themselves, the inquiry may set forth specific findings as to those issues.
2. Standard of Proof – *Apply* a standard of proof that is consistent with requirements of the relevant legal regime. Findings that violations/abuses of international human rights law or that international crimes may have been committed should be based on a clear standard of proof, explicitly articulated in the report. In future, this this standard should ideally be “reasonable grounds to believe,” which is similar to what is required at the accusatory phase of criminal justice processes. If the proof as to contextual elements of international crimes, such as the “existence of a widespread or systematic attack directed against a civilian population,” is so strong as to meet a higher level of certainty, then a finding can be made that this higher standard was satisfied.
3. Elements of Violations/Abuses and of International Crimes and Supporting Information – *Ensure* that there is sufficient information on each essential element required to be established under the applicable body of law for the relevant violation, abuse, or crime. An individual can be listed as a suspect if there are reasonable grounds to believe that his

or her conduct fit within the recognized forms or modes of liability and satisfied the elements of the crime. HRIs should *secure* all relevant supporting information relevant to the finding that a specific individual is allegedly responsible for a violation or crime, and do it in a manner so that the connections will be apparent to others analyzing the material in the future. Any subsequent sharing of the information should only be done with consent of the source and with due regard for his or her safety and security.

4. Statutes and Customary Law – *Cite* the legal basis for findings as to the commission and responsibility for crimes under international criminal law. The Rome Statute of the International Criminal Court (“ICC”) and the ICC’s “Elements of Crimes” may generally be used as guides for determining the elements that must be satisfied for findings that an international crime has been committed and that individual(s) are responsible, but customary international law and the jurisprudence of the *ad hoc* tribunals are also useful.
5. The Existence of an Armed Conflict – *Apply* international humanitarian law if it is necessary to determine the existence and status of an armed conflict. HRIs should endeavor at all times to indicate clearly and consistently, to the extent possible, the existence and type of armed conflict, the time frames and the parties thereto. They should base their finding on information that they have reasonable grounds to believe satisfies the elements set forth in the Geneva Conventions and their Additional Protocols or in customary international law. In defining the elements, they may be guided by the commentaries to the Geneva Conventions and their Protocols.
6. Notice to Superiors – *Notify* persons having apparent control over military units, security forces, armed groups, or other entities that are reasonably believed to be responsible for criminal acts. The notice should describe the specific conduct and include a citation of the provisions of international criminal law that render superiors criminally responsible for the acts of their subordinates if they fail to take action to prevent or punish the conduct. This may cause such persons to take the required action, thus deterring further criminal conduct. If they do not, the notice can assist in establishing the “knowledge” element necessary for conviction as a responsible superior.

### **III. Recommendations of Best Practices for Making Findings on Factual Matters**

The ST should assist HRIs by providing investigative guidance setting forth best practices for gathering and evaluating information in order to make findings on factual matters. The guidance prepared by the ST for the HRIs should include the following:

1. Methodology – *Provide* HRIs with methodology for the identification of human rights violations/abuse, patterns and context, as well as information that links violations and abuses to suspects. Generally the methodology should include best practices for preventing damage to or loss of information or materials of potential relevance to accountability processes, preserving the integrity of the information, and effectively interacting with and interviewing sources of information. Specific examples of the guidance that should be considered for inclusion in the methodology are set forth below.
2. Information as to Potential Responsibility – For cases in which HRIs are mandated to identify potential suspects, *include* examples of the types of information that may be relevant to such determinations in judicial proceedings.
3. Non-testimonial information – Non-testimonial information includes both documentary information and physical objects. Documentary information includes hard copy and digital forms, as well as video and audio recordings. Open-source information may be relevant to human rights fact-finding mandates. *Make* copies or *take* pictures of the non-testimonial information, and create a detailed record of all circumstances surrounding the collection of this information, including as to the source. *Keep* this record together with the copy of the information. Where exceptional circumstances require that the fact-finder take the original, in addition to the detailed information referenced above, *develop* protocols outlining proper methods to preserve and store these originals. Exceptional circumstances may include, for example, where non-testimonial information may be damaged or lost if not collected at the time, or where copying or other processing of the information might result in loss of relevant information, or where the capacity to copy the information is not readily at hand.
4. Site Visits – In situations where it may be possible to visit the scenes of alleged violations, *conduct* these visits without unduly exposing the team or others to danger (including biological and chemical hazards), and without affecting the integrity of the information or physical objects. Whenever possible, *make* a record of the site, including taking panoramic and close-up photographic and/or video images, noting coordinates, making drawings and maps, etc., describing in full how the site was found, in what condition, what artifacts were present, and whether there were any human remains. Only collect these items if a risk exists that they might be destroyed or otherwise become unavailable, with such collection following recognized standards and procedures geared toward minimizing any contamination and maximizing the preservation of such information. *Provide* training and field materials on the fundamentals of information-gathering methodologies as part of the pre-deployment briefings of team members.
5. Chain of custody – Where exceptional circumstances require that the fact-finder collect the original documentary information or physical object, it is essential to maintain an accurate

chain of custody. In such an instance, *use* a chain of custody form to record all details surrounding the circumstances of collection, including the original location, condition and handling of the piece of information. In addition, *record* on the form all people who handled that information and the purpose for which they handled it.

6. Verification of information –HRIs should not refuse to accept relevant information from any source, but they should make reasonable efforts to *verify* the information according to recognized standards, and *assess* its relevance and credibility. HRIs should *identify* the standard used to verify the information included in their reports
7. Interviews – *Identify* risks connected to the interaction of the interviewee with the inquiry, and take all necessary precautions. *Use* the PEACE method<sup>1</sup>-or other recognized standards in interviews. To the extent possible, only persons necessary to the conduct of the interview should be present in the interview room. Such persons include the interviewer and his or her colleague, the interviewee, an interpreter if required, and a support person if requested by the interviewee. *Address* issues surrounding informed consent and the continued presence of the interviewee in the affected community. *Share* information about available resources and referral processes with the interviewee. Unless the interviewer and interviewee are fluent in the same language/s, *use* an experienced interpreter. Thoroughly *discuss* with the interpreter the ground rules for the conduct of the interview. To the extent possible, *document* and *preserve* information relating to injuries. *Include* in the appended investigator’s notes any limitations as to matters not raised or insufficiently discussed.
8. Special Category Interviewees – *Be alert* to the prospect of sexual and gender-based violence (SGBV) against any person or of violence against children, and ask the appropriate questions to maximize the chance of eliciting this information during interviews. *Develop* indicators for situations where there is an increased risk of these violations, such as in prison settings, at checkpoints or roadblocks, during violent expulsion campaigns, or as part of the recruitment of child soldiers. *Include* persons with the appropriate experience and expertise on teams that will be meeting with victims and survivors to *gather* information effectively, to *minimize* the risk of re-traumatization and to *respond* to interviewee preferences. *Give* special attention to other particularly vulnerable individuals, including those advanced in age, persons with disabilities, and displaced persons.
9. Informed Consent – Informed consent is required for any sharing of information from a source, including sharing of identifying information. *Request* and *record* the informed consent. *Obtain* consent after the source is clearly told who would be the potential recipients of the information, and how the information may be used, including its potential

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<sup>1</sup> P – Preparation and planning; E – Engage and explain; A – Account; C – Closure; E – Evaluate.

use by international and/or national authorities, and indicate if such authorities would be able to provide appropriate protective measures. In addition, clearly *inform* the source of his or her options (i.e., no sharing, sharing only non-identifying information, sharing all information) subject to any conditions that the source attaches to such disclosure.

10. Sharing of information – There is a presumption in favor of sharing information, subject always to UN privileges and immunities. The ST should maintain a system to *respond* to requests for information sharing. Where the source has not consented to sharing the information, the ST should seek to *contact* the source to ask if the original non-consent can be modified to allow disclosure subject to appropriate protective measures and conditions. In addition to the information identified in paragraph 9 above, the HRI should also *discuss* with the source: specific risks associated with information sharing, as well as any risks associated with the broader context; and the level of such risk relative to each category of potential recipient (e.g., an international prosecutor in contrast to a national prosecutor of a state associated with one side in the conflict). Where the source displays the capacity to understand and exhibits a clear comprehension of the potential risk involved, the presumption is that it is for the source to determine whether to share information, with whom, and for what purpose, subject to UN privileges and immunities.
11. Forensic Analysis – Where an HRI has access to physical objects or documentary material, including digital data that could, by forensic analysis, reveal information relevant to its mandate, *provide* the necessary forensic capacity. In situations where this might not be possible or feasible, *document* the existence of such physical objects or other material, using recognized standards.
12. Information management – *Establish* a secure user-friendly information management system before commencing fact-finding. This includes hard copy documentary information, electronic information in all its forms (i.e. digital or analog), and physical objects. *Prepare* policies, protocols, and tools for all stages of the information management cycle: creation/acquisition, data capture (including indexing and cataloguing), maintenance, synthesis/analysis, use and re-use, retrieval, publication/sharing, preservation, archiving and disposal.
13. Security – Security is a critical component of all aspects of fact-finding. *Develop* and *utilize* appropriate standards to ensure the security of persons and information, including electronic and digital data, as well as the security of communications. *Conduct* periodic information and technology security audits. *Train* fact-finders on appropriate security standards and practices.