UN Accountability Mandates in International Justice

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Abstract

This article discusses an important international justice development, and specifically the rise of a new generation of 'accountability mandates' at the United Nations (UN). Often created in response to mass atrocities alleged in country situations falling outside of the International Criminal Court's jurisdiction, UN accountability mandates are generally tasked to collect, consolidate, preserve, and analyse evidence of international law violations, prepare files, and preserve such evidence until it can be made available to support legal accountability proceedings, including as relevant of the criminal nature. Through such investigative and evidence preservation responsibilities, UN accountability mandates can help fill important impunity gaps by helping to collate information generated by a variety of sources, including civil society documenters, and by laying the groundwork for judicial authorities. Within this broad categorization, however, UN accountability mandates are not a monolith and exist along a spectrum based on the strength of any accountability requirements they contain — including whether they are explicitly mandated to follow criminal justice standards — and their general institutional and operational setup. The investigative mechanisms created for Syria, Myanmar and Daesh/ISIL are specifically tasked to fulfil 'pre-prosecutorial' functions and enjoy greater resources and independence than other, less resourced and more 'hybrid' mandates — expected to simultaneously fulfil the role of more traditional human rights investigations, while also supporting legal accountability. All, however, play a crucial role within the broader

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international justice ecosystem, while sharing common challenges that this article submits would be best addressed by permanently centralizing a variety of investigative support functions, to be administered by a dedicated, permanent, standing investigative entity. The article will first provide an overview of how and why UN accountability mandates have evolved over the past decade, and of the important role they have come to play. It will then turn to discussing the case and proposed models for a standing, permanent UN accountability mandate to support future investigations. After providing a comparative analysis of the possible alternatives, the article will conclude with some recommendations and ideas for the way forward.

1. Introduction

International justice can be controversial and is certainly never easy. As a field, it is relatively young and, since its inception, it has undergone two major waves of institutional growth at the international level, with a first generation of international justice institutions taking shape after the end of World War II, more precisely with the Nuremberg and Tokyo tribunals, and a new generation of international criminal courts coming into being with the field's mid-1990s revival, and culminating in the creation of the International Criminal Court (ICC). In the 20 years since its establishment, the ICC has without a doubt made immense contributions to the further development and ongoing trajectory of this field. This includes, by virtue of the complementarity principle enshrined in the Rome Statute,[1] what scholars have hailed as the third and future chapter of this field:[2] the 'domestication' of international criminal law, and the resulting growth in the exercise of universal jurisdiction, with more and more states now investigating and prosecuting international crimes cases before their domestic courts. Notwithstanding such progress, and despite the fact that, by today, a remarkable number of 123 states have become parties to the ICC Statute, the ICC's universalist ambition is yet to be achieved, leaving a great number of countries where situations of mass atrocities are taking place beyond its jurisdictional reach.[2] This situation has been compounded by

1 Arts 17 and 53 ICCSt.

2 E. van Sliedregt, 'International Criminal Justice: A Bubble About to Burst?' in E. Hoven and M. Kubiciel (eds), *Zukunftsperspektiven des Strafrechts: Symposium zum 70. Geburtstag von Thomas Weigend* (Nomos, 2020) 253–276; C. Stahn, 'The Future of International Criminal Justice', 4 *Hague Justice Journal* (2009) 257–266; M. du Plessis, 'The Future of International Criminal Justice is Domestic', iLawyer Blog, 17 September 2014, available online at https://ilawyerblog.com/future–international–criminal–just ice–domestic/. The latter website, as well as all cited websites, were last accessed on 25 August 2023.

2 E. van Sliedregt, 'International Criminal Justice: A Bubble About to Burst?' in E. Hoven and M. Kubiciel (eds), *Zukunftsperspektiven des Strafrechts: Symposium zum 70. Geburtstag von Thomas Weigend* (Nomos, 2020) 253–276; C. Stahn, 'The Future of International Criminal Justice', 4 *Hague Justice Journal* (2009) 257–266; M. du Plessis, 'The Future of International Criminal Justice is Domestic', iLawyer Blog, 17 September 2014, available online at https://ilawyerblog.com/future–international–criminal–just ice–domestic/. The latter website, as well as all cited websites, were last accessed on 25 August 2023.

repeated failures of the United Nations (UN) Security Council, the only international organ with such powers under the Statute,[3] to refer to the Court's egregious situations falling outside of its jurisdiction, entrenching significant impunity gaps. At the same time, however, the nature and scale of the international law violations arising from many country situations over the last decade — in combination with the unrelenting, dedicated advocacy of affected communities that ensued — have further underscored the imperative among states to reaffirm normative commitments to basic international law principles and institutions. In other words, brought to new crossroads, the international justice field has been forced to innovate in order to create new pathways for accountability.[4]

One such innovation materialized in 2016, when the General Assembly (UNGA) took the unprecedented step to establish, through resolution A/71/248, the International, Impartial and Independent Mechanism to assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM).[5] The establishment of the IIIM was both ground-breaking and a watershed moment in international justice. The institution was created with what might be considered quasi-prosecutorial — or more accurately *pre*-prosecutorial — functions: i.e., explicit case-building and evidence preservation responsibilities in order to facilitate and expedite fair and independent criminal proceedings, but without the power to indict anyone. Rather, it was mandated to carry out its work 'in accordance with international criminal justice standards' in support of proceedings in any 'national, regional or international court or tribunal that have or may in the future' be able to exercise its jurisdiction.[6] In other words, the UNGA broke new ground by creating a new category of international justice institution that would fulfil pre-prosecutorial functions without being attached to any specific court. Its core task would instead be to support third-party proceedings.

This was a significant departure from the institutional precedent that had previously been set for any other country situation, for which various models of tribunals had been created, all with full prosecutorial powers and functions.[7] As this article submits, it was also one of this field's most consequential innovations in recent years, potentially setting the stage for another wave of growth and reform affecting international institutions. Indeed, over the two following years, both the UN Security Council (UNSC) and the UN Human

3 International Criminal Court, 'The States Parties to the Rome Statute', available online at https://asp.icc–cpi.int/states–parties.

4 Art. 15*ter* and Art. 13(b) ICCSt.

5 Just to provide a few examples, various countries and international organizations have set up 'joint investigative teams' to respond to situations such as investigating alleged chemical weapons attacks in Syria, and the 2014 downing of civilian airline MH17 by pro-Russia separatists over the skies of eastern Ukraine. Debate is currently also ongoing on the potential establishment (and modalities thereof) of a special aggression tribunal for Ukraine. See, for example, F. D'Alessandra, 'Pursuing Accountability for the Crime of Aggression Against Ukraine', 5 *Revue Européenne du Droit* (2023) 55–66.

6 GA Res. 71/248, 11 January 2017.

7 *Ibid.*, § 4.

Rights Council (HRC) created similar ad hoc institutions — though with important differences in their respective mandates — for the situations of ISIL/Daesh, and for Myanmar.[8] Most importantly, ever since the establishment of the IIIM, calls for more and more of such mandates to be created for other country situations have become the norm at each session of the HRC.[9] Outside of the UN system, too, we are witnessing a similar rise of evidence-gathering bodies — with two recent developments worth a particular mention in this discussion. The first is Eurojust's announcement of a change in agency rules that will allow them to 'preserve, analyse and store evidence relating to core international crimes, including war crimes, crimes against humanity and genocide';[10] and the second being the European Union's establishment of an International Centre for the Prosecution of the Crime of Aggression (ICPCA) as an interim step towards a more comprehensive solution to pursue criminal accountability for the crime of aggression against Ukraine.[11] The ICPCA will be a 'unique judicial hub' based in The Hague and supported by Eurojust, which will allow 'independent prosecutors from different countries' to 'work together in the same location on a daily basis' to 'exchange evidence …, and agree on a common investigative and prosecution strategy' with the objective to 'effectively prepare and contribute to any future prosecutions of the crime of aggression, irrespective of the jurisdiction before which these will be brought'.[12]

The subsequent establishment of so many investigative and 'evidence preservation' bodies can only be credited to the unquenchable thirst for justice consistently displayed by those most affected by unspeakable forms of violence. At the same time, the ground-breaking nature of these institutions, the performance and innovation of their work, and a growing recognition of the role they

8 Even though significant differences also set each of these precedents aside from others, they all operate or have operated as tribunals, if according to a variety of models from international to hybrid to regional. For an overview, see J. Rikhof, 'Analysis: A History and Typology of International Criminal Courts', 1 *PKI Global Justice Journal* (2017) 15, available online at https://globaljustice.queenslaw.ca/news/analysis–a–history–and–typology–of–international–criminal–institutions.

9 Respectively, SC Res. 2379, 21 September 2017 and HRC Res. 39/2, 3 October 2018.

10 See, for example, H. Davidson and J. Borger, 'Rights Groups Call for Inquiries into Uyghur Abuses in China After Damning UN Report', *The Guardian*, 1 September 2022, available online at https://www.theguardian.com/world/2022/sep/01/rights–groups–uyghur–china–un–report–xinjiang; UN News, 'UN Rights Body Launches Iran Human Rights Investigation', 24 November 2022, available online at https://news.un.org/en/story/2022/11/1131022, among the most recent.

11 Council of the EU Press Release, 'Eurojust: Council adopts new rules allowing the agency to preserve evidence of war crimes', 25 May 2022, available online at https://www.consilium.europa.eu/en/press/press–releases/2022/05/25/eurojust–le–conseil–adopte–de–nouvelles–regles–permettant–a–l–agence–de–conserver–des–preuves–de–crimes–de–guerre/.

12 See Eurojust, 'International Centre for the Prosecution of the Crime of Aggression against Ukraine', available online at https://www.eurojust.europa.eu/international-centre-for-the-prosecution-of-the-crime-of-aggression-against-ukraine#:~:text=International%20Centre%20for%20the%20Prosecution%20of%20the%20Crime%20of%20Aggression%20against%20Ukraine,-A%20unique%20judicial&text=The%20ICPA%20is%20a%20unique,to%20the%20war%20in%20Ukraine. For a more general discussion of the various models under consideration for a special aggression tribunal, see D'Alessandra, *supra* note 5.

play within the broader accountability landscape have led some (including this author) to call for the permanent institutionalization of such innovation through the creation of a standing UN investigative mandate with similar attributes.[13] In this article, I will first provide an overview of how this new generation of accountability mandates came about (focusing specifically on UN mandates), and then discuss the current state of affairs and what I believe is the important role they play within the broader international justice ecosystem, before turning to the case for the creation of a permanent investigative mechanism.

2. Accountability at a New Crossroads: Innovation and Dynamism within a Seemingly Stalling Field

A. The UN 'Accountability Turn'

The roots of these developments can be found in a pre-existing phenomenon we started to observe at the UN around 2011. I have previously written about this as the UN 'accountability turn' in reference to the ever-growing tendency, particularly manifest in resolutions emanating from the HRC, to confer certain accountability requirements to inquiry mandates set up to probe allegations of egregious human rights violations perpetrated on a mass scale in a variety of country situations.[14] Initially, these requirements were limited to, inter alia, determining whether the violations they documented may constitute crimes under international law, identifying those responsible and, in general terms, contributing to accountability, no longer just political — as it had been the norm — but now also judicial.[15] The introduction of these requirements meant

13 *Ibid.* Another recently established body that is somewhat of relevance to our discussion here is the new Independent Institution on Missing Persons in Syria, established by the UNGA through GA Res. A/77/L.79 in June 2023. Although the new mechanism had the support of the UN Human Rights High Commissioner, and is expected to at least in some form rely on support/cooperation by the IIIM, it is fundamentally different in nature from any of the other bodies herewith mentioned, as it explicitly does not focus on accountability. For a commentary on the new institution and its history, see: G. Baranowska and G. Citroni, 'The UN Independent Institution on Missing Persons in the Syrian Arab Republic A Marathon, a Sprint, or a Hurdle Race?', EJIL: Talk! Blog of the European Journal of International Law, 7 July 2023, available online at https://www.ejiltalk.org/the–un–independent–institution–on–missing–persons–in–the–syrian–arab–republic–a–marathon–a–sprint–or–a–hurdle–race/.

14 See F. D'Alessandra et al., *Anchoring Accountability for Mass Atrocities: The Permanent Support Needed to Fulfil UN Investigative Mandates*, Oxford Institute for Ethics, Law and Armed Conflict (ELAC), May 2022, available online at https://www.elac.ox.ac.uk/wp–content/uploads/2023/04/Oxford–ELAC–Anchoring–Accountability–for–Mass–Atrocities.pdf; International Commission of Jurists, *Options for the Establishment of a Standing Independent Investigative Mechanism (SIIM)*, September 2022, available online at https://www.icj.org/wp–content/uploads/2022/09/Options–for–the–establishment–of–a–Standing–Independent–Investigative–Mechanism–SIIM–26–September–2022–1.pdf; C. Hale and L. Sadat, 'How International Justice Can Succeed in Ukraine and Beyond', Just Security, 14 April 2022, available online at https://www.justsecurity.org/81086/how–international–justice–can–succeed–in–ukraine–and–beyond/.

15 F. D'Alessandra, 'The Accountability Turn in Third Wave Human Rights Fact–Finding', 33 *Utrecht Journal of International and European Law* (2017) 59–75.

that what were traditionally human rights mandates (i.e., Special Procedures of the Human Rights Council such as Commissions of Inquiry, Fact-Finding Missions, Groups of Eminent Experts, and similar), which had historically (chiefly) dealt with matters of state responsibility under international human rights and humanitarian law, were now being asked to pay closer attention to the potential liability of individuals, thus incorporating an international criminal law lens into their work and findings.

This development was met with its fair share of controversy and resistance at first. Some objected on normative grounds: after all, international justice was usually dealt with principally, though not exclusively, through the UNSC, and was within the purview of The Hague, not Geneva.[16] Other concerns were more practical: mandates that were already scarcely resourced were now being asked to do more, but with the same or fewer means — a particularly valid concern, given how resource-intensive international justice can be. In the same vein, some worried that the weight of these requirements could be such to cause international criminal justice to colonize, and either compromise or even displace, the traditional and vital function of human rights inquiry procedures, the bedrock of the UN human rights regime.[17] While recognizing some of these challenges, others — myself included — were more optimistic, and saw the possibility of better alignment between human rights documentation and international justice processes more positively.[18] Over time, the sheer number and incidence of these requirements shifted the ground for debate: the question became less *whether* human rights mandates should be asked to perform this function but rather, given that they were, *how* they could be best supported to do so.[19] The issue became particularly cogent as

16 This trend is clearly discernible in the respective mandates of the Human Rights Council's investigative missions on: Syria (HRC Res. 16/1, 8 April 2018, OP7; HRC Res. 17/1, 23 August 2011, OP13; HRC Res. 25/1, 9 April 2014, OP13; HRC Res. 71/248, 11 January 2017, OP4); North Korea (HRC Res. 22/13, 21 March 2013, OP5); South Sudan (HRC Res. 31/20, 21 March 2016, OP11); Myanmar (HRC Res. 34/22, 3 April 2017, OP11); Venezuela (HRC Res. 42/25, 27 September 2019, OP24); Belarus (HRC Res. 46/20, 29 March 2021, OP13(a)); Sri Lanka (HRC Res. 46/1, 26 March 2021, OP9); Occupied Palestinian Territory and Israel (HRC Res. S–30/1, 28 May 2021, OP2); 2018 Protests in the Occupied Palestinian Territory (HRC Res. S–28/1, OP5); 2014 Gaza Conflict (HRC Res. S–21/1, 24 July 2014, OP13); Libya (HRC Res. 43/39, 6 July 2020, OP37, OP39, OP43); Burundi (HRC Res. 33/24, 5 October 2016, OP23(a), (b) and (c)); and most recently Ethiopia (HRC Res. S–33/L.1, 21 December 2021, OP9).

17 In this article, I use 'The Hague' and 'Geneva' symbolically, in reference to their historical role as 'sites' of international justice and the UN human rights system respectively. See S. Rapp, 'Bridging the Hague–Geneva Divide: Strengthening the Capacity of Human Rights Inquiries to Collect and Preserve Evidence of Legal Responsibility', Georgetown Law Human Rights Institute, *Perspectives on Human Rights*, Paper 5 (2018) available online at https://georgetown.app.box.com/s/pfzcq2i2o51lymqbexx8u90o1dp6p478, 1–20.

18 See, for example, C. Schwöbel–Patel, 'Commissions of Inquiry: Courting International Criminal Courts and Tribunals', in C. Henderson (ed.), *Commissions of Inquiry: Problems and Prospects* (Hart, 2017) 145–170, at 146.

19 Group of Practitioners in Fact–Finding and Accountability, 'Bridging the Hague–Geneva Divide: Recommendations to Maximize Benefit and Minimize Harm for Human Rights Inquiries and Criminal Investigations at the Same Scenes of Mass Violence', Oxford Institute for Ethics, Law

findings by these mandates started to be introduced in proceedings before international tribunals, to mixed judicial review.[20] Time also proved right those who argued that fulfilling such accountability requirements, fundamentally, called for different skills, methods and tools than those traditionally available to UN human rights inquiries.[21]

The ever crucial — if perennially under-funded — UN Office of the High Commissioner for Human Rights (OHCHR), which has primary responsibility for supporting and staffing human rights mandates, took note of these developments and invested whatever resources it could — even amidst a crippling hiring freeze and budgetary crisis[22] — to rise to these challenges. Steps included the creation of an Investigation Support Unit within its Emergency Response Section[23] with responsibilities for supporting the start-up phase of mandates through recruitment, budgetary and other functions, and the adoption of specifically tailored methodologies and protocols, such as the Berkley Protocol on Digital Open Source Investigations, co-developed by the Office's Methodology and Training Section with the UC Berkley Human Rights Centre.[24] All such measures, which were in line with some of the recommendations already made in 2017 by a group of experts to the then High Commissioner, were positive steps in the right direction, particularly by those concerned with addressing, at a practical level, the implications of the UN accountability turn.[25]

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and Armed Conflict (ELAC), 6 January 2017, available online at https://www.elac.ox.ac.uk/wp–content/uploads/2022/02/bridgingthehague–genevadivide–finalrecommendations6jan2017revpdf.pdf.

20 See, for example: D. Mandel-Anthony, 'Hardwiring Accountability for Mass Atrocities', 11 *Drexel Law Review* (2019) 903–968.

21 See findings that the UN Côte d'Ivoire Commission of Inquiry's conclusions on contextual element of the existence of 'widespread or systematic attacks' against civilians were not strong enough even at the indictment confirmation stage: Decision Adjourning the Hearing of on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, *Gbagbo* (ICC–02/11–01/11–432), Pre-Trial Chamber I, 3 June 2013, § 17; in contrast to the International Court of Justice in *The Gambia v. Myanmar*, which cited favourably the findings of the Myanmar Fact–Finding Mission in holding that the burden for issuance of provisional measures had been met: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of 23 January 2020, available online at https://www.icj–cij.org/sites/default/files/case–related/178/178–20200123–ORD–01–00–EN.pdf, §§ 43–63.

22 Group of Practitioners in Fact-Finding and Accountability, *supra* note 19; S. Ashraph, F. D'Alessandra and S. Rapp, 'Structural Challenges Confronted by UN Accountability Mandates: Perspectives from Current and Former Staff' (Parts I, II, and III), Opinio Juris, 14 October 2010, available online at http://opiniojuris.org/2020/10/14/structural–challenges–confronted–by–un–accountability–mandates–perspectives–from–current–and–former–staff–part–iii/.

23 See D'Alessandra et al., *supra* note 14, at 36–38.

24 Something proposed by the Group of Practitioners in Fact-Finding and Accountability the previous year. See Group of Practitioners in Fact-Finding and Accountability, *supra* note 19, at 2.

25 See University of California Berkeley School of Law Human Rights Center and United Nations Office of the High Commissioner for Human Rights, 'Berkeley Protocol on Digital Open Source Investigations: A Practical Guide on the Effective Use of Digital Open Source and Information in Investigating Violations of International Criminal, Human Rights and Humanitarian Law'

Starting in 2018, the Oxford Institute for which I serve as Deputy Director, in partnership with the International Bar Association and the US Holocaust Memorial Museum Simon Skjodt Centre for the Prevention of Genocide, carried out an in-depth study to better understand the challenges and opportunities that mandates were facing at this juncture.[26] Our research confirmed that steps taken by OHCHR to date are certainly praiseworthy, in that they have gone a long way in improving the overall situation. Yet, many challenges persist, which are shared across mandates at various phases of their existence and operation — from their creation, deployment and active phase of investigation, all the way to their wind-down and closure. These are detailed in our report, published in 2022, and titled 'Anchoring Accountability for Mass Atrocities: The Permanent Support Needed to Fulfil UN Investigative Mandates'.[27]

A key finding revealed by our data and analysis was that the current approach is still too ad hoc, for it is reactive, presenting both inconsistencies and inefficiencies. These are further compounded by the fact that many parts of the UN system — each with their own institutional realities and constraints — have some level of responsibility or oversight over such mandates — whether with respect to their budgets, procurement, recruitment, standard operating procedures, etc. Even within OHCHR, responsibilities for supporting mandates are shared across various divisions of the Secretariat, often rendering alignment challenging. Challenges appear particularly acute — but are not limited to — the start-up phase of every mandate, which is the most crucial window to set the right conditions for their ability to deliver at the appropriate standard: what happens or does not happen — in terms of experts' recruitment, trainings, processes, and tools' acquisition and development — in this phase

(2022) available online at https://www.ohchr.org/sites/default/files/2022–04/OHCHR_BerkeleyProtocol.pdf and other resources by METS. For example, in 2015 and 2018, respectively, OHCHR's METS published some methodological guidance in OHCHR, 'Commissions of Inquiry and Fact–Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice' (UN, 2015) and OHCHR, 'Who's Responsible? attributing individual responsibility for violations of international human rights and humanitarian law in United Nations commissions of inquiry, fact–finding missions and other investigations' (OHCHR, 2018) with the OHCHR clarifying that more detailed guidance is also available in Guidance Notes, Templates and Examples from COI/FFMs practice, available to staff and secretariats and included in the recently created OHCHR Repository on monitoring and investigations. See D'Alessandra et al., *supra* note 14, at 44, note 88.

26 Rapp, *supra* note 17; Group of Practitioners in Fact-Finding and Accountability, *supra* note 19. Our team at Oxford carried out a review of changes and adjustments initiated within the Office of the High Commissioner in the period under review, and concluded that although additional improvements remain necessary (in accordance with what our study recommended), the steps taken thus far within OHCHR have had some positive effects on improving mandates' performance vis-à-vis the accountability turn.

27 Our methodology included consultations, interviews and an anonymous survey with various stakeholders involved in the creation and operation of UN accountability mandates. The final report containing our data, analysis and recommendations was published in May 2022. See D'Alessandra et al., *supra* note 14, at 8.

will have knock-on effects lasting mandates' overall lifetime and affect their performance and entirety of operations.

On this basis, one of our key conclusions was that centralizing certain functions and bringing them within the purview of a single entity rather than multiple ones — i.e., creating an investigations-support bureau of sorts, responsible for the provision of common services — would be crucial to achieving a more prompt, consistent and effective deployment of mandates and instrumental for wiser resource allocation, thus addressing inefficiencies in both the short and long term. Our team explored some options for how this might be done,[28] both within OHCHR and through a wholly independent structure, to which I will return.

B. The Crossing of the Rubicon: The Birth of a New Typology of International Justice Institution

The creation of the IIIM in 2016 was, in my opinion, the equivalent of the crossing of the Rubicon within this broader picture. By establishing an explicit requirement that the IIIM 'collect, consolidate, preserve and analyse evidence' of international law violations and 'prepare files' in order to 'facilitate and expedite fair and independent criminal proceedings', the UNGA sanctioned this pre-existing movement by the UN towards incorporating international criminal law elements into the mandates it created, chiefly through the HRC, taking the accountability turn even further. In fact, the IIIM was set up precisely as a complement *to* the HRC-mandated Syria Commission of Inquiry (Syria CoI), mandated to 'investigate alleged violations of international human rights law since March 2011 in the Syrian Arab Republic' by 'establishing the facts and circumstances that may amount to such violations', and 'where possible, to identify those responsible with a view of ensuring that perpetrators … are held accountable' — which is operating to this day.[29] At the same time, a crucially important step by the UNGA was to write both independence and impartiality requirements within the IIIM mandate.[30]

Although the substantive work of all mandates conferred by the HRC is, indeed, also independent, their infrastructure has been — and remains — in large part supplied by OHCHR, upon whom they rely for budgeting, staffing, standard operating procedures, information management and security, data infrastructure, records management, procurement and many other elements crucial to all mandates' operations. In contrast, and acknowledging that in its

28 See *ibid.*, Section: II Challenges Relating to the Creation of Mandates and Start-Up Phase of Operations, 30–45; Section III. Needs Relating to the Collection of Information Phase, 48–72; and Section IV. Challenges Relating to Information Analysis and Preservation, 74–87.

29 See *ibid.*, 96–104. A similar conclusion was independently reached by the International Commission of Jurists, *supra* note 14, 9–11.

30 See UN Human Rights Council, 'Independent International Commission of Inquiry on the Syrian Arab Republic Mandate', available online at https://www.ohchr.org/en/hr–bodies/hrc/iici–syria/co–i–mandate. On its relationship with IIIM, see GA Res. 71/248, 11 January 2017, § 5.

start-up phase the IIIM also received vital OHCHR support, its independence ultimately meant that it is functioning — from its budget to the appointment and reporting channels of its leadership, to the make-up of its staff, as well as its working methods, procurement and overall resources and support infrastructure — could be determined with more flexibility, be adjusted on the basis of their specific needs and be less vulnerable to some of the institutional, budgetary and political dynamics that otherwise weigh on the investigations the HRC had mandated to that date.[31]

On this basis, the IIIM was able to create its own mould and break unprecedented ground in terms of the capabilities, expertise, processes and tools it amassed, which in many cases had to be built from scratch in order to fulfil its specific needs and requirements. In this, the IIIM was facilitated, in no small part, by the fact that — although it was initially funded via voluntary contributions by states — it would eventually be able to access funding from both the UN's regular budget and extrabudgetary contributions;[32] as well as by another requirement included in the mandate — i.e., that it should be provided with the appropriate means and resources to shore up a state-of-the-art technical (including technological) infrastructure.[33]

The IIIM's impartiality requirement, for its part, did not constitute a departure from previous HRC-conferred mandates[34] but set the IIIM apart from another mandate created the following year by the UNSC, the Investigative Team to Promote Accountability for Crimes Committed by Daesh/ISIL (UNITAD), which, as its name makes explicit, is similarly focused on accountability for international crimes, but only where these are committed by the terrorist group.[35] In 2018, a third investigative mandate was created, this time by

31 GA Res. 71/248, 11 January 2017, §§ 4–5.

32 See D'Alessandra et al., *supra* note 14, 30–45.

33 This in contrast to mandates supported by OHCHR which, as revealed by OHCHR officials directly in interviews to our team, ought to be funded through the UN regular budget: *ibid.*, 34–39. See also GA. Res. 74/262, 14 January 2020.

34 The claim here is not that having such wording in the establishing parameters of the IIIM *automatically* translated into the IIIM acquiring such capacities, but that having such wording in the resolutions opened the space for the IIIM leadership (as was the case with the leadership of other OHCHR supported mandates with similar wording in their resolutions, such as the South Sudan Human Rights Commission) to insist that such capabilities be provided and prioritized. See: International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011 (IIIM), 'Message from the Head of IIIM', Bulletin No. 5 February 2021, available online at https://iiim.un.org/wp–content/uploads/2021/08/IIIM–Syria–Bulletin–5–ENG–Feb–2021.pdf, at 2.

35 Unlike for HRC–mandated investigations, impartiality has a long and controversial history within the remit of international justice institutions of the previous generation — i.e., international courts: one example of such controversy arose when — in an effort to entice cooperation by the Ugandan government — the then ICC Prosecutor only opened an investigation into alleged crimes committed by rebel forces. Another example was the Special Tribunal for Lebanon, which had an explicit mandate to investigate and prosecute only one incident, i.e., the assassination of former Prime Minister Rafik Hariri, at the hands of members of the terrorist group Hezbollah.

the HRC, for the situation in Myanmar.[36] The substantive provisions of the mandate of the Independent Investigative Mechanism for Myanmar (IIMM) are very similar to those of the IIIM for Syria, including with respect to its independence and impartiality. Both are also based in Geneva, and neither benefit of the 'consent and cooperation' of the authorities with primary jurisdiction over the crimes they are investigating. This is in contrast with UNITAD, which is headquartered in Baghdad, and both supports — and is supported by — the government of Iraq.[37]

At the same time, the IIMM also differs from its 'sister' mandate in important ways: to begin with, unlike the Syria IIIM, the investigative nature of the Myanmar mandate is written into its very name, further anchoring Geneva's turn towards international justice. And, unlike the Syria mechanism, which continues to operate in parallel with the Syria CoI, the IIMM was created instead as a follow-up to — and at the recommendation of — its predecessor, the HRC-mandated Fact-Finding Mission for Myanmar (FFMM), once this ceased its operations.[38] In this sense, the Syria and Myanmar situations present different 'relational models' that can exist between investigative mandates of the 'new generation' and HRC-mandated human rights investigations. Differences in how each model has played out are indeed insightful as we consider the way forward, to which I shall return.

Another peculiarity of the IIMM is that, at the time of its establishment, proceedings had already been initiated by the Gambia against Myanmar before the International Court of Justice (ICJ) and the ICC Prosecutor had requested a Pre-Trial Chamber's authorization to proceed with an investigation (based in Bangladesh, an ICC state party, to which many Rohingyas were deported). The IIMM is explicitly pursuing cooperation with both courts.[39] In addition, on the basis of the FFMM's findings on the role that social media platforms — particularly Facebook — played in the dynamics of the alleged genocide,[40] as well as challenges relating to the retrieval of important data thereof,[41] the IIMM's mandate also contains unprecedented reference to collaboration with the private sector.[42]

36 SC Res. 2379, 21 September 2017.

37 HRC Res. 39/2, 3 October 2018.

38 SC Res. 2379, *supra* note 36, at 2.

39 UN Human Rights Council, 'Report of the Independent and International Fact–Finding Mission on Myanmar' (September 2018), available online at https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM–Myanmar/A_HRC_39_64.pdf.

40 Independent Investigative Mechanism for Myanmar (IIMM), 'External Cooperation', available online at https://iimm.un.org/external–cooperation/.

41 See 'Report of the Independent and International Fact–Finding Mission on Myanmar', *supra* note 39, § 74.

42 'Mass Atrocities in the Digital Age: Preserving Social Media Evidence', Oxford Institute for Ethics, Law and Armed Conflict (ELAC), in partnership with the International Bar Association and the Berkley Human Rights Center. The project page is available online at https://www.elac.ox.ac.uk/research/values–and–multilateralism–3/.

C. The Current State of Play

Since the IIIM's ground-breaking requirements to collect, consolidate, preserve and analyse evidence to a criminal standard and make it available to judicial authorities were first introduced, such requirements have become a staple in the vast majority of resolutions passed subsequently by the HRC for additional country situations. For example, in 2021, the HRC created what some experts in the field informally dubbed an IIIM-lite for Sri Lanka,[43] with more recent examples being the mandates it created for Belarus, and especially that it created for Ukraine following Russia's 2022 invasion.[44] In fact, it would be accurate, in my view, to state that distinctions between the mandates of the three investigative mechanisms and subsequent HRC-appointed inquiries have, today, almost entirely been blurred, at least in the texts of establishing resolutions, with most UN investigations now existing along a spectrum — an accountability continuum — precisely on the basis of the strength of the international justice requirements they contain.[45]

To be more granular, whereas the three independent investigative mechanisms for Syria, Myanmar and Daesh/ISIL were created specifically with pre-prosecutorial functions intended to support directly third-party criminal proceedings, which data indicates they are doing,[46] all subsequent mandates created by the HRC have been given a hybrid — and arguably more challenging function. If, on the one hand, they too are mandated to collect, consolidate, preserve and analyse evidence to support judicial accountability, including but not exclusively criminal proceedings, unlike the three independent investigative mechanisms they are *also* expected to continue to fulfil the more traditional role of UN human rights inquiries. That is, to report their findings about international law violations publicly to the HRC (in contrast to the mechanisms whose work is, and needs to be, for the most part confidential); to address matters of state responsibility for said violations (rather than exclusively investigate the criminal liability of specific individuals); and to make recommendations on action and reform the authorities of the state under investigation should adopt to halt and redress violations.[47]

43 Independent Investigative Mechanism for Myanmar (IIMM), *supra* note 40.

44 HRC Res. 46/1, 26 March 2021. UN diplomats in both Geneva and New York have referred to this mandate as an 'IIIM-lite' in our in-person consultations and exchanges since.

45 HRC Res. 46/20, 29 March 2021, OP13(a).

46 This objective statement, reflective of the language now present in most establishing resolutions, is not intended to suggest that the mandate holders themselves interpret such accountability requirements in the same manner as the leadership of the independent investigative mandates does or pass judgement on their operational ability to deliver on such requirements.

47 IIIM, 'Report of the International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011', Rep. 76/690, 11 February 2022. For a most recent example, see the ongoing crimes against humanity trial in the Netherlands against Hasna Aarab, where the Prosecution is relying on evidence originally obtained by UNITAD. M. Capacci, 'Netherlands to Open First Trial on Crimes Against Yezidis', JusticeInfo, 22 May 2023, availableonline at https://www.justiceinfo.net/en/117090–netherlands–trial–crimes–against–yazidis.html.

Such functions around public reporting and the probing of state responsibility for international law violations are vital for the proper functioning of the UN human rights regime, and cannot be substituted by the case-building, pre-prosecutorial responsibilities of the investigative mandates. The clearest example of this is the case of Myanmar, where the winding down of the FFMM prior to the establishment of the IIMM left a perceptible gap around public reporting and advocacy for ongoing violations due, principally, to the quieter and confidential nature of the IIMM's work. Equally due to the IIMM's focus on the criminal responsibility of individuals, no mechanism is currently in place to monitor the conduct and responsibility of the State of Myanmar, despite a clear need for doing so dictated both by the continued nature of the violence and the existence of ongoing proceedings — focused, precisely, on state responsibility — before the ICJ.[48]

In most other cases — with the exception of Syria, for which the CoI and IIIM continue to exist simultaneously and independently from one another — the norm seems to have become, instead, a piling-on of *both* functions and related responsibilities. And yet, unlike the IIIM, IIMM and UNITAD, none of the hybrid investigations subsequently created by the HRC have been given either independence or the appropriate resources that their ever-expanding mandates now require. In fact, some of the most recent mandates, such as the one for Ukraine, contain the same exact requirements as the IIIM.[49] The immense discrepancy in resourcing and in the potential reach of their respective capabilities can also be gleaned by looking at the size of budgets — with each of the three investigative mechanisms operating with budgets between $15 and 25 million per year, while HRC-mandated investigations having to make do with yearly budgets of between $1 and 5 million.[50] This is immensely consequential, particularly when we consider the role these investigations might fulfil within the broader international justice tapestry, which I will now turn to discussing.

3. International Justice in Crisis? A Look at the Bigger Picture

A. Increasing Demands for Justice within a Still Evolving Field

The advent of this new generation of investigative mandates occurred within a field that seemed to be at a stalemate. To be sure, larger trends — such as the so-called crisis of multilateralism, and a chronic sense of normative backsliding over the past decade — were partially to blame for this. Yet, it is beyond dispute that the enthusiasm with which the re-discovery of international justice was ushered in during the 1990s and early 2000s has now ceded terrain

48 D'Alessandra et al., *supra* note 14, 13–24.

49 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, available online at https://www.icj–cij.org/en/case/178.

50 HRC Res. 49/1, para. 11 (b), (c) and (d).

to more realistic expectations of what international justice can achieve.[51] Against this backdrop, a general sense of fatigue, the immense challenges already facing many of the existing institutions, and, in certain cases, a performance-driven decline in some of them, initially raised legitimate doubts as to what this new generation of mandates, facing even bigger limitations and constraints, could possibly achieve. Yet, a decade since the accountability turn begun, and half a decade since the creation of the first of the investigative mechanisms, there are reasons to be hopeful. If, undoubtedly, its institutions' performance is an important indicator, judging the overall health of the international justice field on this narrow basis misses a bigger, and far more encouraging, picture: that of a field that is, indeed, very much alive and still evolving.

To begin with, we are witnessing an unprecedented — and very much decentralized — cascade of accountability proceedings for international crimes cases. The adoption of universal jurisdiction laws by a growing number of countries, recent large-scale movements of refugee populations (which bring a growing number of both victims and perpetrators under the jurisdiction of third countries), and an increased level of confidence in investigating and prosecuting international crimes domestically have meant that, at the time of writing, at least 14 national jurisdictions had pending or active cases before their justice systems.[52] Similarly, an unprecedented number of proceedings concerning state responsibility for international crimes now fill the dockets of regional international human rights courts and other tribunals.[53]

Brave and painstaking documentation efforts by civil society groups, in many cases feeding directly into these proceedings, have also grown exponentially both in volume and sophistication. If significant differences persist in standards and means across the civil society sector, there has been an unquestionable boom, over the past decade at least, in the overall quality and quantity of the information now gathered by NGOs intentionally taking judicial standards into account.[54] The digital revolution has, without a doubt, also

51 See, for example, GA Res. 77/262, at 41; GA Res. 76/245, at 43; GA Res. 75/252, at 49; GA Res. 74/262, at 46; GA Res. 73/352/Add.6, at 26.

52 See, generally: P. Akhavan et al., 'What Justice for the Yazidi Genocide? Voices from Below', 42 *Johns Hopkins University Press Human Rights Quarterly* 1 (2020) 1–47. Although, certainly, international justice has been much in focus with respect to the situation in Ukraine. This has injected renewed enthusiasm into both existing institutions such as the ICC (especially following the issuing of an arrest warrant against President Vladmir Putin), as well as potential new institutions, including various proposals currently being debated for a special aggression tribunal. See D'Alessandra, *supra* note 5.

53 This includes the Netherlands, Germany, Sweden, Norway, United Kingdom, Finland, Canada, Belgium, Denmark, Switzerland, United States of America, Ukraine, France, Argentina. Alongside criminal proceedings, civil suits are also becoming more common in many jurisdictions. See, for example, *Wickrematunge v. Rajapaksa*, US District Court Central District of California, Case No. 2:19 (CV02577–R–RAO).

54 See *The Netherlands v. Russia*, ECtHR (1978), No. 28525/20; *Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, available online at https://www.icj–cij.org/en/case/180; *Case Concerning the International Convention for the Suppression of the Financing of Terrorism and of the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v.*

been a significant contributing factor, with open-source information and methods now allowing for remote investigations, and the on-the-ground leveraging of documentary tools and technologies for the (often contemporaneous) capture, verification, analysis and preservation of crucial information that would, otherwise, have been lost or compromised.[55]

If, for over a decade, scepticism of — if not opposition to — these developments seemed to be the prevalent response by field 'professionals' (or one might say traditionalists), this is no longer the case:[56] our research found that increased levels of respect, cooperation and even a certain level of symbiosis now exist among the various justice actors populating this field, with judicial authorities, in particular, relying ever more on civil society partners to get the information and leads they need to establish jurisdictional links, meet evidentiary standards, carry out proceedings and flex the international justice muscle domestically. This is equally true for international tribunals, with NGO-derived information now making recurring appearances in court proceedings.[57] Importantly, the ICC itself provided an important endorsement of the role and contributions that civil society groups can make to judicial — even criminal — accountability by releasing its own 'Guidelines for Civil Society Organisations on the Documentation of International Crimes and Human Rights Violations'.[58]

In other words, today, various factors are contributing to an increase in demand for international justice, which the field is adjusting to meet. Given that jurisdictional avenues often remain limited — or are unclear at the time when investigations take place, especially where situations fall outside of the ICC's purview — a key paradigm shift has been a growing recognition that partnerships are needed across large and diverse groupings of actors working in tandem to secure evidence, open jurisdictional avenues and close impunity gaps for the most heinous international acts. These partnerships work at their best when stakeholders within them possess unique — if complementary — vantage points, which they leverage as part and parcel of a broader coalition. For this reason, in our work, we speak about a still evolving ecosystem, with

Russia), available online at https://www.icj–cij.org/en/case/166; *Case Concerning Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russia)*, available online at https://www.icj–cij.org/en/case/182 ; and *Case Concerning the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, available online at https://www.icj–cij.org/en/case/178.

55 F. D'Alessandra and K. Sutherland, 'The Promise and Challenges of New Actors and New Technologies in International Justice', 19 *Journal of International Criminal Justice* (2021) 9–34, at 14; also see, generally: L. Freeman and R. Llorente, 'Finding the Signal in the Noise: International Criminal Evidence and Procedure in the Digital Age', 19 *Journal of International Criminal Justice* 1 (2021) 163–188; A. Koenig, 'From 'Capture to Courtroom': Collaboration and the Digital Documentation of International Crimes in Ukraine', 20 *Journal of International Criminal Justice* 4 (2022) 829–842.

56 *Ibid.*

57 F. D'Alessandra, 'The Ten Year Revolution: Civil Society Documentation in International Criminal Justice' (*Journal of International Criminal Justice*, forthcoming,).

58 D'Alessandra et al., *supra* note 14, at 20.

civil society actors sitting upstream and justice authorities sitting downstream from the flux of information and evidence that may support international justice proceedings in a variety of forms and before a diverse range of institutions.[59] Indeed, I submit that the health of the international justice project as a whole should be judged through the lens of this ecosystem — not by the performance of any of its specific constituencies, but by the innovation that the sum of its parts has been capable of in just a matter of years.

If, as I believe, this is the only sustainable direction for international justice — and a better way to appreciate its incredible resilience and dynamism — refocusing on the overall ecosystem also demands addressing more seriously pressing needs around the coordination, if not inter-operability, of its various constituent parts. As I will discuss below, this is where our research reveals that UN accountability mandates can, and are increasingly expected to, play a vital milling function.

B. The Evidentiary Pipeline: Accountability Mandates as Data Enterprises

Colleagues and I have argued elsewhere that this new generation of UN accountability mandates are vital components of the overall ecosystem, sitting — as they often do — at the very heart of the evidentiary lifecycle intended to support accountability processes. Upstream from them sit the civil society groups carrying out documentation, specifically with accountability proceedings in mind: data from our Oxford research reveals, in fact, that most civil society groups now involved in documentation consider accountability either a top priority or a very high priority, and look to UN accountability mandates to provide guidance and support to help focus their documentation work, become a secure repository of the information they gather, and channel it to the appropriate institutions.[60] Downstream from accountability mandates are the judicial authorities that increasingly look to them to both directly and indirectly support their work, and to act as a quality check and analytical filter, where appropriate, for the vast volumes of information and data civil society now generates.[61] This is especially the case for domestic authorities and international courts focusing on state responsibility, although consultations with a wide range of ICC experts have also revealed that, under the right conditions and with the right protocols and cooperation arrangements in place, UN accountability mandates can be particularly helpful in the Preliminary Examination phase — specifically given that, in this phase, the Office of the Prosecutor (OTP) already relies on third-party information and submissions.[62] Accountability mandates can thus be thought of as sitting at the heart of this

59 ICC Press Release, 'ICC Prosecutor and Eurojust Launch Practical Guidelines for Documenting and Preserving Information on International Crimes', 21 September 2022, available online at https://www.icc–cpi.int/news/icc–prosecutor–and–eurojust–launch–practical–guidelines–documenting–and–preserving–information.

60 D'Alessandra et al., *supra* note 14, at 20; D'Alessandra and Sutherland, *supra* note 55, at 11.

61 D'Alessandra et al., *supra* note 14, at 21.

62 *Ibid.*

evidentiary lifecycle — where they have the opportunity to sift information received from civil society groups and channel it to pertinent institutions.

Another helpful way to think about this is by visualizing an information funnel, with the funnel's wider opening indicating various data-entry points, and the narrower end representing data-exit points. Each entry point might represent either a typology of information (i.e., documentary, witness, photo/video); the source of information (human-derived, open-source, etc.); or the means of acquisition (i.e., obtained through third party, including civil society groups, or obtained directly through independent investigative work). Similarly, each exit point represents a potentially different use of the information by a variety of actors — i.e., judicial versus non-judicial accountability; criminal versus state responsibility proceedings; before domestic versus international legal systems — with each of them shrinking the narrow end of the funnel even further. At the centre of this information pipeline is, precisely, where we can picture these accountability mandates, the processing cores at the heart of each funnel. It might equally be helpful to conceptualize these mandates in terms of data enterprises, given that they are expected to collect, consolidate, analyse and either preserve or make available information in support of accountability.[63]

It is crucial to underscore that each one of the funnel's entry and exit points raises a significantly different set of challenges, calling for different approaches, tools and expertise.[64] If information is received by a third party, for example, it will need to be authenticated and verified, then analysed and archived. If the information is gathered by the investigative mandates first-hand, how it is gathered — by witness interview, through open-source methods, etc. — will also affect what expertise and protocols will be required at the point of collection before the information can move to the analysis and preservation phase. The nature of the information in question itself might also present an added layer of challenges requiring — yet again — different expertise, methods, processes, and tools.[65] This is particularly true for digital information: if, in any modern investigation, all information should ideally at some point become digitalized, the authentication and verification of information that is already digital at the point of collection will look a lot differently than for information that is, say, human-derived or in hard copy when it is acquired. All these factors will also weigh on the journey each piece of information will need to

63 The International Criminal Court Office of the Prosecutor, 'Policy Paper on Preliminary Examinations' November 2013, available online at https://www.icc–cpi.int/sites/default/files/iccdocs/otp/OTP–Policy_Paper_Preliminary_Examinations_2013–ENG.pdf.

64 See The Sedona Conference, 'The Sedona Canada Principles Addressing Electronic Discovery, Third Edition', 23 *The Sedona Conference Journal* (2022) 190–191 for further guidance on the scope of the obligation to preserve information and the use of data maps to represent the 'information pipeline' and lifecycle management practices.

65 *Ibid.*, at 192. The general obligation to preserve information in support of accountability is 'balanced against the party's right to continue to manage its electronic information in an economically reasonable manner'. The Sedona Principles stress that it is 'unreasonable to expect organizations to take every conceivable step to preserve all ESI that may be potentially relevant'.

make as it travels from a certain entry to a given exit point, and according to which standards it is handled as it is processed.[66] This, of course, becomes even more crucial where mandates are asked to — additionally or exclusively — take (much more burdensome) criminal standards into account. Not to mention the fact that not only how the information is treated but also whether (and if so how) it is shared with — i.e., disclosed to — judicial authorities will also vary based on the nature of proceedings, and the (sometimes immensely different) procedural and evidentiary requirements of each potential jurisdiction.[67]

All of this falls within the operational scope derived from mandates' investigative responsibilities: indeed, figuring out how to navigate this minefield of potential challenges is, precisely, what they are expected to do in the middle of the funnel. It is for this reason that so much of our Oxford work put an emphasis on the personnel profiles, resources and technical infrastructure that, alongside the specific tools and processes, mandates truly need to fulfil these new accountability requirements.[68] Equally, none of this can be an afterthought — one reason why the start-up phase is so crucial — especially given that mandates are, generally, created for 12 months, even where there is an expectation that they will be renewed.[69] What is more, if each mandate continues, despite *sui generis* needs dictated by the specific requirements and operational realities of the investigations they are tasked to carry out, a lot of the thematic expertise, tools, processes and capabilities that are common to all investigations could nonetheless be centralized — and, in fact, would *benefit* of being so, rather than being re-created from scratch each time.[70] Smarter resource allocation would not only help achieve much-needed standardization, efficacy and efficiency in addressing mandates' fast-deployment and immediate operational needs. By achieving economies of scale, it would also generate better return on investment for the international community in the long run.

66 P.M. Bednar and V. Katos, 'Digital forensic investigations: a new frontier for Informing Systems', in A. D'Atri and D. Saccà, *Information Systems: People, Organizations, Institutions, and Technologies: ItAIS: The Italian Association for Information Systems* (Physica Heidelberg, 2009) 361–371.

67 D. Oard et al., 'Evaluation of Information Retrieval for E–discovery', 18 *Artificial Intelligence and Law* (2010) 347–386, at 1. For further examples of evidence lifecycle management see: UNITAD, 'Harnessing Advanced Technology in International Criminal Investigations' (2021) available online at https://www.unitad.un.org/sites/www.unitad.un.org/files/general/2105390–harnessing_advanced_technology_in_international_criminal_investigations_web10may_0.pdf.

68 See The Sedona Conference, 'The Sedona Principles, Third Edition', 19 *The Sedona Conference Journal* (2017) 147. Principle 10 provides that 'Parties should take reasonable steps to safeguard electronically stored information, the disclosure or dissemination of which is subject to privileges, work product protections, privacy obligations, or other legally enforceable restrictions'.

69 See further, in the context of the International Criminal Court: Freeman and Llorente, *supra* note 55, at 187.

70 D'Alessandra et al., *supra* note 14, 30–45.

4. The Case for a Permanent UN Investigative Entity

A. Filling Important Gaps and Lending Support to the Overall International Justice Tapestry

From the above analysis, we might draw a few important conclusions. First, that this new generation of UN investigative mandates very much has a raison d'être within the context of the broader international justice tapestry. As mentioned, most of these mandates are created precisely to address and investigate serious crimes and other egregious international law violations in situations that fall outside of the scope of the ICC's jurisdiction, and where the UNSC has failed to take meaningful action. And while there is no doubt that, in light of its universalist ambition and broad-based membership, the ICC remains 'the center of a system of global criminal justice',[71] and that '[t]his central position must be unwaveringly maintained and strengthened',[72] UN accountability mandates can also be crucial in supporting the principle of complementarity under the Rome Statute,[73] for they can play a crucial role in supporting domestic proceedings even in countries that are states party to the court. Although, of course, accountability pathways often remain unclear at the time of these mandates' creation, they fill important gaps with respect to the gathering and preservation of crucial information and evidence in the so-called golden hour of investigations — that is, as close as possible to the commission of potential international crimes before the evidence is lost or compromised.

In fact, even for situations that do — or may someday — fall under the ICC's jurisdiction, these investigations — when carried out to the appropriate standard — can be crucial to support the ICC's own work, particularly during the Preliminary Examination phase, where — as mentioned — third-party information is already relied on by the OTP. Here, the mandates' potential to apply tighter standards and to carry out verification and analysis of said information could relieve the ICC of some of its burden. Indeed, precedent already exists for this in the context of the relationship between the IIMM and the ICC, where a partial overlap of competencies exists with respect to the ICC Bangladesh/Myanmar investigation.[74] In similar situations of potential overlap, the key to successful cooperation will be the crafting of specific agreements and memoranda of understanding to ensure that mandates' work complies with the standards and requirements of the ICC. Importantly, the experience of the IIMM also highlights the crucial role that such investigative

71 *Ibid.*

72 F. Bensouda, 'Reflections from the International Criminal Court Prosecutor', 45 *Case Western Reserve Journal of International Law* (2012) 505–511.

73 A. Coracini, 'Is Amending the Rome Statute the Panacea Against Perceived Selectivity and Impunity for the Crime of Aggression Committed Against Ukraine?' Just Security, 21 March 2021, available online at https://www.justsecurity.org/85593/is–amending–the–rome–statute–the–panacea–against–perceived–selectivity–and–impunity–for–the–crime–of–aggression–committed–against–ukraine/.

74 Arts 17 and 53 ICCSt.

mandates can play in support of state responsibility proceedings, as is the case with respect to the *Gambia v. Myanmar* case before the ICJ.

This is true even taking into account the fact that, by and large, these investigations do not have direct access to the crime scenes — one reason why the leveraging of apt technological tools, processes and skills to allow for remote investigations as well as partnerships with civil society groups carrying out documentation on the ground remain vital. In fact, in such situations, UN accountability mandates can act as both a force multiplier and as coordinating channels with respect to the myriad of documentary efforts that generally follow the outbreak of mass violations that might amount to crimes under international law, and to the channelling of information arising from these investigations before the right institutional avenues. The IIIM can be considered the proof of the concept of how this might work: some of the innovations it has introduced — for instance its Lausanne protocol on the cooperation with civil society actors;[75] its approach to structural investigations;[76] its investment in shoring up state-of-the-art technical infrastructure (with respect, *inter alia*, to its approach to information management and to the security of its archives and premises, just to name two examples); and the development of strong relationships with domestic authorities,[77] among many others — have been key to their ability to support a number of investigations and prosecutions.[78]

Of course, it would be a mistake to assume that the work of any UN accountability mandates — even the more sophisticated and well-resourced ones — could ever be substitutive of the criminal investigative work of the authorities themselves seeking to bring cases against specific individuals. However, our research has revealed a variety of ways in which the work of accountability mandates can be instrumental to successful investigations and prosecutions: inter alia, by providing leads to prosecuting authorities (with respect to the tracking of suspects or the identification of potential witnesses); by providing strategic advice as well as helpful, targeted analysis around contextual elements of the alleged criminal conduct, or with respect to important issues such as the chain of command, order of battle, history of ethno-religious repression, and timelines of events. This is a real value-add, particularly from the perspective of national prosecutorial authorities who need to get up to speed and may not have the resources to devote to a deep-dive or full-scale structural investigation into a particular foreign society. Mandates can

75 Independent Investigative Mechanism for Myanmar (IIMM), 'Mandate and Establishment', available online at https://iimm.un.org/mandate–and–establishment/; *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/the Republic of the Union of Myanmar (ICC–01/19–27)*, Pre-Trial Chamber III, 14 November 2019.

76 IIIM, 'Protocol of Cooperation between the International, Independent and Impartial Mechanism and Syrian Civil Society Organisations participating in the Lausanne Platform', available online at https://iiim.un.org/wp–content/uploads/2021/05/Protocol_IIIM_–_Syrian_NGOs_English.pdf.

77 IIIM, 'What We Do', available online at https://iiim.un.org/what–we–do/.

78 IIIM, 'Support to Jurisdictions', available online at https://iiim.un.org/what–we–do/support–to–jurisdictions/.

also act as repositories of best practices and foster exchanges among various justice actors to the overall benefit of accountability efforts.[79]

Mandates' requirements to collect, consolidate, analyse and preserve evidence — i.e., act as a central repository — can also be of particular value when it comes to the verification and forensic authentication of the volumes of information pertaining to a specific situation: in particular, to their secure storage and retrieval through curated and easily searchable databases that can be interrogated according to, for example, individuals, events, locations, etc.[80] Given the long timeframes of international justice, the long term, secure preservation of this information is also an important element at stake, especially where immediate disclosure is out of the question. This, however, remains a challenge in light of the fact that most mandates are conferred for 12 months, without guarantee of renewal,[81] strengthening the case for a secure repository to be created on a permanent basis.[82]

Of course, mandates can only deliver to the appropriate standard where the proper resources and support infrastructure are provided in a timely manner. As mentioned above, a change in approach appears necessary to ensure the faster and more effective recruitment of the right type of personnel, more flexibility around budgets and procurement for the right tools and capabilities to be in place, and also with respect to the processes and methodologies that are required to adequately perform all of these functions.[83] Some of these investigation-support functions are, however, common to all mandates; and there are good reasons to believe that some of the investment that has already been made at the level of capabilities and infrastructure — particularly by the IIIM — could be put to good use to support other mandates.[84] This is where the argument for creating a permanent UN investigative entity comes to a head. Indeed, various ideas have already been put forth with respect to what such an entity could look like, which I will discuss in the following section. It is crucial to emphasize, however, that all options currently on the table have, in fact, been conceived specifically with the idea of strengthening — not fragmenting — the prevailing international justice architecture, and in a manner that is complementary and indeed supportive of the ICC's own work.

B. Options for Building a Permanent UN Investigative Entity

In recent years, various justice stakeholders have called for the creation of standing investigative bodies, with such calls taking various forms. Some calls

79 IIIM, Rep. 76/690, *supra* note 47.
80 D'Alessandra et al., *supra* note 14, 94–103.
81 *Ibid.*
82 Take, for example, the failure to renew the Group of Eminent Experts on Yemen (GEE)'s mandate.
83 D'Alessandra and Sutherland, *supra* note 55, at 23.
84 See, generally, D'Alessandra et al., *supra* note 14.

have been put forward with respect to *thematic* areas of concern in international justice: for example, starting in 2019, the United Kingdom Foreign Office began to consider the so-called Hague–Jolie proposal for the creation of a standing body to investigate conflict-related sexual violence.[85] Similarly, in 2020, a High-Level Panel on Media Freedom called for the establishment of fast-deployment investigative teams to more effectively probe crimes committed against journalists.[86] Finally, a 2021 joint study by Save the Children and my own Oxford Institute for Ethics, Law and Armed Conflict similarly called, among other solutions, for the establishment of deployment-ready rosters or a standing investigative mandate to ensure violations and crimes affecting children in conflict are duly prioritized.[87] Other calls have, instead, been advanced to improve the UN's structural capacity and overall readiness to support international inquiry mandates, with one such call (for the establishment of an Investigation Support Unit, which was eventually created within OHCHR) dating back to 2017.[88]

The consecutive establishment of more and more UN accountability mandates — and continued calls for more such mandates arising from advocacy groups hailing from affected communities — have only renewed interest in the idea of finding a permanent solution. Our Institute's 2022 report 'Anchoring Accountability for Mass Atrocities: The Permanent Support Needed to Fulfil UN Investigative Mandates', in which we explored potential models for permanent UN reform, was published precisely in response to this interest.[89] Importantly, a 2022 study by the International Commission of Jurists, which was carried out independently — if in parallel — with our Oxford process came to the same conclusions on the need to establish a standing UN investigative entity on a permanent basis, advancing similar solutions to those proposed in our Oxford report.[90] At their core, these proposals for reform concern two key issues — or functions to be potentially attached to a permanent investigative entity — reflective of the two major sets of challenges uncovered in our respective work.

85 C. Marchi–Uhel, 'Filling an Accountability Gap? How a Standing UN Investigative Mechanism Would Further International Criminal Justice' Panel Discussion, 6 December 2022, Leiden University Leiden, the Netherlands.

86 UK Parliament, 'William Hague, Angelina Jolie Pitt and Baroness Helic to Give Evidence to Lords', 8 September 2015, available online at https://www.parliament.uk/external/committees/lords–select/sexual–violence–in–conflict/news/2015/svc–cttee–evidence–session–080915/.

87 N. Houry, 'Advice on Promoting More Effective Investigations into Abuses Against Journalists' (2004) International Bar Association Human Rights Institute, available online at https://www.ibanet.org/Investigations–report–launch–2020.

88 F. D'Alessandra et al., *Advancing Justice for Children: Innovations to Strengthen Accountability for Violations and Crimes Affecting Children in Conflict*, Save the Children and the Oxford Institute for Ethics, Law and Armed Conflict (ELAC), March 2021, available online at https://resourcecentre.savethechildren.net/document/advancing–justice–children–innovations–strengthen–accountability–violations–and–crimes/.

89 Group of Practitioners in Fact–Finding and Accountability, *supra* note 19, at 2.

90 D'Alessandra et al., *supra* note 14, at 5, 96–104.

The first concerns what we might consider a readiness and capacity-building function the proposed permanent entity would have. Indeed, both our Oxford Institute and the International Commission of Jurists have called for the establishment of what might be considered an investigations support bureau that would be responsible for the provision of common services, particularly in fulfilment of accountability requirements when these are conferred to inquiry mandates.[91] Based on our study, we reached the conclusion that centralizing certain investigations support functions would improve existing practices around resource allocation and, potentially, achieve economies of scale. This is so in light of the shared needs and challenges we observed across all mandates, derived in particular from requirements around the collection, collation, analysis and preservation of evidence; as well as the potential to capitalize on the significant investment that has already been made in shoring up such capabilities by the IIIM. In addition, such a bureau, or service provider, could be responsible for streamlining certain start-up processes — such as budgets, recruitment, trainings, procurement, the development of methodologies and standard operating procedures — and running and maintaining a central technical infrastructure responsible for information management (including the digitalization and secure preservation of archives, alongside its analysis and disclosure as appropriate); act as a central repository (not just for the evidence, but also for best practices and deployment ready Standard Operating Protocols, thus helping retain crucial institutional memory); and become the main institutional channel through which external relations with a variety of partner stakeholders (from civil society organizations to judicial authorities and private sector actors) could be streamlined, standardized and curated.[92]

At the same time, such a permanent body could also fulfil an investigative function of its own — similar to the pre-prosecutorial responsibilities of the three independent investigative mechanisms — which, however, would need to be activated by a competent UN body.[93] In other words, wherever a future situation may arise that calls for case-building and evidence preservation to a criminal standard, rather than creating a new investigative mechanism, this permanent entity could itself be activated to pursue this type of investigation as warranted in a specific country situation.[94] There are various reasons why this would make sense: not unlike the first function discussed above, there is a pragmatic, resource-driven rationale for conferring such investigative responsibilities to an already existing institution — which would already have all capabilities needed and centralized on a standing basis — rather than incur the much higher (political and financial) cost of mounting a new investigative body from scratch;[95] but that is not all. One of the biggest concerns with the

91 International Commission of Jurists, *supra* note 14, 9–11.

92 *Ibid.*; D'Alessandra et al., *supra* note 14, 94–103.

93 *Ibid.*

94 D'Alessandra et al., *supra* note 14, at 5, 96–104; International Commission of Jurists, *supra* note 14, at 12.

95 *Ibid.*; International Commission of Jurists, *supra* note 14.

current approach to mandating such investigations is the unevenness with which various crises are treated — with some being prioritized over others, by either receiving stronger mandates or, in fact, receiving a mandate at all — feeding perceptions of politicizations and double standards that have for so long plagued the international justice project as a whole.[96] By being conflict agnostic in its creation, a permanent mechanism would hold intrinsic potential to address some of these concerns.[97] It might also be advantageous as a way to focus advocacy on groups that have to instead navigate a whole spectrum of potential mandates.

Of course, the key to how effectively this piece of the puzzle would meet expectations lies with the processes through which such an investigative function would be activated. This is where, in a sense, the rubber meets the road, as an activation mechanism that could be triggered with ease should be preferable if the intention is to address (real or perceived) double standards; and yet, too low a threshold for activation will, most likely, be met with disapproval by the vast majority of states (who might fear either its politicization, its scrutiny, or both). Various proposals are out there with respect to this trigger mechanism issue,[98] although the most realistic (and perhaps sensible) one might be by a General Assembly vote.[99] It is also important to underscore that this question of the trigger is, in fact, only relevant to potential investigations that would concern carrying out pre-prosecutorial functions: it is fundamentally important to reiterate that the HRC's ability to mandate and support human rights investigations must not be affected by these developments, given the fundamental role these investigations play in support of the broader human rights regime, and the international justice architecture as a whole.[100] The public reporting and advocacy function of these mandates, in particular, cannot — and *should* not — take a back seat to criminal justice proceedings, for doing so would leave a gaping hole with respect to the monitoring of states' compliance with their human rights obligations, and other matters of state responsibility. Yet, to the extent that any such inquiry mandates might continue to receive certain accountability requirements, they could also benefit from the support of this standing entity.[101]

96 Of course, doing so would not extinguish the need to also address specific personnel and other needs that might arise for specific country mandates, which should be addressed for each specific mandate in their establishing resolution and budget.

97 See, for example: R. Alford, 'There is a Double Standard at the ICC', Opinio Juris, 11 July 2011, available online at http://opiniojuris.org/2011/11/07/there–is–a–double–standard–at–the–icc/.

98 Although, of course, as the ICC's own experience has shown, being conflict agnostic in its creation does not automatically constitute a bullet-proof defence against accusations of bias and double standards. How an institution performs in delivering its mandate is equally if not more important. However, an institution that is not conflict agnostic in its creation is biased (towards certain situations) by definition.

99 For example, the International Commission of Jurists's proposal for a Standing Independent Investigative Mechanism (SIIM).

100 This would also make sense in terms of oversight given its core budget, to be sustainable, would have to come from the UN regular budget.

101 D'Alessandra et al., *supra* note 14, 13–24.

In terms of where such a permanent entity may be housed within the UN system — i.e., whether it would be embedded within OHCHR, or stand as an independent entity like the IIIM — this may also depend on a few factors. To begin with, one consideration is whether — either at the time of its creation or, perhaps, somewhere down the line — both functions would be ascribed to it. If so, the experience of the investigative mechanisms for Syria, Myanmar and ISIL/Daesh seem to indicate just how important its independence would be.[102] In fact, there are strong grounds to argue that independence would be preferable even if only the investigative-support function would be instated. Beyond the greater levels of (much-needed) flexibility independence would entail,[103] many of the technical capabilities that such a bureau would need to properly function have already been created outside the OHCHR — i.e., by the IIIM. And while it is conceivable that, with the right investment, similar capabilities could be replicated inside of OHCHR, its effective administration would still require a level of restructuring by the Office that would be challenging — though not impossible — to achieve, and would most certainly require both strategic vision and top-down direction by the High Commissioner.[104]

C. Between Idealism and Pragmatism: Moving from Vision to Implementation

Hopefully, the analysis and conclusions presented thus far have helped advance both the *pragmatic* as well as the *normative* case for a standing UN investigative entity to be created on a permanent basis. Such an entity should be envisioned as having two core functions: a primary preparedness-ready and capacity-building function to be fulfilled by centralizing a range of investigative support responsibilities (and related infrastructure) under a service bureau responsible for the provision of common services (function A); and a pre-prosecutorial function (function B) that could be activated by a competent UN body where a future situation might so warrant. Ideally, this entity would be created with terms of reference and capabilities similar to those of the IIIM, including in terms of its independence and impartiality where function B would be triggered. In terms of its relationship with the existing investigative mechanisms, a phased approach could be considered where, gradually, the lessons learned and capabilities already achieved through the work of the existing mechanisms could be incorporated into this new entity; and, eventually, either the existing mechanisms could themselves be incorporated into the standing entity, following the example of the residual mechanisms for international criminal tribunals,[105] or a different model altogether could be

102 *Ibid.*, at 96, Option 1. In fact, any data mandate will face this need, and a crucial example is the new mandate for the creation of an independent institution for missing persons in the context of Syria. See UN Res. A/77/L.79.

103 *Ibid.*

104 *Ibid.*

105 For an example of what this could look like, see D'Alessandra et al., *supra* note 14, 94–106.

conceived. One noteworthy idea has come from the Head of the IIIM herself, who has spoken in supportive terms about the proposal for a standing investigative entity (particularly with respect to function A), acting as a mother ship around which various vessels (i.e., current and future investigative mandates independently created by other UN bodies) could rely on for support and centralized infrastructure.[106]

On the basis of ongoing consultations by ELAC, the International Commission of Jurists, and other partners, it seems that there are growing levels of support for a proposal that would, at least, bring the delivery of function A to fruition. Whether or not function B would also be granted to such an entity, as well as where — with respect to the overall UN infrastructure — this entity would sit remain open questions, warranting additional consideration and deliberation among states, with the High Commissioner and with civil society stakeholders, which our team at Oxford is continuing to support. If the activation of this latter function *should* be considered an objective to be pursued both in strategic and normative terms, a two-track approach could also be considered in order to move from vision to implementation: while deliberations continue on the more contentious issues, steps could be taken today to begin operationalizing function A by consolidating a number of existing capabilities, perhaps initially through a partnership between the IIIM and OHCHR. Although this process might not, in fact, *require* a resolution by the UNGA or other competent body to be initiated, UNGA endorsement would eventually be key as expression of political support by the broader international community, and a signal of the UN's institutional commitment in supporting this pathway to reform, particularly in light of the financial resources that would be needed to ensure this vision remains sustainable into the future. If this were to become the approach, the UNGA resolution could specifically punt the issue of function B and its activation mechanism as a potential matter to be taken further into consideration, and if and when agreement is found around those more contentious issues, a second UNGA vote could sanction such agreement in the wording of a subsequent, dedicated resolution.

An additional or alternative strategy could be that, the next time a call for an IIIM-like entity arises for a specific country situation that, realistically, could be passed through the UNGA (rather than the HRC), its establishing resolution could also mandate it to — more broadly — pursue objectives aimed to implement function A also in support of other mandates, whether present or future. The resolution could require that this be done in cooperation with — and drawing from the experience and lessons learned from the — IIIM, with the potential for function B to be activated for additional country situations at some point in the future, if pursuant to a specific UNGA vote to do so. Either approach would allow progress to continue to be made towards achieving — in the shortest possible timeframe — the pragmatic and operational solution that is so clearly needed to support all mandates affected by the accountability

106 See *ibid.*, at 96, 'Option 1'.

turn, while leaving open space for debating the most appropriate timeframe and conditions for a more comprehensive — and ambitious and desirable — proposal for reform to be achieved. Such steps are needed to ensure that this new generation of accountability mechanisms is institutionalized, and their role within the broader justice tapestry recognized and empowered in perpetuity.

5. Conclusions

To conclude, as I hope this article has demonstrated, the international justice project as a whole is proving to be much more resilient than a *prima facie* assessment might, in fact, find it to be. Such resilience is both spurred and sustained by increased demands for justice that so many dedicated justice stakeholders — be they civil society advocates, dedicated state representatives or judicial authorities — are now pursuing through innovative, and ever more important, partnerships. Such partnerships are giving rise to a growing cascade of accountability proceedings — whether pertaining to the criminal responsibility of individuals or the liability of states — for egregious violations of international law that often amount to the most heinous crimes known to the international community. All such proceedings rest on the inescapable and imperative need to capture and preserve evidence of such violations, as close as possible to their commission. The international justice field appears to be evolving in response to these changes, as evidenced by the birth of a new generation of ad hoc international justice institutions tasked to collect, consolidate, preserve and analyse evidence in a variety of affected country situations. Irrespective of the ultimate use that will be made of such evidence, this new generation of UN investigative mandates now sits at the heart of the evidentiary lifecycle, acting as data enterprises and processing cores milling information into data pipelines to support a vast range of accountability proceedings. Considering how this new generation of accountability mandates can be best supported — and this new approach to evidence collection and preservation institutionalized — has become urgent.

Both aims could be achieved through the establishment by the UNGA of a standing UN investigative entity, to be stood up on a permanent basis, to fulfil two key functions: at a minimum, the establishment of a UN investigations-support bureau responsible for the provision of common services to *all* mandates affected by the accountability turn. This could be through a partnership between OHCHR and the IIIM in the first instance, with eventual endorsement through a UNGA resolution. Ideally, however, this entity could — and in fact should — also achieve a more ambitious goal: that of filling important gaps by being itself given the ability to perform pre-prosecutorial functions in country situations that might warrant the institution of criminal proceedings, and that fall (mostly or entirely) outside of the ICC's purview. This could go a long way in redressing some of the power imbalances and politicizations that are still felt by many operating within the international justice field. If the appropriate

terms and conditions for such a function to be potentially activated in the future will remain a matter of debate for some time — and could be conferred to such an entity through a dedicated, follow-on UNGA resolution once agreement is reached — such debates, and the search for a more apt and comprehensive solution, should not stand in the way of achieving, today, what can and must be achieved: better resource allocation in support of UN investigative mandates through the centralization of core functions, resources and capabilities any investigation tasked to support accountability will need. In other words, both the need and the opportunity are there, today, to begin institutionalizing progress around the accountability turn. It is incumbent on all states, relevant UN entities and other justice stakeholders — be they judicial authorities, civil society groups or private sector entities — to come together to craft a concrete roadmap to effectively fill key gaps left in the international justice tapestry and hopefully support the next chapter of this field's institutional evolution.